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BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR & PENSIONS
ON
HR 3721: PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT

WEDNESDAY, MAY 5, 2010
2175 RAYBURN HOUSE OFFICE BUILDING
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HR 3721: PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT: A RESPONSE TO GROSS V. FBL FINANCIAL SERVICES INC.

Chairman Andrews, Ranking Member Price and members of the Subcommittee, thank you for convening this hearing regarding the impact of the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*[1] on employees' right to work free from discrimination based upon age, and the legislative response to this surprising decision.

Unfortunately the Court's decision poses a very fundamental question - what Congress really means when it says it is unlawful to discriminate because of age? Stated alternatively, what is the tolerable amount of discrimination Congress is willing to permit against older workers? I, along with many others, believe that Congress had already answered this question – none – but the *Gross* decision requires Congress to be more explicit as to what amount of discrimination it will allow.

HR – 3721 is a fair, balanced, indeed conservative attempt to return the law to where everyone, the courts included, thought it was. The bill also attempts to stem the confusion created by the decision and provides the explicit statement of congressional intent the Supreme Court in *Gross* demands.

My name is Michael Foreman. I am the Director of the Civil Rights Appellate Clinic at the Pennsylvania State University Dickinson School of Law where I also teach an advanced employment discrimination course. I have handled employment matters through all phases of their processing from the administrative filing, at trial and through appeal and have represented both employers and employees. It is from this broad perspective that I provide my testimony.[2] Much of my testimony is taken from my more detailed analysis of the *Gross* decision which will be appearing in in Volume 40, Issue 4, Summer 2010 of the University of Memphis Law Review.

Gross undermined Congress's legislative intent and immediately impacted older workers, relegating them to second-class status among victims of discrimination. It has already been used to erode protections seemingly established under other antidiscrimination laws. The *Gross* majority made it explicit that it is up to Congress to clarify its intent in extremely precise terms when it amends employment discrimination statutes. Indeed the majority chastises Congress for not being more specific as to its intent and appears to challenge Congress to act.[3]

I. GROSS V. FBL FINANCIAL SERVICES : THE DECISION

Gross v. FBL Financial Services involved a claim that FBL engaged in ADEA-prohibited age discrimination. In the district court, a jury found that Mr. Gross's age was a motivating

[1] 129 S. Ct. 2343 (2009).

[2] A copy of my biography is attached.

[3] Referring to a broader interpretation of the ADEA, the *Gross* majority said, "[T]hat is a decision for Congress to make." *Gross*, 129 S. Ct. at 2349 n.3. The five justices in the majority hung their hat on what they deemed was Congress's failure to act.

factor in FBL's decision to demote him.[4] The district court instructed the jury to enter a verdict for Gross if he proved by a preponderance of the evidence that he was demoted and that his age was a motivating factor in the demotion.[5] The district court also explained to the jury that age was a motivating factor if it played a part in the demotion and instructed the jury to return a verdict for FBL if it proved that it would have demoted Gross regardless of age.[6]

On appeal, the Eighth Circuit reversed and remanded, holding that the district court's mixed-motive jury instruction was flawed because the appropriate legal analysis was the standard established in *Price Waterhouse v. Hopkins*,[7] which shifts the burden of persuasion to the employer only if the plaintiff presents "direct evidence" of age discrimination.[8] Gross petitioned for certiorari on this narrow issue of whether direct evidence was required in age cases.[9] In a surprising 5-4 decision, the Supreme Court held that a mixed-motive jury instruction is never proper under the ADEA because the ADEA's prohibition against discrimination "because of" an individual's age requires plaintiffs to prove that age was the "but-for" cause of the employer's decision.[10]

The Supreme Court stated that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged employment action.[11] According to the Court, the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced evidence that age was one motivating factor in the decision.[12]

The majority believed the language of the ADEA is clear. In their view, the plain meaning of the ADEA's requirement that an employer's adverse action was "because of" age means that age was "the reason" the employer decided to act.[13] In other words, the burden of persuasion necessary to establish employer liability is the same in mixed-motives cases as in any other ADEA disparate-treatment action: the plaintiff must prove by a preponderance of the evidence, either direct or circumstantial, that age was the "but-for" cause of the challenged employer decision.[14] The Court concluded that because it held that ADEA plaintiffs retain the burden of persuasion to prove all disparate-treatment claims, it did not have to address whether plaintiffs must present direct evidence to obtain a burden-shifting instruction.[15]

A. The *Gross* Majority Decided An Issue Not Presented To The Court.

Neither the parties to *Gross* nor the interested *amici curiae* were given notice the Court

[4] *Id.* at 2347.
[5] *Id.*.
[6] *Gross* at 2344-2345.
[7] 490 U.S. 228 (1989).
[8] *Id*.
[9] *Gross* at 2346.
[10] *Id*. at 2351.
[11] *Id.* at 2344.
[12] *Id.* at 2352.
[13] *Gross at 2350.*
[14] *Id.* at 2351.
[15] *Id.* at 2351, n.3.

would be considering whether a mixed-motive instruction was available under the ADEA.[16] The issue presented and on which the Supreme Court granted certiorari was whether, under the ADEA, a plaintiff is required to present "direct evidence" of age discrimination to obtain a mixed-motive jury instruction.[17] Parties on both sides proceeded with the understanding that the *Price Waterhouse* motivating-factor type of analysis was applicable to ADEA claims until FBL filed its brief at the Supreme Court questioning the utility of *Price-Waterhouse*.[18] The majority, rather than determining whether a *Price-Waterhouse*-type of mixed motive analysis applied, determined that it must reach a much more fundamental issue—whether any type of mixed-motive analysis applies to ADEA claims.[19]

At oral argument, the Office of the Solicitor General pleaded with the Court not to take up an issue that was not briefed by the parties or the United States.[20] The five-member *Gross* majority decision prompted the four justices in dissent to note that the majority was unconcerned that the "question it chooses to answer has not been briefed by the parties or interested *amici curiae*," and that the majority's "failure to consider the views of the United States, which represents the agency charged with administering the ADEA [was] especially irresponsible."[21] Ultimately, the Court avoided the issue on which it granted certiorari and held that the ADEA does not authorize a mixed-motive discrimination claim.

B. The *Gross* Majority Ignored Precedent That Had Interpreted Similar Language To Allow Mixed-Motive Liability.

The *Gross* decision stands in stark contrast to the Court's precedent and a body of uniform circuit court decisions. In *Price Waterhouse,* the Court examined Title VII and determined that the words "because of" prohibit adverse employment actions motivated, in whole or in part, by prohibited considerations.[22] Considering the relationship between Title VII and the ADEA, circuit courts consistently adopted the *Price Waterhouse* standard in the context of ADEA claims for nearly twenty years without issue.[23]

For example, in *Febres v. Challenger Caribbean Corp.*, the United States Court of Appeals for the First Circuit applied the *Price Waterhouse* standard to an ADEA claim.[24] The First Circuit explained that in a mixed-motive case the burden of persuasion does not shift merely because the plaintiff introduces sufficient direct evidence to permit a finding that a discriminatory motive was at work.[25] The burden shifts only if the direct evidence actually

[16] *Id.* at 2353 (Stevens, J. dissenting).
[17] *Gross* at 2346.
[18] *Id.* at 2348, 2353.
[19] *Id*. at 2350.
[20] *Gross* Tr. of Oral Arg. 20–21, 28–29.
[21] *Id.* at 2353 (Stevens, J., dissenting).
[22] See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-247 (1989)(plurality opinion)(concluding that the words "because of" such individual's [protected classification] mean that [the protected classification] must be irrelevant to employment decisions).
[23] "…the Courts of Appeals to have considered the issue unanimously have applied *Price Waterhouse* to ADEA claims." *Gross* at 2354-55, n.5 (Stevens, J., dissenting)(citing numerous circuit court opinions applying *Price Waterhouse* to ADEA claims.).
[24] 214 F.3d 57 (1st Cir. 2000).
[25] *Febres* at 64.

persuades the jury that a discriminatory motive was at work.[26] In sum, "the burden of persuasion does not shift unless and until the jury accepts the 'direct evidence' adduced by the plaintiff and draws the inference that the employer used an impermissible criterion in reaching the disputed employment decision."[27] In *Gross*, however, the Court determined that "because of" means something different for victims of age discrimination.[28]

The relevant language of Title VII and the ADEA use identical "because of" terminology, and "[the Court has] long recognized that [its] interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII.'"[29] The majority appeared unconcerned by Congress' use of identical language and instead focused on what Congress did not explicitly do when it enacted the Civil Rights Act of 1991.[30] The ADEA's text does not specifically reference a mixed motive type of claim as Title VII does as amended in 1991.[31] The majority found it significant that Congress did not add this specific language to the ADEA when it amended Title VII, even though it contemporaneously amended the ADEA in several ways.[32] However, the *Gross* majority never explained why identical "because of" language in the two statutes should have different meanings.

Rather than justifying its departure from *Price Waterhouse*, the majority merely characterized its holding as a decision not to extend *Price Waterhouse* to the ADEA.[33] The Court reasoned that it would not ignore Congress' decision to amend Title VII's relevant provisions but not to make similar changes to the ADEA.[34] According to the Court, when Congress amends one statutory provision but not another, it is presumed to have acted intentionally.[35] Again, the Court was unconcerned that its interpretation was in direct conflict with the understanding that the Courts of Appeals have unanimously accepted since 1991.[36]

C. ***Gross* Undermines Congressional Intent To Eliminate Discrimination In The Workplace.**

The increased burden *Gross* imposes upon older workers contravenes the clear intent of Congress to prohibit age discrimination in the workplace. Just a few years after *Price Waterhouse*, Congress passed the 1991 amendments to Title VII to codify the Court's "motivating factor" test and to clarify that a same-decision defense went only to damages—not liability.[37] This amendment reflected Congress' continued commitment to eradicating

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[26] *Id.*
[27] *Id.*
[28] "Under [the ADEA], the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action." *Gross* at 2351.
[29] *Gross* at 2354 (Stevens, J. dissenting).
[30] *Id.* at 2349.
[31] *See* 42 USC §§2000e-2(m), 2000e-5(g)(2)(B).
[32] *Gross at* 2350-51.
[33] "This Court has never held that the burden-shifting framework [of Title VII] applies to ADEA claims. And we decline to do so now." *Gross* at 2349.
[34] *Id.* at 2349.
[35] *Id.*
[36] *See* n.23 supra.
[37] *See* 42 USC §§2000e-2(m), 2000e-5(g)(2)(B).

discrimination in employment.[38] Rather than recognizing this express congressional approval of mixed-motive liability, the *Gross* majority misconstrues the amendment by inferring congressional intent to exclude mixed-motive claims from employment discrimination statutes it did not simultaneously amend.[39] Such an inference appears misplaced when the Court is interpreting amendments designed to counteract "Supreme Court decisions that sharply cut back on the scope and effectiveness of [civil rights] laws."[40]

The Courts of Appeals had universally recognized Congress' express approval of the motivating factor test, and, therefore, consistently applied that test in ADEA claims for nearly twenty years.[41] But now, having determined that Congress did not intend these consistent interpretations, the five Justices have sent a clear message that if Congress wants to eliminate the consideration of age in employment decisions, it must explicitly say so.

II. THE FUNDAMENTAL LESSONS OF THE *GROSS* DECISION

A. <u>If Congress Wants To Provide Protections Against Discrimination, Congress Must Be Clear - Very Very Clear.</u>

The prohibitions against age discrimination in the workplace have never been viewed as providing less protection for older workers, or stated alternatively, as allowing more discrimination against older workers than the protections under Title VII of the Civil Rights Act of 1964. Yet this is effectively *Gross's* outcome. The majority's decision has made it significantly more difficult to bring an age discrimination claim and requires employees who are victims of age discrimination to meet a higher burden of proof than someone alleging discrimination based upon race, color, religion, sex, or national origin under Title VII.

In *Gross* the Court concluded that even though age was a "motivating" factor for the adverse employment action, as the jury determined in Mr. Gross's case, this is not enough to prove a violation of the ADEA.[42] Congress has never said or implied that age discrimination is any less pernicious than discrimination against Title VII-protected groups, or that age discrimination should be harder to prove. Congress has been unequivocal about its desire to eliminate *all* discrimination in the workplace—including age discrimination.[43] Likewise, Congress modeled the ADEA on Title VII.[44]

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[38] In addition to the logical conclusion that Congressional codification of the motivating-factor test evinced Congressional approval of the test, Justice Stevens pointed out in his dissent that "There is, however, some evidence that Congress intended the 1991 mixed-motives amendments to apply to the ADEA as well. *See* H. R. Rep., pt. 2, at 4 (noting that a "number of other laws banning discrimination, including . . . the Age Discrimination in Employment Act (ADEA), are modeled after and have been interpreted in a manner consistent with Title VII," and that "these other laws modeled after Title VII [should] be interpreted consistently in a matter consistent with the Title VII as amended by this Act," including the mixed-motive provisions.)" *Gross* at 2356 (Stevens, J. dissenting).

[39] *Gross* at 2349 ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.").

[40] H. R. Rep. No. 102-40, pt.2, p.2 (1991).

[41] *See* n.23 supra.

[42] *Id.* at 2347.

[43] In *McKennon v. Nashville Banner Publ'g Co.*, the majority stated, "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of

The majority based its holding on the notion that the prohibitions against discrimination in the ADEA and Title VII need not be treated consistently unless Congress states this explicitly.[45] Because of identical language in both statutes, the majority requires an employee claiming age discrimination to prove more: they must now prove "but-for" causation. This standard was rejected by the Court in *Price Waterhouse v. Hopkins*,[46] as well as by Congress in the 1991 Amendments to the Civil Rights Act.

B. ***Gross* Increases The Burden Of Proof For Older Employees.**

The impact of *Gross*—that older workers attempting to prove unlawful discrimination have a much higher burden—was immediately recognized:

- "The 'but-for' causation standard . . . makes it *much more* difficult for plaintiffs to prevail in age discrimination cases . . . . [I]t is not enough to show that age may have influenced the employer's decision." "[A] significant victory for employers."[47]
- "Supreme Court Majority Makes It Harder for Plaintiffs to Prove Age Discrimination Under the ADEA"[48]
- Without the "traditional 'mixed motive analysis,' . . . [plaintiffs'] job in court [will be] much more difficult."[49]
- A "sea change in current law [which] might even indicate a seismic shift in the Supreme Court's interpretation of statutes that deal with employment."[50]
- "…It's becoming increasingly difficult for workers to prove their claims. … *Gross* found that older workers bringing age discrimination claims must meet a higher standard to prove their claims than others who have been subject to unfair discrimination at work."[51]

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invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." 513 U.S. 352, 357 (1995).

[44] *Lorillard v. Pons*, 434 US 575, 584 (1978).

[45] *Id.* at 2350.

[46] 490 U.S. 228, 249-50 (1989) (plurality opinion); *id.* at 259-60 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment).

[47] *Supreme Court EEO Decisions Present Mixed Results for Employers*, 25 No. 7 TERMINATION OF EMP. BULL. 1 (July 2009) (emphasis added).

[48] *Supreme Court Majority Makes It Harder for Plaintiffs to Prove Age Discrimination Under the ADEA*, 23 No. 6 EMP. L. UPDATE 1 (June 2009).

[49] Timothy D. Edwards, *Supreme Court Rejects Mixed-Motive Jury Instruction in Age Discrimination Case*, 18 No. 8 WIS. EMP. L. LETTER 4 (Aug. 2009).

[50] Michael Newman & Faith Isenhath, *Supreme Court Gives Mixed-Motive Analysis a Mixed Review*, 56 FED. LAW. 16 (Aug. 2009).

[51] Laura Bassett, *Older Jobseekers Face an Uphill Climb*, The Huffington Post, <http://news.yahoo.com/s/huffpost/20100427/cm_huffpost/553882> (April 27, 2010).

This was not simply a "sky is falling" reaction by the media. Courts immediately understood *Gross*'s importance, and that it significantly changed the rules of the game for those attempting to prove age discrimination:

- "In the wake of [*Gross*] it's not enough to show that age was *a* motivating factor. The Plaintiff must prove that, but for his age, the adverse action would not have occurred."[52]

- "The 'burden of persuasion does not shift to the employer to show that they would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.'"[53]

- "[T]his Court interprets *Gross* as elevating the quantum of causation required under the ADEA. After *Gross,* it is no longer sufficient for Plaintiff to show that age was a motivating factor in Defendant's decision to terminate him."[54]

- The burden of persuasion does not shift to the employer "even when plaintiff has produced some evidence that age was one motivating factor in that decision."[55]

- Pursuant to the Supreme Court's recent decision in *Gross v. FBL Financial Services, Inc*., a claimant bringing suit under the ADEA must demonstrate that age was not just a motivating factor behind the adverse action, but rather the 'but-for' cause of it. Title VII, on the other hand, does authorize a 'mixed motive' discrimination claim.[56]

- "Before the Supreme Court's decision in *Gross,* 'the employee could prevail if the evidence, viewed in the light most favorable to the plaintiff, would permit a jury to find that her dismissal was motivated *at least in part* by age discrimination.' *Gross* changed 'the latter part of this formulation by eliminating the mixed-motive analysis that circuit courts had brought into the ADEA from Title VII cases.'"[57]

Under the increased burdens imposed by the "but for" standard, courts are already dismissing age claims for failure of proof based upon *Gross*.[58]

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[52] *Martino v. MCI Commc'ns Servs., Inc.*, 574 F.3d 447, 454 (7th Cir. 2009).
[53] *Geiger v. Tower Automotive*, No. 08-1314, 2009 WL 2836538, at *4 (6th Cir. Sept. 4, 2009).
[54] *Fuller v. Seagate Technology*, No. 08-665, 2009 WL 2568557, at *14 (D. Colo. Aug. 19, 2009).
[55] *Woehl v. Hy-Vee, Inc*. No. 08-19, 2009 WL 2105480, at *4 (S.D. Iowa, July 10, 2009).
[56] *Leibowitz v. Cornell Univ.*, 584 F.3d 487, n.2 (2d Cir. 2009).
[57] *Philips v. Pepsi Bottling Group*, 2010 U.S. App. LEXIS 8391, at *7 (10th Cir. 2010)(citing Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010).
[58] In *Wellesley v. Debevoise & Plimpton, LLP*, a Second Circuit panel cited *Gross* and held that since the plaintiff did not provide evidence of "but-for" age discrimination, her claims should be dismissed. No. 08-1360, 2009 WL 3004102, at *1 (2d Cir. Sept. 21, 2009). Similarly, in *Guerro v. Preston*, the court cited *Gross* and dismissed the plaintiff's claims because she failed to satisfy "but-for" causation. No. 08-2412, 2009 WL 2581569, at *6 (S.D. Tex. Aug 18, 2009). Finally, in *Fuller v. Seagate Technology*, the court dismissed a plaintiff's ADEA claim, because he failed to prove direct causation. No. 08-665, 2009 WL 2568557, at *14 (D. Colo. Aug. 19, 2009).

C. <u>This "But-For" Causation Standard Imposes An Onerous Burden On Victims of Age</u>

The Court's "but-for" causation requirement places a significant hardship on victims of age discrimination and permits consideration of age under a statute that Congress intended to eradicate age discrimination in employment. Employees face a heavy burden at trial because showing the employer improperly considered age in the employment decision is no longer a sufficient basis to establish liability.[59] A jury determination that age is not only a factor, but the motivating factor for an adverse employment action, as the jury found in Mr. Gross's case, is no longer sufficient to prove an ADEA violation.[60]

But-for causation may largely nullify the ADEA, limiting relief to only the most extreme cases of discrimination. Most employment actions have several causes; this is especially true when adverse employment actions occur in a down economy. Proving that one of several factors in the employer's decision was the "but-for" cause of the decision is particularly difficult, particularly where evidence of the employer's intent is usually within the sole control of the employer. Employers who improperly consider age may now escape liability if they are able to point to additional factors they considered when making the decision. Moreover, employers can easily create some rationale for the adverse action, and employees will have little chance of showing that bias, not the employer-asserted rationale, was the "but-for" cause.

III. *GROSS* IS CREATING A CONFUSION AND UNSETTLING IMPACT IN THE COURTS

Gross was a substantial departure from prior judicial interpretations of the ADEA, and its effects have already impacted ADEA litigation in the lower courts. Moreover, the decision's effects extend well beyond the ADEA, as it has created uncertainty and eroded the protections of similar antidiscrimination legislation.

A. <u>*Gross* Raised Uncertainties About The Continued Use Of The *McDonnell Douglas* Evidentiary Framework In Summary Judgment</u>.

The *Gross* decision created confusion in the lower courts regarding the plaintiff's burden at the summary judgment stage of litigation. While the *Gross* Court determined the burden of persuasion never shifts to the employer in ADEA cases, the majority left open the question of whether the evidentiary framework of *McDonnell Douglas v. Green*[61] is appropriate under the

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[59] *See Anderson v. Equitable Resources, Inc.*, 2009 U.S. Dist. LEXIS 113256, at *45 (W.D. Pa. 2009)(granting summary judgment for employer where plaintiff proffered sufficient evidence to show that age was *a* factor in his termination, but not a *determinative* one); *Kelly v. Moser, Patterson & Sheridan, LLP*, 2009 U.S. App. 22352, at *13 (3rd Cir. 2009)(finding it insufficient, under *Gross*, to show that age was a secondary consideration in the employer's decision, not a determinative "but for" factor); *Woods v. The Boeing Company*, 2009 U.S. App. LEXIS 26717 (10th Cir. 2009)(Anderson, J., concurring)(emphasizing to the trial court that the plaintiff must persuade the jury that, all things being equal expect for age, the employer would have hired the plaintiff if he had been younger).

[60] *Gross* at 2347.

[61] 411 U.S. 792 (1973).

ADEA.[62] This framework addresses the burden of production in Title VII cases, and courts have consistently adopted it in the ADEA and other antidiscrimination statutes.[63] In the wake of *Gross*, however, lower courts feel compelled to reexamine this settled precedent.

Long before *Price Waterhouse* and the 1991 amendments to Title VII, the Supreme Court recognized the challenges employees face in proving discriminatory animus on the part of their employer. In 1973, the Court established an evidentiary framework to help sort through the difficult task of determining discriminatory intent in employment cases in *McDonnell Douglas*.[64] Under this framework, once a plaintiff establishes a prima facie case of age discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action.[65] If the defendant articulates a legitimate reason, the *McDonnell Douglas* presumption falls away, and the burden of production shifts back to the plaintiff to demonstrate the defendant's proffered reason was a pretext to mask unlawful discrimination.[66]

Though the ultimate burden still lies with the plaintiff, the *McDonnell Douglas* framework assists plaintiffs by forcing the employer to articulate a nondiscriminatory reason for the action, so the plaintiff can disprove the proffered reason or prove it is only a pretext for discrimination.[67] Courts have applied this standard in thousands of ADEA cases.[68] Indeed, several of the Supreme Court's seminal employment discrimination cases, such as *Kentucky Retirement Systems v. EEOC*, discuss the *McDonnell Douglas* standard in claims of age discrimination.[69]

Interestingly enough, the Supreme Court, within the *Gross* opinion, makes the observation that it has never formally held that the *McDonnell Douglas* standard applies in the context of the ADEA.[70] So the Supreme Court raises another issue not presented by the parties, specifically, whether the *McDonnell Douglas* framework applies in ADEA cases. However, the Supreme Court opts not to answer the question of whether the framework applies to ADEA cases. By raising the issue but not answering it, the Court added no clarity to the law and only created more confusion.

To add to the confusion caused by the Supreme Court after *Gross*, lower courts have

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[62] *Gross* at 2349, n.2.
[63] *McDonnell Douglas* at 802; *Arroyo-Audifred v. Verizon Wireless, Inc.*, 527 F.3d 215, 218 (1st Cir. 2008); *D'Cunha v. Genovese/Eckerd Corp.*, 479 F.3d 193, 194-95 (2d Cir. 2007); *Pipen v. Burlington Res. Oil & Gas Co.,* 440 F.3d 1186,1193 (10th Cir. 2006); *see also Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133 (2000)(assuming arguendo that the *McDonnell Douglas* framework applies to an ADEA claim, and applying it to such claim, "[b]ecause the parties do not dispute the issue.").
[64] *McDonnell Douglas* at 802.
[65] *Id.*
[66] *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (citing *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981).
[67] *See Burdine* at 253(elaborating on the burden-shifting framework established in *McDonnell Douglas*).
[68] To give an example of *McDonnell Douglas's* wide spread acceptance, a LexisNexis search between 2007 and 2010 identified 1,977 cases where the *McDonnell Douglas* standard was discussed in the context of ADEA claims. (*LexisNexis Federal and State Cases, Combined>Terms & Connectors Search> McDonnell Douglas and ADEA or age discrimination or Age Discrimination in Employment Act or A.D.E.A. and date aft 2007*.)
[69] 128 S.Ct. 2361 (2008).
[70] *Gross* at 2349, n.2.

questioned the continuing viability of *McDonnell Douglas* or have felt compelled to reflect on, or alter the framework to reflect, *Gross*'s ultimate causation standard. In *Smith v. City of Allentown*,[71] the Third Circuit observed that "although *Gross* expressed significant doubt about any burden-shifting under the ADEA, we conclude that the but-for causation standard required by *Gross* does not conflict with our continued application of the *McDonnell Douglas* paradigm in age discrimination cases."[72] The *Smith* court continued to explain:

> *Gross* stands for the proposition that it is improper to shift the burden of persuasion to the defendant in an age discrimination case. The *McDonnell Douglas* standard, however, imposes no shift in the burden of persuasion but instead on the burden of production. Throughout the shifts, the burden of persuasion remains on the employee. Therefore, *Gross*, which prohibits shifting the burden of persuasion to an ADEA defendant, does not forbid our adherence to precedent applying *McDonnell Douglas* to age discrimination claims.[73]

Other circuit decisions are in accord with the Third Circuit, including the Second Circuit in *Leibowitz v. Cornell University*[74] and *Hrisinko v. New York City Department of Education*,[75] the Sixth Circuit in *Geiger v. Tower Automotive*,[76] and the Seventh Circuit in *Martino v. MCI Communications Services, Inc.*[77] While these courts continue to apply the *McDonnell Douglas* framework, the majority's unanswered observation in *Gross* is, at a minimum, causing the parties and the courts to reexamine this application.[78]

B. The *Gross* Ruling Is Impacting The Burdens Of Proof Under Other Laws Prohibiting Discrimination In Employment.

Hundreds of federal, state, and local laws prohibit discrimination in employment. Many use language identical or similar to the "because of" standard codified in Title VII and the ADEA. Courts have interpreted language in antidiscrimination statutes consistently, recognizing that Congress understood judicial statutory interpretations when it chose to model one statute after the other.[79] Under *Gross,* however, courts are cautioned, and in some cases believe they are obligated, to reconsider the propriety of applying rules applicable under one statute to a different

[71] 589 F.3d 684 (2009).
[72] 589 F.3d 684 (2009).
[73] *Id.* at 691.
[74] 584 F.3d 487 (2009).
[75] 2010 U.S. App. LEXIS 5180.
[76] 579 F.3D 614 (2009).
[77] 574 F.3D 447 (2009).
[78] Furthermore, it seems as though the confusion surrounding the application of *Gross* even in the age context will persist.. Despite the holding in *Gross*, at least one district court recently held that a mixed motive analysis is still applicable in ADEA claims within the federal sector. In *Fuller v. Gates*, the court stated that a plaintiff who is lacking direct evidence of age discrimination may proceed under either a pretext theory or mixed motive theory, or both.2010 U.S. Dist. LEXIS 17987.
[79] "The relevant language in [Title VII and the ADEA] is identical, and we have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *ad haec verba* from Title VII.'" *Gross* at 2354 (Stevens, J., dissenting)(*citing Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)((quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)). *See also* n.9 supra.

statute.[80] The result will be confusion and increased litigation over the burdens of proof under all of these statutes.[81]

The *Gross* majority reasoned its conclusion through a negative legislative inference: Congress must not have intended the *Price Waterhouse* standard to apply under the ADEA because Congress failed to amend the ADEA when it amended Title VII to expressly codify the *Price Waterhouse* motivating-factor standard.[82] This reasoning ignores a significant line of cases holding that courts should consistently interpret and apply the language of both statutes with equal force.[83] Moreover, *Gross* opens the door for courts to impose the same elevated standard under any antidiscrimination statute that was not similarly amended, even where the statute was clearly modeled after Title VII. This method of statutory construction cripples congressional functions because it implies that anytime Congress acts to codify existing case law, which had previously been interpreted as applying to other similar statutes, Congress's action has no impact on these other comparable statutes unless they were simultaneously amended - even if these other statutes were modeled on the amended statute and interpreted in a manner consistent with the amended statute. This rationale places an unreasonable burden on Congress to identify every statute potentially affected by legislation.

At least one Court of Appeals has embraced this expansive application of *Gross*. The Seventh Circuit has held that, "After *Gross*, plaintiffs in federal suits must demonstrate but-for causation unless a statute (such as the Civil Rights Act of 1991) provides otherwise."[84] Applying this standard, the Seventh Circuit overruled precedent expressly adopting the motivating factor standard in prior cases and extended the "but-for" causation requirement to cases where the statutes included did not have the precise motivating factor language used in the Civil Rights Acts of 1991.[85] Such a broad application of *Gross* leaves virtually all federal antidiscrimination and antiretaliation legislation open to new interpretation, despite the precedent and cannons of construction upon which Congress, plaintiffs, and employers have rightfully relied.

Considering the indisputable connections between the various state and federal antidiscrimination statutes, the *Gross* holding has prompted the lower courts to revisit the causation standards of many antidiscrimination laws. In a recent Fifth Circuit case filed under the ADA and the Family Medical Leave Act, *Crouch v. J C Penney Corp., Inc.*,[86] the court cautioned that "the Supreme Court's recent opinion in *Gross v. FBL Financial Services, Inc.*

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[80] *Gross* at 2349.

[81] A recent Third Circuit decision under 42 U.S.C. § 1981 also exemplifies the confusion the courts now confront. While the majority in *Brown v. J. Katz, Inc.*, did not believe that *Gross* had any impact on the litigation of Section 1981 mixed-motive claims, the concurring opinion pointed out that simply continuing to use Title VII analysis for Section 1981 mixed-motive claims "ignores the fundamental instruction in *Gross* that analytical constructs are not to be simply transposed from one statute to another without a thorough and thoughtful analysis." 581 F.3d 175, 182 (3d Cir. 2009).

[82] *Gross* at 2349.

[83] *Id.* at 2351. (Stevens, J. dissenting).

[84] *Gunville v. Walker*, 583 F.3d 979 (7th Cir. 2009)(citing *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009).

[85] *Fairley v. Andrews*, 578 F.3d 518(7th Cir. 2009)(stating that "[7th Circuit decisions adopting the motivating factor standard] do not survive *Gross*, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."); *Serwatka v. Rockwell Automation Services, Inc.* 2010 U.S. App. LEXIS 948 (7th Cir. 2010).

[86] 337 Fed. Appx. 399 (2009).

raises the question of whether mixed-motive framework is available to plaintiffs alleging discrimination outside the Title VII framework."[87]

Later, in *Smith v. Xerox*,[88] the Fifth Circuit refused to extend *Gross* to retaliation claims under Title VII. Despite noting that while the considerations present in the retaliation analysis are "similar to the Supreme Court's reasoning in *Gross*,"[89] the majority believed such a simplified explanation of *Gross* was incorrect.[90] The dissent, however, relying on Seventh Circuit case law and its view of the *Gross* holding, argued that the courts must apply *Gross* to Title VII retaliation claims and chastised the majority's arguments as a "meaningless distinction indeed."[91]

As discussed, the Seventh Circuit did not avoid the issue of how the *Gross* analysis impacts causation standards under other antidiscrimination laws. In *Serwatka v. Rockwell Automation Inc.*,[92] the court examined the pre-amended language of the ADA, which prohibited discrimination "because of" an individual's disability or perceived disability.[93] The court determined that "the importance *Gross* attached to the express incorporation of mixed-motive in Title VII suggests that when another antidiscrimination statute lacks comparable language, mixed-motive claims will not be viable."[94]

Although provisions of the ADA specifically incorporate Title VII's mixed-motive remedies, the Seventh Circuit was unconvinced and refused to recognize the motivating-factor test absent express language in the statute or explicit reference to Title VII's motivating-factor standard.[95] Decisions such as this indicate that, at least in the Seventh Circuit, any plaintiff whose discrimination claim falls outside the Title VII protected classes *must* prove "but-for" causation in every case.

To date, district courts have applied *Gross* to require but-for causation under state

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[87] *Crouch v. J C Penney Corp. Inc.*, 2009 U.S. App. LEXIS 14362 (5th Cir. 2009). *See also Hunter v. Valley View Local Sch.*, 579 F.3d 688 (6th Cir. 2009)(stating that *Gross* requires the court to revisit the propriety of applying Title VII precedent to the FMLA by deciding whether the FMLA authorizes motivating-factor claims, and holding that it does).
[88] 2010 U.S. App. LEXIS 6190.
[89] 2010 U.S. App. LEXIS 6190 at 18.
[90] 2010 U.S. App. LEXIS 6190 at 19.
[91] 2010 U.S. App. LEXIS 6190 at 45.
[92] 2010 U.S. App. LEXIS 948 (7th Cir. 2010).
[93] *Id.* at *11. [The version of the ADA applicable to the *Serwatka* case in relevant part provides that "[n]o covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." *42 U.S.C. § 12112(a) (2008)*. Pursuant to the ADA Amendments Act of 2008, Congress has made substantial changes to the ADA, which took effect on January 1, 2009. The language of the statute has been modified to prohibit an employer from discriminating against an individual "*on the basis of* disability." *42 U.S.C. § 12112(a) (2009)*. The Seventh Circuit concluded that whether "on the basis of" means anything different from "because of", and whether this or any other revision to the statute matters in terms of the viability of a mixed-motive claim under the ADA, were not questions it needed to consider in the *Serwatka* appeal. *Serwatka* at 962-63.]
[94] *Id.* at *10.
[95] *Id.* at *13-14.

antidiscrimination statues,[96] eliminated the mixed-motive theory under the Juror Protection Act,[97] and solidified a decision to require but-for causation under the anti-retaliation provision of Title VII.[98] For decades there has been an accepted standard for how plaintiffs prove discrimination under employment discrimination laws and recognition that comparable statutes involve comparable burdens and methods of proof. *Gross* has now opened the door for increased litigation over the appropriate burden and methods of proof under all the statutes prohibiting discrimination in employment, even if they were expressly modeled after Title VII. Title VII makes it clear after the 1991 amendments that these discrimination laws were intended to protect workers from adverse actions motivated, in whole or in part, by improper considerations. Under the *Gross* decision, every statute must be examined anew to determine just how much discrimination that statute will permit. *Gross*'s ramifications extend far beyond the ADEA, and this decision is having an immediate and detrimental effect on plaintiffs bringing non-age-based employment discrimination claims. Unless Congress acts to specifically express its intent, the courts will continue to narrowly construe the ADEA and similar statutes in a way that enables workplace discrimination by increasing the costs of litigation and placing insurmountable burdens upon plaintiffs.

C. Some Courts Are Even Reading *Gross* As Requiring Age To Be The Sole Cause, Leading To Nonsensical Results And Practical Pleading Confusion.

Though they face a difficult obstacle at trial, plaintiffs who defeat summary judgment obviously fare better than many plaintiffs who will be unable to bring their claims to trial. A number of lower courts, interpreting *Gross*, now require proof that age was the *sole* cause of an employer's decision, and have dismissed plaintiff's ADEA claims who plead additional discriminatory causes for an employer's adverse action.[99] In these districts, plaintiffs are confronted with impractical difficulties initiating an ADEA claim, as the mere pleading of another discriminatory basis risks automatic dismissal of the age claim.

> For example, in *Culver v. Birmingham Board of Education*, the plaintiff brought both Title VII and ADEA claims.[100] The court dismissed the ADEA claim, finding that *Gross* holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that . . . [age] . . . was the *only* or *the but-for* reason for the alleged adverse employment action. The only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the

[96] *See Kozlosky v. Steward EFI, LLC*, 2009 U.S. Dist. LEXIS 77605 (W.D. Tex. 2009)(holding that *Gross* applies to age discrimination claims under the Texas Labor Code); *Cormack v. N. Broward Hospital Dist.*, 2009 U.S. Dist. LEXIS 76396 (S.D. Fl. 2009)(holding that *Gross* applies to age discrimination claims under the Florida Civil Rights Act).

[97] *Williams v. District of Columbia*, 646 F. Supp. 2d 103 (D.C. 2009).

[98] *Beckford v. Timothy Geithner, Secretary of the Treasury*, 2009 U.S. Dist. LEXIS 96038 (Dist. Columbia, Oct 15, 2009).

[99] See *Love v. TVA Board of Directors*, No. 06-754, 2009 WL 2254922 (M.D. Tenn. July 28, 2009) (dismissing plaintiff's ADEA claim reasoning that, under *Gross*, since race had been a factor, plaintiff could not prove that age was the *sole* factor); *see also Wardlaw v. City of Philadelphia Streets Department*, Nos. 05-3387, 07-160, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009) (dismissing plaintiff's ADEA claim because plaintiff had alleged discrimination on other protected basis; thus, she could not show that age was the sole factor).

[100] 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009).

employer's adverse conduct and simultaneously claim that there was *any* other proscribed motive involved.[101]

In other words, some courts do not allow an ADEA plaintiff to plead duel claims; to do so would admit that another motive was at play, which, under this court's interpretation of *Gross*, would foreclose the age claim.

Decisions like these are a harsh reality for older workers who, prior to *Gross*, had the opportunity to show age was a consideration in the employment decision. While raising the bar for older workers, *Gross* lowers employers' standards of behavior by sending a message that age may be a factor in employment decisions, so long as it is not the determining factor. Moreover, as most courts continue to apply the *McDonnell Douglas* burden-shifting standard*,* the *Gross* decision has failed to clear the murky waters of burden-shifting in ADEA cases.[102] *Gross* has the true effect of circumventing Congress' intent to eliminate age as a factor in employment decisions by increasing the burden on older employees, creating confusion in the lower courts, and increasing litigation costs.

IV. HR 3721: PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT

Congress was unequivocal about its desire to eliminate *all* discrimination in the workplace—including age discrimination.[103] Likewise, Congress modeled the ADEA on Title VII of the Civil Rights Act,[104] and the courts have long recognized the fundamental relationship that exists between the statutes. Yet, the *Gross* decision sent a message to Congress that if it wants the Supreme Court to provide protections against discrimination, it must be specific. Congress must act to ensure the ADEA is not stripped of all its intended power and protect older employees' fundamental right to nondiscriminatory treatment. Presently, the Protecting Older Workers Against Discrimination Act has been proposed to restore the intended protections of the ADEA.[105]

The preceding discussion highlights in detail the issues with the *Gross* decision. HR: 3721 is a balanced response to it by returning the law to the status quo. It also eliminates the confusion created by *Gross*. Indeed, some say it does not go far enough because it still allows

[101] *Id.*; *but see Belcher v. Service Corp. International*, 2009 U.S. Dist. LEXIS 102611 (E.D. Tenn. 2009)("While *Gross* arguably makes it impossible for a plaintiff to ultimately recover on an age and a gender discrimination claim in the same case, the undersigned does not read *Gross* as taking away a litigant's right to plead alternate theories under the Federal Rules.").

[102] The *Gross* majority suggested that burden-shifting, at least of the *Price Waterhouse* variety, has been difficult to apply in practice and that its cumbersome nature has "eliminated any perceivable benefit to extending its framework to ADEA claims." *Gross* at 2352.

[103] In *McKennon v. Nashville Banner Publ'g Co.*, the majority stated, "The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." 513 U.S. 352, 357 (1995).

[104] *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

[105] The House version of the bill was introduced on October 6,2009, H.R. 3721, 111th Congress (2009). The Senate version of the bill was introduced on October 6th, 2009, S 1756, 111th Congress (2009). The language of the bills track each other. For ease of discussion we will reference the house bill.

employers who have considered age to limit their damages if they can show they would have taken the same action anyhow.

The Protecting Older Workers Against Discrimination Act overrules *Gross* and expressly addresses issues the *Gross* Court ignored or misinterpreted. The amendment largely mirrors the 1991 amendments to Title VII, which codified the *Price Waterhouse* motivating-factor theory and transformed its "same decision" affirmative defense into a limitation on remedies. In its current form, the amendment:

- Restores the motivating factor test to ADEA claims by specifying that a plaintiff establishes an unlawful employment practice by demonstrating either age was "a motivating factor for the practice complained of, even if other factors also motivated that practice, or the questionable practice would not have occurred in the absence of an impermissible factor."[106]

- Clearly establishes the motivating factor standard as the congressionally intended standard in all federal discrimination statutes absent an explicit statement adopting another proof standard.[107]

- Adopts Title VII's same-decision limitation on remedies.[108] This allows juries to find employers liable for considering a protected characteristic while limiting the available remedies when the employer can show that it would have taken the adverse action even without considering the characteristic.

- Expressly preserves the evidentiary framework set forth in *McDonnell Douglas*.[109]

- Answers the issue actually presented in *Gross* by clarifying that a plaintiff may demonstrate mixed-motive liability by relying on "any type or form of admissible circumstantial or direct evidence."[110]

- Preserves and/or restores the mixed-motive test in any Federal law forbidding employment discrimination; any law forbidding retaliation against an individual for engaging in federally protected activity; and any provision of the Constitution that protects against discrimination or retaliation.[111]

Essentially, this amendment restores the protections afforded under the ADEA prior to the *Gross* decision and ensures courts will interpret similar statutes accordingly. Employers will no longer be able to defeat the victim's discrimination claims with a mere showing that some other reason was a factor in their decision. The statute makes it clear that there is no tolerable level of discrimination in employment.

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[106] H.R. 3721, §3(g)(1)
[107] H.R. 3721, §3(g)(5)
[108] H.R. 3721, §3(g)(2)
[109] H.R. 3721, §3(g)(4)
[110] H.R. 3721, §3(g)(3)
[111] H.R. 3721, §3(g)(5)

Gross runs contrary to our national commitment to equality. Thus, Congress should take positive steps to ensure that our civil rights and employment laws protect *all* American workers. At the very least, Congress must stem the "Gross" implication that congressional action to strengthen one statute may be deemed to weaken other statutes dealing with similar issues but not simultaneously amended. This was clearly not the intent of Congress in 1991 when it amended Title VII to reflect its approval of *Price Waterhouse*'s "because of" interpretation. And just as Congress, in response to Supreme Court decisions, acted in 1991 to reaffirm its intention "to prohibit all invidious consideration of sex, race, color, religion, or national origin in employment decisions,"[112] Congress must now act to restore those protections for our older workers.

The *Gross* decision has detrimentally affected plaintiffs' ability to access the courts and to obtain relief for employment discrimination. If Congress wishes to secure the rights it thought it guaranteed in the civil rights laws, it must act to clarify that intent.[113] As the Supreme Court has said, "It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes."[114] As Justice Ginsburg noted in *Ledbetter v. Goodyear Tire & Rubber Co.*[115] , "Once again, the ball is in Congress' court."[116].

[112] H.R. Rep. No. 102-40, pt. 2, at 17 (1991).

[113] This is not a new issue for Congress, as just last year Congress reversed the same majority's decision in by passing the Lilly Ledbetter Fair Pay Act In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court held that "an employee wishing to bring a Title VII lawsuit must first file an EEOC charge within . . . 180 days 'after the alleged unlawful employment practice occurred,'" and that new violations did not occur because of non-discriminatory acts (here, the issuing of paychecks). 550 U.S. 618, 621 (2007). The *Ledbetter* dissent specifically called upon Congress to act to correct the "Court's parsimonious reading of Title VII." *Id.* at 661 (Ginsburg, J., dissenting). Congress indeed responded by passing the Lilly Ledbetter Fair Pay Act, which clarified that the 180-day statute of limitations resets each time "a discriminatory compensation decision . . . occurs . . . ." Pub. L. No. 111-2, 123 Stat. 5 (2009).

[114] *Circuit City*, 532 U.S. at 120.

[115] 550 U.S. 618 (2007)

[116] 550 U.S. at 661 (Ginsburg, J., dissenting).

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October 7, 2009, testified before U.S. Senate Judiciary Committee at a hearing on "Workplace Fairness; Has The Supreme Court Been Misinterpreting Laws designed to protect American Workers From Discrimination?"

July 15, 2009, a panelist on the ALI-ABA Teleseminar "Supreme Court Employment Law Update 2009"

March 4, 2009, a panelist in a legal roundtable at the 2009 Higher Education Symposium held at the Southern Methodist University in Dallas, Texas, discussing the Supreme Court Employment Docket

November 20, 2008, a witness before the United States Equal Employment Opportunity Commission on the use of criminal histories as an employment screening device.

Prior to his work with the Lawyers' Committee, Professor Foreman was the acting deputy general counsel for the U.S. Commission on Civil Rights. He previously served as a clinical supervisor in the Southern Methodist University School of Law Civil Clinic and was a partner in the Baltimore, Maryland, law firm Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., where he led the firm's Employment Law Group. Professor Foreman was also general counsel for the Maryland Commission on Human Relations and was an appellate attorney with the Equal Employment Opportunity Commission.

In 1998, Shippensburg University honored Professor Foreman with the Jesse S. Heiges Distinguished Alumnus Award. He also has been awarded the Carnegie Medal for Outstanding Heroism, and last year was selected as a Wasserstein Fellow by Harvard Law School, which recognizes dedicated service in the public interest.