STATEMENT OF
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BEFORE THE
COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
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Introduction

Mr. Chairman, and distinguished members of the Committee, thank you for the opportunity to appear before you at this important hearing to discuss the "Protecting Older Workers Against Discrimination Act" (S. 1756), which would supersede the Supreme Court's 2009 decision in *Gross v. FBL Financial Services*.[1]

The Supreme Court in *Gross* held that "mixed-motives" claims are not cognizable under the Age Discrimination in Employment Act of 1967 (ADEA), and that older workers cannot prevail on a claim of age discrimination unless they prove that age was the "but for" cause of the employment practice at issue. In practice, this means that an ADEA plaintiff will no longer have a valid claim, and therefore will be entitled to no relief whatsoever – even if a defendant *admits* that it took an adverse employment action in part because of the plaintiff's age – unless the plaintiff can show that the defendant would not have made the same decision anyway (i.e., if the employer had not actually taken the victim's age into account).

The *Gross* decision was a startling departure from decades of settled precedent developed in federal district and intermediate appellate courts. It erected a new, much higher (and what will often be an insurmountable) legal hurdle for victims of age-based employment decisions. Indeed, recent case law reveals that *Gross* already is constricting the ability of older workers to vindicate their rights under the ADEA, as well as other anti-discrimination statutes.

The U.S. Equal Employment Opportunity Commission (EEOC or Commission) believes that legislation like S.1756 is needed to restore and bolster the basic protections that applied to ADEA claims pre-*Gross*. This would more fully effectuate Congress's original intent in passing the ADEA – to "promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination in employment."[2]

The Surge in ADEA Charges and the Staying Power of Age-Based Stereotypes

The *Gross* ruling could not have come at a worse time. More than 40 years after Congress passed the ADEA, age discrimination may be at historic highs. EEOC receipts of ADEA charges certainly are at or near record-levels. In fiscal year 2008, age discrimination charges

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

[2] 29 U.S.C. § 621(b).

jumped nearly 30 percent over the previous year, and represented nearly 26 percent of all charges the EEOC received that year.[3] In 2009, age-based charges were at their second-highest level ever (exceeded only by the previous year), and constituted over 24 percent of all receipts.[4]

It is difficult to pinpoint the causes of this surge in age discrimination charges. It is clear, however, that negative stereotypes about older workers remain deeply entrenched.[5] These stereotypes include unwarranted assumptions that older workers are more costly, harder to train, less adaptable, less motivated, less flexible, more resistant to change, and less energetic than younger employees.[6] Employers also may be reluctant to invest in training and other developmental opportunities for older workers based on the perception that they have less time remaining in their careers.[7]

While extensive research has shown that these negative age-based stereotypes have little basis in fact,[8] they undoubtedly influence far too many employment decisions. For instance, as a result of these stereotypes, older persons with the same or similar qualifications typically receive lower ratings in interviews and performance appraisals than younger counterparts (and thus are apt to have more trouble finding or keeping a job or securing a promotion).[9] Older workers also typically are rated as having less potential for development than younger workers, and thus are given fewer training and development opportunities.[10]

Further, it appears that age-based stereotypes operate to disadvantage older workers in corporate "downsizing" situations, in particular. Because the main goal of such downsizing is usually to

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[3] In fiscal year 2008, the EEOC received 24,582 charges containing ADEA allegations (an increase from the 19,103 ADEA charges received in fiscal year 2007). *See* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[4] In fiscal year 2009, the EEOC received 22,778 ADEA charges. *See id.*

[5] *See* Daniel Kohrman & Mark Hayes, *Employers Who Cry "RIF" and the Courts That Believe Them*, 23 HOFSTRA LAB. & EMP. L.J. 153, 160 (2005) (studies show that bias against older people is more deeply embedded than other forms of bias including race, gender, religion, and sexual orientation).

[6] *See* Remarks of Professor Michael Campion, EEOC Meeting of July 15, 2009: Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers, http://www.eeoc.gov/eeoc/meetings/7-15-09/campion.cfm.

[7] *See id.*

[8] *See id.* (while older workers face stereotypes that job performance declines with age, extensive research actually shows that it improves with age); *see also* Towers Perrin, *The Business Case for Workers Age 50+, Planning for Tomorrow's Talent Needs in Today's Competitive Environment* (AARP), at 33 (Dec. 2005) (it is a myth that performance suffers over time, and "mounting evidence—both anecdotal and statistical—demonstrates that older workers bring experience, dedication, focus, stability and enhanced knowledge to their work, in many cases to a greater degree than younger workers"); William McNaught & Michael C. Barth, *Are Older Workers "Good Buys"? A Case Study of Days Inns of America*, SLOAN MGMT. REV. 53-63 (Spring 1992) (net cost of employing older reservations agents was nearly identical to the net cost of employing younger workers; with regard to flexibility, older workers were just as quick as younger workers to adapt to modern computer technology, and training times for the two groups were virtually identical).

[9] *See* Remarks of Professor Campion, *supra* note 6.

[10] *Id.*

cut costs, age-based stereotypes that older workers are more costly, harder to train, less flexible, or less competent may become much more prominent in the minds of the decision-makers.[11] To make matters worse, once older workers are laid off, they often are again vulnerable to age-based stereotyping as they attempt to find new jobs. It seems older workers who have been laid off are less likely to obtain reemployment than younger workers, take longer to find new jobs than younger workers, and generally fail to obtain jobs paying the same wages as their previous positions.[12]

The EEOC has brought numerous cases under the ADEA involving the manifestation of just these sorts of ageist stereotypes. These include:

- *EEOC v. Lockheed Martin Global Telecommunications, Inc.* The EEOC alleged that the employer violated the ADEA by firing eight employees as part of a reduction-in-force. To determine who would be laid off, employees were placed in comparison groups, and with only one exception, the oldest employee within the comparison group was the one laid off. The RIF rated employees using subjective criteria that included the "ability to get along with others." Again, with only one exception, the ratings for "ability to get along with others" corresponded to employee ages, with the youngest employees being ranked highest in this area and the oldest employees the lowest. This case was settled for $773,000.

- *EEOC v. Mike Albert Leasing, Inc.* The charging party, aged 60, was the oldest area manager for a company that leased cars, trucks, and vans throughout several states. There was evidence that about a year before the charging party was fired, the company president commented at a sales meeting that the sales force was "old and aging" and that the company needed some fresh young blood. Shortly before firing the charging party, the company hired a 38-year-old male to take over the charging party's accounts. The EEOC alleged that although the charging party's job evaluations and sales numbers indicated he was outperforming the majority of his peers, the company fired him for his failure to meet "goals" that were intentionally unrealistic. This case was settled for $100,000.

- *EEOC v. Dawes County, Nebraska.* After working for the respondent for more than 30 years, the charging party was fired at the age of 71 from his position with the county roads department, even though there was no evidence of performance problems. The EEOC alleged that the county decided to impose a stress test for workers 70 or older to determine whether they could meet the physical requirements of their job and the charging party was fired based on the assumption that he would not be able to pass the test. The respondent never actually implemented the stress test, and no one other than the charging party was fired because of the test. This case was settled for $50,000.

[11] *Id.*

[12] *Id.*

The Unfavorable Legal Climate for Age Discrimination Plaintiffs

Unfortunately, older workers who are victims of such age-based decision-making now must seek to assert their ADEA rights in a legal landscape that increasingly minimizes the significance of age discrimination. The prevailing judicial approach distinguishes ADEA claims from those brought under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, sex, religion, or national origin. Notably, for example, in a statement that appears to reflect the erroneous but widespread stereotypes about older workers, the Supreme Court has said that a lower level of protection under the ADEA than under Title VII is "consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[13]

This judicial antipathy to age discrimination claims also can be seen in lower court decisions in which courts apply crabbed interpretations of the ADEA to rule against plaintiffs even when plaintiffs present evidence of age-based comments by managers. For example, courts have dismissed as "stray remarks" not probative of age discrimination comments calling the plaintiff "the old guy in the department,"[14] stating that the plaintiff looked "old and tired,"[15] repeatedly calling the plaintiff "old man,"[16] saying that the company goal was to "attract younger talent,"[17] and stating that some workers "were just too old to get the job done" and that the company "wanted to go to a young aggressive group of people."[18]

Given this relatively inhospitable legal climate, it is perhaps not surprising that while all discrimination plaintiffs face enormous challenges in proving their claims, success seems to be especially elusive for age discrimination plaintiffs.[19]

The Gross *Decision*

Against this already-challenging legal backdrop, the Supreme Court's recent ruling in *Gross* is particularly troubling. *Gross* is the latest, and in some respects the most problematic, in a string of judicial decisions that have weakened the ADEA significantly. Moreover, because lower courts have begun to extend *Gross*'s reasoning beyond the ADEA context, the decision threatens to undermine numerous other federal anti-discrimination laws, as well.

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[13] *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). Of course, as already indicated, the Court's statement seems to assume a closer correlation between age and inability than research suggests exists. *See supra* note 8.

[14] *Luks v. Baxter Healthcare Corp.*, 467 F.3d 1049, 1055 (7th Cir. 2006).

[15] *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007).

[16] *EEOC v. Republic Servs., Inc.*, 640 F. Supp. 2d 1267, 1286 (D. Nev. 2009).

[17] *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 351-52 (5th Cir. 2007).

[18] *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir. 2000).

[19] *See* Kohrman and Hayes, *supra* note 5, at 153 (data collected by the Administrative Office of the U.S. Courts for 1998-2001 shows that ADEA plaintiffs win 20.93 percent of bench trials while the win rate for bench trials in employment discrimination cases overall is 25.94 percent).

The Supreme Court granted certiorari in *Gross* to answer what appeared to be an arcane legal question – whether "direct evidence" is needed to obtain a "mixed-motives" jury instruction in an ADEA case. In the end, however, the Court's ruling in *Gross* struck at the heart of the ADEA's core anti-discrimination provision.

In the 1989 decision in *Price Waterhouse v. Hopkins*, the Supreme Court had held that a Title VII plaintiff who had shown that discrimination was a "motivating factor" in an employment decision could request a mixed-motives jury instruction, which would shift the burden of proof to the employer to show that it would have taken the same action in the absence of discrimination.[20] The Supreme Court subsequently held that a Title VII plaintiff could rely on either direct or circumstantial evidence to request such a mixed-motives instruction.[21] While lower courts agreed that mixed-motives claims were cognizable under the ADEA, as well, the lower courts were split as to whether ADEA plaintiffs needed to present "direct evidence" to obtain a mixed-motives instruction (or whether, like Title VII plaintiffs, they could present either direct or circumstantial evidence to justify the instruction).[22]

The majority in *Gross* ultimately decided that it was unnecessary to address this issue – the question on which the Court had granted certiorari – because it concluded that mixed-motives claims are never available under the ADEA at all. The Court held that in an ADEA case, the burden of proof *never* shifts to the employer to defend its action, and that an ADEA plaintiff must always prove that age was the "but for" factor in the adverse employment action. This issue was never briefed by the parties or amici, and counsel for the United States had urged the Court during oral argument not to reach the issue.[23] And, as already indicated, lower courts had unanimously concluded that ADEA plaintiffs could indeed obtain a mixed-motives instruction and had only disagreed as to whether direct evidence was needed.[24]

Need for Legislation to Supersede Gross

While the *Gross* decision dealt with seemingly abstract concepts about causation and burdens of proof, it is having real-world implications for age discrimination litigants. Now, after *Gross*, ADEA plaintiffs are unable to prove age discrimination by showing that age was one factor (of perhaps several factors) that motivated the challenged employment practice, unless they can also prove that age was the "but for" factor for the decision. Thus, ADEA plaintiffs with cases involving "mixed motives" are subject to a more demanding standard of causation and burden of proof than similar Title VII plaintiffs.

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[20] 490 U.S. 228, 258 (1989).

[21] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003).

[22] *Compare Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 360 (8th Cir. 2008) (ADEA plaintiff must produce direct evidence in order to obtain mixed-motives instruction), *with Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004) (direct evidence not needed for mixed-motives instruction under ADEA).

[23] *Gross*, 129 S. Ct. at 2353 n.2 (Stevens, J., dissenting).

[24] *Id.* at 2355 & n.5 (collecting cases).

When Congress enacted the Civil Rights Act of 1991, it confronted a similar issue. Congress responded by expressly "authorizing discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision."[25]

Similar to the negative impact *Price Waterhouse* had on victims of sex-based and race-based discrimination, the Supreme Court's decision in *Gross* is damaging the ability of victims of age discrimination to vindicate their statutory rights. In the *Gross* case itself, the Eighth Circuit on remand reversed a jury verdict and nearly $47,000 in lost compensation the jury had awarded to Jack Gross.[26] In addition to the adverse effect it had in Mr. Gross's ADEA case, the Supreme Court's ruling has begun to negatively impact other litigants. One district court affirmed summary judgment for the employer even though there was sufficient evidence for a jury to conclude that age was one of the factors that motivated the plaintiff's termination. Relying on *Gross*, the court noted that "just because age may have played a role in the decision does not mean that it was a 'but for' cause of his termination."[27] Similarly, the Third Circuit has concluded that a plaintiff could not prevail on his termination claim under the ADEA despite evidence that the employer wanted to get rid of "older and better paid" employees and to retain "younger and cheaper" employees. The court stated that such evidence showed at most that age was a "secondary consideration" in the plaintiff's termination, not a "but for" factor as required by *Gross*.[28]

In addition, some courts now have interpreted *Gross* as not only requiring a plaintiff to prove that age was a "but for" cause, but also to show that it was the *sole* cause, for the challenged employment action. For example, in one case, the plaintiff was forced to choose between his Title VII claim and his ADEA claim. The court concluded that, under *Gross*, the plaintiff was required to demonstrate that age was "the only or the but-for reason for the alleged adverse employment action," and thus, the plaintiff could not claim that the action was based on age while simultaneously claiming that there was another unlawful motive involved.[29] Similarly, another court dismissed a plaintiff's ADEA claim because she had alleged not only age discrimination but also discrimination based on gender, race, and disability. The court interpreted the *Gross* decision as requiring a plaintiff to present direct evidence that age was the sole reason for the challenged action.[30] This particular interpretation of *Gross* would appear to preclude "intersectional" discrimination claims (e.g., those alleging that discrimination occurred because of a combination of two or more protected traits). This doctrinal development would

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[25] *Id.* (*quoting* 42 U.S.C. § 2000e-2(m)).

[26] *Gross v. FBL Fin. Servs., Inc.*, 588 F.3d 614 (8th Cir. 2009).

[27] *Anderson v. Equitable Res., Inc.*, 2009 WL 4730230, at *14-15 (W.D. Pa. Dec. 4, 2009).

[28] *Kelly v. Moser, Patterson & Sheridan, L.L.P.*, 2009 WL 3236054 (3d Cir. Oct. 9, 2009) (unpublished).

[29] *Culver v. Birmingham Bd. of Educ.*, 646 F. Supp. 2d 1270, 1271 (N.D. Ala. 2009).

[30] *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009).

upend decades of settled law allowing for such claims, and represent an alarming restriction on longstanding civil rights protections.[31]

Finally, the *Gross* decision not only impedes the ability of older workers to successfully challenge various forms of age discrimination. It has also begun to undermine the enforcement of other federal anti-discrimination statutes. For example, the Seventh Circuit recently determined, citing *Gross*, that plaintiffs alleging discrimination under the Americans with Disabilities Act (ADA) now must show that disability is a "but for" cause of a challenged employment practice.[32]

Clarifying legislation will thus not only protect plaintiffs who bring claims under the ADEA, but also plaintiffs who seek redress under other anti-discrimination laws which may be similarly weakened by the application of the *Gross* decision.

S. 1756

S. 1756 would legislatively overturn *Gross* to ensure that ADEA plaintiffs receive the same core protections and are subject to the same basic standards of causation with respect to disparate treatment claims as Title VII plaintiffs. This aspect of the legislation would simply restore the law to the state of parity that existed between ADEA and Title VII pre-*Gross*. Such parity reflects the Congressional intent evident in the original passage of the ADEA – namely, that age discrimination should be no more permissible than discrimination based on race, color, sex, religion, or national origin.[33]

The bill would make clear that the ADEA may be violated any time age is a motivating factor for the complained of practice; that plaintiffs can use any evidence, direct or circumstantial, to make that showing; and that every method of proof, including the *McDonnell-Douglas*[34] framework, can be used to prove a violation. In addition, the bill would have other important effects:

- The bill would apply to the ADA and other federal employment discrimination laws, thus ensuring more uniform standards and protection across various statutes.

- The bill would apply to prohibitions against retaliation, including the protections against retaliation contained in Title VII.

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[31] *Cf.* Remarks of Cathy Ventrell-Monsees, EEOC Meeting of July 15, 2009: Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers, http://www.eeoc.gov/eeoc/meetings/7-15-09/ventrell-monsees.cfm (noting *Gross* "is extremely problematic for older women and older minorities who often bring claims under both the ADEA and Title VII").

[32] *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 964 (7th Cir. 2010).

[33] *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting the "important similarities" between the two statutes, "both in their aims – the elimination of discrimination from the workplace – and in their substantive provisions").

[34] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

- The bill would ensure that where an employer shows that it would have taken the same action in the absence of discrimination, plaintiffs will be entitled to the same remedies in mixed-motives cases under the ADEA and other employment discrimination laws as Title VII plaintiffs now may recover.

The EEOC believes, however, that a bill like S. 1756 is just the first step that is needed to ensure that older workers are protected against age discrimination. As already noted, *Gross* reflects the general view of the Supreme Court that age discrimination claims are qualitatively different than race or sex discrimination claims, and that protections and legal standards under the ADEA are not the same as those in Title VII. For example, the Supreme Court recognized in *Smith v. City of Jackson* that the disparate impact theory of liability is available to age discrimination plaintiffs, but at the same time also determined that the scope of disparate impact liability is narrower under the ADEA than under Title VII.[35] Similarly, while the Supreme Court has held that a policy that facially discriminates on the basis of sex is unlawful even if an employer has benevolent motives for the policy,[36] the Court upheld, in *Kentucky Retirement System v. EEOC*, a disability retirement plan that was explicitly based on age, reasoning that the differences in treatment were not "actually motivated" by age.[37] These decisions have placed victims of age discrimination at a legal and practical disadvantage compared with victims of other forms of discrimination, and thus have impeded effective enforcement of the ADEA.

The EEOC's Response and Enforcement Role

As the nation's chief enforcer of protections against age-based employment discrimination, the EEOC is especially concerned by these developments. In response, we have sought to determine how best to use our limited resources to counteract (or at least contain) the damage done by the deteriorating legal landscape for victims of age discrimination.

The recent spate of case law restricting the rights of age discrimination plaintiffs, coupled with the rise in age discrimination charges, prompted the EEOC to hold a public Commission meeting on these issues in July 2009.[38] At this meeting, witnesses discussed Supreme Court decisions, including *Gross*, that have significantly undermined the protections that Congress intended to confer when it enacted the ADEA. Experts at the meeting urged a variety of potential enforcement and policy solutions to counteract these adverse rulings, such as issuing regulations to fully define the components and burdens of pleading and proof of the "reasonable factor other than age" defense to an ADEA disparate impact claim, developing policy guidance to make uniform the relevance and weight of ageist comments, and using the EEOC's rulemaking

[35] 544 U.S. at 240.

[36] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199-200 (1991).

[37] 128 S. Ct. 2361, 2367 (2008).

[38] The transcript and other materials from this meeting can be found at http://www.eeoc.gov/eeoc/meetings/7-15-09/index.cfm.

authority under the ADEA to clarify the factors announced by the Supreme Court in *Kentucky Retirement*.

The EEOC is carefully evaluating these and other ideas, and implementing them as appropriate. In February 2010, the Commission issued a notice of proposed rulemaking to address an employer's "reasonable factors other than age" defense to an ADEA disparate impact claim. This proposed regulation clarifies the circumstances under which an employer may adopt a facially neutral policy that disproportionately harms older workers. It also explains the steps that employers need to take to minimize the potential for age-based stereotyping when managers are granted wide discretion to engage in subjective decisionmaking.[39]

The Commission will continue to use all available means at its disposal – including issuing regulations and policy guidance, providing outreach and training, conducting administrative enforcement, and litigating ADEA cases – to safeguard equal employment opportunity for older workers. However, these tools alone may no longer be sufficient to the task. As some of the experts at the EEOC's recent public meeting noted, a legislative response now is needed to overcome recent legal setbacks, and to restore the original potency and promise of the ADEA.

To that end, the Commission stands ready and eager to help this Committee with technical assistance on S. 1756 – and on any future related legislation.

Conclusion

Thank you again for inviting me here today to testify on this very important issue. I look forward to your questions.

[39] These proposed regulations are available at http://edocket.access.gpo.gov/2010/2010-3126.htm.