111TH CONGRESS
1ST SESSION

H. R. 3721

To amend the Age Discrimination in Employment Act of 1967 to clarify the appropriate standard of proof.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 6, 2009

Mr. GEORGE MILLER of California (for himself, Mr. CONYERS, Mr. ANDREWS, Mr. NADLER of New York, Mr. COURTNEY, Ms. CHU, Ms. CLARKE, Mr. HOLT, Mr. HARE, Mr. KILDEE, Mr. LOEBSACK, Mr. SABLAN, Mr. SCOTT of Virginia, Ms. HIRONO, Ms. WOOLSEY, Mr. BISHOP of New York, and Mr. SESTAK) introduced the following bill; which was referred to the Committee on Education and Labor, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Age Discrimination in Employment Act of 1967 to clarify the appropriate standard of proof.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the ''Protecting Older
5 Workers Against Discrimination Act''.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds the following:

1 (1) In enacting the Age Discrimination in Em-
2 ployment Act of 1967, Congress intended to elimi-
3 nate discrimination against individuals in the work-
4 place based on age.
5 (2) In passing the Civil Rights Act of 1991,
6 Congress correctly recognized that unlawful discrimi-
7 nation is often difficult to detect and prove because
8 discriminators do not usually admit their discrimina-
9 tion and often try to conceal their true motives.
10 (3) Congress has relied on a long line of court
11 cases holding that language in the Age Discrimina-
12 tion in Employment Act of 1967, and similar anti-
13 discrimination and antiretaliation laws, that is near-
14 ly identical to language in title VII of the Civil
15 Rights Act of 1964 would be interpreted consistently
16 with judicial interpretations of title VII of the Civil
17 Rights Act of 1964, including amendments made by
18 the Civil Rights Act of 1991. The Supreme Court's
19 decision in Gross v. FBL Financial Services, Inc.,
20 129 S. Ct. 2343 (2009), has eroded this long-held
21 understanding of consistent interpretation and cir-
22 cumvented well-established precedents.
23 (4) The holding of the Supreme Court in Gross,
24 by requiring proof that age was the ''but for'' cause
25 of employment discrimination, has narrowed the

1 scope of protection intended to be afforded by the
2 Age Discrimination in Employment Act of 1967,
3 thus eliminating protection for many individuals
4 whom Congress intended to protect.

5 (5) The Supreme Court's holding in Gross, rely-
6 ing on misconceptions about the Age Discrimination
7 in Employment Act of 1967 articulated in prior de-
8 cisions of the Court, has significantly narrowed the
9 broad scope of the protections of the Age Discrimi-
10 nation in Employment Act of 1967.

11 (6) Unless Congress takes action, victims of age
12 discrimination will find it unduly difficult to prove
13 their claims and victims of other types of discrimina-
14 tion may find their rights and remedies uncertain
15 and unpredictable.

16 (b) PURPOSE.—The purpose of this Act is to ensure
17 that the standard for proving unlawful disparate treat-
18 ment under the Age Discrimination in Employment Act
19 of 1967 and other anti-discrimination and anti-retaliation
20 laws is no different than the standard for making such
21 a proof under title VII of the Civil Rights Act of 1964,
22 including amendments made by the Civil Rights Act of
23 1991.

1 **SEC. 3. STANDARD OF PROOF.**

2 Section 4 of the Age Discrimination in Employment
3 Act of 1967 (29 U.S.C. 623) is amended by adding after
4 subsection (f) the following:

5 ''(g)(1) For any claim brought under this Act or any
6 other authority described in paragraph (5), a plaintiff es-
7 tablishes an unlawful employment practice if the plaintiff
8 demonstrates by a preponderance of the evidence that—

9 ''(A) an impermissible factor under that Act or
10 authority was a motivating factor for the practice
11 complained of, even if other factors also motivated
12 that practice; or

13 ''(B) the practice complained of would not have
14 occurred in the absence of an impermissible factor.

15 ''(2) On a claim in which a plaintiff demonstrates a
16 violation under paragraph (1)(A) and a defendant dem-
17 onstrates that the defendant would have taken the same
18 action in the absence of the impermissible motivating fac-
19 tor, the court—

20 ''(A) may grant declaratory relief, injunctive re-
21 lief (except as provided in subparagraph (B)), and
22 attorney's fees and costs demonstrated to be directly
23 attributable only to the pursuit of a claim under
24 paragraph (1); and

1 "(B) shall not award damages or issue an order
2 requiring any admission, reinstatement, hiring, pro-
3 motion, or payment.

4 "(3) In making the demonstration required by para-
5 graph (1), a plaintiff may rely on any type or form of
6 admissible circumstantial or direct evidence and need only
7 produce evidence sufficient for a reasonable trier of fact
8 to conclude that a violation described in subparagraph (A)
9 or (B) of paragraph (1) occurred.

10 "(4) Every method for proving either such violation,
11 including the evidentiary framework set forth in McDon-
12 nell-Douglas Corp. v. Green, 411 U.S. 792 (1973), shall
13 be available to the plaintiff.

14 "(5) This subsection shall apply to any claim that the
15 practice complained of was motivated by a reason that is
16 impermissible, with regard to that practice, under—

17 "(A) this Act, including subsection (d);

18 "(B) any Federal law forbidding employment
19 discrimination;

20 "(C) any law forbidding discrimination of the
21 type described in subsection (d) or forbidding other
22 retaliation against an individual for engaging in, or
23 interference with, any federally protected activity in-
24 cluding the exercise of any right established by Fed-
25 eral law (including a whistleblower law); or

1 “(D) any provision of the Constitution that pro-
2 tects against discrimination or retaliation.
3 “(6) This subsection shall not apply to a claim under
4 a law described in paragraph (5)(C) to the extent such
5 law has an express provision regarding the legal burdens
6 of proof applicable to that claim.
7 “(7) In any proceeding, with respect to a claim de-
8 scribed in paragraph (5), the plaintiff need not plead the
9 existence of this subsection.
10 “(8) In this subsection, the term ‘demonstrates’
11 means meet the burdens of production and persuasion.”.

12 **SEC. 4. APPLICATION.**

13 This Act, and the amendments made by this Act,
14 shall apply to all claims described in section 4(g)(4) of
15 the Age Discrimination in Employment Act of 1967 (29
16 U.S.C. 623(g)(4)) pending on or after June 17, 2009.

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