



TESTIMONY SUBMITTED TO THE

Health, Employment, Labor, and Pensions Subcommittee Hearing

H.R. 3721, Protecting Older Workers Against Discrimination Act

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Good Morning Chairman Andrews and Ranking Member Price:

My name is Gail Aldrich. I am a member of the Board of Directors of AARP and I am pleased to testify today on behalf of AARP. Older workers have long been an AARP priority, and roughly half of all AARP members are employed either full or half-time. On behalf of AARP's members and all older workers, we advocate for older workers both in Congress and before the courts to combat age discrimination. AARP also participates in the Senior Community Service Employment Program (SCSEP) in which we match lower-income older jobseekers and employers with available positions. We also annually recognize "Best Employers" for workers over age 50, and partner with employers stating a commitment to welcome older persons into their workforce as part of an AARP "National Employer Team." We also organize job fairs allowing employers and older workers to find one another.

I want to preface my remarks by noting that before I became an AARP Board member, I was formerly a business executive, responsible for applying federal and state employment laws on a day-to-day basis. Specifically, I previously served as chief membership officer for the Society for Human Resources Management (SHRM). During my career, I also have been the lead human resources professional for three major organizations: the California State Automobile Association, Exponent, an engineering and scientific consulting firm, and the Electric Power Research Institute. As a result, I am quite familiar with the challenges of addressing age or other discrimination claims by employees.

I want to thank you and all members of the Education and Labor Subcommittee on Health, Employment, Labor and Pensions for extending AARP this opportunity to speak on the issue of protecting older workers against age discrimination, and in particular, the topic of proposed legislation to address the U.S. Supreme Court's troubling decision last year in *Gross v. FBL Financial Services, Inc.*, No. 08-441, 129 S. Ct. 2343 (June 18, 2009). In that decision the Supreme Court, by the narrowest of margins, announced 5-4 that older workers challenging unfair treatment based on their age, under the Age Discrimination in Employment Act (ADEA), have lesser protection than other workers protected by federal law against illegal bias. Older workers, the Court said, have to meet a higher standard to prove discrimination than workers facing bias based on their sex, race or national origin. In effect, the Court said that Congress intended – when it passed the ADEA back in 1967 – to place older workers in a second-class category of protection from unfair treatment at work. We at AARP think this decision is wrong, and that the court's understanding of what Congress meant when it enacted the ADEA is inaccurate. Unless corrected, this decision will have devastating consequences for older workers – workers who represent a growing share of the U.S. workforce and are increasingly critical to the nation's economic recovery.

The Supreme Court's decision in *Gross v. FBL* could not have come at a worse time for older workers, who are experiencing a level of unemployment and job insecurity not seen since the late 1940s. Over the past 28 months (December 2007 through March 2010), finding work has proven elusive for millions of younger *and* older workers as employers have laid off workers and scaled back hiring due to reduced demand. However, older workers face another barrier—age discrimination. Age discrimination is difficult to quantify, since few employers are likely to admit that they discriminate against older

workers. Available research does highlight, however, the extent to which younger job applicants are preferred over older ones, who more often fail to make it through the applicant screening process.¹ Older workers themselves see age discrimination on the job: 60 percent of 45-74-year-old respondents to a pre-recession AARP survey contended that based on what they have seen or experienced, workers face age discrimination in the workplace.² That percentage could well be higher if those workers were asked about age discrimination today. More age discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC) in FY 2008 and FY 2009 than at any time since the early 1990s, according to the latest EEOC data.³

One of the ways in which the *Gross* decision already has affected older workers is to make it impossible in some circumstances to bring age discrimination claims. Some courts have interpreted the *Gross* Court's language to require proof that age bias was a "sole cause" of an unfair termination, or as in Jack Gross' case, an unfair demotion. Thus in one recent case in Alabama, the plaintiff alleged both race and age discrimination. *Culver v. Birmingham Bd. of Education*, 2009 WL 2568325 (N.D. Ala. August 17, 2009). Relying on *Gross*, the court ordered Mr. Culver to either abandon his age claim or his race discrimination claim because "*Gross* h[eld] for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact that he is over 40 years old was the only . . . reason for the alleged adverse employment action." This was never the law before *Gross*, and it makes no sense now. Surely Congress meant for victims of age and other bias to bring claims on whatever grounds they can assemble proof to support a charge of discrimination. Not to choose between one of several grounds of illegal unfair treatment. Similarly, in a case in Pennsylvania, a federal court recently relied on *Gross* to force a

plaintiff to choose between claims of age and sex discrimination. *Wardlaw v. City of Philadelphia Streets Dep't*, 2009 WL 2461890 (E.D. Pa. Aug. 11, 2009). The court cited the plaintiff's allegations that she was treated less favorably because she was an "older female" to conclude that her age was not the "but-for" cause of the discrimination she complained of. According to this court, "The Supreme Court held in *Gross* that a plaintiff can only prevail on an age-related employment discrimination claim if that is the *only* reason for discrimination." Once again, AARP submits this makes no sense and fundamentally misunderstands the ADEA. We cannot wait for these sorts of rulings to spread. This must end.

Thus, AARP strongly endorses the Protecting Older Workers Against Discrimination Act or "POWADA", H.R. 3721, of which many members of this Committee are a sponsor. POWADA would correct the wrong turn in the law that the *Gross* decision represents. It would eliminate the second-class status for victims of age bias that the Court in *Gross* seemed to embrace. It would tell lower courts not to treat older workers who face discrimination law differently, in key respects, than they treat workers who face bias on grounds of race or sex under Title VII of the 1964 Civil Rights Act. Congress, after all, consistently has followed Title VII as the model for other employment discrimination laws, like the ADEA and the Americans with Disabilities Act.

Let me say a few more words about the impact on older workers of this Court decision. It takes away a vital legal protection at the very time that the economy does not give older workers the luxury of ignoring discrimination and simply finding another job.

The unemployment rate for persons aged 55 and over has more than doubled since the start of the recession, rising from 3.2 percent in December 2007 to 6.9 percent in March 2010. Although the unemployment rate for this age group has traditionally been and remains lower than that for younger persons, the increase in unemployment for older persons has been greater, thus significantly narrowing the age gap in unemployment.

Once out of work, older job seekers face a prolonged and often discouraging job search. Newspapers and news programs have profiled many older jobs seekers who report sending out hundreds of resumes and receiving few if any responses from employers. Statistics back up the anecdotes of the job-seeking frustrations of older workers. Average duration of unemployment has soared since the start of the recession and is substantially higher for older job seekers than it is for their younger counterparts—38.4 weeks versus 31.1 weeks in March -- a difference of nearly two months. In December 2007, average duration of unemployment for older persons was 20.2 weeks.

Older workers also are more likely to be found among the long-term unemployed—those who have been out of work for 27 or more weeks. Just over half (50.6 percent) of job seekers aged 55 and over and 42 percent of those under age 55 could be classified as “long-term” unemployed in March. Once out of work, older persons are more likely than the younger unemployed to stop looking for work and drop out of the labor force. If they do find work, they are more likely than younger job finders to earn less than they did in their previous employment.

Today, older workers are more likely than younger workers to be displaced. As of December 2009, 78 percent of unemployed workers aged 55 and over were out of work

because they lost their jobs or because a temporary job ended. This compares to 65 percent of the unemployed under age 55. Job loss has risen substantially for both age groups since the start of the recession two years earlier and far more than it had in the two years before December 2007. (See Table 1.)

Hence, older workers need effective age discrimination laws when employers choose to displace them based on their age, due to stereotypes or other forms of bias, rather than their performance or other legitimate business reasons. And there can be no doubt that unfounded stereotypes about older workers linger. In cases in which AARP has played a role over the last decade, AARP attorneys have battled employer perceptions that older workers have less energy and are less engaged, despite AARP research data showing that on the contrary, older workers are more engaged in their jobs, as well as more reliable (*i.e.*, less likely to engage in absenteeism). Some employers also still believe older workers are a poor investment and are disinclined to include them in training programs. Again, AARP research shows that older workers are more loyal to (*i.e.*, less likely to leave) their current employers, and thereby may be better bets in terms of employer investments in training. And finally, some employers have outdated notions of older workers as incapable of adapting in industries -- such as computers and information technology -- requiring acquisition of new skills, despite Baby Boomers' enthusiastic embrace of virtually all forms of rapidly changing IT products and services.

Research also shows why failing to protect older workers from discriminatory exclusion from employment is not only unjust but also counterproductive for a nation facing enormous challenges supporting a growing aging population. That is, there is growing evidence that older persons need to work and that they would benefit financially from

working longer: millions lack pension coverage, have not saved much for retirement, have lost housing equity, and have seen their investment portfolios plummet. Many have exhausted their savings and tapped their IRA and 401(k) accounts while unemployed. Some workers seem to be opting for Social Security earlier than they might have otherwise. The Urban Institute (UI), for example, points to a surge in Social Security benefit awards at age 62 in 2009. To a large extent, this is a result of a sharp rise in the aged 62 population. However, the UI reports that the benefit take-up rate was substantially higher in 2009 than in recent years, which they say is likely due to an inability to find work.⁴ One out of four workers in the 2010 Retirement Confidence Survey maintains that their expected retirement age has increased in the past year, most commonly because of the poor economy (mentioned by 29 percent) and a change in employment situation (mentioned by 22 percent).⁵

Failing to allow older workers a fair chance to fight age discrimination is directly contrary to other federal policies envisioning that Americans will work longer. Public policies such as the 1983 Social Security amendments that increased the age of eligibility for full benefits and the benefits for delaying retirement, as well legislation in 2000 that eliminated the Social Security earnings test for workers above the normal retirement age, were designed to encourage longer work lives. Eliminating discrimination is critical if older persons are to push back the date of retirement.

Working longer is good for society as earners typically pay more in taxes than retirees and contribute to the productive output of the economy. It is also good for workers, who have more years to save and less time in retirement to finance. And it is good for employers who retain skilled and experienced employees. This last advantage

may be less clear in a deep recession; however, the economy will recover eventually – we hope sooner rather than later! With the impending retirement of the boomers, many experts predict sizable labor and skills shortages in many industries.

In closing, I want to emphasize AARP's commitment to vigorous enforcement of the ADEA and other civil rights law as one part of a broad-based strategy to serve the needs and interests of older workers consistent with the overall public interest. We recognize that prudent employers, indeed we hope most employers, follow the law and respect the rights of older workers. But we also believe that the ADEA and other civil rights law must be preserved so that they act as a real deterrent, and if need be, a tool for redress, when employers are tempted to discriminate or actually violate the rights of older workers. Unless POWADA returns the law to the state of affairs that existed before the *Gross* decision, legal advocates will have a very hard time defending older workers who encounter workplace bias. And we also urge Congress to make sure that POWADA protects older workers from the expansion of the reasoning in *Gross* to other employment laws. For instance, we are aware of decisions restricting application of other laws important to older workers – such as the ADA and ERISA, see *Serwatka v. Rockwell Automation, Inc.*, --- F.3d ----, 2010 WL 137343 (7th Cir., January 15, 2010) (NO. 08-4010)(ADA) and *Nauman v. Abbott Laboratories*, CA 04-7199 (N.D. Ill. April 22, 2010) – based on the flawed logic of the narrow Supreme Court majority in *Gross*.

We believe the Protecting Older Workers Against Discrimination Act (POWADA), H.R. 3721, is a vital and reasonable effort to restore the law to the state of play prior to the *Gross* decision. At that time, employers were able to manage their proof obligations in ADEA cases. Virtually no court in the U.S. believed age had to be the only reason for an

employer terminating an older worker for the worker to have a claim under the ADEA. But now, based on Gross, some courts have been embracing this new and onerous interpretation. And the same view has been applied to other civil rights laws, to the detriment of older workers and other discrimination victims. This is not right. In the worst economic conditions in decades for older workers, Congress should act now to correct the misguided ruling in the *Gross* decision and pass POWADA.

Thank you.

Table 1.
Percent of Workers Giving Job Loss or End of Temporary Job as the Reason They Were Unemployed, by Age, December 2005, December 2007, and December 2009

Age and Reason for Unemployment	December 2005	December 2007	December 2009
Aged 55+			
Job loser/on layoff	21.0	23.8	14.0
Other job loser	33.8	36.8	55.8
Temporary job ended	8.3	8.2	8.6
Total	63.1	68.8	78.4
Under Age 55			
Job loser/on layoff	13.7	13.2	11.0
Other job loser	25.9	26.9	43.9
Temporary job ended	11.0	12.5	9.8
Total	50.6	52.6	64.7

Source: AARP PPI calculations of data in the Current Population Survey.

¹ M. Bendick, L. E. Brown, and K. Wall, “No Foot in the Door: An Experimental Study of Employment Discrimination against Older Workers, *Journal of Aging & Social Policy*, 1999 10(4), 1999, pp. 5-23; J. Lahey, *Age, Women, and Hiring: An Experimental Study* (Chestnut Hill, MA: Center for Retirement Research at Boston College, 2006).

² AARP, *Staying Ahead of the Curve 2007: The AARP Work and Career Study* (Washington, DC: AARP, 2008).

³ U.S. Equal Employment Opportunity Commission, April 29, 2010 at <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>.

⁴ R. W. Johnson and C. Mommaerts, *Social Security Retirement Benefit Awards Hit All-Time High in 2009*, Fact Sheet on Retirement Policy (Washington, DC: Urban Institute, 2010).

⁵ EBRI, “The 2010 Retirement Confidence Survey: Confidence Stabilizing, but Preparations Continue to Erode,” *EBRI Issue Brief*, No. 340, March 2010 at www.ebri.org/pdf/briefspdf/EBRI_IB_03-2010_No340_RCS.pdf.