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Via Federal Express Mail

Kelsey Kobelt
Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Re: Written Questions from Committee Members

Dear Ms. Kobelt:

I am enclosing answers to the additional questions that were submitted by Senator Sessions.

I am also enclosing an edited copy of the transcript of the hearing pursuant to Senator Leahy's request.

If there is anything else that I can do to assist the Committee, please let me know.

Very truly yours,

Michael W. Fox

MWF/mtr
Enclosures

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Follow-Up Questions for Mr. Fox

1. The question the Court granted Certiorari on in *Gross* v. *FBL Financial Services, Inc.* was "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967."[1] Mr. Gross's Certiorari Petition presented this question: "Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?"[2] Supreme Court Rule 14.1(a) states that "[t]he statement of any question presented [in a petition for certiorari] will be deemed to comprise every subsidiary question fairly included therein."

   (a) Given the question presented in Mr. Gross's Certiorari Petition, would you say that the question actually decided by the Court in *Gross* was a "subsidiary question fairly included therein?"

ANSWER:

The issue actually decided by the Court was clearly a "subsidiary question fairly included" in the statement of the question presented to the Court. The Court was asked to opine on the evidentiary standard necessary for a mixed-motive instruction in an age discrimination case. Before that question could be answered, it was necessary to determine whether such an instruction is ever appropriate. In other words, there was no way for the Court to answer the question presented without resolving the issue of whether a mixed-motive instruction was ever available under the Age Discrimination in Employment Act. Having concluded the answer to the foundational question was no, it was unnecessary (and would have been inappropriate) to issue an opinion on what evidentiary standard would require such an instruction.

   (b) If you answered question 1(a) in the affirmative, would you say that Mr. Gross's Certiorari Petition did, although perhaps unwittingly, ask the Court to answer the question it answered?

ANSWER:

Yes.

2. In your written testimony and at the hearing, you testified that the mixed-motive theory, which was addressed in *Gross,* is seldom used and is confusing to juries. You explained that the theory was developed at a time when Title VII claims were only tried to the bench, and was, therefore, poorly adapted to be an effective jury instruction.

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[1] 129 S. Ct. 2343, 2346 (2009).

[2] Petition for Writ of Certiorari, *Gross,* 129 S.Ct.2343 (No. 08-411), 2008 WL 4462099.

(a) Do you think the mixed-motive theory developed in *Price Waterhouse* v. *Hopkins* was necessary and helpful when Title VII claims were tried only to a judge?

ANSWER:

In *Price Waterhouse v. Hopkins*, and cases which preceded it, the mixed motive language had been used by the court as a way of explaining the rationale which allowed it to reach its decision in a bench trial. As such, it was certainly helpful as a way of explaining a court's decision. However, that does not mean that it should be transformed into a mechanism that a jury is required to follow in reaching a decision, which is what the legislative proposal would do.

(b) Given the increasingly complex nature of evidence presented in employment litigation, do you think it is likely juries were, in practice, applying the simple "but-for" causation approach to cases presented to them on a mixed-motive theory, even before *Gross*?

ANSWER:

First, it should be emphasized that in only a very, very small percentage of cases does a plaintiff actually ask for a mixed motive instruction. In that respect, the argument that *Gross v. FBL Services* seriously hampers age discrimination plaintiffs is much less than has been portrayed by many who advocate that it should be legislatively overturned. In any event, I do believe it is quite likely that juries do in fact apply a common sense, straight forward approach of determining whether or not age, or any other protected category, was the determining factor when they decide these cases.

3. In his written testimony, Mr. Foreman said the following:

> In formulating public policy, we must not divorce ourselves from the reality of life for many Americans: If a blue-collar worker refuses to sign a job application containing a pre-dispute mandatory arbitration clause, or a separate arbitration agreement included in a stack of documents piled before them on their first day of the job, do you honestly think the employee would get the job? We all know what would happen, especially in today's economy: the employer would just go on to the next applicant who signed the arbitration agreement, regardless of whether that worker knew he or she was agreeing to submit his or her civil rights claims to mandatory arbitration or what that really meant.

Mr. Foreman seems to present pre-dispute binding arbitration clauses as universal contracts of adhesion, such that all workers have to choose between signing an arbitration agreement or being unemployed.

(a) As a trial lawyer who represents employers in labor and employment law matters, would you agree with that characterization?

ANSWER:

No.

(b) If you answered part 1(a) in the negative, would you say that a number of your clients, or other employers you have encountered in your practice, refrain from using arbitration clauses in all or some of their employment contracts or application for employment?

ANSWER:

In my experience it is a minority of employers who require employees to agree to resolve any employment related claims through binding arbitration as a condition of employment.