PENNSTATE

The Dickinson School of Law

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BEFORE THE SENATE JUDICIARY COMMITTEE
ON
WORKPLACE FAIRNESS: HAS THE SUPREME COURT BEEN MISINTERPRETING LAWS DESIGNATED TO PROTECT AMERICAN WORKERS FROM DISCRIMINATION?

WEDNESDAY, OCTOBER 7, 2009
SENATE DIRKSEN OFFICE BUILDING ROOM 226
10:00 A.M.

Chairman Leahy, Ranking Member Sessions and members of the Committee. Thank you for convening this hearing, which will scrutinize several of the Supreme Court's recent interpretation of laws designed to protect American workers from discrimination.

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.[1]

My testimony will focus on two issues which the Supreme Court recently addressed. In *Gross v. FBL Financial Services, Inc.*, the Court undermined Congress's legislative intent and narrowed the interpretations of the Age Discrimination in Employment Act in a way that makes it harder for older workers to prove age claims, while potentially impacting many other federal antidiscrimination laws.[2] 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."[3] In *14 Penn Plaza LLC v. Pyett*, the Court upheld a pre-dispute mandatory arbitration clause in a collective bargaining agreement. The decision restricts employees who never personally agreed to binding arbitration and their ability to bring discrimination claims in court, long before any disputes actually arise.[4] In these decisions, the majority chastises Congress for not being more specific as to its intent and appears to challenge Congress to act if it desires a different outcome in these types of cases.[5]

Gross and *Pyett* reflect a disturbing trend by a narrow Supreme Court majority that seems willing to ignore Congress's clear intent, thus significantly narrowing the protections afforded by civil rights laws.[6] This is not a new issue for Congress, as just last year Congress reversed the same majority's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[7] by passing the Lilly Ledbetter Fair Pay Act.[8]

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[1] A copy of my biography is attached.

[2] 129 S. Ct. 2343 (2009).

[3] *Id.* at 2353 (Stevens, J., dissenting).

[4] 129 S. Ct. 1456 (2009). *Gross*, 129 S. Ct. at 2349 n.3 (majority opinion).

[5] 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. In upholding the pre-dispute arbitration clause in *Pyett*, the majority noted that "Congress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Pyett*, 129 S. Ct. at 1472 (internal quotation omitted). In both cases, the five justices in the majority hung their hat on what they deemed was Congress's failure to act.

[6] One area of discrimination law where the Court has been protective of employees' rights is under the anti-retaliation protections designed to insure employees do not suffer because they exercise their rights under the various employment discrimination laws. *See Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Gomez-Perez v Potter*, 128 S. Ct 1931 (2008); *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

[7] 550 U.S. 618 (2007)

[8] 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

I. The Supreme Court's Decision In *Gross* Sends A Message To Congress – If You Want Us To Provide Protections Against Discrimination, Be Specific.

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. This result runs contrary to our national commitment to equality. Congress should thus take positive steps to ensure that our civil rights and employment laws protect all American workers.

A. Congress Did Not Intend For Age Discrimination To Be Treated Differently Than Other Types Of Discrimination.

In *Gross* the five-member majority held that a plaintiff cannot bring a mixed-motive age discrimination claim under the ADEA[9] and must prove "but-for" causation.[10] Thus, 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.[11] This interpretation ignored Court precedent and the unmistakable intent of Congress, increasing the burden on older employees, creating confusion in the lower courts, and increasing litigation costs.

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.[12] 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*,[13] as well as by Congress in the 1991 Amendments to the Civil Rights Act. The majority's decision ignores a significant line of cases holding that the language of both statutes should be interpreted consistently and applied with equal force.[14]

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

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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).

[9] 129 S. Ct. at 2351.

[10] *Id.* at 2346.

[11] *Id.* at 2347.

[12] *Id.* at 2350.

[13] 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).

[14] 129 S. Ct. at 2354-55 & n.5 (Stevens, J., dissenting) (citing numerous circuit court opinions applying *Price Waterhouse* to ADEA claims).

prove. Congress has been unequivocal about its desire to eliminate *all* discrimination in the workplace—including age discrimination.[15] Likewise, Congress modeled the ADEA on Title VII.[16] *Gross* ignores the long-standing interpretation of the ADEA and the fundamental relationship that exists between the statutes. The resulting difficulties require Congress to act to ensure that the ADEA is not stripped of all its intended power, and to ensure that employees continue to have this fundamental right that Congress has worked tirelessly to protect.

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."[17]

- "Supreme Court Majority Makes It Harder for Plaintiffs to Prove Age Discrimination Under the ADEA"[18]

- Without the "traditional 'mixed motive analysis,' . . . [plaintiffs'] job in court [will be] much more difficult."[19]

- 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."[20]

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."[21]

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[15] 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).

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

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

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

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

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

[21] *Martino v. MCI Commc'ns Servs., Inc.*, 574 F.3d 447, 454 (7th Cir. 2009).

- "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.'"[22]

- "[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."[23]

- 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."[24]

Under the increased burdens imposed by the "but for" standard, courts are already dismissing age claims for failure of proof based upon *Gross*.[25]

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

Courts are consistent in holding that *Gross* narrows the ways that age discrimination can be proven under the ADEA. Their varied applications, however, have resulted in confusing decisions, which stand congressional intent on its head.

In *Culver v. Birmingham Board of Education*, the plaintiff brought Title VII and ADEA claims. The court dismissed his ADEA claim, holding that "*Gross* holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact he is over 40 years old 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 employer's adverse conduct and simultaneously claim that there was *any* other proscribed motive involved."[26] In other words, a plaintiff can never plead a mixed-motive claim. To do so would admit that another motive was at play which, under this court's interpretation of *Gross*, would foreclose the age claim. Similarly, in *Love v. TVA Board of Directors*, the plaintiff alleged that he was fired because of his race and age.[27] The trial court found that *Gross* imposed a new standard, and that while under his race claim he could prove a violation under the traditional methods of proof, for his age claim he must prove "that his age was *the* reason for his nonselection." Accordingly, the court dismissed his ADEA claim, reasoning that since race had been a factor, he could not prove that, under *Gross*, age was the sole factor.[28] In *Wardlaw v. City*

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[22] *Geiger v. Tower Automotive*, No. 08-1314, 2009 WL 2836538, at *4 (6th Cir. Sept. 4, 2009).
[23] *Fuller v. Seagate Technology*, No. 08-665, 2009 WL 2568557, at *14 (D. Colo. Aug. 19, 2009).
[24] *Woehl v. Hy-Vee, Inc*. No. 08-19, 2009 WL 2105480, at *4 (S.D. Iowa, July 10, 2009).
[25] 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).
[26] No. 08-31, 2009 WL 2568325, at *1 (N.D. Ala. Aug. 17, 2009).
[27] No. 06-754, 2009 WL 2254922 (M.D. Tenn. July 28, 2009).
[28] *Id*. at *9-10.

of Philadelphia Streets Department, the court dismissed the plaintiff's claims of gender, disability, age, and race discrimination. The disturbing aspect of the case is that the court dismissed the age claim because she alleged discrimination on other protected bases; thus, according to the court, she could not show that age was the sole factor.[29]

D. The *Gross* Ruling Threatens To Impact The Burdens Of Proof Under Other Laws Prohibiting Discrimination In Employment.

There are hundreds of federal and state laws prohibiting discrimination in employment. Many use the "because of" standard codified in Title VII and the ADEA. Under *Gross*, this language does not need to be applied consistently across these statutes. The result will be confusion and increased litigation over the burdens of proof under all of these statutes unless Congress acts to stem this tide.

A recent Third Circuit decision under 42 U.S.C. § 1981 exemplifies the confusion the courts will be confronting. While the majority in *Brown v. J. Kaz, Inc.* did not believe that *Gross* had any impact on the litigation of Section 1981 claims,[30] 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."[31] *Gross* has opened the door for increased litigation over the appropriate burden of proof under many of these statutes. Congress should step in to clarify the very important issue.

As the cases mentioned show, the results of the *Gross* decision are proving to be a harsh reality for older workers who, prior to *Gross*, would have had an opportunity to show that age was a consideration in the employment decision. That includes Mr. Gross, whose jury had returned a verdict finding discrimination and awarding him lost compensation.[32] What these cases also make clear is that *Gross* has ramifications far beyond the ADEA and that it 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 in a way that enables workplace discrimination.

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[29] Nos. 05-3387, 07-160, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009). Some courts even question whether the *McDonnell-Douglas* burden-shifting framework still applies to the ADEA or, if it does apply, whether a heightened standard is required." *See, e.g., Bell v. Raytheon Co*., No. 08-702, 2009 WL 2365454, at *4 (N.D. Texas July 31, 2009) (citing *Gross*, 129 S. Ct. at 2349 n.2) ("Recently, however, the United States Supreme Court issued a decision that questions whether the *McDonnell-Douglas* approach should be applied in ADEA cases."); *Holowecki v. Fed. Express Corp*., No. 02 Civ. 3355, 2009 WL 2251662, at *10 (S.D.N.Y. July 29, 2009) (citing *Gross*, 129 S. Ct. at 2349 n.2) ("Whether *Gross*, by implication, also eliminates the *McDonnell-Douglas* burden-shifting framework in ADEA cases was left open by the Court . . . .").

[30] No. 08-2713, 2009 WL 2902248, at *8 (3d Cir. Pa. Sept. 11, 2009).

[31] *Id.* at *9 (Jordan, J., concurring).

[32] *Gross*, 129 S.Ct. at 2347.

II. The Impact Of The Supreme Court's Decisions To Allow Pre-Dispute Arbitration Agreements In The Employment Context.

The second issue that I will address today is the impact of mandatory arbitration of employment claims arising under the federal laws prohibiting unlawful discrimination. At its core, this issue is about how much we, as a society, value the civil rights of our workers. Pre-dispute mandatory arbitration is an issue that that is not only timely, but critical as we, as a nation, continue to struggle to ensure equal employment opportunities for all. It is important to recognize at the outset that pre-dispute mandatory arbitration is not just an employment issue or a civil rights issue; it is an issue that cuts to the core of this country's ideals of equality and due process.

For over half of a century, our society and this Congress has struggled with issues concerning equal employment opportunities and attacked the problem of employment discrimination through significant legislation including Title VII, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act, to name a few. In keeping with our national commitment to equality, Congress created a framework for enforcing these rights through individual lawsuits, litigation by the Attorney General, and the efforts of federal agencies, like the Equal Employment Opportunity Commission, tasked with enforcing laws against employment discrimination. In doing so, Congress established a plan for combating discrimination through an open, fair process governed by the rule of law and administered by impartial judges and juries that allowed for public accountability. In fact, as recently as 1991, Congress acted to protect employees by codifying their right to a jury trial in Title VII cases.

Congress has also recognized that permitting parties to use alternative dispute resolution is an important tool in the enforcement of federal antidiscrimination laws.[33] Indeed, Section 118 of the Civil Rights Act of 1991 encourages the use of various types of alternative dispute resolution in the employment context. However, it is hard to imagine that Congress, when it recognized a role for the voluntary resolution of employment disputes, envisioned a system that allows employees to be deprived of the very rights Congress has worked tirelessly to protect. Pre-dispute mandatory arbitration clauses hidden in employment applications and employee handbooks are being implemented by employers in a manner that leaves employees no real choice, forcing them to arbitrate their claims. If this result is not what Congress intended, then according to the Supreme Court, Congress needs to clarify how arbitration should be used in the adjudication of employment disputes.

Ignoring the very real impact that pre-dispute mandatory arbitration has on workers, a five-justice majority of the Supreme Court in a recent line of cases has allowed employers to unilaterally implement these agreements. These rulings effectively deprive employees of their federally protected rights and distort the role Congress intended alternative dispute resolution to

[33] Section 118 of the Civil Rights Act of 1991 provides "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." 42 U.S.C. § 12212.

play in the employment context. In its most recent ruling, this slim majority[34] made it clear that it will continue down this path unless Congress directs otherwise.

A. In Recent Cases, The Supreme Court Has Misinterpreted The Role Arbitration Should Play Under The Federal Laws Prohibiting Discrimination In Employment.

The Court's view towards arbitration of civil rights claims has changed dramatically since the landmark decision in *Alexander v. Gardner-Denver*. There, the Court recognized that "there can be no prospective waiver of an employee's rights under Title VII."[35] In the years since *Gardner-Denver*, the Court has handed down several decisions that have incrementally eroded employees' rights to litigate their discrimination claims in a federal forum. Beginning with *Gilmer v. Interstate/Johnson Lane Corp.*, the Court ruled that a plaintiff's ADEA claim was properly the subject of arbitration.[36] The *Gilmer* Court discussed many of the differences between arbitration and federal litigation including potential arbitrator bias, limited discovery, lack of written opinions, and disparity in bargaining power. The Court concluded, however, that in this case the NYSE rules governing the arbitration provided sufficient protection of the individual's rights.

In *Circuit City Stores, Inc., v. Adams*, the Supreme Court held that the scope of the exemption from coverage enunciated by the residual clause of Section 1 of the Federal Arbitration Act extends solely to transportation workers, and not to all employees engaged in commerce.[37] This allowed all employment contracts, except for those of transportation workers, to be subject to the Federal Arbitration Act.[38] While seemingly a technical decision with limited impact, this decision opened the gates for the use of mandatory arbitration agreements and allowed employers to adopt them *en masse*.

Last term, in *14 Penn Plaza LLC v. Pyett*, the Court, by a five-to-four majority, extended the reasoning in *Circuit City* and *Gilmer*. At issue in *Pyett* was whether a union could permissibly include in its collective bargaining agreement a requirement that all ADEA claims be brought to binding arbitration. The Court concluded that collective bargaining agreements can mandate binding arbitration.[39] This decision allows unions to collectively bargain away an

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[34] The majority in *Pyett* is the same as the majority in *Gross*, and in *Ledbetter v. Goodyear Tire & Rubber Co*., see *supra* note 8.

[35] *Alexander v. Gardner-Denver*, 415 U.S. 36, 51 (1974).

[36] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)

[37] *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2000).

[38] Justice Stevens's dissent highlights the "extensive and well-documented" legislative history of the Federal Arbitration Act that the majority opinion does not address. *Circuit City*, 532 U.S. 105, 125 (2000) (Stevens, J., dissenting). This history explains that the original text of the FAA bill, which did not have an employment exemption provision, was opposed by representatives of organized labor because of their fear that employment contracts might be subjected to arbitration. *Id.* at 126-27. The drafters responded to this objection by amending the bill to exempt all employment contracts. *Id.* Justice Stevens explained that "another supporter of the bill, then Secretary of Commerce Herbert Hoover, suggested that 'if objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Id.* at 127. Four justices agreed with Justice Stevens's reading of the FAA.

[39] 129 S.Ct. at 1466.

individual employee's right to pursue their federally protected anti-age discrimination claim in federal court, even when there is no individual consent by the employee.

Mr. Pyett worked for 14 Penn Plaza in various positions and had been effectively demoted, resulting in decreased wages, and other harms. The union decided that it could not represent Mr. Pyett in these grievances because they had consented to the changes that resulted in his demotion. Mr. Pyett filed a complaint with the EEOC, and finally filed suit in federal district court. Defendants filed a motion to compel arbitration, which the district court denied, and the Second Circuit affirmed. The Second Circuit followed *Gardner-Denver*, which mandates that there be no prospective waiver of an employee's claims under Title VII. The Second Circuit held that a union could not bargain for pre-dispute binding arbitration clauses in its contracts, even though an individual employee could do so.[40]

The Supreme Court reversed, holding that a union could bargain for pre-dispute binding arbitration clauses that covered employment discrimination claims.[41] As a result, a union can now force its members to arbitrate their civil rights claims. The Court in *Pyett* effectively overruled the *Gardner-Denver* line of cases, even if it stated that it was doing otherwise.[42] More importantly, the Court declared that is up to Congress to decide if the ADEA should forbid pre-dispute arbitration in the resolution of claims.[43] Clearly, this trend of forcing employees into arbitration without any real consent will continue unless Congress expressly mandates a better course.

B. Many Employees Have No Choice In Whether To Submit Their Civil Rights Claims To Pre-Dispute Mandatory Arbitration.

Seeing a way to minimize the costs associated with violating civil rights laws, employers are increasingly turning to pre-dispute mandatory arbitration. In 1979, only a small percentage of employers used arbitration for employment disputes. According to most recent estimates, arbitration instead of litigation is the primary means used to resolve disputes for at least one-third of nonunion employees.[44] Additionally, around 15% to 25% of employers nationally have adopted mandatory employment arbitration procedures.[45] The stark reality is that all too often in today's economy, employees have no choice but to surrender their rights and accept mandatory arbitration. Many employees do not have the luxury of choosing when, and under what

[40] *Id.* at 1461.
[41] *Id*. at 1474.
[42] A four-justice dissent pointed out that the majority's decision effectively overruled *Gardner-Denver*. Justice Stevens explained that "[b]ecause the purposes and relevant provisions of Title VII and the ADEA are not meaningfully distinguishable, it is only by reexamining the statutory questions resolved in *Gardner-Denver* through the lens of the policy favoring arbitration that the majority now reaches a different result." *Pyett*, 129 S.Ct. 1456, 1475 (2009) (Stevens, J., dissenting).
[43] *Id.* at 1472.
[44] Alexander Colvin, *Conflict at Work in the Individual Rights Era: An Examination of Employment Arbitration* 1 (January 4, 2009) (Presented at Labor & Employment Relations Association 61st Annual Meeting; available from author).
[45] *See* Alexander Colvin *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007). Describing it as a conservative estimate, Professor Colvin extrapolates the 25% figure from his 2003 finding that 23% of the non-union telecommunications workforce was covered by mandatory arbitration programs.

conditions, to submit to arbitration, because employers often make such agreements a job requirement. Employees who refuse to sign a mandatory arbitration agreement could lose their current jobs or be denied a new position. Additionally, employers add binding arbitration clauses to employee handbooks or existing employment contracts, requiring all employees to accept these new agreements or resign.

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?[46] 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.

For many employees, the only real choices they face are ones like:

- Passing up a paycheck that would help put food on the table or signing a job application stating that one's signature constitutes an agreement to binding arbitration of any dispute;

- Risking foreclosure from unpaid mortgage bills or agreeing to submit their supposedly federally guaranteed civil rights to mandatory arbitration; or

- Giving up the chance to finally get health care benefits or signing away their right to a jury trial.

These employees do not really have a choice at all. Lacking any other option but to accept mandatory arbitration, many employees are stuck trying to enforce their federally protected civil rights in a system selected and dominated by their employer.

One example of this trend can be found in the recent decision of *Ellerbee v. GameStop, Inc.*[47] After several years of employment, the plaintiff, Mr. Ellerbee, received notice that GameStop was implementing new procedures for dispute resolution. The company provided each employee with a copy of the new rules and required them to sign a form acknowledging its receipt. Mr. Ellerbee refused to sign, and informed his supervisor of his desire to consult his attorney. Mr. Ellerbee's supervisor warned him that continued employment would constitute express agreement with the terms, and would require arbitration of all covered claims. A month later, Mr. Ellerbee was fired for alleged insubordination and filed a Title VII claim in federal

[46] This assumes that the applicant is actually aware of the pre-dispute mandatory arbitration requirement. Even if some employees would object to unfair and burdensome pre-dispute mandatory arbitration clauses, such clauses are often deeply buried in the small print of lengthy employment contracts, and can be so unclear that most employees do not truly understand the consequences of signing the agreement.

[47] 604 F. Supp. 2d 349 (D. Mass. 2009).

court alleging discrimination based on race. The court dismissed the complaint, and ordered the parties to proceed with arbitration.[48]

Jamie Leigh Jones' case is another eye-opening example of the injustice in pre-dispute arbitration agreements for employees. In *Jones v. Halliburton Co.*,[49] Ms. Jones, who has testified here today, was working for Halliburton in the "green zone" in Baghdad, Iraq, and living in employer-provided housing. She was brutally raped and beaten by men living alongside her in the barracks. In her employment contract with a subsidiary of Halliburton, she had signed an arbitration agreement that took away her right to file a federal claim against her employer for disputes related to her employment. The effect of the arbitration clause was to first bring into question her ability to bring any claim, state or federal, before a judge, and absolutely blocked her ability to bring a federal sexual harassment claim against Halliburton in the federal courts. Additionally, the arbitration clause limited her ability to conduct a meaningful investigation for the purpose of bringing her attackers to justice and preventing these events from happening again.

Even for Ms. Jones, there may be disputes that arise in the employment context that she would prefer to have arbitrated rather than submit to a court. But this brutal attack by her co-workers was not one of those cases. At the very least, employees like Ms. Jones are entitled to a meaningful choice as to which forum is best for resolving their claims.

C. Pre-Dispute Arbitration Agreements Have A Real Impact On An Employee's Substantive Right To Be Free From Discrimination.

Employees should have a real choice in whether or not they want to submit their claims to arbitration because of the significant differences between arbitration and federal litigation. By insuring a meaningful choice, Congress gives meaning to the substantive and procedural protections it worked so hard to include in the laws prohibiting workplace discrimination, while still allowing for the appropriate use of alternate dispute resolution.

Congress intended to grant employees the right to litigate federal anti-discrimination laws before an impartial jury. This intention was reinforced by the passage of the 1991 Amendments to the Civil Rights Act, and provided for additional remedies to deter unlawful harassment and intentional discrimination. Congress recognized that there is value in vindicating anti-discrimination rights in a public forum to ensure accountability and to maximize the deterrent function of those laws. In the 1991 Amendments, Congress encouraged the use of alternative dispute resolution in employment discrimination cases, but Congress clearly intended only to supplement lawsuits in federal court in appropriate circumstances, not supplant them.

Employees' right to choose for themselves the appropriate forum to adjudicate their claims should be protected because mandatory arbitration agreements can lack the safeguards,

[48] *See also Seawright v. Am. General Fin. Servs., Inc*., 507 F.3d 967, 973 (6th Cir. 2007) (finding that continued employment constitutes assent to arbitration agreement); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 476 (10th Cir. 2006) (same).

[49] *Jones v. Halliburton, Co.*, 2009 WL 29400061 (5th Cir. Sept. 15, 2009).

accountability, and impartiality of the system Congress created, allowing employers to bypass some of the most important protections built into anti-discrimination legislation.

- Serious questions remain about the fairness to employees under the arbitration process. Private arbitrators, who are selected by the employer, depend on the employer for repeat business, and thus have an incentive to rule in favor of the employer. In fact, despite the clear conflict of interest that arises, employers sometimes finance the arbitration. In such cases, the arbitrator may feel obliged to rule in favor of the party that is paying the bill.[50]

- Mandatory arbitration agreements deny employees their day in court before an impartial judge and a jury of their peers. Mandatory arbitration forces employees to forego the traditional court system and present their claims before arbitrators who are not required to know or follow established civil rights and employment law.

- The limited right to appeal arbitration decisions is a critical difference between arbitration and civil litigation. Courts are permitted to overturn such decisions only under extreme circumstances and even the existence of clear errors of law or fact in an arbitrator's decision does not provide grounds for appeal.

- The lack of meaningful discovery in arbitration makes it difficult for plaintiffs to compile evidence of discrimination. This provides employers a distinct advantage as employees bear the burden of proof, and as discussed above, after the *Gross* decision in some cases the burden is to show the discriminatory reason was the *sole* reason for the adverse action.

- Arbitration narrows the remedies available to employees that prevail on their discrimination claims. Unlike a federal court, arbitration does not provide for injunctive relief and rarely allows punitive damage awards.

- Arbitration also imposes stringent filing requirements, which gives employees less time to prepare and build their case than they would have in an identical claim brought in federal court.

- An employee's right to bring a class action lawsuit in arbitration, which is an efficient and useful tool to combat wide-ranging discrimination, is not guaranteed. Employers often force their employees to sign mandatory arbitration agreements that include prospective waivers of their right to bring a class action.

[50] *See* Alexander Colvin, *Conflict at Work in the Individual Rights Era: An Examination of Employment Arbitration* 15 (Jan. 4, 2009) (discussing the concerns of employees that arbitrators will favor employers during arbitration in hopes of securing future business). The available data supports this concern. For example, between January 1, 2003 and March 31, 2007, AAA's public records show that AAA held 62 arbitrations for Pfizer, of which 29 reached a decision. Of these 29 cases, the arbitrator found for the employer 28 times–a decision rate of 97 percent for the employer. Similarly, Halliburton's win rate was 32 out of 39 cases that went to decision–an 82 percent win rate for the employer. *See Hearing on H.R.. 3010, The Arbitration Fairness Act of 2007Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (Testimony of Ms. Cathy Ventrell-Monsees, Esq.).

- Arbitrations are almost always held in private settings, and most decisions are not publicly available. This spares employers from the negative publicity that otherwise would provide a strong incentive to proactively address discrimination and harassment.

Allowing an employee to choose between arbitration and federal litigation after a dispute arises provides them the ability to bargain for the safeguards they deem integral to the process. Guaranteed arbitrator impartiality, full discovery, and articulated remedies can all be negotiated to ensure that employees' civil rights are protected. It is one thing to permit employees to willingly and knowingly agree to resolve an existing dispute through arbitration. It is quite another to allow vulnerable employees to be forced by their circumstances to rely on mandatory arbitration to enforce their civil rights and maintain our nation's commitment to equality.

III. The Supreme Court Has Made Clear That If Congress Intends A Different Result, They Need To Address It Through Legislation.

Both *Pyett* and *Gross* demonstrate how a slim majority of the Court has narrowly construe federal antidiscrimination laws. In the *Pyett* majority's view, Congress has failed to explicitly and clearly express its will.[51] As Justice Ginsburg noted in the *Ledbetter* decision, "Once again, the ball is in Congress' court."[52]

The Court's decisions have 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. 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."[53]

[51] *Gross*, 129 S. Ct. at 2349 ("We cannot ignore Congress' recent decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.")
[52] 550 U.S. at 661 (Ginsburg, J., dissenting).
[53] *Circuit City*, 532 U.S. at 120.

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Professor Michael Foreman is the Director of the new Civil Rights Appellate Clinic at Penn State's Dickinson School of Law. He also teaches an advanced employment discrimination course. Immediately prior to joining Penn State Law he served as the deputy director of Legal Programs for the Lawyers' Committee for Civil Rights Under Law, where he was responsible for supervising all litigation in employment discrimination, housing, education, voting rights, and environmental justice.

Professor Foreman's professional and scholarly focus has centered primarily on civil rights issues and employment discrimination. Prior to his role 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. Prior to his work with the law firm, Professor Foreman was 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.

Recent Presentations:

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

June 24, 2009, a panelist at the National Employment Lawyers Association's 20th Annual Convention, presented "Retaliation Redux," discussing the Supreme Court's recent decisions on retaliation in the workplace.

March 27, 2009, presented "Title IX: What's Hot, What's Not and How We Got There" presented as part of Penn State Women's History Month: A Celebration of Penn State Women's Athletics.

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