TO: The Honorable Virginia Foxx  
Ranking Member  
The United States House of Representatives Committee on Education and Labor  

FROM: G. Roger King  
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HR Policy Association  

RE: H.R. 1230 – PROTECTING OLDER WORKERS AGAINST DISCRIMINATION ACT  

I. Summary of Position  

Proponents of H.R. 1230 state that the legislation only overturns the Supreme Court’s decision in Gross v. FBL Financial Services, 129 S. Ct. 2343 (2009). This statement is clearly erroneous.  

H.R. 1230 as outlined below goes beyond simply overruling Gross, and additionally presents unnecessary and increasing legal expense for employers. Finally, the proposed legislation would also appear to significantly decrease employee rights of recovery in meritorious age claim lawsuits. The only beneficiaries from H.R. 1230 would appear to be plaintiffs’ attorneys – certainly not a protected “class” under any appropriate definition of the term.  

Employment discrimination litigation in the federal and state courts has been increasing at a very rapid pace and showing no signs of dissipating in the near future.Indeed, retaliation litigation has skyrocketed over the last two decades and continues to be the number one subject for employment discrimination complaints and lawsuits. This increased litigation trend is extremely expensive for the business community and causes employers to shift resources for litigation defense that otherwise could be used for job creation and employee wages and benefits. In a survey of 20 Fortune 200 companies, average yearly litigation costs were shown to have increased by 4156883.

increased 112 percent between 2000 and 2010. Such drastic and exponential increases are untenable and would only be further worsened by the passage of H.R. 1230.

The bill will cause the above noted employment litigation trends in federal and state courts to expand even further. Indeed, many of the current and contemplated lawsuits in this area are without factual and legal merit and are simply filed to extract settlement amounts from employers. The critical tactical point in many of these cases is for a plaintiff’s attorney to get past an employer’s motion for summary judgment. If a plaintiff’s attorney can succeed in defeating an employer’s summary judgment motion, in virtually every case, the next step is for the plaintiff’s attorney to attempt to extract a large settlement payment from the employer. Employers often are inclined to make such payments to avoid large expenses from protracted litigation. Often a large portion of any such settlement goes to the plaintiff’s lawyer, with employees and individuals receiving small payments, if any.

H.R. 1230 would specifically overrule the Supreme Court’s decision in Gross, in which the Court foreclosed mixed-motive claims under the Age Discrimination in Employment Act (“ADEA”). The bill will change the law and permit plaintiff’s attorneys to plead “mixed-motive” theories in cases under the ADEA, and perhaps other federal employment discrimination statutes, and succeed in virtually every case in avoiding summary judgment motions.

H.R. 1230 will also reinstate the “same action” defense that was eliminated in Gross as an employer defense. As noted in the minority staff’s policy analysis of H.R. 1230, Gross has provided certain assistance to plaintiffs in discrimination lawsuits because the “same action defense” has not been available for employers. And in the absence of an employer being able to use a “same action” defense, successful plaintiffs have been able to recover their actual damages including reinstatement and backpay.

H.R. 1230 will result in additional litigation in retaliation claims by making a mixed-motive theory available. In situations where employees believe they may be subject to discharge or discipline, employees can instruct their attorney to file an anticipatory discrimination charge based on the situation at present. Thereafter, if the employer proceeds with the discharge or discipline under the mixed-motive approach, the employee’s counsel then can file a lawsuit on such basis, and in virtually every situation will be able to avoid a summary judgment motion. Stated alternatively, the mixed-motive approach may provide considerable cover for plaintiff’s attorneys in such situations, and as noted above, cause employers to expend additional resources in such litigation or in the alternative settle the matter to prevent it from going to trial.

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II. Analysis and Background on the Impact of the Proposed Amendments to the ADA and Other Discrimination Statutes

H.R. 1230 makes significant changes in employment discrimination law beyond simply overturning *Gross*. To fully understand and comprehend such changes, a brief review of the law in this area is helpful.

A. Burden of Causation in Disparate Treatment Discrimination Cases

In order to establish a discrimination claim under federal anti-discrimination or anti-retaliation laws, a plaintiff must show that he or she had been subjected to an adverse employment action “because of” a protected characteristic/activity. Before the decision in *Gross*, a plaintiff could generally satisfy the “because of” standard of causation in one of two ways.

“*But For*” Standard. The first way to satisfy this standard required a plaintiff to establish that “but for” the protected characteristic/activity, he or she would not have suffered an adverse employment action. The “but for” standard has been interpreted by the courts to mean that the protected characteristic/activity had a role in the employer’s decision-making process “and had a determining influence on the outcome.” A “determinative factor” is one without which the adverse employment action would not have been taken but need not be the “sole cause”. Almost all plaintiffs in employment discrimination cases try to use the “but for” standard of causation.

“Mixed-Motives” Standard. The second way a plaintiff could satisfy the “because of” standard was to show that “mixed-motives” (some of which were based on his or her protected characteristic/activity and some of which were based on legitimate reasons) led to an adverse employment action. The mixed-motives standard has been interpreted to require a plaintiff to show that the protected characteristic/activity was a “motivating factor” in the employer’s decision-making process even though other legitimate factors may have also resulted in the employer’s action. The impact of the Civil Rights Act of 1991 and the Supreme Court’s *Gross* decision on mixed-motive cases is explained in the following section.

Example of Mixed-Motives. A good example of a mixed-motives fact pattern comes from *Price Waterhouse v. Hopkins*, the seminal case on mixed-motives under Title VII. In that case, Ann Hopkins, who was by all accounts very accomplished and competent, was up for a partnership promotion. However, she did not receive the promotion, and the firm cited her lack of interpersonal skills and abrasiveness as the reasons for its decision not to promote her. She did apparently have difficulty with some of her co-workers, and her judgment was questioned because of some of her behavior. These are legitimate business concerns and would justify the decision not to promote. However, she was also told by one of the partners in the decision-making process that many of her professional problems could be solved if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, [5]

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5 The ADA Amendments Act amended the words “because of” to “on the basis of”. However, the phrases have been interpreted to have the same basic meaning.
and wear jewelry.” The fact-finder (the district court in this case) concluded that gender stereotypes had been a motivating factor in Hopkins denial of promotion.

**Same Action Defense & Direct Evidence in Mixed-Motive Cases.** Because it is easier for plaintiffs to allege discrimination under the mixed-motives standard, the Court in *Price Waterhouse v. Hopkins* ruled that plaintiffs must show through direct evidence rather than circumstantial evidence that his or her protected characteristic/activity was a motivating factor in the employer’s decision. The court also ruled that if a plaintiff can show mixed-motive then the employer has the opportunity to assert an affirmative defense and would not be liable “if it can prove that, even if it had not taken [protected characteristic/activity] into account, it would have come to the same decision” or taken the same action.9

It is important to remember that the same action defense only becomes relevant if the plaintiff first proves that a protected characteristic/activity was a motivating factor in the employer’s decision-making regarding an adverse employment action.

**B. Subsequent Changes Impacting Mixed-Motive Cases**

**Civil Rights Act of 1991.** Shortly after the *Price Waterhouse* decision, Congress passed the Civil Rights Act of 1991 (“CRA 1991”). Among other things, the CRA 1991 amended the discrimination provision of Title VII to explicitly permit plaintiffs to use the mixed-motives standard. Thus, in order for a plaintiff to establish a prima facie case that an unlawful employment practice had occurred under Title VII, a plaintiff need only demonstrate that a discriminatory motive “was a motivating factor for any employment practice, even though other factors also motivated the practice.”

**Limitation on Application of the “Same Action” Doctrine.** Congress, however, modified the *Price Waterhouse* same action defense with respect to the discrimination provision of Title VII. Congress rejected making the same action doctrine a complete defense because it did not believe an employer should be completely absolved of liability if protected characteristics/activities factored into an employer’s decision-making, even if the employer could demonstrate that it would have taken the same employment action in the absence of an impermissible motivating factor. Congress, however, limited the remedies available to a mixed-motive Title VII discrimination plaintiff if the employer could establish the same action defense. Thus, in a mixed-motives case, an employer has a limited defense that restricts the remedies available to a prevailing plaintiff’s declaratory relief to attorney’s fees and costs, and certain types of injunctive relief excluding reinstatement, promotion, or hiring. In other words, if the employer in a mixed-motives Title VII discrimination case can establish the same action defense, the court may issue a judgment in favor of the plaintiff, enjoin the employer from discriminating, and award attorney’s fees to the plaintiff’s attorney but it may not award back pay, front pay, compensatory or punitive damages or order reinstatement, hiring, or promotion.

**Complete Defense Remains Viable for Non-Title VII Claims.** As noted above, the changes made to the *Price Waterhouse* complete defense by the CRA 1991 only apply to the discrimination provision of Title VII. Consequently, courts considering mixed-motives claims under other federal

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anti-discrimination and anti-retaliation laws such as the ADA, ADEA, Section 1981, OSHA, False Claims Act, ERISA, etc. have generally applied Price Waterhouse’s original mixed-motives analysis including the complete defense for employers, precluding any sort of remedy for plaintiffs where such a defense is properly raised.

C. The Gross Decision and ADEA Cases

In Gross v. FBL Financial Services, Inc., the District Court jury was instructed that it must return a verdict for Gross if age was a motivating factor in his demotion (i.e., mixed-motives standard). The court also instructed the jury that the verdict must be for the employer if it proved that it would have demoted Gross regardless of his age (i.e., complete defense). The jury found in favor of Gross and awarded $46,945 in back pay.

The United States Court of Appeals for the Eighth Circuit reversed and remanded the case to the district court because the jury had not been instructed that Gross had to establish his mixed-motives claim through direct evidence. The Supreme Court took the case to determine whether direct evidence was necessary to establish a mixed-motives case under the ADEA.

The Supreme Court, however, determined it did not need to decide the direct evidence issue because the mixed-motives standard of causation adopted in Price Waterhouse and the CRA 1991 for Title VII discrimination did not apply to the ADEA. Instead, the Supreme Court ruled the words “because of” in the ADEA required a plaintiff to show that age was the “but for” cause of the challenged adverse employment action. Likewise, the Court also decided that the burden of persuasion never shifts to the employer to show it would have taken the same action regardless of age.

The results of the Gross decision therefore resulted in the following legal principles to be established:

- Mixed-motives standard of causation doesn’t apply in the context of the ADEA.
- Because mixed-motives claims are unavailable under the ADEA, the same action employer defense doesn’t apply.

10 See, e.g., Head v. Glacier Northwest, Inc., 413 F.3d 1053 (9th Cir. 2005); Watson v. Southeastern Pennsylvania Transportation Authority, 207 F.3d 207 (3d Cir. 2000). Several circuits have gone the other way.
11 See, e.g., Baqir v. Principi, 434 F.3d 733, 745 (4th Cir. 2006); DeMarco v. Holy Cross High School, 4 F.3d 166, 172 (2d Cir. 1993).
15 See, e.g., Lightfoot v. Union Carbide, 110 F.3d 898, 901 (2d Cir. 1997); Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1222 (11th Cir. 1993).
III. Conclusions

Overruling *Gross* would significantly increase employment discrimination litigation in our federal and state courts. Further, such litigation would cause employers to needlessly expend millions of dollars in additional litigation and expenses. H.R. 1230 also inappropriately reinstates the “same action” defense in meritorious ADEA lawsuits. In his testimony before Congress, former EEOC General Counsel Eric Dreiband discussed these points when he testified on a previous legislative proposal that was quite similar to H.R. 1230:

First, the bill incorrectly asserts that the decision by the Supreme Court of the United States in *Gross v. FBL Financial Services* eliminated protections for many individuals. The *Gross* decision, however, does not eliminate any protections for victims. Before the decision, age discrimination defendants could prevail, even when they improperly considered a person’s age, if they demonstrated that they would have made the same decision or taken the same action for reasons unrelated to age. The Court’s decision stripped away this so-called “same action” or “same decision” defense, and it, therefore, deprived entities that engage in age discrimination of this defense. For this reason, since the *Gross* decision was issued, the Federal courts have repeatedly ruled in favor of discrimination plaintiffs and against defendants. In fact, the United States Courts of Appeals for the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have relied upon the *Gross* decision to issue decisions in favor of plaintiffs. Second, the bill will restore the same action defense eliminated by the *Gross* decision. Discrimination victims may prove that a protected trait, such as age, was a motivating factor for a particular practice complained of, yet still lose their case. This is because the bill would deprive discrimination victims of any meaningful remedy in so-called “same action” cases. Their lawyers may receive payment for fees directly attributable to the pursuit of a motivating factor claim, but the alleged victim will get nothing—no job, no money, no promotion, nothing.17

Indeed, the text of the H.R. 1230 itself precludes damages where an employer has successfully raised the same action defense and states:

(3) On a claim in which an individual demonstrates that age was a motivating factor for any employment practice, under section 4(g)(1), and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court A) may grant declaratory relief, injunctive relief (except as provided in subparagraph (B)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 4(g)(1); and (B) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.18

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Finally, permitting a mixed-motive theory to be used in ADEA cases may present considerable problems when retaliation claims are raised. Employees who know they may be subject to termination or other discipline may file anticipatory Title VII complaints alleging discrimination, and when an employer does make a disciplinary decision the employee’s attorney could easily file a retaliation claim and avoid summary judgment. The Supreme Court recognized this issue of applying a lower causation standard in its decision in *University of Texas Southwestern Medical Center v. Nassar*19 In that case, the Court held that Title VII retaliation claims must be proved pursuant to well-established principles of but-for causation rather than under a mixed-motive theory. H.R. 1230 would undermine the Supreme Court’s reasoning in the *Nassar* case and again give plaintiff’s attorneys an inappropriate advantage in employment discrimination cases.

Even simply altering the standards of proof under mixed-motive claims could mitigate – at least to a certain extent – the negative consequences outlined in this memo. Under H.R. 1230’s current framework, any type of evidence is permitted in a mixed-motive claim, with the combined result being a balance that swings significantly towards the plaintiff at the outset of any employment discrimination case. Requiring direct evidence instead would do much to swing the balance back towards the middle without dispensing with mixed-motive claims altogether.

I hope these comments have been helpful to your deliberations.

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