On The Hill

NELA's Washington Report

NELA Advocates for Employee Rights
National Employment Lawyers Association

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Bill To Overturn Supreme Court's Decision In *Gross v. FBL Financial Service, Inc.* Introduced In Senate

This week, the long awaited bill to overturn the U.S. Supreme Court's misguided 2009 decision in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009) was introduced in the Senate. The bill, entitled the "Protecting Older Workers Against Discrimination Act" (POWADA/S.2189), is modeled on legislation of the same name introduced in 2010 and restores significant protections of the Age Discrimination in Employment Act (ADEA). The bipartisan bill is co-sponsored by both Senators from plaintiff Jack Gross' home state of Iowa, Tom Harkin (D) and Charles Grassley (R), as well as Senator Patrick Leahy (D-VT). Prior to the *Gross* decision, it was well established that older workers had the option of showing discrimination by proving that their age was simply one factor motivating their employer's adverse action against them. If the employee could meet this burden of proof, then it shifted to the employer to show it would have taken the same action regardless of the employee's age. The Supreme Court ruled in *Gross*, however, that the "motivating factor" standard of proof does not apply to the ADEA. Thus, the only way for older workers to establish discrimination under the ADEA is to prove that "but for" the discriminatory motive, the employer would not have taken the adverse action, a much higher burden of proof for employees. Moreover, many lower courts have interpreted *Gross* to require proof that age was the only factor that caused the employer to discriminate - in other words, the "sole cause."

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In addition to its impact on age discrimination, the *Gross* decision has created uncertainty in other employment and civil rights laws. The reasoning of the *Gross* decision logically can be applied not only to the ADEA, but also to any law that requires proof of motivation, unless it explicitly provides a different causation standard. For example, courts have held that the tough Gross causation standard applies to the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, the Jury Systems Improvement Act (JSIA), the First Amendment, and even to retaliation claims under Title VII of the Civil Rights Act of 1964.

We look forward to Congress' swift passage of this much needed remedial legislation. NELA extends its gratitude to Daniel B. Kohrman, NELA Executive Board Member and Vice President of Public Policy, and NELA member Professor Eric Schnapper, for their support and expertise on the development and introduction of this bill. We also acknowledge the following individuals for their valuable contributions to the bill over the years:

Jonathan A. Bernstein (NY), Michael J. Carroll (IA), David R. Cashdan (DC), Stephen Z. Chertkof (DC), Herbert Eisenberg (NY), Professor Michael L. Foreman (PA), Bruce A. Fredrickson (DC), Joseph D. Garrison (CT), Jill R. Gaulding (MN), Janice Goodman (NY), Margaret A. Harris (TX), Janet E. Hill (GA), Douglas B.

Huron (DC), Richard E. Johnson (FL), Joseph V. Kaplan (DC), David L. Lee (IL), Laurie A. McCann (DC), Thomas W. Osborne (DC), Jonathan C. Puth (DC), Nancy Richards-Stower (NH), Mary Anne Sedey (MO), Joseph M. Sellers (DC), Richard T. Seymour (DC), Beth Townsend (IA), Cathy Ventrell-Monsees (DC), and Jason M. Zuckerman (DC).

Click here to view the full text of S. 2189.

Click here to see NELA's press statement on POWADA.

EEOC Issues ADEA Disparate Impact Final Regulations
The U.S. Equal Employment Opportunity Commission (EEOC) has published in the Federal Register its final regulations providing guidance to employees and employers on the "reasonable factors other than age" affirmative defense to disparate impact claims afforded employers under Section 623(f)(1) of the Age Discrimination in Employment Act (ADEA).

This step brings the agency's regulations in line with the U.S. Supreme Court's decisions in *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), which upheld the disparate impact theory of liability under the ADEA (*Smith*), and assigned to employers the burden of proving the existence of a "reasonable factor other than age" as an affirmative defense (*Meacham*), but did not identify standards to determine whether an employer's age-neutral practice is "reasonable." This regulation replaces the "business necessity" test the EEOC previously applied to age-neutral employer rules in age-based disparate impact cases.

NELA submitted comments on May 30, 2008, urging the EEOC's rulemaking to amend the agency's regulations to reflect the holding in *Smith*, to clarify further the standards for disparate impact claims under the ADEA, and to provide additional regulatory guidance regarding the meaning of "reasonable factor other than age."

NELA Participates In Stakeholder Meeting With MSPB
On March 6, 2012, I participated in an informal discussion with U.S. Merit Systems Protection Board (MSPB) staff and corollary stakeholders as part of the MSPB's ongoing process to revise its adjudicatory regulations. The MSPB Chair, Susan Tsui Grundmann, invited all stakeholders who provided written comments, including NELA, to participate in an informal discussion. Several private and government counsel also attended the meeting. Given that the Board does not often undertake a comprehensive review of its regulations, the Chair wanted to ensure all concerns were heard as it begins the task of drafting a notice of proposed rulemaking to be issued this summer.

Click here to read NELA's written comments to the MSPB.

House Education And Labor Workforce Protections Subcommittee Holds Hearing On DOL Proposed Rules For Homecare Workers
On March 7, 2012, the Workforce Protections Subcommittee of the House Education and the Workforce Committee held a hearing, entitled "Ensuring Regulations Protect Access to Affordable and Quality Companion Care." The hearing examined the Department of Labor's (DOL) proposed rule to provide most homecare workers with federal minimum wage and overtime protections. NELA previously, submitted to the DOL its comments in regards to the proposed rules. Specifically, the proposed rule would ensure that those workers who spend more than 20 percent of their time providing personal care to clients or who work for third party employers, such as staffing agencies, are no longer excluded from the protections of the Fair Labor Standards Act (FLSA). Among other things, NELA stated:

> The Rule would bring the FLSA into conformance with many state laws. At least 21 states and the District of Columbia already guarantee a minimum wage to its homecare workers; 15 of these states also guarantee overtime pay for some groups of homecare workers. The Rule would provide these workers, now members of one of the country's fastest growing occupations, equal rights as all of America's workers, including those who perform the same work in institutional settings.

NELA expresses its gratitude to NELA Executive Board Member and Treasurer Marguerite M. Longoria for drafting the comments on our behalf.

Representative Linda Sanchez (D-CA) announced her intention to reintroduce legislation that would extend the FLSA to the homecare workforce. Senator Bob Casey Jr. (D-PA) is expected to follow suit in the Senate shortly.

Click here to read NELA's comments to the DOL proposed rules.

Representative Andrews Introduces Bill To Exclude From Title 9 Forced Arbitration In Employment Contracts & Disputes
On March 8, 2012, Representative Robert Andrews (D-NJ) introduced legislation in the House (H.R. 4181) that would amend Title 9, United States Code, so that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute."

Cliff Palefsky, a former NELA Board Member and the organization's longtime advisor on forced arbitration, stated "This critically important bill will restore the original intention of Congress when it passed the Federal Arbitration Act by excluding from its scope predispute agreements imposed on workers who are powerless to say no. Workers should not be forced by their employers to waive their right to enforce the civil rights and labor laws as a condition of employment. The U.S. Supreme Court has repeatedly said that arbitration is a matter of 'consent and not coercion.' This bill will make sure that is the case."

Click here to view H.R. 4181.

Maryland Legislature Proposes Its Own Civil Rights Tax Relief Act
On March 6, 2012, the House Ways and Means Committee of the Maryland Legislature held a hearing on HB 1091, the Maryland Civil Rights Tax Relief Act (CRTRA). HB 1091, introduced by Delegates Hucker, Niemann, and Rosenberg on February 10, 2012 would amend the Maryland Tax Code to prevent the taxation of non-economic damages and awards received in discrimination cases.

NELA posted an action alert on NELANet regarding the hearing and a call for stories of clients who have been adversely affected by taxation on a settlement or a verdict. NELA members listed as Maryland residents or whose place of business is in the state were also asked to lobby their delegates.

Click here to read the MD CRTRA.

Judicial Nominations: Senator Reid Files Cloture Vote On District Court Nominations, Strikes Deal With Mitch McConnell
NELA Members Volunteer As Spokespeople On Judicial Vacancy Crisis
The Senate's impending vote on the massive transportation bill cleared the way for a move by Majority Leader Harry M. Reid (D-NV) to push through several judicial nominees and to begin addressing the vacancy crisis in the federal judiciary. Reid filed cloture March 12, 2012, on 17 nominees to federal judgeships, meaning the Senate could vote as early as March 14, 2012 on whether to proceed to final consideration of their nominations. Fourteen of the 17 nominees were referred to the full Senate unanimously by the Senate Judiciary Committee.

After days of partisan sparring, Senate leaders reached an agreement on a group of President Obama's judicial nominees, avoiding a showdown that could have brought the chamber to a standstill. Majority Leader Harry Reid (D-NV) cancelled cloture votes on 17 of Obama's nominees that was set to begin on March 14 after reaching the deal with Senate Minority Leader Mitch McConnell (R-KY). Under the agreement, the Senate will put 14 of the 17 judicial nominees up for a vote by May 7, 2012 at a pace of two per week, according to a Senate Democratic aide.

In connection with the pending judicial nominees on the calendar, the Leadership Conference on Civil and Human Rights issued a call to action for volunteers "willing and able to be available to talk to local press about the judicial vacancy crisis and the importance of voting on the judicial nominees on the calendar, many of whom have been waiting more than three months for a vote." Several members of NELA's Judicial

Nominations Committee answered the call and will be participating in a two-day campaign targeted at several states that have been declared emergency jurisdictions.

Sincerely,

Eric M. Gutierrez,
Legislative & Public Policy Director
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