

June 10, 2019

The Honorable Bobby Scott, Chairman  
Committee on Education and Labor  
U.S. House of Representatives  
2176 Rayburn House Office Bldg.  
Washington, DC 20515

The Honorable Virginia Foxx, Ranking Member  
Committee on Education and Labor  
U.S. House of Representatives  
2101 Rayburn House Office Bldg.  
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

On behalf of the undersigned organizations and the millions of workers we represent, we urge all Committee Members to **vote to support H.R. 1230, the Protecting Older Workers Against Discrimination Act** (POWADA), sponsored by Chairman Scott and Rep. Jim Sensenbrenner (R-WI). POWADA is bipartisan, limited legislation to restore fairness and well-established legal standards on workplace discrimination that were undermined by certain court decisions.

To ensure equal treatment and equal opportunity in employment, the civil rights laws make clear that discrimination in the workplace “because of” a protected characteristic or activity is unlawful. For decades, this meant that discrimination may not play any role in employment practices.

Yet, 10 years ago this month, the Supreme Court erected a new and substantial legal barrier in the path of equal opportunity for older workers. In *Gross v. FBL Financial Services, Inc.* (2009), the Court imposed a much higher burden of proof on workers who allege age discrimination than is required of those who allege discrimination based on race, sex, national origin, or religion. Proving that discrimination tainted the employer’s conduct was no longer enough; after *Gross*, older workers must prove that discrimination played a decisive role in the employer’s action.

Since the *Gross* decision, the Supreme Court and lower courts have extended this same unreasonably difficult burden of proof to other types of civil rights complaints:

- Retaliation - In Title VII cases in which an employer *retaliates* against a worker who challenges workplace discrimination based on race, sex, or other grounds, the worker must now prove that retaliation was the decisive cause for their adverse treatment. *University of Texas Southwestern Medical Center v. Nassar* (2013).
- Disability discrimination - The Supreme Court has not yet ruled on whether workers subjected to disability discrimination must also meet this much higher standard of causation, but four federal circuit courts of appeal have ruled that disability-based employment discrimination must be established under the higher, “but-for” causation standard.

This line of court decisions has made it exponentially more difficult for workers who have experienced discrimination to have their day in court and prove their case. These decisions have also sent a terrible message to employers and the courts that some types of discrimination are not as wrong, or as unlawful, as other forms of discrimination.

POWADA would restore the causation standard that was in effect and consistently applied by the courts before 2009, and make Congress' intent clear that discrimination in the workplace is never acceptable. Please support H.R. 1230 and swiftly pass this bipartisan legislation.

Sincerely,

AARP

American Association of People with Disabilities (AAPD)

American Association of University Women (AAUW)

American Civil Liberties Union (ACLU)

American Federation of State, County, and Municipal Employees (AFSCME)

Bazelon Center for Mental Health Law

Disability Rights Education & Defense Fund (DREDF)

Easterseals

Equal Rights Advocates

Justice for Migrant Women

Justice in Aging

Leadership Conference on Civil and Human Rights

National Council on Aging

National Disability Institute

National Domestic Workers Alliance

National Education Association (NEA)

National Employment Law Project

National Employment Lawyers Association

National Partnership for Women & Families

National Women's Law Center

NETWORK Lobby for Catholic Social Justice

Paralyzed Veterans of America

The Arc

The Gerontological Society of America

Women Employed

Women's Institute for a Secure Retirement (WISER)