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June 4, 2019

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

Ranking Member Virginia Foxx
Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Re: Hearing on "Eliminating Barriers to Employment: Opening Doors to Opportunity", May 21, 2019

Dear Chairman Scott and Ranking Member Foxx:

Please find attached my statement addressing the referenced Committee hearing.

Very truly yours,

SEYFARTH SHAW LLP

/s/ Lawrence Z. Lorber

Lawrence Z. Lorber

LZL:kmm
Attachment

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June 4, 2019

Statement of Lawrence Z. Lorber, Counsel, Seyfarth Shaw LLP
Committee on Education and Labor
Hearing on "Eliminating Barriers to Employment: Opening Doors to Opportunity"
May 21, 2019

BACKGROUND

H.R. 1230 - Protecting Older Workers Against Discrimination Act, ("POWADA") purports to "cure" a lapse in the coverage of the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 by importing into those statutes the theory of mixed-motive discrimination included within Title VII in the Civil Rights Act of 1991. POWADA would amend those statutes by including language parallel to that included in Title VII holding that "the complaining party demonstrates that age or an activity protected by subsection (d) was a motivating factor for any practice, even though other factors also motivated the practice." POWADA further provides that the complaining party can rely on any type of admissible evidence sufficient for a trier of fact to find that an unlawful practice occurred under the respective acts.

POWADA reverses the Supreme Court's holding in *Gross v FBL Financial Services, Inc.*, 557 U.S. 167 (2009) ("*Gross*") which held that the specific language in the 1991 Civil Rights Act which recognized the mixed-motive theory in Title VII did not recognize that theory in the statutes

amended by POWADA. The proponents of POWADA argue that a theory of equity urges that the definitions of discrimination under our various and varied non-discrimination laws be uniform. It is curious, however, that the sponsors of POWADA wrote the legislation to maintain the significant limitations on remedies included in the 1991 Civil Rights Act whereby a finding that the improper employment decision based upon "a motivating factor" is limited to an award of attorney's fees and costs, a possible injunction, and declaratory relief. This would be the case even if the employer demonstrates that the employment action would have occurred in the absence of the impermissible factor. A mixed-motive violation under POWADA, therefore, would not result in any individual relief to the claimant including damages or an order of rehire, hire, reinstatement or any other individual relief. But it would result in needless litigation.

Finally, and as will be discussed separately, POWADA also undertakes to reverse another Supreme Court decision, *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) ("*Nassar*"). There the Supreme Court relied in part on the *Gross* decision and held that since the 1991 Civil Rights Act did not address or amend section 704 of Title VII (pertaining to retaliation claims), then the mixed-motive theory of discrimination would similarly not apply to retaliation charges. Notably, the Findings and Purposes section of POWADA is absolutely silent as to the application of the mixed-motive theory to retaliation and POWADA does not even refer to the *Nassar* decision.

DISCUSSION

While Congress can further the reach of any statute as long as its action is constitutionally permissible, the underlying theory of POWADA—that the various non-discrimination statutes

should be interpreted precisely the same when they define violations—is belied by the history, passage, amendment and structure of the non-discrimination statutes here at issue. Indeed, the question of incorporating age discrimination into the prohibitions of discriminating based on race, sex, gender, religion and national origin of Title VII was debated when Title VII itself was passed in 1964. During the debate held on February 8, 1964, the House voted down an amendment by the vote of 123 to 94, which would have included age. In the debate, Chairman Cellar (D-NY), a main sponsor of the Civil Rights Act of 1964, stated that the reach of age discrimination, although inherently pernicious was not widely understood and differed from the focus of the Civil Rights Act. Similarly in the Senate debate on June 11, 1964, Democrat Senators Humphrey and Morse, and Minority Leader Dirksen, all prime sponsors of the Civil Rights Act, argued that the problem of age discrimination was distinct from that of race discrimination and should be addressed separately. The amendment to include age in the Civil Rights Act was defeated 63 to 28.

Of course, in 1967, Congress did address age discrimination but included it as an amendment to the Fair Labor Standards Act, as the Age Discrimination in Employment Act (ADEA) and not Title VII. But when Congress passed the ADEA in 1967 it included within that law a provision not found in Title VII. Congress determined in 29 U.S.C. § 623 (f) (1) that it would not be unlawful for an employer to rely on "reasonable factors other than age" (RFOA). The Supreme Court recognized that:

> "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause into the ADEA 'significantly

narrowing its coverage,'" citing to *Smith v. City of Jackson.* 544 U.S. 228 at 233 (2005).

Meachem et. al. v. Knolls Atomic Power Laboratory, 554 U.S. 84, 102. (2008).

This Congressional action certainly did not denigrate the problems of age discrimination and the ADEA, but rather recognizes, as it should, that in dealing with the complexities of discrimination, not every form of discrimination is the same nor does it require that every form of discrimination be defined precisely the same, or that the procedures and remedies designed to address the discrimination be the same. So not only did Congress not include the various statutes at issue in POWADA in the 1991 Civil Rights Act recognizing mixed-motive discrimination in Title VII, it also did not include ADEA in the new remedial scheme established for Title VII including punitive and compensatory damages. And, in reviewing the RFOA affirmative defense, it is difficult to square that defense with the mixed-motive theory holding that liability can be found when there are two factors deemed to be motivating, a "good" factor and a "bad" factor. Indeed, it is difficult to discern how the mixed-motive theory can co-exist with the RFOA defense.

Another significant concern about POWADA which should be addressed is that including a mixed-motive theory into the ADEA, and the other statutes at issue, will simply encourage needless litigation in which, by statute, the only successful participant will be the plaintiff's attorney. If the employer demonstrates it would have taken the same action in the absence of the impermissible motivating factors of age or retaliation, by statute, the "successful" plaintiff gains nothing from the proceeding and indeed may very well be left with a tax liability when his or her attorney's fee is paid. Too, because the theory of mixed-motive is so elusive, and under the RFOA theory in the

ADEA will be inextricably raised, it will undoubtedly make it nearly impossible for an employer to prevail on summary judgment even if it has a persuasive explanation for its action. Such a result does not prevent discrimination. Rather it furthers unnecessary litigation. Indeed, under the mixed-motive theory a persuasive explanation for an employer's action is not persuasive at all. That is why the Supreme Court distinguished the ADEA from Title VII of the Civil Rights Act in the *City of Jackson* and *Meachem* decisions. [1]

Americans with Disabilities Act. Equally clear is that the inclusion of the ADA and the cited sections of the Rehabilitation Act in POWADA reflects an attempt to achieve "statutory equality" without any understanding of the critical elements of the ADA and the Rehabilitation Act. The problem of disability discrimination, and the well-established procedures to deal with it does not lend itself to a mixed-motive analysis. The ADA has its own procedures and required employer actions including the key element of the interactive process. In the interactive process, the parties must engage in discussion of all factors considered for reasonable accommodation. There may be instances where the employer does not accept the requested accommodation and instances where the employee or applicant does not accept the proffered accommodation. Under a mixed motive theory, the interactive process could by itself be an example of a mixed-motive and lead to a finding of employer liability. Concern about expensive and needless litigation addressing a mixed-motive would hinder the achievement of the key purpose of the ADA and Rehabilitation Act,

[1] In considering age discrimination and the reach of the ADEA, it should be noted that unlike other protected characteristics, age is not an immutable characteristic and the ADEA treats age differently even as compared to individuals within the protected age level but with different ages. See e.g. *O'Connor v Consolidated Coin Caterers,* 517 U.S. 308 (1996). So in attempting to rationalize RFOA with mixed motive treatment, it becomes even more difficult to reach a fair conclusion and the burden on employers is even greater.

reasonable accommodation. There is no evidence that the ADA needs the mixed motive analysis in order to be an effective statute.

Retaliation. In addition to the attempt to include mixed-motive into three different statutes, the sponsors of POWADA inserted new and alarming language into the bill, a heretofore undiscussed requirement to include mixed-motive into the retaliation theories already included in the statutes at issue and Title VII. The Findings and Purpose section of POWADA provides no reason or purpose for these proposed amendments. Indeed, only in the testimony of the advocates for POWADA do we find the reference to reversing the Supreme Court decision in *Nassar.* In *Nassar,* with some reliance on *Gross,* the Court reached the obvious conclusion that since Congress chose not to amend the retaliation section in Title VII in 1991, it certainly did not intend to amend, through judicial fiat, that statutory section in 2013. Nor should it have.

Retaliation is inherently a case of differing explanations. The plaintiff claims that the employer is taking an adverse action because the plaintiff complained of a certain improper employer's action (or participated in an action opposing an improper employer action). If a case proceeds beyond dispositive motions, the employer has the burden to show that its action was otherwise justified because of an employment policy or some other legitimate non-retaliatory reason. The plaintiff will attempt to show that the employer's explanation is without credence. If the plaintiff is successful, then all of the remedial provisions of the operative statute are available. The plaintiff will receive actual relief.

However, in a mixed-motive case, which will involve almost the same set of facts, the plaintiff receives nothing. This gives the plaintiff's attorney two bites of the apple but in a mixed-

motive retaliation case, the plaintiff does not even get the core. Furthermore, if the mixed motive involves the application of an employment policy, the plaintiff's attorney may well attempt to request an injunction precluding the employer from enforcing its own policy. Thus, aggressive plaintiffs' attorneys could use mixed-motive retaliation claims to seize control of an employer's personnel system.

In 1991 Congress decided that it should broaden the theory of mixed-motive discrimination in Title VII because of a belief that the Supreme Court decision in *Hopkins v Price Waterhouse*, 490 U.S. 228 (1989), where the plaintiff in fact was successful, created an unnecessary inhibition on the ability of Title VII plaintiffs or their lawyers to pursue cases. However, recognizing that the mixed-motive theory was perhaps antithetical to the core purpose of Title VII because it could lead to finding liability for possible bad thoughts or so called impermissible motivating factors even though the impermissible motivating factor really did not result in a discriminatory action, Congress provided that while a plaintiff could get her or his day in court, they would not benefit.

CONCLUSION

Thus with the ADEA and the problem of age discrimination the mixed-motive theory is a bad fit. Congress provided for the RFOA as an explanation for an employer's actions has insured that age will always be part of the inquiry. Adding mixed-motive as a threshold for liability under POWADA will insure there will always be an issue of fact to be resolved eliminating the prospect of a successful motion for summary judgment thereby extending litigation and increasing costs for all parties involved.

And with respect to the ADA and Rehabilitation Act, the mixed-motive theory is not only a bad fit but will encumber the achievement of the direct purposes of the Acts, Rather than the constructive interchange which would lead to a focused accommodation, the concern about mixed motive claims will constrict the examination of workplace accommodations. And most concerning, "success" in a mixed-motive litigation will lead to no relief for the individual.

Finally, maintaining the status quo where mixed-motive is not the threshold for liability in any of these statutes does not denigrate any of these vital protections. Requiring that they all lose their individual identity and be interpreted the same merely eliminates the unique factors associated with these different protected classes. POWADA represents a misunderstanding of the complexity of employment discrimination law and should not be enacted.