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)