

**Testimony for Senate HELP Committees/ May 2010**

**Jack Gross, CPCU, CLU, ChFC**

**I'm honored to be here and to be given an opportunity to speak out on behalf of the baby boomer generation, many of whom like me, have experienced age discrimination. You invited me here to share my story since I have, because of a Supreme Court ruling, become the new name associated with age discrimination. I am happy to do so.**

**To me, of course, my story is personal and unique. I ask you to keep in mind, however, that key aspects of my story have, and are being duplicated millions of times across this country. Please, envision those millions who are depending on you standing behind me today. In spirit, they are.**

**I certainly never imagined that my case would end up here when it all started over seven years ago. That is when my employer, Farm Bureau Insurance, or FBL, merged with the Kansas Farm Bureau. Apparently not wanting to add any more older workers, they offered the Kansas claims employees who were over 50 a buyout to purge them from the company. At the same time, they just demoted all claims employees in the Iowa operation who were 50 and over and had supervisory or higher positions. Only one person who was under 50, but approaching it, was demoted.**

**Being 54 at the time, I was included in that sweep, even though I had 13 consecutive years of performance reviews in the top 3-5% of the company, and had dedicated most of my working career to making Farm Bureau a better company. My contributions were exceptional and well documented. Not least was managing what Farm Bureau called it's biggest undertaking ever. In 1997, I was asked to take all of**

**our existing property and casualty policies, re-write them in a way they could be easily understood, and combine them into a totally unique package policy unlike anyone else had in our market. And, they asked me to do it in a year. I did, and it is still their exclusive and very popular modular product, upon which they are basing their future. That was only one of many valuable contributions I made to FBL, but my time is limited. The jury that decided my case heard all about them.**

**Since age was the obvious reason, I filed a complaint, and two years later a federal jury spent a week listening to all the testimony, seeing all of the evidence, and being instructed on the ADEA. They were also instructed to rule in my favor if I had proved by a preponderance of evidence that age was a motivating factor, and also that they should rule in favor of FBL if they could find any reason, other than age, for my demotion. The verdict came back in my favor, and I thought the ordeal was over in 2005. As we now know, it was just the beginning.**

**After that, FBL appealed and got my jury verdict overturned on what I consider a technicality in the jury instruction. Apparently, most courts said that, in a so-called mixed motive case, any kind of evidence was sufficient. But, the 8<sup>th</sup> Circuit said I had to have so-called “direct” evidence. That left us no choice but to appeal it to the Supreme Court.**

**We were optimistic and grateful when the court accepted cert on whether direct evidence was required to get a mixed-motive instruction. Precedent and legislation, we felt, were overwhelmingly on our side. At the hearing, however, the Supreme Court broke their own protocol and allowed the defense to advance an entirely new**

**argument. It had not been briefed, nor had we been given an opportunity to prepare a rebuttal. To make a long story short, the court essentially hijacked my case and used it as a vehicle to water down the ADEA, a law written by the branch of government closest to the people. Editorials and bloggers dubbed me this year's Lily Ledbetter. (I take that as a compliment.)**

**My wife and I came to this town last March expecting to see our high court at its best. We believed in the rule of law and its consistent application to all areas of discrimination. Needless to say, we were disappointed, disillusioned, and quite frankly embarrassed by the arrogance we witnessed. I felt the High Court had pulled a "bait and switch" on me.**

**As it stands now, I have a new trial scheduled for November of this year, nearly eight years after the unjustified and unlawful demotion. In that time, witnesses have moved out of state, memories have faded, and the court has changed the rules. My trust in the judicial system is shattered. I used to believe that our courts tried to uphold and sanctify the decisions of our citizen juries, instead of second-guessing their ability to understand the letter and spirit of the law.**

**That is the story of my discrimination experience. I don't have time to share much of my personal background, so I'll be very brief. I grew up in a small town in southern Iowa. My dad was a highway patrolman and my mother a school teacher. I overcame chronic health problems to achieve my education and success. My wife, to whom I've been married for 43 years, and I started with absolutely nothing but a determination to build a good life, and we did against all odds. We have two wonderful grown children and two grandchildren who are**

**the lights of our lives. I am very proud of my family and of my professional accomplishments.**

**Since I was integrally involved in defending FBL for many years as a claims manager, I am probably an unlikely candidate to be here. We believe that is the reason FBL has defended this case so aggressively, and that it explains the intensity of the retaliation I endured over the past seven years while the litigation proceeded. I finally retired last December because the stress of that retaliation was causing me health problems.**

**Since the Supreme Court's decision in my case, I have been particularly distressed over the collateral damage that is being inflicted on others because of the Court's ruling. I hate having my name associated with the pain and injustice now being inflicted on older workers, because it is nearly impossible to provide the level of proof now required by the Court. I have to keep reminding myself that I'm not the one who changed the law. Five powerful men in black robes did it.**

**As a citizen, I believe this body -Congress- has a long history of working together, on a bi-partisan basis, to create and maintain a level playing field in the workplace. The ADEA, and the ensuing legislation that reinforced it's intent, is but one example. As a citizen, it clearly says to me that congress intended to put an end to discrimination in employment practices. I believe the same is true for most jurors. We don't parse individual words the way judges and some attorneys do. We know what "is" is. The ADEA simply states that it shall be unlawful to discriminate because of age. We get it. This Supreme Court apparently doesn't. Justice Thomas challenged**

**you to state that age has to be “a motivating factor” if that is what you intended. The Protecting Older Workers Against Discrimination Act does that, and I urge you, on behalf of myself and the millions of baby boomers behind me who have been paying the bills for a generation and want to continue working, to pass it in the same bi-partisan spirit you’ve shown in the past.**

**Finally, one of my jurors, during voir dire, said that she just couldn’t understand how a man could sue a company that gave him a job. Her words resonated with me. I agonized over the decision to pursue this. The folks standing behind me understand. My wife and I prayed about it, decided it had to be done, and then we left the outcome in God’s hands. If my experience eventually prevents anyone else from having to endure the pain and humiliation of discrimination, I will always believe that this effort was part of God’s plan for my life.**

**Thank you**