

115TH CONGRESS
1ST SESSION

S. 2019

To amend title VII of the Civil Rights Act of 1964 and other statutes to clarify appropriate liability standards for Federal antidiscrimination claims.

IN THE SENATE OF THE UNITED STATES

OCTOBER 26, 2017

Ms. BALDWIN (for herself, Mr. DURBIN, Mr. MARKEY, Mr. BLUMENTHAL, and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend title VII of the Civil Rights Act of 1964 and other statutes to clarify appropriate liability standards for Federal antidiscrimination claims.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Employment Pro-
5 tection Act of 2017”.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—Congress finds the following:

8 (1) Discrimination and harassment are wide-
9 spread problems in workplaces in the United States.

1 In 2016, sex discrimination charges comprised 30.7
2 percent of the charges filed with the Equal Employ-
3 ment Opportunity Commission (referred to in this
4 section as the “EEOC”) under all the statutes the
5 agency enforces. In 2016, 83.4 percent of sexual
6 harassment charges were filed by women.

7 (2) Women and people of color working in low-
8 wage jobs are particularly vulnerable to harassment
9 in the workplace.

10 (3) In some industries, harassment is even
11 more widespread. For example, a survey conducted
12 by the Restaurant Opportunities Centers United
13 Forward Together found that two-thirds of women
14 workers and over half of men workers had experi-
15 enced some form of sexual harassment from man-
16 agement in the restaurant industry; nearly 80 per-
17 cent of women and 70 percent of men experienced
18 some form of sexual harassment from co-workers;
19 and nearly 80 percent of women and 55 percent of
20 men experienced some form of sexual harassment
21 from customers.

22 (4) Studies indicate that sexual harassment of
23 women, including unwanted touching, grabbing, and
24 stalking, is also common in male-dominated indus-
25 tries, such as construction, public safety, manufac-

1 turing, farming, and the high-tech industry. Harass-
2 ment in male-dominated industries operates as a
3 barrier to women's entry into higher paying jobs.

4 (5) Racial harassment remains a pervasive
5 problem in the workplace in the United States. In
6 fiscal year 2016, 35.3 percent of the charges of al-
7 leged violations filed with the EEOC were charges
8 on the basis of race.

9 (6) Research shows that workers in a wide
10 spectrum of occupations, ranging from service and
11 support positions to management and professional
12 positions, report experiencing race-based harassment
13 while on the job.

14 (7) Harassment in the workplace is a persistent
15 barrier to opportunity for people with disabilities.
16 Harassment can result in workers with disabilities
17 being forced off the job. Workplace harassment is
18 used to send the message that workers with disabil-
19 ities do not belong at work.

20 (8) Age discrimination continues to be a barrier
21 to employment for older workers. Nearly one-third of
22 older workers report that they or someone they know
23 experienced age discrimination in the workplace.

24 (9) The Supreme Court's decision in Vance v.
25 Ball State University, No. 11-556 (June 24, 2013),

1 significantly undermines protections against dis-
2 crimination that the Supreme Court established in
3 Faragher v. Boca Raton, 524 U.S. 775 (1998) and
4 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742
5 (1998), which held that an employer may be vicari-
6 ously liable under title VII of the Civil Rights Act
7 of 1964 for harassment of an employee by an indi-
8 vidual that has supervisory authority over that em-
9 ployee.

10 (10) In Faragher and Ellerth, the Supreme
11 Court held that employers will be subject to a strict
12 liability standard when employees with supervisory
13 authority engage in harassment that results in “tan-
14 gible employment actions”. However, in situations
15 where “supervisors” engage in harassment that does
16 not result in tangible employment actions, the Court
17 explained, an employer can avoid vicarious liability
18 by showing that—

19 (A) the employer exercised reasonable care
20 to prevent and correct any harassing behavior;
21 and

22 (B) the plaintiff unreasonably failed to
23 take advantage of the preventive or corrective
24 opportunities that the employer provided.

1 (11) Whether an employer should be vicariously
2 liable for harassment is a functional analysis that is
3 based not on the title of the harasser or the employ-
4 er's job description for the harasser's position but on
5 the authority vested in that individual by the em-
6 ployer.

7 (12) The Supreme Court holding in Vance lim-
8 its the category of individuals who are considered su-
9 pervisors and for which an employer may be held vi-
10 cariously liable under Faragher and Ellerth to those
11 individuals that have authority to take tangible em-
12 ployment actions. This holding ignores the reality
13 that employees with the authority to control their
14 subordinates' daily work should be included in that
15 category, for which an employer may be held vicari-
16 ously liable, because such individuals are aided by
17 that authority in perpetuating a discriminatory work
18 environment.

19 (13) Individuals who direct the daily work ac-
20 tivities of employees but do not have the authority
21 to take tangible employment actions against those
22 employees are common in the workplace in the
23 United States, particularly in industries that employ
24 low-wage workers. Workers in industries including
25 retail, restaurant, health care, housekeeping, and

1 personal care, which may pay low wages and employ
 2 large numbers of female workers, are particularly
 3 vulnerable to harassment by individuals who have
 4 the power to direct day-to-day work activities but
 5 lack the power to take tangible employment actions.

6 (b) PURPOSE.—The purpose of this Act is to clarify
 7 that an employer’s vicarious liability for harassment under
 8 title VII of the Civil Rights Act of 1964, the Age Discrimi-
 9 nation in Employment Act of 1967, the Americans with
 10 Disabilities Act of 1990, the Rehabilitation Act of 1973,
 11 section 1977 of the Revised Statutes, the Genetic Informa-
 12 tion Nondiscrimination Act of 2008, the Government Em-
 13 ployee Rights Act of 1991, the Congressional Account-
 14 ability Act of 1995, and title 3, United States Code, ex-
 15 tends to—

16 (1) an individual with the authority to under-
 17 take or recommend tangible employment actions af-
 18 fecting the victim of the harassment; or

19 (2) an individual with the authority to direct
 20 the victim’s daily work activities.

21 **SEC. 3. AMENDMENT TO TITLE VII OF THE CIVIL RIGHTS**
 22 **ACT OF 1964.**

23 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
 24 TILE WORK ENVIRONMENT.—Section 703 of the Civil

1 Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by
 2 adding at the end the following:

3 “(o) Subject to section 12 of the Fair Employment
 4 Protection Act of 2017, an employer shall be liable for
 5 the acts of any individual whose harassment of an em-
 6 ployee has created or continued a hostile work environ-
 7 ment that constitutes an unlawful employment practice
 8 under this section if, at the time of the harassment—

9 “(1) such individual was authorized by that em-
 10 ployer—

11 “(A) to undertake or recommend tangible
 12 employment actions affecting the employee; or

13 “(B) to direct the employee’s daily work
 14 activities; or

15 “(2) the negligence of the employer led to the
 16 creation or continuation of that hostile work environ-
 17 ment.”.

18 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-
 19 TALIATORY HOSTILE WORK ENVIRONMENT.—Section 704
 20 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–3) is
 21 amended—

22 (1) by redesignating subsection (b) as sub-
 23 section (c); and

24 (2) by inserting after subsection (a) the fol-
 25 lowing:

1 “(b) Subject to section 12 of the Fair Employment
 2 Protection Act of 2017, an employer shall be liable for
 3 the acts of any individual whose harassment of an em-
 4 ployee has created or continued a retaliatory hostile work
 5 environment that constitutes an unlawful employment
 6 practice as described under subsection (a) if, at the time
 7 of the harassment—

8 “(1) such individual was authorized by that em-
 9 ployer—

10 “(A) to undertake or recommend tangible
 11 employment actions affecting the employee; or

12 “(B) to direct the employee’s daily work
 13 activities; or

14 “(2) the negligence of the employer led to the
 15 creation or continuation of that retaliatory hostile
 16 work environment.”.

17 (c) FEDERAL EMPLOYEES.—Section 717 of the Civil
 18 Rights Act of 1964 (42 U.S.C. 2000e–16) is amended by
 19 adding at the end the following:

20 “(g) The provisions of sections 703(o) and 704(b)
 21 shall apply to hostile work environment claims and retalia-
 22 tory hostile work environment claims, respectively, under
 23 this section.”.

1 **SEC. 4. AMENDMENT TO THE AGE DISCRIMINATION IN EM-**
 2 **PLOYMENT ACT OF 1967.**

3 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
 4 TILE WORK ENVIRONMENT.—Section 4 of the Age Dis-
 5 crimination in Employment Act of 1967 (29 U.S.C. 623)
 6 is amended by adding at the end the following:

7 “(n) Subject to section 12 of the Fair Employment
 8 Protection Act of 2017, an employer shall be liable for
 9 the acts of any individual whose harassment of an em-
 10 ployee has created or continued a hostile work environ-
 11 ment that is unlawful under this section if, at the time
 12 of the harassment—

13 “(1) such individual was authorized by that em-
 14 ployer—

15 “(A) to undertake or recommend tangible
 16 employment actions affecting the employee; or

17 “(B) to direct the employee’s daily work
 18 activities; or

19 “(2) the negligence of the employer led to the
 20 creation or continuation of that hostile work environ-
 21 ment.”.

22 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-
 23 TALIATORY HOSTILE WORK ENVIRONMENT.—Section
 24 4(d) of the Age Discrimination in Employment Act of
 25 1967 (29 U.S.C. 623) is amended by striking “or litiga-
 26 tion under this Act.” and inserting “or litigation under

1 this Act. Subject to section 12 of the Fair Employment
 2 Protection Act of 2017, an employer shall be liable for
 3 the acts of any individual whose harassment of an em-
 4 ployee has created or continued a retaliatory hostile work
 5 environment that is unlawful under this subsection if, at
 6 the time of the harassment—

7 “(1) such individual was authorized by that em-
 8 ployer—

9 “(A) to undertake or recommend tangible
 10 employment actions affecting the employee; or

11 “(B) to direct the employee’s daily work
 12 activities; or

13 “(2) the negligence of the employer led to the
 14 creation or continuation of that retaliatory hostile
 15 work environment.”.

16 (c) FEDERAL EMPLOYEES.—Section 15 of the Age
 17 Discrimination in Employment Act of 1967 (29 U.S.C.
 18 633a) is amended by adding at the end the following:

19 “(h) Subsections (d) and (n) of section 4 shall apply
 20 to retaliatory hostile work environment claims and hostile
 21 work environment claims, respectively, under this sec-
 22 tion.”.

1 **SEC. 5. AMENDMENT TO THE AMERICANS WITH DISABIL-**
2 **ITIES ACT OF 1990.**

3 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
4 TILE WORK ENVIRONMENT.—Section 102 of the Ameri-
5 cans with Disabilities Act of 1990 (42 U.S.C. 12112) is
6 amended by adding at the end the following:

7 “(e) Subject to section 12 of the Fair Employment
8 Protection Act of 2017, an employer shall be liable for
9 the acts of any individual whose harassment of an em-
10 ployee has created or continued a hostile work environ-
11 ment that constitutes discrimination against a qualified
12 individual on the basis of disability under this section if,
13 at the time of the harassment—

14 “(1) such individual was authorized by the em-
15 ployer—

16 “(A) to undertake or recommend tangible
17 employment actions affecting the qualified indi-
18 vidual; or

19 “(B) to direct the qualified individual’s
20 daily work activities; or

21 “(2) the negligence of the employer led to the
22 creation or continuation of that hostile work environ-
23 ment.”.

24 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-
25 TALIATORY HOSTILE WORK ENVIRONMENT.—Section 503

1 of the Americans with Disabilities Act of 1990 (42 U.S.C.
2 12203) is amended—

3 (1) by redesignating subsection (c) as sub-
4 section (d);

5 (2) by inserting after subsection (b) the fol-
6 lowing:

7 “(c) Subject to section 12 of the Fair Employment
8 Protection Act of 2017, an employer shall be liable for
9 the acts of any individual whose harassment of an em-
10 ployee has created or continued a retaliatory hostile work
11 environment that constitutes retaliatory discrimination, as
12 described in subsection (a), or the carrying out of any un-
13 lawful acts described in subsection (b), if, at the time of
14 the harassment—

15 “(1) such individual was authorized by the em-
16 ployer—

17 “(A) to undertake or recommend tangible
18 employment actions affecting the employee; or

19 “(B) to direct the employee’s daily work
20 activities; or

21 “(2) the negligence of the employer led to the
22 creation or continuation of that retaliatory hostile
23 work environment.”; and

1 (3) in subsection (d), as redesignated by para-
 2 graph (1), by striking “subsections (a) and (b)” and
 3 inserting “subsections (a), (b), and (c)”.

4 **SEC. 6. AMENDMENT TO THE REHABILITATION ACT OF**
 5 **1973.**

6 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
 7 TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE
 8 WORK ENVIRONMENT.—Section 501 of the Rehabilitation
 9 Act of 1973 (29 U.S.C. 791) is amended by adding at
 10 the end the following:

11 “(h) Subject to section 12 of the Fair Employment
 12 Protection Act of 2017, each department, agency, and in-
 13 strumentality in the executive branch of Government and
 14 the Smithsonian Institution shall be liable for the acts of
 15 any individual within such department, agency, instrumen-
 16 tality, or the Smithsonian Institution whose harassment
 17 of an individual with a disability has created or continued
 18 a hostile work environment, or a retaliatory hostile work
 19 environment, that constitutes nonaffirmative action em-
 20 ployment discrimination under this section if, at the time
 21 of the harassment—

22 “(1) such individual was authorized by that de-
 23 partment, agency, instrumentality, or the Smithso-
 24 nian Institution—

1 “(A) to undertake or recommend tangible
2 employment actions affecting the individual
3 with a disability; or

4 “(B) to direct the daily work activities of
5 the individual with a disability; or

6 “(2) the negligence of that department, agency,
7 instrumentality, or the Smithsonian Institution led
8 to the creation or continuation of that hostile work
9 environment or retaliatory hostile work environ-
10 ment.”.

11 (b) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
12 TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE
13 WORK ENVIRONMENT.—Section 504 of the Rehabilitation
14 Act of 1973 (29 U.S.C. 794) is amended by adding at
15 the end the following:

16 “(e) Subject to section 12 of the Fair Employment
17 Protection Act of 2017, an employer described under sub-
18 section (b) shall be liable for the acts of any individual
19 whose harassment of a qualified individual with a dis-
20 ability has created or continued a hostile work environ-
21 ment, or a retaliatory hostile work environment, that con-
22 stitutes employment discrimination under this section if,
23 at the time of the harassment—

24 “(1) such individual was authorized by such
25 employer—

“(2) the negligence of such employer led to the
creation or continuation of that hostile work environ-
ment or retaliatory hostile work environment.”.

12 “(3) Sections 501(h) and 504(e) shall apply to
13 hostile work environment claims and retaliatory hos-
14 tile work environment claims under this section.”.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended by adding at the end the following:

•S 2019 IS

1 “(1) such individual was authorized by the em-
2 ployer—

3 “(A) to undertake or recommend tangible
4 employment actions affecting the employee; or

5 “(B) to direct the employee’s daily work
6 activities; or

7 “(2) the negligence of the employer led to the
8 creation or continuation of that hostile work environ-
9 ment or retaliatory hostile work environment.”.

10 **SEC. 8. AMENDMENT TO THE GENETIC INFORMATION NON-**
11 **DISCRIMINATION ACT OF 2008.**

12 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
13 TILE WORK ENVIRONMENT.—Section 202 of the Genetic
14 Information Nondiscrimination Act of 2008 (42 U.S.C.
15 2000ff–1) is amended by adding at the end the following:

16 “(d) Subject to section 12 of the Fair Employment
17 Protection Act of 2017, an employer shall be liable for
18 the acts of any individual whose harassment of an em-
19 ployee has created or continued a hostile work environ-
20 ment that constitutes an unlawful employment practice
21 under this section if, at the time of the harassment—

22 “(1) such individual was authorized by the em-
23 ployer—

24 “(A) to undertake or recommend tangible
25 employment actions affecting the employee; or

1 “(B) to direct the employee’s daily work
2 activities; or

3 “(2) the negligence of the employer led to the
4 creation or continuation of that hostile work environ-
5 ment.”.

6 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-
7 TALIATORY HOSTILE WORK ENVIRONMENT.—Section
8 207(f) of the Genetic Information Nondiscrimination Act
9 (42 U.S.C. 2000ff–6(f)) is amended by striking “violations
10 of this subsection.” and inserting “violations of this sub-
11 section. Subject to section 12 of the Fair Employment
12 Protection Act of 2017, an employer shall be liable for
13 the acts of any individual whose harassment of an em-
14 ployee has created or continued a retaliatory hostile work
15 environment that constitutes discrimination under this
16 subsection if, at the time of the harassment—

17 “(1) such individual was authorized by the em-
18 ployer—

19 “(A) to undertake or recommend tangible
20 employment actions affecting the employee; or

21 “(B) to direct the employee’s daily work
22 activities; or

23 “(2) the negligence of the employer led to the
24 creation or continuation of that retaliatory hostile
25 work environment.”.

1 **SEC. 9. AMENDMENT TO THE GOVERNMENT EMPLOYEE**
 2 **RIGHTS ACT OF 1991.**

3 Section 302 of the Government Employee Rights Act
 4 of 1991 (42 U.S.C. 2000e–16b) is amended by adding at
 5 the end the following:

6 “(c) Subject to section 12 of the Fair Employment
 7 Protection Act of 2017, an employer of an individual de-
 8 scribed under section 304(a) shall be liable for the acts
 9 of any individual whose harassment of a State employee
 10 described in section 304 has created or continued a hostile
 11 work environment or a retaliatory hostile work environ-
 12 ment constituting discrimination under this section, if at
 13 the time of the harassment—

14 “(1) such individual was authorized by such
 15 employer—

16 “(A) to undertake or recommend tangible
 17 employment actions affecting the employee; or

18 “(B) to direct the employee’s daily work
 19 activities; or

20 “(2) the negligence of the employer led to the
 21 creation or continuation of that hostile work environ-
 22 ment or retaliatory hostile work environment.”.

23 **SEC. 10. AMENDMENT TO TITLE 3, UNITED STATES CODE.**

24 Section 411 of title 3, United States Code, is amend-
 25 ed—

1 (1) by redesignating subsections (c) through (f)
2 as subsections (d) through (g), respectively;

3 (2) by inserting after subsection (b) the fol-
4 lowing:

5 “(c) LIABILITY OF EMPLOYING OFFICE.—Subject to
6 section 12 of the Fair Employment Protection Act of
7 2017, an employing office shall be liable for the acts of
8 any individual whose harassment of a covered employee
9 has created or continued a hostile work environment or
10 a retaliatory hostile work environment constituting dis-
11 crimination under this section if, at the time of the harass-
12 ment—

13 “(1) such individual was authorized by the em-
14 ploying office—

15 “(A) to undertake or recommend tangible
16 employment actions affecting the covered em-
17 ployee; or

18 “(B) to direct the covered employee’s daily
19 work activities; or

20 “(2) the negligence of the employing office led
21 to the creation or continuation of that hostile work
22 environment or retaliatory hostile work environ-
23 ment.”; and

1 (3) in subsection (f), as redesignated by para-
 2 graph (1), by striking “subsections (a) through (c)”
 3 and inserting “subsections (a) through (d).”.

4 **SEC. 11. AMENDMENT TO THE CONGRESSIONAL ACCOUNT-**
 5 **ABILITY ACT OF 1995.**

6 Section 201 of the Congressional Accountability Act
 7 of 1995 (2 U.S.C. 1311) is amended—

8 (1) by redesignating subsection (d) as subsection (e);
 9 and

10 (2) by inserting after subsection (c) the following:

11 “(d) Subject to section 12 of the Fair Employment
 12 Protection Act of 2017, an employing office shall be liable
 13 for the acts of any individual whose harassment of a cov-
 14 ered employee has created or continued a hostile work en-
 15 vironment or a retaliatory hostile work environment that
 16 constitutes discrimination under this section if, at the time
 17 of the harassment—

18 “(1) such individual was authorized by the em-
 19 ploying office—

20 “(A) to undertake or recommend tangible
 21 employment actions affecting the covered em-
 22 ployee; or

23 “(B) to direct the covered employee’s daily
 24 work activities; or

1 “(2) the negligence of the employing office led
2 to the creation or continuation of that hostile work
3 environment or retaliatory hostile work environ-
4 ment.”.

5 **SEC. 12. RULE OF CONSTRUCTION.**

6 Nothing in this Act shall be construed to limit the
7 availability of, or access to, defenses available under the
8 law.

9 **SEC. 13. SAVINGS CLAUSE.**

10 If any provision of this Act is declared invalid, the
11 other provisions in this Act will remain in full force and
12 effect.

13 **SEC. 14. APPLICATION.**

14 This Act, and the amendments made by this Act,
15 shall apply to all claims pending on or after the date of
16 enactment of this Act.

○