

115TH CONGRESS  
1ST SESSION

# S. 443

To amend the Age Discrimination in Employment Act of 1967 and other laws to clarify appropriate standards for Federal employment discrimination and retaliation claims, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 27, 2017

Mr. CASEY (for himself, Mr. GRASSLEY, Mr. LEAHY, and Ms. COLLINS) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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## A BILL

To amend the Age Discrimination in Employment Act of 1967 and other laws to clarify appropriate standards for Federal employment discrimination and retaliation claims, and for other purposes.

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 “Protecting Older  
5 Workers Against Discrimination Act”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

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

1           (1) In enacting section 107 of the Civil Rights  
2   Act of 1991 (adding section 703(m) of the Civil  
3   Rights Act of 1964), Congress reaffirmed its under-  
4   standing that unlawful discrimination is often dif-  
5   ficult to detect and prove because discriminators do  
6   not usually admit their discrimination and often try  
7   to conceal their true motives. Section 703(m) of the  
8   Civil Rights Act of 1964 expressly approved so-  
9   called “mixed motive” claims, providing that an un-  
10   lawful employment practice is established when a  
11   protected characteristic was a motivating factor for  
12   any employment practice, even though other factors  
13   also motivated the practice.

14           (2) Congress enacted amendments to other civil  
15   rights statutes, including the Age Discrimination in  
16   Employment Act of 1967 (referred to in this section  
17   as the “ADEA”), the Americans with Disabilities  
18   Act of 1990, and the Rehabilitation Act of 1973, but  
19   Congress did not expressly amend those statutes to  
20   address mixed motive discrimination.

21           (3) In the case of *Gross v. FBL Financial Serv-*  
22   *ices, Inc.*, 557 U.S. 167 (2009), the Supreme Court  
23   held that, because Congress did not expressly amend  
24   the ADEA to address mixed motive claims, such  
25   claims were unavailable under the ADEA, and in-

1       stead the complainant bears the burden of proving  
2       that a protected characteristic or protected activity  
3       was the “but for” cause of an unlawful employment  
4       practice. This decision has significantly narrowed  
5       the scope of protections afforded by the statutes that  
6       were not expressly amended in 1991 to address  
7       mixed motive claims.

8       (b) PURPOSES.—The purposes of this Act are—

9           (1) to clarify congressional intent that mixed  
10       motive claims shall be available, and that a com-  
11       plaining party need not prove that a protected char-  
12       acteristic or protected activity was the “but for”  
13       cause of an unlawful employment practice, under the  
14       ADEA and similar civil rights provisions;

15          (2) to reject the Supreme Court’s reasoning in  
16       the Gross decision that Congress’ failure to amend  
17       any statute other than title VII of the Civil Rights  
18       Act of 1964 (with respect to discrimination claims),  
19       in enacting section 107 of the Civil Rights Act of  
20       1991, suggests that Congress intended to disallow  
21       mixed motive claims under other statutes; and

22          (3) to clarify that complaining parties—

23           (A) may rely on any type or form of ad-  
24       missible evidence to establish their claims of an  
25       unlawful employment practice;

1 (B) are not required to demonstrate that  
 2 the protected characteristic or activity was the  
 3 sole cause of the employment practice; and

4 (C) may demonstrate an unlawful employ-  
 5 ment practice through any available method of  
 6 proof or analytical framework.

7 **SEC. 3. STANDARDS OF PROOF.**

8 (a) AGE DISCRIMINATION IN EMPLOYMENT ACT OF  
 9 1967.—

10 (1) CLARIFYING PROHIBITION AGAINST IMPER-  
 11 MISSIBLE CONSIDERATION OF AGE IN EMPLOYMENT  
 12 PRACTICES.—Section 4 of the Age Discrimination in  
 13 Employment Act of 1967 (29 U.S.C. 623) is amend-  
 14 ed by inserting after subsection (f) the following:

15 “(g)(1) Except as otherwise provided in this Act, an  
 16 unlawful practice is established under this Act when the  
 17 complaining party demonstrates that age or an activity  
 18 protected by subsection (d) was a motivating factor for  
 19 any practice, even though other factors also motivated the  
 20 practice.

21 “(2) In establishing an unlawful practice under this  
 22 Act, including under paragraph (1) or by any other meth-  
 23 od of proof, a complaining party—

24 “(A) may rely on any type or form of admis-  
 25 sible evidence and need only produce evidence suffi-

cient for a reasonable trier of fact to find that an unlawful practice occurred under this Act; and

“(B) shall not be required to demonstrate that age or an activity protected by subsection (d) was the sole cause of a practice.”.

(2) REMEDIES.—Section 7 of such Act (29 U.S.C. 626) is amended—

(A) in subsection (b)—

(i) in the first sentence, by striking

“The” and inserting “(1) The”;

(ii) in the third sentence, by striking

“Amounts” and inserting the following:

“(2) Amounts”;

(iii) in the fifth sentence, by striking

“Before” and inserting the following:

“(4) Before”; and

(iv) by inserting before paragraph (4),

as designated by clause (iii) of this sub-

paragraph, the following:

“(3) On a claim in which an individual demonstrates

that age was a motivating factor for any employment prac-

tice, under section 4(g)(1), and a respondent demonstrates

that the respondent would have taken the same action in

the absence of the impermissible motivating factor, the

court—

1           “(A) may grant declaratory relief, injunctive re-  
 2           lief (except as provided in subparagraph (B)), and  
 3           attorney’s fees and costs demonstrated to be directly  
 4           attributable only to the pursuit of a claim under sec-  
 5           tion 4(g)(1); and

6           “(B) shall not award damages or issue an order  
 7           requiring any admission, reinstatement, hiring, pro-  
 8           motion, or payment.”; and

9                       (B) in subsection (c)(1), by striking “Any”  
 10           and inserting “Subject to subsection (b)(3),  
 11           any”.

12           (3) DEFINITIONS.—Section 11 of such Act (29  
 13           U.S.C. 630) is amended by adding at the end the  
 14           following:

15           “(m) The term ‘demonstrates’ means meets the bur-  
 16           dens of production and persuasion.”.

17           (4) FEDERAL EMPLOYEES.—Section 15 of such  
 18           Act (29 U.S.C. 633a) is amended by adding at the  
 19           end the following:

20           “(h) Sections 4(g) and 7(b)(3) shall apply to mixed  
 21           motive claims (involving practices described in section  
 22           4(g)(1)) under this section.”.

23           (b) TITLE VII OF THE CIVIL RIGHTS ACT OF  
 24           1964.—

1           (1) CLARIFYING PROHIBITION AGAINST IMPER-  
 2           MISSIBLE CONSIDERATION OF RACE, COLOR, RELI-  
 3           GION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT  
 4           PRACTICES.—Section 703 of the Civil Rights Act of  
 5           1964 (42 U.S.C. 2000e–2) is amended by striking  
 6           subsection (m) and inserting the following:

7           “(m) Except as otherwise provided in this title, an  
 8           unlawful employment practice is established under this  
 9           title when the complaining party demonstrates that race,  
 10          color, religion, sex, or national origin or an activity pro-  
 11          tected by section 704(a) was a motivating factor for any  
 12          employment practice, even though other factors also moti-  
 13          vated the practice.”.

14          (2) FEDERAL EMPLOYEES.—Section 717 of  
 15          such Act (42 U.S.C. 2000e–16) is amended by add-  
 16          ing at the end the following:

17          “(g) Sections 703(m) and 706(g)(2)(B) shall apply  
 18          to mixed motive cases (involving practices described in sec-  
 19          tion 703(m)) under this section.”.

20          (c) AMERICANS WITH DISABILITIES ACT OF 1990.—

21          (1) DEFINITIONS.—Section 101 of the Ameri-  
 22          cans with Disabilities Act of 1990 (42 U.S.C.  
 23          12111) is amended by adding at the end the fol-  
 24          lowing:

1           “(11) DEMONSTRATES.—The term ‘demon-  
 2           strates’ means meets the burdens of production and  
 3           persuasion.”.

4           (2) CLARIFYING PROHIBITION AGAINST IMPER-  
 5           MISSIBLE CONSIDERATION OF DISABILITY IN EM-  
 6           PLOYMENT PRACTICES.—Section 102 of such Act  
 7           (42 U.S.C. 12112) is amended by adding at the end  
 8           the following:

9           “(e) PROOF.—

10           “(1) ESTABLISHMENT.—Except as otherwise  
 11           provided in this Act, a discriminatory practice is es-  
 12           tablished under this Act when the complaining party  
 13           demonstrates that disability or an activity protected  
 14           by subsection (a) or (b) of section 503 was a moti-  
 15           vating factor for any employment practice, even  
 16           though other factors also motivated the practice.

17           “(2) DEMONSTRATION.—In establishing a dis-  
 18           criminatory practice under paragraph (1) or by any  
 19           other method of proof, a complaining party—

20           “(A) may rely on any type or form of ad-  
 21           missible evidence and need only produce evi-  
 22           dence sufficient for a reasonable trier of fact to  
 23           find that a discriminatory practice occurred  
 24           under this Act; and

1           “(B) shall not be required to demonstrate  
2           that disability or an activity protected by sub-  
3           section (a) or (b) of section 503 was the sole  
4           cause of an employment practice.”.

5           (3) CERTAIN ANTIRETALIATION CLAIMS.—Sec-  
6           tion 503(c) of such Act (42 U.S.C. 12203(c)) is  
7           amended—

8                   (A) by striking “The remedies” and insert-  
9                   ing the following:

10           “(1) IN GENERAL.—Except as provided in para-  
11           graph (2), the remedies”; and

12                   (B) by adding at the end the following:

13           “(2) CERTAIN ANTIRETALIATION CLAIMS.—Sec-  
14           tion 107(c) shall apply to claims under section  
15           102(e)(1) with respect to title I.”.

16           (4) REMEDIES.—Section 107 of such Act (42  
17           U.S.C. 12117) is amended by adding at the end the  
18           following:

19           “(c) DISCRIMINATORY MOTIVATING FACTOR.—On a  
20           claim in which an individual demonstrates that disability  
21           was a motivating factor for any employment practice,  
22           under section 102(e)(1), and a respondent demonstrates  
23           that the respondent would have taken the same action in  
24           the absence of the impermissible motivating factor, the  
25           court—

1 “(1) may grant declaratory relief, injunctive re-  
2 lief (except as provided in paragraph (2)), and attor-  
3 ney’s fees and costs demonstrated to be directly at-  
4 tributable only to the pursuit of a claim under sec-  
5 tion 102(e)(1); and

6 “(2) shall not award damages or issue an order  
7 requiring any admission, reinstatement, hiring, pro-  
8 motion, or payment.”.

9 (d) REHABILITATION ACT OF 1973.—

10 (1) IN GENERAL.—Sections 501(f), 503(d), and  
11 504(d) of the Rehabilitation Act of 1973 (29 U.S.C.  
12 791(f), 793(d), and 794(d)), are each amended by  
13 adding after the words “title I of the Americans  
14 with Disabilities Act of 1990 (42 U.S.C. 12111 et  
15 seq.)” the following: “, including the standards of  
16 causation or methods of proof applied under section  
17 102(e) of that Act (42 U.S.C. 12112(e)),”.

18 (2) FEDERAL EMPLOYEES.—The amendment  
19 made by paragraph (1) to section 501(f) shall be  
20 construed to apply to all employees covered by sec-  
21 tion 501.

1 **SEC. 4. APPLICATION.**

2       This Act, and the amendments made by this Act,  
3 shall apply to all claims pending on or after the date of  
4 enactment of this Act.

