

112<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 3317

To restore the effective use of group actions for claims arising under title VII of the Civil Rights Act of 1964, title I of the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, section 1977 of the Revised Statutes, and the Genetic Information Non-discrimination Act of 2008, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JUNE 20, 2012

Mr. FRANKEN (for himself, Mr. LEAHY, Mrs. MURRAY, Mr. HARKIN, Mr. WHITEHOUSE, Mr. BLUMENTHAL, Ms. MIKULSKI, Mr. SANDERS, Mrs. BOXER, Mr. AKAKA, Mr. COONS, Mr. INOUE, Mr. KERRY, Mrs. SHAHEEN, Mr. BINGAMAN, Mr. BROWN of Ohio, Mrs. GILLIBRAND, Mr. UDALL of New Mexico, Mr. DURBIN, Mr. WYDEN, Mr. MERKLEY, Ms. CANTWELL, Mr. UDALL of Colorado, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To restore the effective use of group actions for claims arising under title VII of the Civil Rights Act of 1964, title I of the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, section 1977 of the Revised Statutes, and the Genetic Information Nondiscrimination Act of 2008, 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,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Equal Employment  
3 Opportunity Restoration Act of 2012”.

4 **SEC. 2. FINDINGS AND PURPOSE.**

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

6 (1) Congress has enacted laws to eradicate  
7 workplace discrimination and to secure equal em-  
8 ployment opportunities for all Americans, as noted  
9 in *Teamsters v. United States*, 431 U.S. 324 (1977)  
10 and *McDonnell Douglas Corp. v. Green*, 411 U.S.  
11 792 (1973) (stating that civil rights laws are meant  
12 “to assure equality of employment opportunities and  
13 to eliminate . . . discriminatory practices and de-  
14 vices” in the workplace).

15 (2) Workplace discrimination laws prohibit sub-  
16 jective employment practices that operate to deny  
17 equal employment opportunities to employees, as ex-  
18 plained in *Watson v. Fort Worth Bank & Trust*, 487  
19 U.S. 977 (1988), which stated that personnel deci-  
20 sions “based on the exercise of personal judgment or  
21 the application of inherently subjective criteria” are  
22 unlawful when the personnel decisions have the ef-  
23 fect of discriminating on grounds prohibited by law.

24 (3) Class actions often have been the most ef-  
25 fective means to enforce employment discrimination  
26 laws, as explained in *East Texas Motor Freight Sys-*

1       tem Inc. v. Rodriguez, 431 U.S. 395 (1977)  
2       (“[S]uits alleging . . . discrimination are often by  
3       their very nature class suits, involving classwide  
4       wrongs” where “[e]ommon questions of law or fact  
5       are typically present.”) and in Eisen v. Carlisle &  
6       Jacquelin, 417 U.S. 156 (1974) (“Economic reality  
7       dictates that [claims of relatively small value] pro-  
8       ceed as a class action or not at all.”).

9               (4) Historically, a class action alleging employ-  
10       ment discrimination could be maintained if the class  
11       was united by a common issue of law or fact. As a  
12       leading legal treatise, William B. Rubenstein, 1  
13       Newberg on Class Actions § 3:20 (5th ed. 2011), ex-  
14       plained, “this requirement [was] easily met in most  
15       cases”. As another leading treatise, Charles A.  
16       Wright et al., 7A Federal Practice and Procedure,  
17       Wright and Miller § 1763 (3rd ed. 2005), explained,  
18       this requirement had been given “permissive applica-  
19       tion”.

20              (5) However, the Supreme Court recently made  
21       it more difficult for victims of discrimination to vin-  
22       dicate claims for their rights. In Wal-Mart Stores,  
23       Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Court re-  
24       quired “convincing proof of a companywide discrimi-  
25       natory pay and promotion policy” as a prerequisite

1 to class certification. In a dissent in that case, Jus-  
 2 tice Ginsberg wrote that the Court’s decision “dis-  
 3 qualifies the class at the starting gate”.

4 (b) PURPOSE.—The purpose of this Act is to restore  
 5 employees’ ability to challenge, as a group, discriminatory  
 6 employment practices, including subjective employment  
 7 practices.

8 **SEC. 3. GROUP ACTIONS.**

9 (a) IN GENERAL.—Part VI of title 28, United States  
 10 Code, is amended by adding at the end the following:

11 **“CHAPTER 182—GROUP ACTIONS**

“Sec.

“4201. Group actions in certain employment discrimination cases.

12 **“§ 4201. Group actions in certain employment dis-**  
 13 **crimination cases**

14 “(a) GROUP ACTIONS.—In seeking relief under title  
 15 VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et  
 16 seq.), title I of the Americans with Disabilities Act of 1990  
 17 (42 U.S.C. 12111 et seq.), title V of the Rehabilitation  
 18 Act of 1973 (29 U.S.C. 791 et seq.), section 1977 of the  
 19 Revised Statutes (42 U.S.C. 1981), or title II of the Ge-  
 20 netic Information Nondiscrimination Act of 2008 (42  
 21 U.S.C. 2000ff et seq.) (individually referred to in this sec-  
 22 tion as a ‘covered employment statute’), 1 or more mem-  
 23 bers (collectively referred to in this section as the ‘rep-  
 24 resentative party’) of a group may sue on behalf of all

1 members of the group if the representative party shows,  
2 by a reasonable inference, that—

3 “(1) the members of the group are so numerous  
4 that their joinder is impracticable;

5 “(2) the claims of the representative party are  
6 typical of the claims of the group the representative  
7 party seeks to represent and the representative party  
8 and the representative party’s counsel will fairly and  
9 adequately protect the interests of the group; and

10 “(3) the members of the group are, or have  
11 been, subject to an employment practice that has ad-  
12 versely affected or is adversely affecting a significant  
13 portion of the group’s members.

14 “(b) SUBJECTIVE EMPLOYMENT PRACTICES.—

15 “(1) DEFINITION.—In this subsection, the term  
16 ‘subjective employment practice’ means—

17 “(A) an employer’s policy of leaving per-  
18 sonnel decisions to the unguided discretion of  
19 supervisors, managers, and other employees  
20 with authority to make such personnel deci-  
21 sions; or

22 “(B) an employment practice that com-  
23 bines a subjective employment practice, as de-  
24 fined in subparagraph (A), with other types of  
25 personnel decisions.

1           “(2) CHALLENGES.—A representative party  
2           may challenge a subjective employment practice cov-  
3           ered by a covered employment statute in a group ac-  
4           tion filed under this section to the same extent as  
5           the party may challenge any other employment prac-  
6           tice covered by the covered employment statute in  
7           such an action.

8           “(3) EXERCISE OF DISCRETION IN DIFFERENT  
9           WAYS.—The fact that individual supervisors, man-  
10          agers, or other employees with authority to make  
11          personnel decisions may exercise discretion in dif-  
12          ferent ways in applying a subjective employment  
13          practice under the covered employment statute shall  
14          not preclude a representative party from filing a cor-  
15          responding group action under this section.

16          “(4) CONSIDERATION OF WRITTEN NON-  
17          DISCRIMINATION POLICY.—In determining whether  
18          to certify a group action challenging an employment  
19          practice, the court may consider as evidence, in op-  
20          position to certification, an employer’s written non-  
21          discrimination policy only to the extent that the em-  
22          ployer demonstrates that the policy has been consist-  
23          ently and effectively used to prevent and, where nec-  
24          essary, promptly correct discrimination against the  
25          group.

1       “(c) RELATIONSHIP TO RULE 23 OF THE FEDERAL  
2 RULES OF CIVIL PROCEDURE.—

3           “(1) ELECTION OF PROCEDURE.—The rep-  
4 resentative party may elect to proceed in a group ac-  
5 tion under this section or in a class action under  
6 rule 23 of the Federal Rules of Civil Procedure. This  
7 election shall occur not later than the latest date on  
8 which the representative party may petition for class  
9 certification under rule 23 of the Federal Rules of  
10 Civil Procedure.

11           “(2) RULE 23 REQUIREMENTS.—To the extent  
12 consistent with this section, the court shall apply the  
13 provisions of rule 23(c) through rule 23(h) of the  
14 Federal Rules of Civil Procedure, including the re-  
15 quirements under rule 23 regarding notice and re-  
16 quests for exclusion, to claims brought pursuant to  
17 this section.

18           “(3) INTERLOCUTORY APPELLATE REVIEW.—  
19 Decisions granting or denying certification of claims  
20 as group actions under this section are subject to re-  
21 view to the same extent as orders granting or deny-  
22 ing class certification pursuant to rule 23 of the  
23 Federal Rules of Civil Procedure.

24           “(4) CLASS ACTION FAIRNESS ACT.—Group ac-  
25 tions certified under this section shall be subject to

1 section 1332(d), section 1453, and chapter 114 to  
2 the same extent as class actions certified pursuant  
3 to rule 23 of the Federal Rules of Civil Procedure.

4 “(5) RULE OF CONSTRUCTION.—Nothing in  
5 this section shall be construed to create any infer-  
6 ence regarding the standards for determining wheth-  
7 er claims may be adjudicated together under any law  
8 other than the covered employment statutes.

9 “(d) REMEDIES.—

10 “(1) AVAILABILITY OF REMEDIES.—If an em-  
11 ployer has been found liable under a covered employ-  
12 ment statute against a group certified under this  
13 section, the court may deny a remedy available  
14 under the covered employment statute to a member  
15 of the group only if the employer demonstrates, by  
16 a preponderance of the evidence, that the member of  
17 the group would not have received the corresponding  
18 employment opportunity or benefit even in the ab-  
19 sence of a violation of the covered employment stat-  
20 ute.

21 “(2) RELIEF.—

22 “(A) IN GENERAL.—The court shall fash-  
23 ion the most complete relief possible for mem-  
24 bers of a prevailing group described in this sec-



1           tion and shall have broad discretion in deter-  
2           mining how to fashion that relief.

3           “(B) EXERCISE OF DISCRETION.—In exer-  
4           cising its discretion under this paragraph, the  
5           court shall—

6                   “(i) use such procedures as the inter-  
7                   ests of justice warrant, which procedures  
8                   may include economic or statistical mod-  
9                   eling, mathematical calculation, sampling,  
10                  individual adjudication, and other means  
11                  the court may adopt;

12                   “(ii) consider which procedure will  
13                   best ensure that members of the group will  
14                   be made whole;

15                   “(iii) consider which procedure will  
16                   best minimize the cost to and burden on  
17                   the parties; and

18                   “(iv) consider which procedure most  
19                   reliably and efficiently accounts for limita-  
20                   tions on the court’s ability to identify indi-  
21                   vidual members of the group and to meas-  
22                   ure the harm incurred by individual mem-  
23                   bers of the group.”.

1 (b) TECHNICAL AND CONFORMING AMENDMENT.—

2 The table of chapters for part VI of title 28, United States

3 Code, is amended by adding at the end the following:

“182. Group actions ..... 4201”.

