

113TH CONGRESS
1ST SESSION

S. 1391

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.

IN THE SENATE OF THE UNITED STATES

JULY 30, 2013

Mr. HARKIN (for himself, Mr. GRASSLEY, 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 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 ‘dem-
2 onstrates’ means meets the burdens of production
3 and 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(g), 503(d), and
 11 504(d) of the Rehabilitation Act of 1973 (29 U.S.C.
 12 791(g), 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(g) 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.

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