

116TH CONGRESS  
1ST SESSION

# S. 2287

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

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## IN THE SENATE OF THE UNITED STATES

JULY 25, 2019

Ms. BALDWIN (for herself and Mr. LEAHY) 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 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 2019”.

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

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

8 (1) In fiscal year 2018, sex discrimination  
9 charges comprised 32.3 percent of the charges filed

1 with the Equal Employment Opportunity Commis-  
2 sion (referred to in this section as the “EEOC”)  
3 under all the statutes the agency enforces. In fiscal  
4 year 2018, 84.1 percent of sexual harassment  
5 charges were filed by women.

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

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

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

1        ment in male-dominated industries operates as a  
2        barrier to women’s entry into higher paying jobs.

3            (5) Racial harassment remains a pervasive  
4        problem in the workplace in the United States. In  
5        fiscal year 2018, 32.2 percent of the charges of al-  
6        leged violations filed with the EEOC were charges  
7        on the basis of race.

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

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

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

23           (9) The Supreme Court’s decision in *Vance v.*  
24       *Ball State University*, 570 U.S. 421 (2013), signifi-  
25       cantly undermines protections against discrimination

1 that the Supreme Court established in *Faragher v.*  
2 *Boca Raton*, 524 U.S. 775 (1998) and *Burlington*  
3 *Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998),  
4 which held that an employer may be vicariously lia-  
5 ble under title VII of the Civil Rights Act of 1964  
6 for harassment of an employee by an individual that  
7 has supervisory authority over that employee.

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

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

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

23 (11) Whether an employer should be vicariously  
24 liable for harassment is a functional analysis that is  
25 based not on the title of the harasser or the employ-

1 er's job description for the harasser's position but on  
2 the authority vested in that individual by the em-  
3 ployer.

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

16 (13) Individuals who direct the daily work ac-  
17 tivities of employees but do not have the authority  
18 to take tangible employment actions against those  
19 employees are common in the workplace in the  
20 United States, particularly in industries that employ  
21 low-wage workers. Workers in industries including  
22 retail, restaurant, health care, housekeeping, and  
23 personal care, which may pay low wages and employ  
24 large numbers of female workers, are particularly  
25 vulnerable to harassment by individuals who have

1 the power to direct day-to-day work activities but  
 2 lack the power to take tangible employment actions.

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

13 (1) an individual with the authority to under-  
 14 take or recommend tangible employment actions af-  
 15 fecting the victim of the harassment; or

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

18 **SEC. 3. AMENDMENT TO TITLE VII OF THE CIVIL RIGHTS**

19 **ACT OF 1964.**

20 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
 21 TILE WORK ENVIRONMENT.—Section 703 of the Civil  
 22 Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by  
 23 adding at the end the following:

24 “(o) Subject to section 12 of the Fair Employment  
 25 Protection Act of 2019, an employer shall be liable for

1 the acts of any individual whose harassment of an em-  
 2 ployee has created or continued a hostile work environ-  
 3 ment that constitutes an unlawful employment practice  
 4 under this section if, at the time of the harassment—

5           “(1) such individual was authorized by that em-  
 6       ployer—

7                   “(A) to undertake or recommend tangible  
 8       employment actions affecting the employee; or

9                   “(B) to direct the employee’s daily work  
 10      activities; or

11           “(2) the negligence of the employer led to the  
 12      creation or continuation of that hostile work environ-  
 13      ment.”.

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

18           (1) by redesignating subsection (b) as sub-  
 19      section (c); and

20           (2) by inserting after subsection (a) the fol-  
 21      lowing:

22           “(b) Subject to section 12 of the Fair Employment  
 23      Protection Act of 2019, an employer shall be liable for  
 24      the acts of any individual whose harassment of an em-  
 25      ployee has created or continued a retaliatory hostile work

1 environment that constitutes an unlawful employment  
 2 practice as described under subsection (a) if, at the time  
 3 of the harassment—

4 “(1) such individual was authorized by that em-  
 5 ployer—

6 “(A) to undertake or recommend tangible  
 7 employment actions affecting the employee; or

8 “(B) to direct the employee’s daily work  
 9 activities; or

10 “(2) the negligence of the employer led to the  
 11 creation or continuation of that retaliatory hostile  
 12 work environment.”.

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

16 “(g) The provisions of sections 703(o) and 704(b)  
 17 shall apply to hostile work environment claims and retalia-  
 18 tory hostile work environment claims, respectively, under  
 19 this section.”.

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

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

1       “(n) Subject to section 12 of the Fair Employment  
2 Protection Act of 2019, an employer shall be liable for  
3 the acts of any individual whose harassment of an em-  
4 ployee has created or continued a hostile work environ-  
5 ment that is unlawful under this section if, at the time  
6 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 hostile work environ-  
15 ment.”.

16       (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
17 TALIATORY HOSTILE WORK ENVIRONMENT.—Section  
18 4(d) of the Age Discrimination in Employment Act of  
19 1967 (29 U.S.C. 623) is amended by striking “or litiga-  
20 tion under this Act.” and inserting “or litigation under  
21 this Act. Subject to section 12 of the Fair Employment  
22 Protection Act of 2019, an employer shall be liable for  
23 the acts of any individual whose harassment of an em-  
24 ployee has created or continued a retaliatory hostile work

1 environment that is unlawful under this subsection if, at  
 2 the time of the harassment—

3 “(1) such individual was authorized by that em-  
 4 ployer—

5 “(A) to undertake or recommend tangible  
 6 employment actions affecting the employee; or

7 “(B) to direct the employee’s daily work  
 8 activities; or

9 “(2) the negligence of the employer led to the  
 10 creation or continuation of that retaliatory hostile  
 11 work environment.”.

12 (c) FEDERAL EMPLOYEES.—Section 15 of the Age  
 13 Discrimination in Employment Act of 1967 (29 U.S.C.  
 14 633a) is amended by adding at the end the following:

15 “(h) Subsections (d) and (n) of section 4 shall apply  
 16 to retaliatory hostile work environment claims and hostile  
 17 work environment claims, respectively, under this sec-  
 18 tion.”.

19 **SEC. 5. AMENDMENT TO THE AMERICANS WITH DISABIL-**  
 20 **ITIES ACT OF 1990.**

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

1       “(e) STANDARD FOR EMPLOYER LIABILITY FOR  
2 HOSTILE WORK ENVIRONMENT.—Subject to section 12 of  
3 the Fair Employment Protection Act of 2019, an employer  
4 shall be liable for the acts of any individual whose harass-  
5 ment of an employee has created or continued a hostile  
6 work environment that constitutes discrimination against  
7 a qualified individual on the basis of disability under this  
8 section if, at the time of the harassment—

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

11                       “(A) to undertake or recommend tangible  
12       employment actions affecting the qualified indi-  
13       vidual; or

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

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

19       (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
20 TALIATORY HOSTILE WORK ENVIRONMENT.—Section 503  
21 of the Americans with Disabilities Act of 1990 (42 U.S.C.  
22 12203) is amended—

23               (1) by redesignating subsection (c) as sub-  
24       section (d);

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

3           “(c) EMPLOYER LIABILITY.—Subject to section 12 of  
4 the Fair Employment Protection Act of 2019, an employer  
5 shall be liable for the acts of any individual whose harass-  
6 ment of an employee has created or continued a retaliatory  
7 hostile work environment that constitutes retaliatory dis-  
8 crimination, as described in subsection (a), or the carrying  
9 out of any unlawful acts described in subsection (b), if,  
10 at the time of the harassment—

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

13           “(A) to undertake or recommend tangible  
14           employment actions affecting the employee; or

15           “(B) to direct the employee’s daily work  
16           activities; or

17           “(2) the negligence of the employer led to the  
18           creation or continuation of that retaliatory hostile  
19           work environment.”; and

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

1 **SEC. 6. AMENDMENT TO THE REHABILITATION ACT OF**  
2 **1973.**

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

8 “(g) Subject to section 12 of the Fair Employment  
9 Protection Act of 2019, each department, agency, and in-  
10 strumentality in the executive branch of Government and  
11 the Smithsonian Institution shall be liable for the acts of  
12 any individual within such department, agency, instrumen-  
13 tality, or the Smithsonian Institution whose harassment  
14 of an individual with a disability has created or continued  
15 a hostile work environment, or a retaliatory hostile work  
16 environment, that constitutes nonaffirmative action em-  
17 ployment discrimination under this section if, at the time  
18 of the harassment—

19 “(1) such individual was authorized by that de-  
20 partment, agency, instrumentality, or the Smithso-  
21 nian Institution—

22 “(A) to undertake or recommend tangible  
23 employment actions affecting the individual  
24 with a disability; or

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

1           “(2) the negligence of that department, agency,  
2           instrumentality, or the Smithsonian Institution led  
3           to the creation or continuation of that hostile work  
4           environment or retaliatory hostile work environ-  
5           ment.”.

6           (b) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
7           TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE  
8           WORK ENVIRONMENT.—Section 504 of the Rehabilitation  
9           Act of 1973 (29 U.S.C. 794) is amended by adding at  
10          the end the following:

11          “(e) Subject to section 12 of the Fair Employment  
12          Protection Act of 2019, an employer described under sub-  
13          section (b) shall be liable for the acts of any individual  
14          whose harassment of a qualified individual with a dis-  
15          ability has created or continued a hostile work environ-  
16          ment, or a retaliatory hostile work environment, that con-  
17          stitutes employment discrimination under this section if,  
18          at the time of the harassment—

19                 “(1) such individual was authorized by such  
20                 employer—

21                         “(A) to undertake or recommend tangible  
22                         employment actions affecting the qualified indi-  
23                         vidual with a disability; or

24                         “(B) to direct the daily work activities of  
25                         the qualified individual with a disability; or

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

4           (c) REMEDIES.—Section 505 of the Rehabilitation  
5 Act of 1973 (29 U.S.C. 794a) is amended by adding at  
6 the end of subsection (a) the following:

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

10 **SEC. 7. AMENDMENT TO SECTION 1977 OF THE REVISED**  
11 **STATUTES.**

12           Section 1977 of the Revised Statutes (42 U.S.C.  
13 1981) is amended by adding at the end the following:

14           “(d) Subject to section 12 of the Fair Employment  
15 Protection Act of 2019, a nongovernmental employer shall  
16 be liable for the acts of any individual whose harassment  
17 of an employee has created a hostile work environment  
18 or a retaliatory hostile work environment, constituting an  
19 unlawful employment practice, if, at the time of the har-  
20 assment—

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

23           “(A) to undertake or recommend tangible  
24           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 or retaliatory hostile work environment.”.

6 **SEC. 8. AMENDMENT TO THE GENETIC INFORMATION NON-**  
7 **DISCRIMINATION ACT OF 2008.**

8           (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
9           TILE WORK ENVIRONMENT.—Section 202 of the Genetic  
10           Information Nondiscrimination Act of 2008 (42 U.S.C.  
11           2000ff–1) is amended by adding at the end the following:

12           “(d) STANDARD FOR EMPLOYER LIABILITY FOR  
13           HOSTILE WORK ENVIRONMENT.—Subject to section 12 of  
14           the Fair Employment Protection Act of 2019, an employer  
15           shall be liable for the acts of any individual whose harass-  
16           ment of an employee has created or continued a hostile  
17           work environment that constitutes an unlawful employ-  
18           ment practice under this section if, at the time of the har-  
19           assment—

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

22           “(A) to undertake or recommend tangible  
23           employment actions affecting the employee; or

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

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

4           (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
5           TALIATORY HOSTILE WORK ENVIRONMENT.—Section  
6           207(f) of the Genetic Information Nondiscrimination Act  
7           (42 U.S.C. 2000ff–6(f)) is amended by striking “violations  
8           of this subsection.” and inserting “violations of this sub-  
9           section. Subject to section 12 of the Fair Employment  
10          Protection Act of 2019, an employer shall be liable for  
11          the acts of any individual whose harassment of an em-  
12          ployee has created or continued a retaliatory hostile work  
13          environment that constitutes discrimination under this  
14          subsection if, at the time of 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.”.

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 2019, 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 (e) 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           2019, 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) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
12 TALIATORY HOSTILE WORK ENVIRONMENT.—Subject to  
13 section 12 of the Fair Employment Protection Act of  
14 2019, an employing office shall be liable for the acts of  
15 any individual whose harassment of a covered employee  
16 has created or continued a hostile work environment or  
17 a retaliatory hostile work environment that constitutes dis-  
18 crimination under this section if, at the time of the harass-  
19 ment—

20           “(1) such individual was authorized by the em-  
21 ploying office—

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

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

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

7 **SEC. 12. RULE OF CONSTRUCTION.**

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

11 **SEC. 13. SAVINGS CLAUSE.**

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

15 **SEC. 14. APPLICATION.**

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

○