112TH CONGRESS
2D SESSION

S. 2189

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

IN THE SENATE OF THE UNITED STATES

MARCH 13, 2012

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

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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 antidiscrimination and antiretaliation claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Protecting Older Workers Against Discrimination Act''.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1) In enacting the Age Discrimination in Employment Act of 1967 (referred to in this section as the ''ADEA''), Congress intended to eliminate workplace discrimination against individuals 40 and older based on age.

(2) In enacting the Civil Rights Act of 1991, Congress reaffirmed its understanding that unlawful discrimination is often difficult to detect and prove because discriminators do not usually admit their discrimination and often try to conceal their true motives.

(3) Congress intended that courts would interpret Federal statutes, such as the ADEA, that are similar in their text or purpose to title VII of the Civil Rights Act of 1964, in ways that were consistent with the ways in which courts had interpreted similar provisions in that title VII. The Supreme Court's decision in Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), departed from this intent and circumvented well-established precedents.

(4) Congress disagrees with the Supreme Court's interpretation, in Gross, of the ADEA and with the reasoning underlying the decision, specifically language in which the Supreme Court—

(A) interpreted Congress' failure to amend any statute other than title VII of the Civil Rights Act of 1964 in enacting section 107 of the Civil Rights Act of 1991 (adding section 703(m) of the Civil Rights Act of 1964), to mean that Congress intended to disallow mixed motive claims under other statutes;

(B) declined to apply the Supreme Court's ruling in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a part of which was subsequently approved by Congress, and enacted into law by section 107 of the Civil Rights Act of 1991, as section 703(m) of the Civil Rights Act of 1964, which provides that an unlawful employment practice is established when a protected characteristic was a motivating factor for any employment practice, even though other factors also motivated the practice;

(C) interpreted causation language and standards, including the words ''because of'' that are similar in their text or purpose to title VII of the Civil Rights Act of 1964, in a manner that departed from established precedent;

(D) held that mixed motive claims were unavailable under the ADEA; and

(E) indicated that other established causation standards and methods of proof, including the use of any type or form of admissible circumstantial or direct evidence as recognized in Desert Palace Inc. v. Costa, 539 U.S. 90 (2003), or the availability of the analytical framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), might not apply to the ADEA.

(5) Lower courts have applied Gross to a wide range of Federal statutes, such as the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(6) The Gross decision has significantly narrowed the scope of protections intended to be afforded by the ADEA.

(7) Congress must restore and reaffirm established causation standards and methods of proof to ensure victims of unlawful discrimination and retaliation are able to enforce their rights.

(b) PURPOSES.—The purposes of this Act include—

(1) to restore the availability of mixed motive claims and to reject the requirements the Supreme Court enunciated in Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009), that a com-

plaining party always bears the burden of proving that a protected characteristic or protected activity was the ''but for'' cause of an unlawful employment practice;

(2) to reject the Supreme Court's reasoning in Gross that Congress' failure to amend any statute other than title VII of the Civil Rights Act of 1964, in enacting section 107 of the Civil Rights Act of 1991, suggests that Congress intended to disallow mixed motive claims under other statutes; and

(3) to establish that under the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), and the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.), complaining parties—

(A) may rely on any type or form of admissible evidence to establish their claims;

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

(C) may demonstrate an unlawful practice through any available method of proof, including the analytical framework set out in McDon-

nell Douglas Corp. v. Green, 411 U.S. 792 (1973).

SEC. 3. STANDARDS OF PROOF.

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

(1) CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF AGE IN EMPLOYMENT PRACTICES.—Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by inserting after subsection (f) the following:

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

''(2) In establishing an unlawful practice under this Act, including under paragraph (1) or by any other method of proof, a complaining party—

''(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient 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 subparagraph, the following:

''(3) On a claim in which an individual demonstrates that age was a motivating factor for any employment practice, 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—

''(A) may grant declaratory relief, injunctive relief (except as provided in subparagraph (B)), and

attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 4(g)(1); and

''(B) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.''; and

(B) in subsection (c)(1), by striking ''Any'' and inserting ''Subject to subsection (b)(3), any''.

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

''(m) The term 'demonstrates' means meets the burdens of production and persuasion.''.

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

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

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

(1) CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT

PRACTICES.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by striking subsection (m) and inserting the following:

''(m) Except as otherwise provided in this title, an unlawful employment practice is established under this title when the complaining party demonstrates that race, color, religion, sex, or national origin or an activity protected by section 704(a) was a motivating factor for any employment practice, even though other factors also motivated the practice.''.

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

''(g) Sections 703(m) and 706(g)(2)(B) shall apply to mixed motive cases (involving practices described in section 703(m)) under this section.''.

(c) AMERICANS WITH DISABILITIES ACT OF 1990.—

(1) DEFINITIONS.—Section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) is amended by adding at the end the following:

''(11) DEMONSTRATES.—The term 'demonstrates' means meets the burdens of production and persuasion.''.

(2) CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF DISABILITY IN EMPLOYMENT PRACTICES.—Section 102 of such Act (42 U.S.C. 12112) is amended by adding at the end the following:

''(e) PROOF.—

''(1) ESTABLISHMENT.—Except as otherwise provided in this Act, a discriminatory practice is established under this Act when the complaining party demonstrates that disability or an activity protected by subsection (a) or (b) of section 503 was a motivating factor for any employment practice, even though other factors also motivated the practice.

''(2) DEMONSTRATION.—In establishing a discriminatory practice under paragraph (1) or by any other method of proof, a complaining party—

''(A) may rely on any type or form of admissible evidence and need only produce evidence sufficient for a reasonable trier of fact to find that a discriminatory practice occurred under this Act; and

''(B) shall not be required to demonstrate that disability or an activity protected by subsection (a) or (b) of section 503 was the sole cause of an employment practice.''.

(3) CERTAIN ANTIRETALIATION CLAIMS.—Section 503(c) of such Act (42 U.S.C. 12203(c)) is amended—

(A) by striking ''The remedies'' and inserting the following:

''(1) IN GENERAL.—Except as provided in paragraph (2), the remedies''; and

(B) by adding at the end the following:

''(2) CERTAIN ANTIRETALIATION CLAIMS.—Section 107(c) shall apply to claims under section 102(e)(1) with respect to title I.''.

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

''(c) DISCRIMINATORY MOTIVATING FACTOR.—On a claim in which an individual demonstrates that disability was a motivating factor for any employment practice, under section 102(e)(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) may grant declaratory relief, injunctive relief (except as provided in paragraph (2)), and attorney's fees and costs demonstrated to be directly at-

tributable only to the pursuit of a claim under section 102(e)(1); and

''(2) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.''.

(d) REHABILITATION ACT OF 1973.—

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

(2) FEDERAL EMPLOYEES.—The amendment made by paragraph (1) to section 501(g) shall be construed to apply to all employees covered by section 501.

SEC. 4. APPLICATION.

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

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