

114TH CONGRESS  
2D SESSION

# S. 3089

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

JUNE 23, 2016

Ms. BALDWIN (for herself, Mr. BLUMENTHAL, Ms. MIKULSKI, Mr. MARKEY, Mr. FRANKEN, Mr. LEAHY, Mrs. MURRAY, Mr. SCHATZ, and Mr. DURBIN) 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 2016”.

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

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

8 (1) Harassment is a widespread problem in  
9 workplaces in the United States. In fiscal year 2014,

1 nearly 30 percent of the charges filed with the Equal  
2 Employment Opportunity Commission (hereinafter  
3 referred to as the “EEOC”) under all the statutes  
4 the agency enforces were on the basis of sex. Women  
5 filed 19,605, or 74.4 percent, of those charges.

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, 80 percent of female  
11 farm-workers working in the fields in central Cali-  
12 fornia reported that they had experienced sexual  
13 harassment.

14 (4) Studies indicate that sexual harassment of  
15 women, including unwanted touching, grabbing, and  
16 stalking, is also common in male-dominated indus-  
17 tries, such as construction, public safety, manufac-  
18 turing, farming, and the high-tech industry. Harass-  
19 ment in male-dominated industries operates as a  
20 barrier to women’s entry into higher-paying jobs.

21 (5) Racial harassment remains a pervasive  
22 problem in the workplace in the United States. In  
23 fiscal year 2015, 34.7 percent of the charges filed  
24 with the EEOC were charges of racial harassment.

1           (6) Research shows that workers in a wide  
2 spectrum of occupations, ranging from service and  
3 support positions to management and professional  
4 positions, report experiencing race-based harassment  
5 while on the job.

6           (7) Harassment in the workplace is a persistent  
7 barrier to opportunity for people with disabilities.  
8 Harassment can result in workers with disabilities  
9 being forced off the job. Workplace harassment is  
10 used to send the message that workers with disabili-  
11 ties do not belong at work.

12           (8) Age discrimination continues to be a barrier  
13 to employment for older workers. Nearly one-third of  
14 older workers report that they or someone they know  
15 experienced age discrimination in the workplace.

16           (9) The Supreme Court's decision in *Vance v.*  
17 *Ball State University*, No. 11–556 (June 24, 2013),  
18 significantly undermines protections against dis-  
19 crimination that the Supreme Court established in  
20 *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and  
21 *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742  
22 (1998), which held that an employer may be vicari-  
23 ously liable under title VII of the Civil Rights Act  
24 of 1964 for harassment of an employee by an indi-

1       vidual that has supervisory authority over that em-  
2       ployee.

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

12               (A) the employer exercised reasonable care  
13              to prevent and correct any harassing behavior;  
14              and

15               (B) the plaintiff unreasonably failed to  
16              take advantage of the preventive or corrective  
17              opportunities that the employer provided.

18               (11) Whether an employer should be vicariously  
19      liable for harassment is a functional analysis that is  
20      based not on the title of the harasser or employer’s  
21      job description for the harasser’s position but on the  
22      authority vested in that individual by the employer.

23               (12) The Supreme Court holding in *Vance* lim-  
24      its the category of individuals who are considered su-  
25      pervisors and for which an employer may be held vi-

1       cariously liable under Faragher and Ellerth to those  
2       individuals that have authority to take tangible em-  
3       ployment actions. This holding ignores the reality  
4       that employees with the authority to control their  
5       subordinates' daily work should be included in that  
6       category, for which an employer may be held vicari-  
7       ously liable, because such individuals are aided by  
8       that authority in perpetuating a discriminatory work  
9       environment.

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

22       (b) PURPOSE.—The purpose of this Act is to clarify  
23       that an employer's vicarious liability for harassment under  
24       title VII of the Civil Rights Act of 1964, the Age Discrimi-  
25       nation in Employment Act of 1967, the Americans with

1 Disabilities Act of 1990, the Rehabilitation Act of 1973,  
 2 section 1977 of the Revised Statutes, the Genetic Informa-  
 3 tion Nondiscrimination Act of 2008, the Government Em-  
 4 ployee Rights Act of 1991, the Congressional Account-  
 5 ability Act of 1995, and title III of the United States Code  
 6 extends to—

7           (1) an individual with the authority to under-  
 8           take or recommend tangible employment actions af-  
 9           fecting the victim of the harassment; or

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

12 **SEC. 3. AMENDMENT TO TITLE VII OF THE CIVIL RIGHTS**  
 13 **ACT OF 1964.**

14           (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
 15 TLE WORK ENVIRONMENT.—Section 703 of the Civil  
 16 Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by  
 17 adding at the end the following:

18           “(o) Subject to section 12 of the Fair Employment  
 19 Protection Act of 2016, an employer shall be liable for  
 20 the acts of any individual whose harassment of an em-  
 21 ployee has created or continued a hostile work environ-  
 22 ment that constitutes an unlawful employment practice  
 23 under this section if, at the time of the harassment—

24           “(1) such individual was authorized by that em-  
 25           ployer—

1           “(A) to undertake or recommend tangible  
2           employment actions affecting the employee; or

3           “(B) to direct the employee’s daily work  
4           activities; or

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

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

12           (1) by redesignating subsection (b) as sub-  
13           section (c); and

14           (2) by inserting after subsection (a) the fol-  
15           lowing:

16           “(b) Subject to section 12 of the Fair Employment  
17           Protection Act of 2016, an employer shall be liable for  
18           the acts of any individual whose harassment of an em-  
19           ployee has created or continued a retaliatory hostile work  
20           environment that constitutes an unlawful employment  
21           practice as described under subsection (a) if, at the time  
22           of the harassment—

23           “(1) such individual was authorized by that em-  
24           ployer—



1 ment that is unlawful under this section if, at the time  
2 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 hostile work environ-  
11 ment.”.

12 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
13 TALIATORY HOSTILE WORK ENVIRONMENT.—Section  
14 4(d) of the Age Discrimination in Employment Act of  
15 1967 (29 U.S.C. 623) is amended by striking “or litiga-  
16 tion under this Act.” and inserting “or litigation under  
17 this Act. Subject to section 12 of the Fair Employment  
18 Protection Act of 2016, an employer shall be liable for  
19 the acts of any individual whose harassment of an em-  
20 ployee has created or continued a retaliatory hostile work  
21 environment that is unlawful under this subsection if, at  
22 the time of the harassment—

23 “(1) such individual was authorized by that em-  
24 ployer—



1 individual on the basis of disability under this section if,  
2 at the time of the harassment—

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

5 “(A) to undertake or recommend tangible  
6 employment actions affecting the qualified indi-  
7 vidual; or

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

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

13 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
14 TALIATORY HOSTILE WORK ENVIRONMENT.—Section 503  
15 of the Americans with Disabilities Act of 1990 (42 U.S.C.  
16 12203) is amended—

17 (1) by redesignating subsection (c) as sub-  
18 section (d);

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

21 “(c) Subject to section 12 of the Fair Employment  
22 Protection Act of 2016, 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  
25 environment that constitutes retaliatory discrimination, as

1 described in subsection (a), or the carrying out of any un-  
2 lawful acts described in subsection (b), if, at the time of  
3 the harassment—

4 “(1) such individual was authorized by the 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.”; and

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

16 **SEC. 6. AMENDMENT TO THE REHABILITATION ACT.**

17 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
18 TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE  
19 WORK ENVIRONMENT.—Section 501 of the Rehabilitation  
20 Act of 1973 (29 U.S.C. 791) is amended by adding at  
21 the end the following:

22 “(h) Subject to section 12 of the Fair Employment  
23 Protection Act of 2016, each department, agency, and in-  
24 strumentality in the executive branch of the Government  
25 and the Smithsonian Institution shall be liable for the acts

1 of any individual within such department, agency, instru-  
2 mentality, or the Smithsonian Institution whose harass-  
3 ment of an individual with a disability has created or con-  
4 tinued a hostile work environment, or a retaliatory hostile  
5 work environment, that constitutes nonaffirmative action  
6 employment discrimination under this section if, at the  
7 time of the harassment—

8           “(1) such individual was authorized by that de-  
9           partment, agency, instrumentality, or the Smithso-  
10          nian Institution—

11                   “(A) to undertake or recommend tangible  
12                   employment actions affecting the individual  
13                   with a disability; or

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

16           “(2) the negligence of that department, agency,  
17           instrumentality, or the Smithsonian Institution led  
18           to the creation or continuation of that hostile work  
19           environment or retaliatory hostile work environ-  
20           ment.”.

21           (b) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
22           TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE  
23           WORK ENVIRONMENT.—Section 504 of the Rehabilitation  
24           Act of 1973 (29 U.S.C. 794) is amended by adding at  
25           the end the following:

1       “(e) Subject to section 12 of the Fair Employment  
2 Protection Act of 2016, an employer described under sub-  
3 section (b) shall be liable for the acts of any individual  
4 whose harassment of a qualified individual with a dis-  
5 ability has created or continued a hostile work environ-  
6 ment, or a retaliatory hostile work environment, that con-  
7 stitutes employment discrimination under this section if,  
8 at the time of the harassment—

9               “(1) such individual was authorized by such  
10 employer—

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

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

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

19       (c) REMEDIES.—Section 505 of the Rehabilitation  
20 Act (29 U.S.C. 794a) is amended by adding at the end  
21 of subsection (a) the following:

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

1 **SEC. 7. AMENDMENT TO SECTION 1977 OF THE REVISED**  
 2 **STATUTES.**

3 Section 1977 of the Revised Statutes (42 U.S.C.  
 4 1981) is amended by adding at the end the following:

5 “(d) Subject to section 12 of the Fair Employment  
 6 Protection Act of 2016, a nongovernmental employer shall  
 7 be liable for the acts of any individual whose harassment  
 8 of an employee has created a hostile work environment  
 9 or a retaliatory hostile work environment, constituting an  
 10 unlawful employment practice, if, at the time of the har-  
 11 assment—

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

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

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

18 “(2) the negligence of the employer led to the  
 19 creation or continuation of that hostile work environ-  
 20 ment or retaliatory hostile work environment.”.

21 **SEC. 8. AMENDMENT TO THE GENETIC INFORMATION NON-**  
 22 **DISCRIMINATION ACT OF 2008.**

23 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
 24 TILE WORK ENVIRONMENT.—Section 202 of the Genetic  
 25 Information Nondiscrimination Act of 2008 (42 U.S.C.  
 26 2000ff–1) is amended by adding at the end the following:

1       “(d) Subject to section 12 of the Fair Employment  
2 Protection Act of 2016, 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 constitutes an unlawful employment practice  
6 under this section if, at the time of the harassment—

7               “(1) such individual was authorized by the 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  
18 207(f) of the Genetic Information Nondiscrimination Act  
19 (42 U.S.C. 2000ff–6(f)) is amended by striking “violations  
20 of this subsection.” and inserting “violations of this sub-  
21 section. Subject to section 12 of the Fair Employment  
22 Protection Act of 2016, 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 constitutes discrimination under this  
 2 subsection if, at the time of the harassment—

3 “(1) such individual was authorized by the 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 **SEC. 9. AMENDMENT TO THE GOVERNMENT EMPLOYEE**  
 13 **RIGHTS ACT OF 1991.**

14 Section 302 of the Government Employee Rights Act  
 15 of 1991 (42 U.S.C. 2000e–16b) is amended by adding at  
 16 the end the following:

17 “(c) Subject to section 12 of the Fair Employment  
 18 Protection Act of 2016, an employer of an individual de-  
 19 scribed under section 304(a) shall be liable for the acts  
 20 of any individual whose harassment of a State employee  
 21 described in section 304 has created or continued a hostile  
 22 work environment or a retaliatory hostile work environ-  
 23 ment constituting discrimination under this section, if at  
 24 the time of the harassment—

1           “(1) such individual was authorized by such  
2 employer—

3                   “(A) to undertake or recommend tangible  
4 employment actions affecting the employee; or

5                   “(B) to direct the employee’s daily work  
6 activities; or

7           “(2) the negligence of the employer led to the  
8 creation or continuation of that hostile work environ-  
9 ment or retaliatory hostile work environment.”.

10 **SEC. 10. AMENDMENT TO TITLE 3 OF THE UNITED STATES**

11                   **CODE.**

12           Section 411 of title 3, United States Code, is amend-  
13 ed—

14                   (1) by redesignating subsections (e) through (f)  
15 as subsections (d) through (g), respectively; and

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

18           “(c) **LIABILITY OF EMPLOYING OFFICE.**—Subject to  
19 section 12 of the Fair Employment Protection Act of  
20 2016, an employing office shall be liable for the acts of  
21 any individual whose harassment of a covered employee  
22 has created or continued a hostile work environment or  
23 a retaliatory hostile work environment constituting dis-  
24 crimination under this section if, at the time of the harass-  
25 ment—

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

3                   “(A) to undertake or recommend tangible  
4           employment actions affecting the covered em-  
5           ployee; or

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

8           “(2) the negligence of the employing office led  
9           to the creation or continuation of that hostile work  
10          environment or retaliatory hostile work environ-  
11          ment.”; and

12           (3) in subsection (f), as redesignated by para-  
13          graph (2), by striking “subsections (a) through (c)”  
14          and inserting “subsections (a) through (d).”.

15 **SEC. 11. AMENDMENT TO THE CONGRESSIONAL ACCOUNT-**  
16 **ABILITY ACT OF 1995.**

17          Section 201 of the Congressional Accountability Act  
18          of 1995 (2 U.S.C. 1311) is amended—

19           (1) by redesignating subsection (d) as sub-  
20          section (e); and

21           (2) by inserting after subsection (c) the fol-  
22          lowing:

23          “(d) Subject to section 12 of the Fair Employment  
24          Protection Act of 2016, an employing office shall be liable  
25          for the acts of any individual whose harassment of a cov-

1 ered employee has created or continued a hostile work en-  
2 vironment or a retaliatory hostile work environment that  
3 constitutes discrimination under this section if, at the time  
4 of the harassment—

5 “(1) such individual was authorized by the em-  
6 ploying office—

7 “(A) to undertake or recommend tangible  
8 employment actions affecting the covered em-  
9 ployee; or

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

12 “(2) the negligence of the employing office led  
13 to the creation or continuation of that hostile work  
14 environment or retaliatory hostile work environ-  
15 ment.”.

16 **SEC. 12. RULE OF CONSTRUCTION.**

17 Nothing in this Act shall be construed to limit the  
18 availability of, or access to, defenses available under the  
19 law.

20 **SEC. 13. SAVINGS CLAUSE.**

21 If any provision of this Act is declared invalid, the  
22 other provisions in this Act will remain in full force and  
23 effect.

1 **SEC. 14. 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.

○