

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.

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

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 cariously 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 (c) 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.

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