

113TH CONGRESS  
2D SESSION

# S. 2133

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

MARCH 13, 2014

Ms. BALDWIN (for herself, Mr. HARKIN, Mr. LEAHY, Mrs. MURRAY, Mr. WHITEHOUSE, Mr. BLUMENTHAL, Ms. MIKULSKI, Mr. DURBIN, Mr. SCHUMER, Mr. SCHATZ, Ms. WARREN, Mr. CASEY, and Mr. FRANKEN) 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 2014”.

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

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

1           (1) Harassment is a widespread problem in  
2 workplaces in the United States. Surveys indicate  
3 that at least one-fourth of all working women and  
4 10 percent of men have experienced sexual harass-  
5 ment on the job.

6           (2) In fiscal year 2013, a combined total of over  
7 30,000 harassment charges were filed with the  
8 Equal Employment Opportunity Commission and  
9 State fair employment practices agencies. More than  
10 10,000 of these charges involved sexual harassment.

11           (3) Women and people of color working in low-  
12 wage jobs are particularly vulnerable to harassment  
13 in the workplace.

14           (4) In some industries harassment is even more  
15 widespread. For example, 80 percent of female farm-  
16 workers working in the fields in central California  
17 reported that they had experienced sexual harass-  
18 ment.

19           (5) Studies indicate that sexual harassment of  
20 women, including unwanted touching, grabbing, and  
21 stalking, is also common in male-dominated indus-  
22 tries, such as construction, public safety, manufac-  
23 turing, farming, and the high-tech industry. Harass-  
24 ment in male-dominated industries operates as a  
25 barrier to women's entry into higher-paying jobs.

1           (6) Racial harassment remains a pervasive  
2 problem in the workplace in the United States. In  
3 fiscal year 2013, more than 11,000 of the charges  
4 of harassment filed with the Equal Employment Op-  
5 portunity Commission and State fair employment  
6 practices agencies were charges of racial harass-  
7 ment.

8           (7) 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           (8) 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 disabil-  
18 ities do not belong at work.

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

23           (10) Three-quarters of older Americans sur-  
24 veyed are concerned that age may be an obstacle to  
25 finding work.

1           (11) The Supreme Court’s decision in *Vance v.*  
2           *Ball State University*, No. 11–556 (June 24, 2013),  
3           significantly undermines protections against dis-  
4           crimination that the Supreme Court established in  
5           *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and  
6           *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742  
7           (1998), which held that an employer may be vicari-  
8           ously liable under title VII of the Civil Rights Act  
9           of 1964 for harassment of an employee by an indi-  
10          vidual that has supervisory authority over that em-  
11          ployee.

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

21                  (A) the employer exercised reasonable care  
22                  to prevent and correct any harassing behavior;  
23                  and

1 (B) the plaintiff unreasonably failed to  
2 take advantage of the preventive or corrective  
3 opportunities that the employer provided.

4 (13) Whether an employer should be vicariously  
5 liable for harassment is a functional analysis that is  
6 based not on the title of the harasser or the employ-  
7 er's job description for the harasser's position but on  
8 the authority vested in that individual by the em-  
9 ployer.

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

22 (15) Individuals who direct the daily work ac-  
23 tivities of employees but do not have the authority  
24 to take tangible employment actions against those  
25 employees are common in the workplace in the

1 United States, particularly in industries that employ  
2 low-wage workers. Workers in industries including  
3 retail, restaurant, health care, housekeeping, and  
4 personal care, which may pay low wages and employ  
5 a large numbers of female workers, are particularly  
6 vulnerable to harassment by individuals who have  
7 the power to direct day-to-day work activities but  
8 lack the power to take tangible employment actions.

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

19 (1) an individual with the authority to under-  
20 take or recommend tangible employment actions af-  
21 fecting the victim of the harassment; or

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

1 **SEC. 3. AMENDMENT TO TITLE VII OF THE CIVIL RIGHTS**  
2 **ACT OF 1964.**

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

7 “(o) Subject to section 12 of the Fair Employment  
8 Protection Act of 2014, an employer shall be liable for  
9 the acts of any individual whose harassment of an em-  
10 ployee has created or continued a hostile work environ-  
11 ment that constitutes an unlawful employment practice  
12 under this section if, at the time of the harassment—

13 “(1) such individual was authorized by that em-  
14 ployer—

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

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

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

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

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

3           (2) by inserting after subsection (a) the fol-  
4           lowing:

5           “(b) Subject to section 12 of the Fair Employment  
6           Protection Act of 2014, an employer shall be liable for  
7           the acts of any individual whose harassment of an em-  
8           ployee has created or continued a retaliatory hostile work  
9           environment that constitutes an unlawful employment  
10          practice as described under subsection (a) if, at the time  
11          of the harassment—

12                 “(1) such individual was authorized by that 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 retaliatory hostile  
20                 work environment.”.

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

24                 “(g) The provisions of sections 703(o) and 704(b)  
25          shall apply to hostile work environment claims and retalia-



1 tory hostile work environment claims, respectively, under  
 2 this section.”.

3 **SEC. 4. AMENDMENT TO THE AGE DISCRIMINATION IN EM-**  
 4 **PLOYMENT ACT.**

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

9 “(n) Subject to section 12 of the Fair Employment  
 10 Protection Act of 2014, an employer shall be liable for  
 11 the acts of any individual whose harassment of an em-  
 12 ployee has created or continued a hostile work environ-  
 13 ment that is unlawful under this section if, at the time  
 14 of the harassment—

15 “(1) such individual was authorized by that 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 hostile work environ-  
 23 ment.”.

24 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
 25 TALIATORY HOSTILE WORK ENVIRONMENT.—Section

1 4(d) of the Age Discrimination in Employment Act of  
2 1967 (29 U.S.C. 623) is amended by striking “or litiga-  
3 tion under this Act.” and inserting “or litigation under  
4 this Act. Subject to section 12 of the Fair Employment  
5 Protection Act of 2014, an employer shall be liable for  
6 the acts of any individual whose harassment of an em-  
7 ployee has created or continued a retaliatory hostile work  
8 environment that is unlawful under this subsection if, at  
9 the time of the harassment—

10           “(1) such individual was authorized by that em-  
11           ployer—

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

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

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

19           (c) FEDERAL EMPLOYEES.—Section 15 of the Age  
20           Discrimination in Employment Act of 1967 (29 U.S.C.  
21           633a) is amended by adding at the end the following:

22           “(h) Subsections (d) and (n) of section 4 shall apply  
23           to retaliatory hostile work environment claims and hostile  
24           work environment claims, respectively, under this sec-  
25           tion.”.

1 **SEC. 5. AMENDMENT TO THE AMERICANS WITH DISABIL-**  
2 **ITIES ACT.**

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

7 “(e) Subject to section 12 of the Fair Employment  
8 Protection Act of 2014, an employer shall be liable for  
9 the acts of any individual whose harassment of an em-  
10 ployee has created or continued a hostile work environ-  
11 ment that constitutes discrimination against a qualified  
12 individual on the basis of disability under this section if,  
13 at the time of the harassment—

14 “(1) such individual was authorized by the em-  
15 ployer—

16 “(A) to undertake or recommend tangible  
17 employment actions affecting the qualified indi-  
18 vidual; or

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

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

24 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
25 TALIATORY HOSTILE WORK ENVIRONMENT.—Section 503

1 of the Americans with Disabilities Act of 1990 (42 U.S.C.  
2 12203) is amended—

3 (1) by redesignating subsection (c) as sub-  
4 section (d);

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

7 “(c) Subject to section 12 of the Fair Employment  
8 Protection Act of 2014, an employer shall be liable for  
9 the acts of any individual whose harassment of an em-  
10 ployee has created or continued a retaliatory hostile work  
11 environment that constitutes retaliatory discrimination, as  
12 described in subsection (a), or the carrying out of any un-  
13 lawful acts described in subsection (b), if, at the time of  
14 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.”; and

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

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

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

10          “(h) Subject to section 12 of the Fair Employment  
11          Protection Act of 2014, each department, agency, and in-  
12          strumentality in the executive branch of Government and  
13          the Smithsonian Institution shall be liable for the acts of  
14          any individual within such department, agency, instrumen-  
15          tality, or the Smithsonian Institution whose harassment  
16          of an individual with a disability has created or continued  
17          a hostile work environment, or a retaliatory hostile work  
18          environment, that constitutes nonaffirmative action em-  
19          ployment discrimination under this section if, at the time  
20          of the harassment—

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

1           “(A) to undertake or recommend tangible  
2           employment actions affecting the individual  
3           with a disability; or

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

6           “(2) the negligence of that department, agency,  
7           instrumentality, or the Smithsonian Institution led  
8           to the creation or continuation of that hostile work  
9           environment or retaliatory hostile work environ-  
10          ment.”.

11          (b) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
12          TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE  
13          WORK ENVIRONMENT.—Section 504 of the Rehabilitation  
14          Act of 1973 (29 U.S.C. 794) is amended by adding at  
15          the end the following:

16          “(e) Subject to section 12 of the Fair Employment  
17          Protection Act of 2014, an employer described under sub-  
18          section (b) shall be liable for the acts of any individual  
19          whose harassment of a qualified individual with a dis-  
20          ability has created or continued a hostile work environ-  
21          ment, or a retaliatory hostile work environment, that con-  
22          stitutes employment discrimination under this section if,  
23          at the time of the harassment—

24                  “(1) such individual was authorized by such  
25                  employer—



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

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. 8. AMENDMENT TO THE GENETIC INFORMATION NON-**  
11 **DISCRIMINATION ACT OF 2008.**

12           (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-  
13 TILE WORK ENVIRONMENT.—Section 202 of the Genetic  
14 Information Nondiscrimination Act of 2008 (42 U.S.C.  
15 2000ff–1) is amended by adding at the end the following:

16           “(d) Subject to section 12 of the Fair Employment  
17 Protection Act of 2014, an employer shall be liable for  
18 the acts of any individual whose harassment of an em-  
19 ployee has created or continued a hostile work environ-  
20 ment that constitutes an unlawful employment practice  
21 under this section if, at the time of the harassment—

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

24                   “(A) to undertake or recommend tangible  
25           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.”.

6           (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-  
7           TALIATORY HOSTILE WORK ENVIRONMENT.—Section  
8           207(f) of the Genetic Information Nondiscrimination Act  
9           (42 U.S.C. 2000ff–6(f)) is amended by striking “violations  
10          of this subsection.” and inserting “violations of this sub-  
11          section. Subject to section 12 of the Fair Employment  
12          Protection Act of 2014, an employer shall be liable for  
13          the acts of any individual whose harassment of an em-  
14          ployee has created or continued a retaliatory hostile work  
15          environment that constitutes discrimination under this  
16          subsection if, at the time of the harassment—

17           “(1) such individual was authorized by the em-  
18          ployer—

19           “(A) to undertake or recommend tangible  
20          employment actions affecting the employee; or

21           “(B) to direct the employee’s daily work  
22          activities; or

23           “(2) the negligence of the employer led to the  
24          creation or continuation of that retaliatory hostile  
25          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 2014, 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 OF THE UNITED STATES**  
24 **CODE.**

25 Section 411 of title 3, United States Code, is amend-  
26 ed—

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

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           2014, 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 (2), 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 sub-  
9           section (e); and

10          (2) by inserting after subsection (c) the fol-  
11          lowing:

12          “(d) Subject to section 12 of the Fair Employment  
13 Protection Act of 2014, an employing office shall be liable  
14 for the acts of any individual whose harassment of a cov-  
15 ered employee has created or continued a hostile work en-  
16 vironment or a retaliatory hostile work environment that  
17 constitutes discrimination under this section if, at the time  
18 of the harassment—

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

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

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

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

5 **SEC. 12. RULE OF CONSTRUCTION.**

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

9 **SEC. 13. SAVINGS CLAUSE.**

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

13 **SEC. 14. APPLICATION.**

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

○