

112TH CONGRESS
2^D 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

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.

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 “Protecting Older
5 Workers Against Discrimination Act”.

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

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

1 (1) In enacting the Age Discrimination in Em-
2 ployment Act of 1967 (referred to in this section as
3 the “ADEA”), Congress intended to eliminate work-
4 place discrimination against individuals 40 and older
5 based on age.

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

12 (3) Congress intended that courts would inter-
13 pret Federal statutes, such as the ADEA, that are
14 similar in their text or purpose to title VII of the
15 Civil Rights Act of 1964, in ways that were con-
16 sistent with the ways in which courts had inter-
17 preted similar provisions in that title VII. The Su-
18 preme Court’s decision in *Gross v. FBL Financial*
19 *Services, Inc.*, 129 S. Ct. 2343 (2009), departed
20 from this intent and circumvented well-established
21 precedents.

22 (4) Congress disagrees with the Supreme
23 Court’s interpretation, in *Gross*, of the ADEA and
24 with the reasoning underlying the decision, specifi-
25 cally language in which the Supreme Court—

1 (A) interpreted Congress' failure to amend
2 any statute other than title VII of the Civil
3 Rights Act of 1964 in enacting section 107 of
4 the Civil Rights Act of 1991 (adding section
5 703(m) of the Civil Rights Act of 1964), to
6 mean that Congress intended to disallow mixed
7 motive claims under other statutes;

8 (B) declined to apply the Supreme Court's
9 ruling in *Price Waterhouse v. Hopkins*, 490
10 U.S. 228 (1989), a part of which was subse-
11 quently approved by Congress, and enacted into
12 law by section 107 of the Civil Rights Act of
13 1991, as section 703(m) of the Civil Rights Act
14 of 1964, which provides that an unlawful em-
15 ployment practice is established when a pro-
16 tected characteristic was a motivating factor for
17 any employment practice, even though other
18 factors also motivated the practice;

19 (C) interpreted causation language and
20 standards, including the words "because of"
21 that are similar in their text or purpose to title
22 VII of the Civil Rights Act of 1964, in a man-
23 ner that departed from established precedent;

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

1 (E) indicated that other established causa-
2 tion standards and methods of proof, including
3 the use of any type or form of admissible cir-
4 cumstantial or direct evidence as recognized in
5 Desert Palace Inc. v. Costa, 539 U.S. 90
6 (2003), or the availability of the analytical
7 framework set out in McDonnell Douglas Corp.
8 v. Green, 411 U.S. 792 (1973), might not apply
9 to the ADEA.

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

14 (6) The Gross decision has significantly nar-
15 rowed the scope of protections intended to be af-
16 forded by the ADEA.

17 (7) Congress must restore and reaffirm estab-
18 lished causation standards and methods of proof to
19 ensure victims of unlawful discrimination and retal-
20 iation are able to enforce their rights.

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

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

1 plaining party always bears the burden of proving
2 that a protected characteristic or protected activity
3 was the “but for” cause of an unlawful employment
4 practice;

5 (2) to reject the Supreme Court’s reasoning in
6 Gross that Congress’ failure to amend any statute
7 other than title VII of the Civil Rights Act of 1964,
8 in enacting section 107 of the Civil Rights Act of
9 1991, suggests that Congress intended to disallow
10 mixed motive claims under other statutes; and

11 (3) to establish that under the Age Discrimina-
12 tion in Employment Act of 1967 (29 U.S.C. 621 et
13 seq.), title VII of the Civil Rights Act of 1964 (42
14 U.S.C. 2000e et seq.), the Americans with Disabil-
15 ities Act of 1990 (42 U.S.C. 12101 et seq.), and the
16 Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.),
17 complaining parties—

18 (A) may rely on any type or form of ad-
19 missible evidence to establish their claims;

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

23 (C) may demonstrate an unlawful practice
24 through any available method of proof, includ-
25 ing the analytical framework set out in McDon-

1 nell Douglas Corp. v. Green, 411 U.S. 792
2 (1973).

3 **SEC. 3. STANDARDS OF PROOF.**

4 (a) AGE DISCRIMINATION IN EMPLOYMENT ACT OF
5 1967.—

6 (1) CLARIFYING PROHIBITION AGAINST IMPER-
7 MISSIBLE CONSIDERATION OF AGE IN EMPLOYMENT
8 PRACTICES.—Section 4 of the Age Discrimination in
9 Employment Act of 1967 (29 U.S.C. 623) is amend-
10 ed by inserting after subsection (f) the following:

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

17 “(2) In establishing an unlawful practice under this
18 Act, including under paragraph (1) or by any other meth-
19 od of proof, a complaining party—

20 “(A) may rely on any type or form of admis-
21 sible evidence and need only produce evidence suffi-
22 cient for a reasonable trier of fact to find that an
23 unlawful practice occurred under this Act; and

1 “(B) shall not be required to demonstrate that
2 age or an activity protected by subsection (d) was
3 the sole cause of a practice.”.

4 (2) REMEDIES.—Section 7 of such Act (29
5 U.S.C. 626) is amended—

6 (A) in subsection (b)—

7 (i) in the first sentence, by striking
8 “The” and inserting “(1) The”;

9 (ii) in the third sentence, by striking
10 “Amounts” and inserting the following:

11 “(2) Amounts”;

12 (iii) in the fifth sentence, by striking
13 “Before” and inserting the following:

14 “(4) Before”; and

15 (iv) by inserting before paragraph (4),
16 as designated by clause (iii) of this sub-
17 paragraph, the following:

18 “(3) On a claim in which an individual demonstrates
19 that age was a motivating factor for any employment prac-
20 tice, under section 4(g)(1), and a respondent demonstrates
21 that the respondent would have taken the same action in
22 the absence of the impermissible motivating factor, the
23 court—

24 “(A) may grant declaratory relief, injunctive re-
25 lief (except as provided in subparagraph (B)), and

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

4 “(B) shall not award damages or issue an order
5 requiring any admission, reinstatement, hiring, pro-
6 motion, or payment.”; and

7 (B) in subsection (e)(1), by striking “Any”
8 and inserting “Subject to subsection (b)(3),
9 any”.

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

13 “(m) The term ‘demonstrates’ means meets the bur-
14 dens of production and persuasion.”.

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

18 “(h) Sections 4(g) and 7(b)(3) shall apply to mixed
19 motive claims (involving practices described in section
20 4(g)(1)) under this section.”.

21 (b) TITLE VII OF THE CIVIL RIGHTS ACT OF
22 1964.—

23 (1) CLARIFYING PROHIBITION AGAINST IMPER-
24 MISSIBLE CONSIDERATION OF RACE, COLOR, RELI-
25 GION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT

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

4 “(m) Except as otherwise provided in this title, an
5 unlawful employment practice is established under this
6 title when the complaining party demonstrates that race,
7 color, religion, sex, or national origin or an activity pro-
8 tected by section 704(a) was a motivating factor for any
9 employment practice, even though other factors also moti-
10 vated the practice.”.

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

14 “(g) Sections 703(m) and 706(g)(2)(B) shall apply
15 to mixed motive cases (involving practices described in sec-
16 tion 703(m)) under this section.”.

17 (c) AMERICANS WITH DISABILITIES ACT OF 1990.—

18 (1) DEFINITIONS.—Section 101 of the Ameri-
19 cans with Disabilities Act of 1990 (42 U.S.C.
20 12111) is amended by adding at the end the fol-
21 lowing:

22 “(11) DEMONSTRATES.—The term ‘dem-
23 onstrates’ means meets the burdens of production
24 and persuasion.”.

1 (2) CLARIFYING PROHIBITION AGAINST IMPER-
2 MISSIBLE CONSIDERATION OF DISABILITY IN EM-
3 PLOYMENT PRACTICES.—Section 102 of such Act
4 (42 U.S.C. 12112) is amended by adding at the end
5 the following:

6 “(e) PROOF.—

7 “(1) ESTABLISHMENT.—Except as otherwise
8 provided in this Act, a discriminatory practice is es-
9 tablished under this Act when the complaining party
10 demonstrates that disability or an activity protected
11 by subsection (a) or (b) of section 503 was a moti-
12 vating factor for any employment practice, even
13 though other factors also motivated the practice.

14 “(2) DEMONSTRATION.—In establishing a dis-
15 crimatory practice under paragraph (1) or by any
16 other method of proof, a complaining party—

17 “(A) may rely on any type or form of ad-
18 missible evidence and need only produce evi-
19 dence sufficient for a reasonable trier of fact to
20 find that a discriminatory practice occurred
21 under this Act; and

22 “(B) shall not be required to demonstrate
23 that disability or an activity protected by sub-
24 section (a) or (b) of section 503 was the sole
25 cause of an employment practice.”.

1 (3) CERTAIN ANTIRETALIATION CLAIMS.—Sec-
2 tion 503(c) of such Act (42 U.S.C. 12203(c)) is
3 amended—

4 (A) by striking “The remedies” and insert-
5 ing the following:

6 “(1) IN GENERAL.—Except as provided in para-
7 graph (2), the remedies”; and

8 (B) by adding at the end the following:

9 “(2) CERTAIN ANTIRETALIATION CLAIMS.—Sec-
10 tion 107(c) shall apply to claims under section
11 102(e)(1) with respect to title I.”.

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

15 “(c) DISCRIMINATORY MOTIVATING FACTOR.—On a
16 claim in which an individual demonstrates that disability
17 was a motivating factor for any employment practice,
18 under section 102(e)(1), and a respondent demonstrates
19 that the respondent would have taken the same action in
20 the absence of the impermissible motivating factor, the
21 court—

22 “(1) may grant declaratory relief, injunctive re-
23 lief (except as provided in paragraph (2)), and attor-
24 ney’s fees and costs demonstrated to be directly at-

1 tributable only to the pursuit of a claim under sec-
2 tion 102(e)(1); and

3 “(2) shall not award damages or issue an order
4 requiring any admission, reinstatement, hiring, pro-
5 motion, or payment.”.

6 (d) REHABILITATION ACT OF 1973.—

7 (1) IN GENERAL.—Sections 501(g), 503(d), and
8 504(d) of the Rehabilitation Act of 1973 (29 U.S.C.
9 791(g), 793(d), and 794(d)), are each amended by
10 adding after the words “title I of the Americans
11 with Disabilities Act of 1990 (42 U.S.C. 12111 et
12 seq.)” the following: “, including the standards of
13 causation or methods of proof applied under section
14 102(e) of that Act (42 U.S.C. 12112(e)),”.

15 (2) FEDERAL EMPLOYEES.—The amendment
16 made by paragraph (1) to section 501(g) shall be
17 construed to apply to all employees covered by sec-
18 tion 501.

19 **SEC. 4. APPLICATION.**

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

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