

114TH CONGRESS
2D SESSION

H. R. 5693

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 HOUSE OF REPRESENTATIVES

JULY 8, 2016

Ms. DELAURO (for herself, Mr. FARR, Ms. NORTON, Ms. DELBENE, Mr. CAPUANO, Ms. LEE, Mr. McDERMOTT, Mr. LANGEVIN, Mr. POCAN, Mr. TAKANO, Mr. SWALWELL of California, Mr. GENE GREEN of Texas, and Mr. HONDA) introduced the following bill; which was referred to the Committee on Education and the Workforce, and in addition to the Committees on House Administration, the Judiciary, and Oversight and Government Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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”.

1 **SEC. 2. FINDINGS AND PURPOSES.**

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

3 (1) Harassment is a widespread problem in
4 workplaces in the United States. In 2014, sex dis-
5 crimination comprised nearly 30 percent of the
6 charges filed with the Equal Employment Oppor-
7 tunity Commission (EEOC) under all the statutes
8 the agency enforces. Of these charges, women filed
9 19,605, or 74.4 percent.

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

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

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

25 (5) Racial harassment remains a pervasive
26 problem in the workplace in the United States. In

1 fiscal year 2015, 34.7 percent of the alleged charges
2 filed with the EEOC were on the basis of race.

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

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

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

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

1 of 1964 for harassment of an employee by an indi-
2 vidual that has supervisory authority over that em-
3 ployee.

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

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

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

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

1 (12) The Supreme Court holding in Vance lim-
2 its the category of individuals who are considered su-
3 pervisors and for which an employer may be held vi-
4 ciously liable under Faragher and Ellerth to those
5 individuals that have authority to take tangible em-
6 ployment actions. This holding ignores the reality
7 that employees with the authority to control their
8 subordinates' daily work should be included in that
9 category, for which an employer may be held vicari-
10 ously liable, because such individuals are aided by
11 that authority in perpetuating a discriminatory work
12 environment.

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

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

11 (1) an individual with the authority to under-
12 take or recommend tangible employment actions af-
13 fecting the victim of the harassment; or

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

16 **SEC. 3. AMENDMENT TO TITLE VII OF THE CIVIL RIGHTS**
17 **ACT OF 1964.**

18 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
19 TILE WORK ENVIRONMENT.—Section 703 of the Civil
20 Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by
21 adding at the end the following:

22 “(o) Subject to section 12 of the Fair Employment
23 Protection Act of 2016, an employer shall be liable for
24 the acts of any individual whose harassment of an em-
25 ployee has created or continued a hostile work environ-

1 ment that constitutes an unlawful employment practice
2 under this section if, at 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 hostile work environ-
11 ment.”.

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

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

18 (2) by inserting after subsection (a) the fol-
19 lowing:

20 “(b) Subject to section 12 of the Fair Employment
21 Protection Act of 2016, an employer shall be liable for
22 the acts of any individual whose harassment of an em-
23 ployee has created or continued a retaliatory hostile work
24 environment that constitutes an unlawful employment

1 practice as described under subsection (a) 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 retaliatory hostile
11 work environment.”.

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

15 “(g) The provisions of sections 703(o) and 704(b)
16 shall apply to hostile work environment claims and retalia-
17 tory hostile work environment claims, respectively, under
18 this section.”.

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

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

1 “(n) 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 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 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 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.**

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

1 “(e) 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 discrimination against a qualified
6 individual on the basis of disability under this section if,
7 at the time of the harassment—

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

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

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

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

18 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-
19 TALIATORY HOSTILE WORK ENVIRONMENT.—Section 503
20 of the Americans with Disabilities Act of 1990 (42 U.S.C.
21 12203) is amended—

22 (1) by redesignating subsection (c) as sub-
23 section (d);

24 (2) by inserting after subsection (b) the fol-
25 lowing:

1 “(c) 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 retaliatory hostile work
5 environment that constitutes retaliatory discrimination, as
6 described in subsection (a), or the carrying out of any un-
7 lawful acts described in subsection (b), if, at the time of
8 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 employee; or

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

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

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

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

22 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
23 TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE
24 WORK ENVIRONMENT.—Section 501 of the Rehabilitation

1 Act of 1973 (29 U.S.C. 791) is amended by adding at
2 the end the following:

3 “(h) Subject to section 12 of the Fair Employment
4 Protection Act of 2016, each department, agency, and in-
5 strumentality in the executive branch of Government and
6 the Smithsonian Institution shall be liable for the acts of
7 any individual within such department, agency, instrumen-
8 tality, or the Smithsonian Institution whose harassment
9 of an individual with a disability has created or continued
10 a hostile work environment, or a retaliatory hostile work
11 environment, that constitutes nonaffirmative action em-
12 ployment discrimination under this section if, at the time
13 of the harassment—

14 “(1) such individual was authorized by that de-
15 partment, agency, instrumentality, or the Smithso-
16 nian Institution—

17 “(A) to undertake or recommend tangible
18 employment actions affecting the individual
19 with a disability; or

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

22 “(2) the negligence of that department, agency,
23 instrumentality, or the Smithsonian Institution led
24 to the creation or continuation of that hostile work

1 environment or retaliatory hostile work environ-
2 ment.”.

3 (b) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
4 TILE WORK ENVIRONMENT AND RETALIATORY HOSTILE
5 WORK ENVIRONMENT.—Section 504 of the Rehabilitation
6 Act of 1973 (29 U.S.C. 794) is amended by adding at
7 the end the following:

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

16 “(1) such individual was authorized by such
17 employer—

18 “(A) to undertake or recommend tangible
19 employment actions affecting the qualified indi-
20 vidual with a disability; or

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

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

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

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

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

9 Section 1977 of the Revised Statutes (42 U.S.C.
10 1981) is amended by adding at the end the following:

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

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

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

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

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

4 **SEC. 8. AMENDMENT TO THE GENETIC INFORMATION NON-**
5 **DISCRIMINATION ACT OF 2008.**

6 (a) STANDARD FOR EMPLOYER LIABILITY FOR HOS-
7 TILE WORK ENVIRONMENT.—Section 202 of the Genetic
8 Information Nondiscrimination Act of 2008 (42 U.S.C.
9 2000ff–1) is amended by adding at the end the following:

10 “(d) Subject to section 12 of the Fair Employment
11 Protection Act of 2016, an employer shall be liable for
12 the acts of any individual whose harassment of an em-
13 ployee has created or continued a hostile work environ-
14 ment that constitutes an unlawful employment practice
15 under this section if, at the time of the harassment—

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

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

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

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

1 (b) STANDARD FOR EMPLOYER LIABILITY FOR RE-
2 TALIATORY HOSTILE WORK ENVIRONMENT.—Section
3 207(f) of the Genetic Information Nondiscrimination Act
4 (42 U.S.C. 2000ff–6(f)) is amended by striking “violations
5 of this subsection.” and inserting “violations of this sub-
6 section. Subject to section 12 of the Fair Employment
7 Protection Act of 2016, an employer shall be liable for
8 the acts of any individual whose harassment of an em-
9 ployee has created or continued a retaliatory hostile work
10 environment that constitutes discrimination under this
11 subsection if, at the time of the harassment—

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 retaliatory hostile
20 work environment.”.

21 **SEC. 9. AMENDMENT TO THE GOVERNMENT EMPLOYEE**
22 **RIGHTS ACT OF 1991.**

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

1 “(c) Subject to section 12 of the Fair Employment
2 Protection Act of 2016, an employer of an individual de-
3 scribed under section 304(a) shall be liable for the acts
4 of any individual whose harassment of a State employee
5 described in section 304 has created or continued a hostile
6 work environment or a retaliatory hostile work environ-
7 ment constituting discrimination under this section, if at
8 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 employee; or

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

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

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

19 **CODE.**

20 Section 411 of title 3, United States Code, is amend-
21 ed—

22 (1) by redesignating subsections (c) through (f)
23 as subsections (d) through (g), respectively;

24 (2) by inserting after subsection (b) the fol-
25 lowing:

1 “(c) LIABILITY OF EMPLOYING OFFICE.—Subject to
2 section 12 of the Fair Employment Protection Act of
3 2016, an employing office shall be liable for the acts of
4 any individual whose harassment of a covered employee
5 has created or continued a hostile work environment or
6 a retaliatory hostile work environment constituting dis-
7 crimination under this section if, at the time of the harass-
8 ment—

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

11 “(A) to undertake or recommend tangible
12 employment actions affecting the covered em-
13 ployee; or

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

16 “(2) the negligence of the employing office led
17 to the creation or continuation of that hostile work
18 environment or retaliatory hostile work environ-
19 ment.”; and

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

1 **SEC. 11. AMENDMENT TO THE CONGRESSIONAL ACCOUNT-**
2 **ABILITY ACT OF 1995.**

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

5 (1) by redesignating subsection (d) as subsection (e);
6 and

7 (2) by inserting after subsection (c) the following:

8 “(d) Subject to section 12 of the Fair Employment
9 Protection Act of 2016, an employing office shall be liable
10 for the acts of any individual whose harassment of a cov-
11 ered employee has created or continued a hostile work en-
12 vironment or a retaliatory hostile work environment that
13 constitutes discrimination under this section if, at the time
14 of the harassment—

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

17 “(A) to undertake or recommend tangible
18 employment actions affecting the covered em-
19 ployee; or

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

22 “(2) the negligence of the employing office led
23 to the creation or continuation of that hostile work
24 environment or retaliatory hostile work environ-
25 ment.”.

1 **SEC. 12. RULE OF CONSTRUCTION.**

2 Nothing in this Act shall be construed to limit the
3 availability of, or access to, defenses available under the
4 law.

5 **SEC. 13. SAVINGS CLAUSE.**

6 If any provision of this Act is declared invalid, the
7 other provisions in this Act will remain in full force and
8 effect.

9 **SEC. 14. APPLICATION.**

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

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