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(Original Signature of Member)

116TH CONGRESS
1ST SESSION

H. R.

To amend the Age Discrimination in Employment Act of 1967 and other laws to clarify appropriate standards for Federal employment discrimination and retaliation claims, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. SCOTT of Virginia (for himself, Mr. SENSENBRENNER, Ms. BONAMICI, Mr. KATKO, Mr. HURD of Texas, Ms. ADAMS, Mr. TAKANO, and Mr. GROTHMAN) introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Age Discrimination in Employment Act of 1967 and other laws to clarify appropriate standards for Federal employment discrimination and retaliation 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”.

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

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

3 (1) In enacting section 107 of the Civil Rights
4 Act of 1991 (adding section 703(m) of the Civil
5 Rights Act of 1964), Congress reaffirmed its under-
6 standing that unlawful discrimination is often dif-
7 ficult to detect and prove because those who dis-
8 criminate do not usually admit their discrimination
9 and often try to conceal their true motives. Section
10 703(m) of the Civil Rights Act of 1964 expressly ap-
11 proved so-called “mixed motive” claims, providing
12 that an unlawful employment practice is established
13 when a protected characteristic was a motivating
14 factor for any employment practice, even though
15 other factors also motivated the practice.

16 (2) Congress enacted amendments to other civil
17 rights statutes, including the Age Discrimination in
18 Employment Act of 1967 (referred to in this section
19 as the “ADEA”), the Americans with Disabilities
20 Act of 1990, and the Rehabilitation Act of 1973, but
21 Congress did not expressly amend those statutes to
22 address mixed motive discrimination.

23 (3) In the case of *Gross v. FBL Financial Serv-*
24 *ices, Inc.*, 557 U.S. 167 (2009), the Supreme Court
25 held that, because Congress did not expressly amend
26 the ADEA to address mixed motive claims, such

1 claims were unavailable under the ADEA, and in-
2 stead the complainant bears the burden of proving
3 that a protected characteristic or protected activity
4 was the “but for” cause of an unlawful employment
5 practice. This decision has significantly narrowed
6 the scope of protections afforded by the statutes that
7 were not expressly amended in 1991 to address
8 mixed motive claims.

9 (b) PURPOSES.—The purposes of this Act are—

10 (1) to clarify congressional intent that mixed
11 motive claims shall be available, and that a com-
12 plaining party need not prove that a protected char-
13 acteristic or protected activity was the “but for”
14 cause of an unlawful employment practice, under the
15 ADEA and similar civil rights provisions;

16 (2) to reject the Supreme Court’s reasoning in
17 the Gross decision that Congress’ failure to amend
18 any statute other than title VII of the Civil Rights
19 Act of 1964 (with respect to discrimination claims),
20 in enacting section 107 of the Civil Rights Act of
21 1991, suggests that Congress intended to disallow
22 mixed motive claims under other statutes; and

23 (3) to clarify that complaining parties—

1 (A) may rely on any type or form of ad-
2 missible evidence to establish their claims of an
3 unlawful employment practice;

4 (B) are not required to demonstrate that
5 the protected characteristic or activity was the
6 sole cause of the employment practice; and

7 (C) may demonstrate an unlawful employ-
8 ment practice through any available method of
9 proof or analytical framework.

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

11 (a) AGE DISCRIMINATION IN EMPLOYMENT ACT OF
12 1967.—

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

18 “(g)(1) Except as otherwise provided in this Act, an
19 unlawful practice is established under this Act when the
20 complaining party demonstrates that age or an activity
21 protected by subsection (d) was a motivating factor for
22 any practice, even though other factors also motivated the
23 practice.

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

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

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

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

13 (A) in subsection (b)—

14 (I) in the first sentence, by striking

15 “The” and inserting “(1) The”;

16 (ii) in the third sentence, by striking

17 “Amounts” and inserting the following:

18 “(2) Amounts”;

19 (iii) in the fifth sentence, by striking

20 “Before” and inserting the following:

21 “(4) Before”; and

22 (iv) by inserting before paragraph (4),

23 as designated by clause (iii) of this sub-

24 paragraph, the following:

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

7 “(A) may grant declaratory relief, injunctive re-
8 lief (except as provided in subparagraph (B)), and
9 attorney’s fees and costs demonstrated to be directly
10 attributable only to the pursuit of a claim under sec-
11 tion 4(g)(1); and

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

15 (B) in subsection (c)(1), by striking “Any”
16 and inserting “Subject to subsection (b)(3),
17 any”.

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

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

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

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

4 (b) TITLE VII OF THE CIVIL RIGHTS ACT OF
5 1964.—

6 (1) CLARIFYING PROHIBITION AGAINST IMPER-
7 MISSIBLE CONSIDERATION OF RACE, COLOR, RELI-
8 GION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT
9 PRACTICES.—Section 703 of the Civil Rights Act of
10 1964 (42 U.S.C. 2000e–2) is amended by striking
11 subsection (m) and inserting the following:

12 “(m) Except as otherwise provided in this title, an
13 unlawful employment practice is established under this
14 title when the complaining party demonstrates that race,
15 color, religion, sex, or national origin or an activity pro-
16 tected by section 704(a) was a motivating factor for any
17 employment practice, even though other factors also moti-
18 vated the practice.”.

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

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

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

1 (1) DEFINITIONS.—Section 101 of the Ameri-
2 cans with Disabilities Act of 1990 (42 U.S.C.
3 12111) is amended by adding at the end the fol-
4 lowing:

5 “(11) DEMONSTRATES.—The term ‘dem-
6 onstrates’ means meets the burdens of production
7 and persuasion.”.

8 (2) CLARIFYING PROHIBITION AGAINST IMPER-
9 MISSIBLE CONSIDERATION OF DISABILITY IN EM-
10 PLOYMENT PRACTICES.—Section 102 of such Act
11 (42 U.S.C. 12112) is amended by adding at the end
12 the following:

13 “(e) PROOF.—

14 “(1) ESTABLISHMENT.—Except as otherwise
15 provided in this Act, a discriminatory practice is es-
16 tablished under this Act when the complaining party
17 demonstrates that disability or an activity protected
18 by subsection (a) or (b) of section 503 was a moti-
19 vating factor for any employment practice, even
20 though other factors also motivated the practice.

21 “(2) DEMONSTRATION.—In establishing a dis-
22 criminatory practice under paragraph (1) or by any
23 other method of proof, a complaining party—

24 “(A) may rely on any type or form of ad-
25 missible evidence and need only produce evi-

1 dence sufficient for a reasonable trier of fact to
2 find that a discriminatory practice occurred
3 under this Act; and

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

8 (3) CERTAIN ANTI-RETALIATION CLAIMS.—Sec-
9 tion 503(e) of such Act (42 U.S.C. 12203(e)) is
10 amended—

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

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

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

16 “(2) CERTAIN ANTI-RETALIATION CLAIMS.—
17 Section 107(e) shall apply to claims under section
18 102(e)(1) with respect to title I.”.

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

22 “(c) DISCRIMINATORY MOTIVATING FACTOR.—On a
23 claim in which an individual demonstrates that disability
24 was a motivating factor for any employment practice,
25 under section 102(e)(1), and a respondent demonstrates

1 that the respondent would have taken the same action in
2 the absence of the impermissible motivating factor, the
3 court—

4 “(1) may grant declaratory relief, injunctive re-
5 lief (except as provided in paragraph (2)), and attor-
6 ney’s fees and costs demonstrated to be directly at-
7 tributable only to the pursuit of a claim under sec-
8 tion 102(e)(1); and

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

12 (d) REHABILITATION ACT OF 1973.—

13 (1) IN GENERAL.—Sections 501(f), 503(d), and
14 504(d) of the Rehabilitation Act of 1973 (29 U.S.C.
15 791(f), 793(d), and 794(d)), are each amended by
16 adding after the words “title I of the Americans
17 with Disabilities Act of 1990 (42 U.S.C. 12111 et
18 seq.)” the following: “, including the standards of
19 causation or methods of proof applied under section
20 102(e) of that Act (42 U.S.C. 12112(e)),”.

21 (2) FEDERAL EMPLOYEES.—The amendment
22 made by paragraph (1) to section 501(f) shall be
23 construed to apply to all employees covered by sec-
24 tion 501.

1 **SEC. 4. 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.