NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

EMPLOYMENT

FACT SHEET

The Fair Employment Protection Act, S. 2133, H.R. 4227 Section-By-Section Summary

March 2014

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.

Section 1 – Short Title

The Fair Employment Protection Act of 2014.

Section 2 – Findings and Purposes

This bill includes the following findings:

- Harassment is a widespread problem in the American workplace. Women and people of color in low-wage jobs are especially vulnerable to it.
- Sexual harassment of women is also particularly commonplace in male-dominated industries (e.g., construction, public safety, manufacturing, farm work, and high-tech), and harassment in male-dominated industries acts as a barrier to women's entry into higher-paying jobs.
- Racial harassment in the workplace remains a pervasive problem. Workers in a wide range of occupations from service and support positions to management and professional positions report experiencing race-based harassment while on the job.
- Harassment in the workplace is a persistent barrier to opportunity for people with disabilities, and is used to send the message that those with disabilities do not belong at work. Age discrimination also continues to be a barrier to employment for many older workers, and a majority of older Americans are concerned that age may be an obstacle to finding work.
- The Supreme Court in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton* held that employers have a heightened legal responsibility when their employees with supervisory authority engage in harassment. If this harassment does not result in a tangible employment action against the victims then employers are vicariously liable for the harassment unless they can prove an affirmative defense.
- Whether an employer should be vicariously liable for harassment is a functional analysis based on the authority vested in an individual by the employer.
- Individuals who direct employees' daily work activities but do not have the authority to hire, fire, or take other tangible employment actions against an employee are common in the American workplace – particularly in industries that employ low-wage workers (e.g., retail, restaurant, health care, housekeeping, and personal care). Employers give these individuals significant authority in the workplace that can aid in perpetuating discrimination; therefore, the employer should be vicariously liable when these individuals harass and create a hostile work environment.
- The Supreme Court's 2013 decision in *Vance v. Ball State University* ignored this workplace reality by excluding these individuals from the standard that determines an employer's vicarious liability for harassment by an employee that is considered a "supervisor" – and significantly undermined protections against workplace harassment.

The purpose of this bill is:

- To clarify that under several federal statutes, an employer is legally responsible for harassment that creates a hostile work environment or retaliatory hostile work environment if:

- The harasser is authorized to undertake or recommend tangible employment actions affecting the victim of the harassment, or
- The harasser is authorized to direct the victim's daily work activities.

o The statutes amended by this bill are: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, Section 1977 of the Revised Statutes, the Genetic Information Nondiscrimination Act of 2008, the Government Employee Rights Act of 1991, the Congressional Accountability Act of 1995, and title III of the United States Code.

Section 3 – Amendment to Title VII of the Civil Rights Act of 1964

Subsection 3(a) – Standard for Employer Liability for Hostile Work Environment

Under Title VII of the Civil Rights Act of 1964, which prohibits workplace harassment based on an employee's race, color, religion, sex, or national origin, an employer is liable for harassment that leads to a hostile work environment if:

o The harasser was authorized to take tangible employment actions affecting the victim; or

o The harasser was authorized to direct the victim's daily work activities; or

o The employer's negligence led to the creation or continuance of the hostile work environment.

This section is subject to Section 12 of the bill, which provides that the bill is to be construed to allow employers to continue to assert any defenses to liability currently available under law.

Subsection 3(b) – Standard for Employer Liability for Retaliatory Hostile Work Environment

Under Section 704 of Title VII, which makes it unlawful for an employer to retaliate against an employee because the employee has complained of discrimination, an employer is liable for retaliation that leads to a hostile work environment if:

o The person engaging in retaliation was authorized to take tangible employment actions affecting the complainant; or

o The person engaging in retaliation was authorized to direct the complainant's daily work activities; or

o The employer's negligence led to the creation or continuance of the retaliatory hostile work environment.

This section is subject to Section 12 of the bill, which provides that the bill is to be construed to allow employers to continue to assert any defenses to liability currently available under law.

Subsection 3(c) – Standard for Federal Government Liability

The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to federal government employers.[1]

Section 4 – Amendment to the Age Discrimination in Employment Act of 1967

Subsection 4(a) – Standard for Employer Liability for Hostile Work Environment

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits age-based harassment in the workplace. The employer liability standards and defenses in subsection 3(a) apply to ADEA hostile work environment claims.

Subsection 4(b) – Standard for Employer Liability for Retaliatory Hostile Work Environment

The employer liability standards and defenses in subsection 3(b) apply to ADEA retaliatory hostile work environment claims.

Subsection 4(c) – Standard for Federal Government Liability

The employer liability standards and defenses in subsection 4(a) and subsection 4(b) apply to federal government employers for ADEA-based harassment claims.

Section 5 – Amendment to the Americans with Disabilities Act of 1990

Subsection 5(a) – Standard for Employer Liability for Hostile Work Environment

The Americans with Disabilities Act of 1990 (ADA) prohibits workplace harassment based on a disability. The employer liability standards and

defenses in subsection 3(a) apply to ADA hostile work environment claims.

Subsection 5(b) – Standard for Employer Liability for Retaliatory Hostile Work Environment

The employer liability standards and defenses in subsection 3(b) apply to ADA retaliatory hostile work environment claims.

Section 6 – Amendment to the Rehabilitation Act of 1973

Subsection 6(a) – Standard for Federal Government Liability for Hostile Work Environment and Retaliatory Hostile Work Environment

Federal employees with disabilities have ADA protections and remedies under the Rehabilitation Act of 1973. The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to federal government employers for hostile work environment and retaliatory hostile work environment claims based on the Rehabilitation Act.

Subsection 6(b) – Standard for Federal Grantee Liability for Hostile Work Environment and Retaliatory Hostile Work Environment

Employees of federally-funded programs and activities have ADA protections and remedies under the Rehabilitation Act of 1973. The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to federally-funded programs and activities for hostile work environment and retaliatory hostile work environment claims based on the Rehabilitation Act.

Subsection 6(c) – Standard for Federal Government and Federal Grantee Liability for Hostile Work Environment and Retaliatory Hostile Work Environment

The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to claims of hostile work environment and retaliatory hostile work environment under the Rehabilitation Act.

Section 7 – Amendment to Section 1977 of the Revised Statutes

42 U.S.C. 1981 prohibits workplace harassment based on an employee's race. The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to claims of hostile work environment and retaliatory hostile work environment against nongovernmental employers.

Section 8 – Amendments to the Genetic Information Nondiscrimination Act of 2008

Subsection 8(a) – Standard for Employer Liability for Hostile Work Environment

The Genetic Information Discrimination Act of 2008 (GINA) prohibits workplace harassment based on an employee's genetic information. The employer liability standards and defenses in subsection 3(a) apply to GINA hostile work environment claims.

Subsection 8(b) – Standard for Employer Liability for Retaliatory Hostile Work Environment

The employer liability standards and defenses in subsection 3(b) apply to GINA retaliatory hostile work environment claims.

Section 9 – Amendment to the Government Employee Rights Act of 1991

The Government Employee Rights Act of 1991 (GERA) extends Title VII, ADEA, and ADA protections, which prohibit harassment based on race, color, religion, sex, national origin, age, or disability, to staff of local and state elected officials. The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to claims of hostile work environment and retaliatory hostile work environment against state and local elected offices.

Section 10 – Amendment to Title 3 of the United States Code

Section 411 of Title 3 extends Title VII, ADEA, and ADA protections, which prohibit harassment based on race, color, religion, sex, national origin, age, or disability, to Presidential appointees. The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to claims of hostile work environment and retaliatory hostile work environment against employing offices of Presidential appointees.

Section 11 – Amendment to the Congressional Accountability Act of 1995

The Congressional Accountability Act of 1995 (CAA) extends Title VII, ADEA, ADA, and Rehabilitation Act protections, which prohibit harassment based on race, color, religion, sex, national origin, age, or disability, to federal legislative branch employees.[2] The employer liability standards and defenses in subsection 3(a) and subsection 3(b) apply to claims of hostile work environment and retaliatory hostile work environment against legislative branch offices.

Section 12 – Rule of Construction

This section provides that the Act is not to be construed to limit the availability of any defenses that are available to employers under current law.

Section 13 – Savings Clause

Should a court of law hold any one provision of this Act invalid, the remaining provisions of this Act will remain in force.

Section 14 – Application

This Act and the amendments it makes to existing law apply to all claims pending on or after the date of enactment.

1 Under 42 U.S.C. § 2000e-16, Title VII applies to military departments, executive agencies, U.S. Postal Service, D.C. government, the competitive service of the Judicial branch, the Smithsonian Institution, the Government Printing Office, the Government Accountability Office, and the Library of Congress.

2 2 U.S.C. § 1301(3) (defining employees covered under the Act as employees of the U.S. Congress, Office of Congressional Accessibility Services, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, or the Office of Technology Assessment).