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(Original Signature of Member)

115TH 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.

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IN THE HOUSE OF REPRESENTATIVES

Mr. SCOTT of Virginia (for himself and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on

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**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 discriminators do  
8 not usually admit their discrimination and often try  
9 to conceal their true motives. Section 703(m) of the  
10 Civil Rights Act of 1964 expressly approved so-  
11 called “mixed motive” claims, providing that an un-  
12 lawful employment practice is established when a  
13 protected characteristic was a motivating factor for  
14 any employment practice, even though other factors  
15 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 ANTIRETALIATION CLAIMS.—Sec-  
9           tion 503(c) of such Act (42 U.S.C. 12203(c)) 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 ANTIRETALIATION CLAIMS.—Sec-  
17          tion 107(c) 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.