

BILL TEXT
S 3317
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S. 3317

To restore the effective use of group actions for claims arising under title VII of the Civil Rights Act of 1964, title I of the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, section 1977 of the Revised Statutes, and the Genetic Information Nondiscrimination Act of 2008, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 20, 2012

Mr. FRANKEN (for himself, Mr. LEAHY, Mrs. MURRAY, Mr. HARKIN, Mr. WHITEHOUSE, Mr. BLUMENTHAL, Ms. MIKULSKI, Mr. SANDERS, Mrs. BOXER, Mr. AKAKA, Mr. COONS, Mr. INOUE, Mr. KERRY, Mrs. SHAHEEN, Mr. BINGAMAN, Mr. BROWN of Ohio, Mrs. GILLIBRAND, Mr. UDALL of New Mexico, Mr. DURBIN, Mr. WYDEN, Mr. MERKLEY, Ms. CANTWELL, Mr. UDALL of Colorado, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To restore the effective use of group actions for claims arising under title VII of the Civil Rights Act of 1964, title I of the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, section 1977 of the Revised Statutes, and the Genetic Information Nondiscrimination Act of 2008, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Equal Employment Opportunity Restoration Act of 2012”.

SEC. 2. FINDINGS AND PURPOSE.

(a) Findings.—Congress finds the following:

(1) Congress has enacted laws to eradicate workplace discrimination and to secure equal employment opportunities for all Americans, as noted in *Teamsters v. United States*, 431 U.S. 324 (1977) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (stating that civil rights laws are meant “to assure equality of employment opportunities and to eliminate . . . discriminatory practices and devices” in the workplace).

(2) Workplace discrimination laws prohibit subjective employment practices that operate to deny equal employment opportunities to employees, as explained in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), which stated that personnel decisions “based on the exercise of personal judgment or the application of inherently subjective criteria” are unlawful when the personnel decisions have the effect of discriminating on grounds prohibited by law.

(3) Class actions often have been the most effective means to enforce employment discrimination laws, as explained in *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395 (1977) (“[S]uits alleging . . . discrimination are often by their very nature class suits, involving classwide wrongs” where “[c]ommon questions of law or fact are typically present.”) and in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (“Economic reality dictates that [claims of relatively small value] proceed as a class action or not at all.”).

(4) Historically, a class action alleging employment discrimination could be maintained if the class was united by a common issue of law or fact. As a leading legal treatise, William B. Rubenstein, 1 *Newberg on Class Actions* § 3:20 (5th ed. 2011), explained, “this requirement [was] easily met in most cases”. As another leading treatise, Charles A. Wright et al., 7A *Federal Practice and Procedure*, Wright and Miller § 1763 (3rd ed. 2005), explained, this requirement had been given “permissive application”.

(5) However, the Supreme Court recently made it more difficult for victims of discrimination to vindicate claims for their rights. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court required “convincing proof of a companywide discriminatory pay and promotion policy” as a prerequisite to class certification. In a dissent in that case, Justice Ginsberg wrote that the Court’s decision “disqualifies the class at the starting gate”.

(b) Purpose.—The purpose of this Act is to restore employees’ ability to challenge, as a group, discriminatory employment practices, including subjective employment practices.

SEC. 3. GROUP ACTIONS.

(a) In General.—Part VI of title 28, United States Code, is amended by adding at the end the following:

“CHAPTER 182—GROUP ACTIONS

“Sec.

“4201. Group actions in certain employment discrimination cases.

“§ 4201. Group actions in certain employment discrimination cases

“(a) Group Actions.—In seeking relief under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.), title V of the Rehabilitation Act of 1973 (29 U.S.C. 791 et seq.), section 1977 of the Revised Statutes (42 U.S.C. 1981), or title II of the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff et seq.) (individually referred to in this section as a ‘covered employment statute’), 1 or more members (collectively referred to in this section as the ‘representative party’) of a group may sue on behalf of all members of the group if the representative party shows, by a reasonable inference, that—

“(1) the members of the group are so numerous that their joinder is impracticable;

“(2) the claims of the representative party are typical of the claims of the group the representative party seeks to represent and the representative party and the representative party’s counsel will fairly and adequately protect the interests of the group; and

“(3) the members of the group are, or have been, subject to an employment practice that has adversely affected or is adversely affecting a significant portion of the group’s members.

“(b) Subjective Employment Practices.—

“(1) DEFINITION.—In this subsection, the term ‘subjective employment practice’ means—

“(A) an employer’s policy of leaving personnel decisions to the unguided discretion of supervisors, managers, and other employees with authority to make such personnel decisions; or

“(B) an employment practice that combines a subjective employment practice, as defined in subparagraph (A), with other types of personnel decisions.

“(2) CHALLENGES.—A representative party may challenge a subjective employment practice covered by a covered employment statute in a group action filed under this section to

the same extent as the party may challenge any other employment practice covered by the covered employment statute in such an action.

“(3) EXERCISE OF DISCRETION IN DIFFERENT WAYS.—The fact that individual supervisors, managers, or other employees with authority to make personnel decisions may exercise discretion in different ways in applying a subjective employment practice under the covered employment statute shall not preclude a representative party from filing a corresponding group action under this section.

“(4) CONSIDERATION OF WRITTEN NONDISCRIMINATION POLICY.—In determining whether to certify a group action challenging an employment practice, the court may consider as evidence, in opposition to certification, an employer’s written nondiscrimination policy only to the extent that the employer demonstrates that the policy has been consistently and effectively used to prevent and, where necessary, promptly correct discrimination against the group.

“(c) Relationship to Rule 23 of the Federal Rules of Civil Procedure.—

“(1) ELECTION OF PROCEDURE.—The representative party may elect to proceed in a group action under this section or in a class action under rule 23 of the Federal Rules of Civil Procedure. This election shall occur not later than the latest date on which the representative party may petition for class certification under rule 23 of the Federal Rules of Civil Procedure.

“(2) RULE 23 REQUIREMENTS.—To the extent consistent with this section, the court shall apply the provisions of rule 23(c) through rule 23(h) of the Federal Rules of Civil Procedure, including the requirements under rule 23 regarding notice and requests for exclusion, to claims brought pursuant to this section.

“(3) INTERLOCUTORY APPELLATE REVIEW.—Decisions granting or denying certification of claims as group actions under this section are subject to review to the same extent as orders granting or denying class certification pursuant to rule 23 of the Federal Rules of Civil Procedure.

“(4) CLASS ACTION FAIRNESS ACT.—Group actions certified under this section shall be subject to section 1332(d), section 1453, and chapter 114 to the same extent as class actions certified pursuant to rule 23 of the Federal Rules of Civil Procedure.

“(5) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to create any inference regarding the standards for determining whether claims may be adjudicated together under any law other than the covered employment statutes.

“(d) Remedies.—

“(1) AVAILABILITY OF REMEDIES.—If an employer has been found liable under a covered employment statute against a group certified under this section, the court may deny a remedy available under the covered employment statute to a member of the group only if the employer demonstrates, by a preponderance of the evidence, that the member of the group would not have received the corresponding employment opportunity or benefit even in the absence of a violation of the covered employment statute.

“(2) RELIEF.—

“(A) IN GENERAL.—The court shall fashion the most complete relief possible for members of a prevailing group described in this section and shall have broad discretion in determining how to fashion that relief.

“(B) EXERCISE OF DISCRETION.—In exercising its discretion under this paragraph, the court shall—

“(i) use such procedures as the interests of justice warrant, which procedures may include economic or statistical modeling, mathematical calculation, sampling, individual adjudication, and other means the court may adopt;

“(ii) consider which procedure will best ensure that members of the group will be made whole;

“(iii) consider which procedure will best minimize the cost to and burden on the parties; and

“(iv) consider which procedure most reliably and efficiently accounts for limitations on the court’s ability to identify individual members of the group and to measure the harm incurred by individual members of the group.”.

(b) Technical and Conforming Amendment.—The table of chapters for part VI of title 28, United States Code, is amended by adding at the end the following:

“182. Group actions

4201”.

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