

# SENATE BILL 688

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CF HB 1350

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By: **Senators Raskin, Conway, Feldman, Ferguson, Kelley, King, Madaleno, Manno, Montgomery, Peters, Pinsky, Pugh, ~~and Rosapepe~~ Rosapepe, and Forehand**

Introduced and read first time: January 31, 2014  
Assigned to: Judicial Proceedings

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Committee Report: Favorable with amendments  
Senate action: Adopted  
Read second time: March 8, 2014

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## CHAPTER \_\_\_\_\_

1 AN ACT concerning

2 **Fair Employment Preservation Act of 2014**

3 FOR the purpose of providing that ~~an act or omission of a certain employee may be~~  
4 ~~construed to be an act or omission of a certain employer under certain~~  
5 ~~circumstances~~ an employer is liable under certain circumstances in an action  
6 concerning a violation of certain provisions of law based on the creation or  
7 continuation of a hostile work environment; providing for the application of this  
8 Act; and generally relating to discrimination and retaliation in employment.

9 BY adding to  
10 Article – State Government  
11 Section 20–610  
12 Annotated Code of Maryland  
13 (2009 Replacement Volume and 2013 Supplement)

14 Preamble

15 WHEREAS, The State of Maryland seeks to provide increased protections to  
16 employees who are the victims of discrimination in the workplace; and

17 WHEREAS, The laws of Maryland governing employment discrimination have  
18 been based, in large part, on federal statutory provisions, and decisions of the U.S.

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**EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.**

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 Supreme Court interpreting those federal laws may have implications for the  
2 interpretation of Maryland's fair employment laws; and

3 WHEREAS, The Supreme Court's decision in Ledbetter v. Goodyear Tire &  
4 Rubber Co., 550 U.S. 618 (2007), significantly impaired federal statutory protections  
5 against discrimination in employment by allowing employees who are the victims of  
6 discrimination only a limited opportunity under the Civil Rights Act to seek relief for  
7 their unequal pay; and

8 WHEREAS, The General Assembly of Maryland responded by passing the Lilly  
9 Ledbetter Civil Rights Restoration Act of 2009 (Chapters 56 and 57 of the Acts of the  
10 General Assembly of 2009); and

11 WHEREAS, The Lilly Ledbetter Civil Rights Restoration Act of 2009 allowed  
12 employees who are the victims of discrimination greater relief by ensuring that each  
13 discriminating paycheck constitutes a separate act of discrimination; and

14 WHEREAS, Federal protections against discriminatory actions were again  
15 impaired by the Supreme Court in Vance v. Ball State University, 133 S.Ct. 2434  
16 (2013); and

17 WHEREAS, The Supreme Court ruled in Vance that under Title VII of the Civil  
18 Rights Act of 1964 an employer is vicariously liable for ~~the discriminatory actions of~~  
19 hostile work environment harassment by a supervisor only if the supervisor has the  
20 power to ~~hire, fire, transfer, or affect the status of another employee~~ effect a significant  
21 change in employment status, including hiring, firing, failing to promote,  
22 reassignment to a position with significantly different responsibilities, or a significant  
23 change in benefits; and

24 WHEREAS, The Supreme Court's decision in Vance weakens protections from  
25 supervisor harassment that the Supreme Court established in Faragher v. Boca  
26 Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742  
27 (1998), which held that an employer may be vicariously liable under the Civil Rights  
28 Act of 1964 for hostile work environment harassment of an employee by an individual  
29 that has supervisory authority over that employee; and

30 WHEREAS, In Faragher and Ellerth, the Supreme Court held that a strict  
31 liability standard applies to harassment that results in a tangible employment action,  
32 but that when supervisors perpetrate harassment that creates a hostile work  
33 environment, but does not result in a tangible employment action, an employer is  
34 vicariously liable unless the employer exercised reasonable care to prevent and correct  
35 any harassing behavior, and the plaintiff unreasonably failed to take advantage of the  
36 preventive or corrective opportunities that the employer provided; and

37 WHEREAS, The Supreme Court holding in Vance limiting the definition of  
38 "supervisor" to those employees with the authority to take tangible employment  
39 actions against their victims ignores the fact that very often supervisors who direct

1 daily work activities, but who do not have the authority to take tangible employment  
 2 actions, wield significant power over their subordinates; and

3 WHEREAS, Justice Ginsburg dissented in Vance, asserting that an ~~employee is~~  
 4 ~~a supervisor liable for discriminatory actions~~ employer is liable for hostile work  
 5 environment harassment by a supervisor if the supervisor has the power to direct the  
 6 work of other employees; and

7 ~~WHEREAS, Adopting Justice Ginsburg's definition of supervisor is an accord~~  
 8 ~~with the vision of the Lilly Ledbetter Fair Pay Act to ensure that employees who are~~  
 9 ~~the victims of discrimination have expanded avenues to challenge workplace~~  
 10 ~~discrimination; and~~

11 WHEREAS, The General Assembly believes that the legal standards and  
 12 burdens developed and applied by the courts with respect to claims brought under  
 13 Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 42  
 14 U.S.C. 1983, Title 20, Subtitle 6 of the State Government Article, and Article 46 of the  
 15 Maryland Declaration of Rights prior to the Vance decision should be preserved; and

16 WHEREAS, It is the intent of the General Assembly that the standards set  
 17 forth in this Act shall be interpreted and applied for these claims in a manner  
 18 consistent with legal precedent developed by the Maryland and federal courts before  
 19 the issuance of the Vance decision; now, therefore,

20 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF  
 21 MARYLAND, That the Laws of Maryland read as follows:

### Article – State Government

#### 23 **20–610.**

24 **IN AN ACTION CONCERNING A VIOLATION OF THIS SUBTITLE ~~FOR~~**  
 25 **UNLAWFUL EMPLOYMENT HARASSMENT BASED ON THE CREATION OR**  
 26 **CONTINUATION OF A HOSTILE WORK ENVIRONMENT, AN EMPLOYER IS LIABLE:**

27 **(1) FOR THE ~~ACT OR OMISSION~~ ACTS OR OMISSIONS TOWARD AN**  
 28 **EMPLOYEE OR APPLICANT FOR EMPLOYMENT OF AN ~~EMPLOYEE~~ INDIVIDUAL**  
 29 **WHO:**

30 **(1) (1) UNDERTAKES OR RECOMMENDS TANGIBLE**  
 31 **EMPLOYMENT ACTIONS AFFECTING ~~ANOTHER~~ THE EMPLOYEE OR ~~AN~~**  
 32 **APPLICANT FOR EMPLOYMENT, INCLUDING HIRING, FIRING, PROMOTING,**  
 33 **DEMOTING, AND REASSIGNING ~~ANOTHER~~ THE EMPLOYEE OR ~~AN~~ APPLICANT FOR**  
 34 **EMPLOYMENT; OR**

1                    ~~(2)~~ (II) DIRECTS, SUPERVISES, OR EVALUATES THE WORK  
2 ACTIVITIES OF ~~ANOTHER~~ THE EMPLOYEE; OR

3                    (2) IF THE NEGLIGENCE OF THE EMPLOYER LED TO THE  
4 CREATION OR CONTINUATION OF THE HOSTILE WORK ENVIRONMENT.

5                    SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be  
6 construed to apply only prospectively and may not be applied or interpreted to have  
7 any effect on or application to any cause of action arising before the effective date of  
8 this Act.

9                    SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect  
10 October 1, 2014.

Approved:

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Governor.

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President of the Senate.

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Speaker of the House of Delegates.