

LD8365728

## SENATE BILL NO. 411

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws  
on February 28, 1994)

(Patron Prior to Substitute—Senator Robb)

A BILL to amend the Code of Virginia by adding in Title 2.1 a chapter numbered 10.01, consisting of sections numbered 2.1-116.01 through 2.1-116.10, relating to the Virginia Whistle Blower Protection Act.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 2.1 a chapter numbered 10.01, consisting of sections numbered 2.1-116.01 through 2.1-116.10, as follows:

## CHAPTER 10.01.

## THE VIRGINIA WHISTLE BLOWER PROTECTION ACT.

§ 2.1-116.01. Legislative intent.

It shall be the policy of the Commonwealth that employees of public bodies be freely able to report instances of wrongdoing and waste committed by these bodies, their employees or independent contractors of such bodies.

§ 2.1-116.02. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Appropriate authority" means a federal, state, county or municipal government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency, or organization. The term includes, but is not limited to, the Office of the Attorney General, the Office of the State Internal Auditor, and the General Assembly and its committees having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

"Employee" means a person who performs a full- or part-time service for wages, salary, or other remuneration under a written contract for hire for a public body.

"Employer" means a person supervising one or more employees, including the employee in question, a superior of that supervisor, or an agent of a public body.

"Good faith report" means a written, electronic or oral report, provided such oral report is promptly reduced to writing, of wrongdoing or waste which is made without malice or consideration of personal benefit, which otherwise complies with the good faith requirements of § 2.1-116.04, and which the person making the report has reasonable cause to believe is true. The report shall specify the factual basis for the allegation of wrongdoing or waste.

"Public body" means any of the following:

1. A department, division, officer, agency, bureau, board, commission, court in its nonjudicial functions only, council, institution, spending unit, authority or other instrumentality of the Commonwealth;

2. A commission, council, department, agency, board, court in its nonjudicial functions only, official, special district, corporation or other instrumentality of a county or a municipality; or

3. Any other body which is created by state or political subdivision authority or which is funded by thirty-five percent or more by or through state or political subdivision authority, or a member or employee of that body.

"Waste" means an employer's or employee's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state, or political subdivision sources.

"Whistle blower" means an employee who witnesses or has evidence of wrongdoing or waste and who makes or demonstrates by clear and convincing evidence that he is about to make a good faith report of, or testifies or is about to testify to, the wrongdoing or waste to one of the employee's superiors, an agent of the employer or an appropriate authority.

"Wrongdoing" means a violation, which is not of a merely technical or minimal nature, of a federal or state statute or regulation, of an ordinance or regulation formally adopted by a political subdivision, or of a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or the employee.

§ 2.1-116.03. Applicability; discriminatory and retaliatory actions against whistle blowers prohibited.

A. No employer may discharge, threaten or otherwise discriminate or retaliate against a whistle blower whether acting on his own, or through a person acting on his behalf or under his direction, by changing his compensation, terms, conditions, location or privileges of employment.

60 B. No employer may discharge, threaten or otherwise discriminate or retaliate against a whistle  
61 blower by changing his compensation, terms, conditions, location or privileges of employment because  
62 the whistle blower is requested or subpoenaed by an appropriate authority to participate in an  
63 investigation, hearing or inquiry held by an appropriate authority or in a court action.

64 § 2.1-116.04. Good faith requirement.

65 A. To be protected by this chapter, employees who disclose information about suspected wrongdoing  
66 shall do so in good faith and upon a reasonable belief that their allegations are accurate.

67 B. Disclosures which are false or reckless, confidential by law, or malicious shall not be deemed  
68 good faith reports and shall not be protected by this chapter.

69 § 2.1-116.05. Notification requirements.

70 In order to receive the protection of this chapter, an employee shall give a good faith report of the  
71 suspected wrongdoing to his agency head before disclosing the alleged wrongdoing to parties outside of  
72 his agency, except in situations where the agency head is the subject of the complaint. Where the agency  
73 head is the subject of the complaint the employee shall give such report to the agency head's appointing  
74 authority.

75 § 2.1-116.06. Violation; election of grievance procedure.

76 A. Subject to the provisions of subsection A of § 2.1-116.07, any employee, covered by a grievance  
77 procedure pursuant to §§ 2.1-114.5:1, 15.1-7.1 or § 15.1-7.2, may initiate a grievance alleging a  
78 violation of this chapter.

79 B. Whenever it is determined that an appointing authority or supervisor has violated this chapter an  
80 entry shall be made in the appointing authority or supervisor's personnel record to that effect.

81 C. Whenever the Department of Employee Relations Counselors learns that a grievance has been  
82 initiated under this chapter which involves information concerning waste of public funds or  
83 mismanagement of a state agency, it shall transmit a copy of the grievance to the state auditor for an  
84 investigation.

85 D. If an employee elects to pursue a grievance, the decision of the panel shall be the exclusive  
86 remedy. Initiation of a grievance shall preclude initiation of a civil action.

87 E. A grievance panel in rendering a decision for the employee in a grievance brought under this  
88 chapter, may order reinstatement, back pay, full reinstatement of fringe benefits and seniority rights, any  
89 other combination of these remedies, or any other relief available under the grievance procedure  
90 statutes.

91 § 2.1-116.07. Violation; election of civil action; limitation on actions; burden or proof, defense.

92 A. Subject to the provisions of subsection D of § 2.1-116.06, an employee who alleges a violation of  
93 this chapter may bring a civil action in the circuit court of the locality where the employee is employed  
94 for relief pursuant to § 2.1-116.08, which action shall be brought within 180 days after the occurrence  
95 of the alleged violation. Initiation of litigation shall preclude the filing of a grievance.

96 B. An employee alleging a violation of this chapter shall prove by a preponderance of the evidence  
97 that (i) the employee made or caused to be made a good faith report to the employer or appropriate  
98 authority concerning an instance or wrongdoing or waste, (ii) the employer was aware that the  
99 employee made or caused to be made such report, (iii) the employee suffered an adverse employment  
100 action, and (iv) the report was closely followed by the adverse employment action. The employer may  
101 introduce evidence of a separate, legitimate reason for the adverse employment action. The employee  
102 may rebut the evidence offered by the employer by showing that the reason stated by the employer is a  
103 pretext and that, but for the employee having made, or caused to be made, the good faith report, the  
104 employee would not have suffered the adverse employment action.

105 § 2.1-116.08. Redress for the whistle blower.

106 The court, in rendering a judgment for the employee in an action brought pursuant to this chapter,  
107 may order injunctive relief, reinstatement of the employee, the payment of back wages, full reinstatement  
108 of fringe benefits and seniority rights, or any combination of these remedies. The court may also award  
109 the employee all or a portion of the costs of litigation, including reasonable attorneys fees, if the court  
110 determines that such award is appropriate.

111 § 2.1-116.09. Limitations on scope of construction.

112 The provisions of this chapter shall not be construed to require an employer to compensate an  
113 employee for participation in an investigation, hearing or inquiry held by an appropriate authority.

114 § 2.1-116.10. Notice to employees of protection of whistle blowers.

115 Employers shall prominently post notices and use other appropriate means to notify employees and  
116 keep them informed of the protections and obligations set forth in this chapter.