

20107400D

HOUSE BILL NO. 1418

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on February 4, 2020)

(Patron Prior to Substitute—Delegate Watts)

A BILL to amend the Code of Virginia by adding a section numbered 2.2-3904, relating to workplace harassment; civil actions by private parties.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 2.2-3904 as follows:

§ 2.2-3904. *Harassment in employment; definitions; civil action by private parties.*

A. For purposes of this section:

"Lactation" means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.

"Sexual harassment" includes a sexual advance, a request for sexual favors, or any other conduct of a sexual nature, where (i) submission to the conduct involved is made, implicitly or explicitly, a term or condition of employment; (ii) submission to or rejection of the conduct is used as the basis for an employment decision affecting the individual's employment; or (iii) such conduct unreasonably alters an individual's terms, conditions, or privileges of employment by creating an intimidating, hostile, or offensive work environment.

"Unlawful discrimination" includes workplace harassment.

"Workplace harassment" means conduct on the basis of race; color; religion; national origin; sex; sexual orientation; gender identity; pregnancy; childbirth or related medical conditions, including lactation; age; marital status; or veteran status, regardless of whether it is direct or indirect, or verbal or nonverbal, that unreasonably alters an individual's terms, conditions, or privileges of employment, including by creating an intimidating, hostile, or offensive work environment. "Workplace harassment" includes sexual harassment.

B. For purposes of this subsection, in determining whether conduct constitutes workplace harassment, the following rules shall apply:

1. The determination shall be made on the basis of the record as a whole, according to the totality of the circumstances. A single incident may constitute workplace harassment.

2. Incidents that may be workplace harassment shall be considered in the aggregate, with conduct of varying types viewed in totality, rather than in isolation, and conduct based on multiple protected characteristics viewed in totality, rather than in isolation.

3. Factors to consider in determining whether conduct constitutes workplace harassment include the following:

a. The frequency of the conduct;

b. The duration of the conduct;

c. The location where the conduct occurred;

d. The number of individuals engaged in the conduct;

e. The nature of the conduct, which may include physical, verbal, pictorial, or visual conduct, and conduct that occurs in person or is transmitted, such as electronically;

f. Whether the conduct is threatening;

g. Any power differential between the alleged harasser and the person allegedly harassed;

h. Any use of epithets, slurs, or other conduct that is humiliating or degrading; and

i. Whether the conduct reflects stereotypes about individuals in the protected class involved.

4. Conduct may be workplace harassment regardless of whether, for example:

a. The complaining party is not the individual being harassed;

b. The complaining party acquiesced or otherwise submitted to, or participated in, the conduct;

c. The conduct is also experienced by others outside the protected class involved;

d. The complaining party was able to continue carrying out duties and responsibilities of the party's job despite the conduct;

e. The conduct did not cause a tangible injury or psychological injury; or

f. The conduct occurred outside of the workplace.

C. Nothing in this chapter or in Article 4 (§ 2.2-520 et seq.) of Chapter 5 creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions, except as specifically provided in subsections D and E.

D. No employer employing more than five employees shall discharge or unlawfully discriminate against any such employee on the basis of race; color; religion; national origin; sex; sexual orientation; gender identity; pregnancy; childbirth or related medical conditions, including lactation; marital status;

60 or veteran status. No employer employing more than five employees shall unlawfully discriminate
61 against or discharge any such employee on the basis of age if the employee is 40 years of age or older.

62 E. An aggrieved person may commence a civil action in an appropriate general district or circuit
63 court having jurisdiction over the person who allegedly unlawfully discriminated against such person in
64 violation of this chapter. Any such action shall be brought within 300 days from the date of the
65 unlawful discrimination or, if the employee has filed a complaint with the Division of Human Rights of
66 the Department of Law or a local human rights or human relations agency or commission within 300
67 days of the unlawful discrimination, such action shall be brought within 90 days from the date that the
68 Division or a local human rights or human relations agency or commission has rendered a final
69 disposition on the complaint.

70 F. If the court or jury finds that unlawful discrimination has occurred or is about to occur, the court
71 or jury may award to the plaintiff, as the prevailing party, compensatory and punitive damages, without
72 limitation otherwise imposed by law, and the court may award reasonable attorney fees and costs and
73 may grant as relief any permanent or temporary injunction, temporary restraining order, or other order,
74 including an order enjoining the defendant from engaging in such practice, or order such affirmative
75 action as may be appropriate.

76 G. Causes of action based upon the public policies reflected in this chapter shall be exclusively
77 limited to those actions, procedures, and remedies, if any, afforded by applicable federal or state civil
78 rights statutes or local ordinances. Nothing in this section or § 2.2-3900 shall be deemed to alter,
79 supersede, or otherwise modify the authority of the Division or of any local commission on human
80 rights established pursuant to § 15.2-853 or 15.2-965.