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HOUSE BILL NO. 1418

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on February 27, 2020)

(Patron Prior to Substitute—Delegate Watts)

A BILL to amend and reenact § 2.2-3903 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 39 of Title 2.2 sections numbered 2.2-3904, 2.2-3905, and 2.2-3906, relating to workplace harassment; civil actions by private parties.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-3903 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Chapter 39 of Title 2.2 sections numbered 2.2-3904, 2.2-3905, and 2.2-3906 as follows:

§ 2.2-3903. Causes of action not created.

A. 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 B and C *and as provided in §§ 2.2-3904, 2.2-3905, and 2.2-3906 taken together.*

B. No employer employing more than five but less than 15 persons shall discharge any such employee on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, including lactation. No employer employing more than five but less than 20 persons shall discharge any such employee on the basis of age if the employee is 40 years of age or older. For the 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.

C. The employee may bring an action in a general district or circuit court having jurisdiction over the employer who allegedly discharged the employee in violation of this section. Any such action shall be brought within 300 days from the date of the discharge or, if the employee has filed a complaint with the Division of Human Rights of the Department of Law or a local human rights or human relations agency or commission within 300 days of the discharge, such action shall be brought within 90 days from the date that the Division or a local human rights or human relations agency or commission has rendered a final disposition on the complaint. The court may award up to 12 months' back pay with interest at the judgment rate as provided in § 6.2-302. However, if the court finds that either party engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii) award back pay to the date of judgment without regard to the 12-month limitation.

In any case where the employee prevails, the court shall award attorney fees from the amount recovered, not to exceed 25 percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.

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

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

A. For purposes of this section:

"Employer" means a person employing five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

"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) enduring the unwelcome conduct becomes a condition of continued 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) the conduct unreasonably alters an individual's terms, conditions, or privileges of employment by creating an intimidating, hostile, or offensive work environment.

"Workplace harassment" means unwelcome 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.

60 *B. It is an unlawful discriminatory practice for an employer to engage in workplace harassment. An*
61 *employer is responsible for harassment by the employer's nonmanagerial and nonsupervisory employees*
62 *only if the employer knew or should have known of the conduct and failed to take reasonable corrective*
63 *measures.*

64 *C. In determining whether conduct constitutes workplace harassment, the following rules shall apply:*
65 *1. The determination shall be made on the basis of the record as a whole, according to the totality*
66 *of the circumstances. A single incident may constitute workplace harassment.*

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

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

72 *a. The frequency of the conduct;*

73 *b. The duration of the conduct;*

74 *c. The location where the conduct occurred;*

75 *d. The number of individuals engaged in the conduct;*

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

78 *f. Whether the conduct is threatening;*

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

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

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

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

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

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

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

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

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

89 *f. The conduct occurred outside of the workplace.*

90 **§ 2.2-3905. Procedures for a charge of unlawful discrimination; notice; investigation; report;**
91 **conciliation; notice of the right to file a civil action; temporary relief.**

92 *A. Any person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint*
93 *in writing under oath or affirmation with the Division of Human Rights of the Department of Law (the*
94 *Division). The Division itself or the Attorney General may in a like manner file such a complaint. The*
95 *complaint shall be in such detail as to substantially apprise any party properly concerned as to the*
96 *time, place, and facts surrounding the alleged unlawful discrimination.*

97 *B. Upon perfection of a complaint filed pursuant to subsection A, the Division shall timely serve a*
98 *charge on the respondent and provide all parties with a notice informing the parties of the*
99 *complainant's rights, including the right to commence a civil action, and the dates within which the*
100 *complainant may exercise such rights. In the notice, the Division shall notify the complainant that the*
101 *charge of unlawful discrimination will be dismissed with prejudice and with no right to further proceed*
102 *if a written complaint is not timely filed with the appropriate general district or circuit court.*

103 *C. The complainant and respondent may agree to voluntarily submit the charge to mediation without*
104 *waiving any rights that are otherwise available to either party pursuant to this chapter and without*
105 *incurring any obligation to accept the result of the mediation process. Nothing occurring in mediation*
106 *shall be disclosed by the Division or admissible in evidence in any subsequent proceeding unless the*
107 *complainant and the respondent agree in writing that such disclosure be made.*

108 *D. Once a charge has been issued, the Division shall conduct an investigation sufficient to determine*
109 *whether there is reasonable cause to believe the alleged discrimination occurred. Such charge shall be*
110 *the subject of a report made by the Division. The report shall be a confidential document subject to*
111 *review by the Attorney General, authorized Division employees, and the parties. The review shall state*
112 *whether there is reasonable cause to believe the alleged unlawful discrimination has been committed.*

113 *E. If the report on a charge of discrimination concludes that there is no reasonable cause to believe*
114 *the alleged unlawful discrimination has been committed, the charge shall be dismissed and the*
115 *complainant shall be given notice of his right to commence a civil action.*

116 *F. If the report on a charge of discrimination concludes that there is reasonable cause to believe the*
117 *alleged unlawful discrimination has been committed, the complainant and respondent shall be notified of*
118 *such determination and the Division shall immediately endeavor to eliminate any alleged unlawful*
119 *discriminatory practice by informal methods such as conference, conciliation, and persuasion. When the*
120 *Division determines that further endeavor to settle a complaint by conference, conciliation, and*
121 *persuasion is unworkable and should be bypassed, the Division shall issue a notice that the case has*

122 been closed and the complainant shall be given notice of his right to commence a civil action.

123 G. At any time after a notice of charge of discrimination is issued, the Division or complainant may
124 petition the appropriate court for temporary relief, pending final determination of the proceedings under
125 this section, including an order or judgment restraining the respondent from doing or causing any act
126 that would render ineffectual an order that a court may enter with respect to the complainant. Whether
127 it is brought by the Division or by the complainant, the petition shall contain a certification by the
128 Division that the particular matter presents exceptional circumstances in which irreparable injury will
129 result from unlawful discrimination in the absence of temporary relief.

130 H. Upon receipt of a written request from the complainant, the Division shall promptly issue a notice
131 of the right to file a civil action to the complainant after (i) 180 days have passed from the date the
132 complaint was filed or (ii) the Division determines that it will be unable to complete its investigation
133 within 180 days from the date the complaint was filed.

134 **§ 2.2-3906. Civil actions by private parties.**

135 A. An aggrieved person who has been provided a notice of his right to file a civil action pursuant to
136 § 2.2-3905 may commence a timely civil action in an appropriate general district or circuit court having
137 jurisdiction over the person who allegedly unlawfully discriminated against such person in violation of
138 this chapter.

139 B. If the court or jury finds that unlawful discrimination has occurred, the court or jury may award
140 to the plaintiff, as the prevailing party, compensatory and punitive damages and the court may award
141 reasonable attorney fees and costs and may grant as relief any permanent or temporary injunction,
142 temporary restraining order, or other order, including an order enjoining the defendant from engaging
143 in such practice, or order such affirmative action as may be appropriate.

144 C. Upon timely application, the Attorney General may intervene in such civil action if the Attorney
145 General certifies that the case is of general public importance. Upon intervention, the Attorney General
146 may obtain such relief as would be available to a private party under subsection B.

147 **2. That any regulations implementing the provisions of § 2.2-3905 of the Code of Virginia, as**
148 **created by this act, shall, so far as practicable, conform to the practices and timelines of the Equal**
149 **Employment Opportunity Commission with respect to analogous federal laws and regulations, for**
150 **the purpose of maintaining a workshare agreement with that agency.**