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HOUSE BILL NO. 827

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on February 19, 2020)

(Patron Prior to Substitute—Delegate Carroll Foy)

A BILL to amend and reenact §§ 2.2-3901 and 2.2-3903 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 39 of Title 2.2 a section numbered 2.2-3904, relating to the Virginia Human Rights Act; discrimination on the basis of pregnancy, childbirth, or related medical conditions; reasonable accommodation for the known limitations of persons related to pregnancy, childbirth, or related medical conditions.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-3901 and 2.2-3903 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 39 of Title 2.2 a section numbered 2.2-3904 as follows:

§ 2.2-3901. Unlawful discriminatory practice and gender discrimination defined.

Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability shall be an "unlawful discriminatory practice" for the purposes of this chapter.

The terms "because of sex or gender" or "on the basis of sex or gender" or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of pregnancy, childbirth or related medical conditions, *including lactation*. Women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities.

For purposes of this chapter, "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.

§ 2.2-3903. Causes of action for unlawful discharge on the basis of race, color, religion, national origin, sex, or age; other 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 § 2.2-3904.

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, or 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 or 2.2-3904 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. Causes of action for unlawful discrimination related to pregnancy, childbirth, or related medical conditions.

A. As used in this section:

"Employer" means any person, or agent of such person, employing five or more employees for each

60 working day in each of 20 or more calendar weeks in the current or preceding calendar year.

61 "Lactation" means lactation as defined in § 2.2-3901.

62 "Reasonable accommodation" includes more frequent or longer bathroom breaks, breaks to express
63 breast milk, access to a private location other than a bathroom for the expression of breast milk,
64 acquisition or modification of equipment or access to or modification of employee seating, a temporary
65 transfer to a less strenuous or hazardous position, assistance with manual labor, job restructuring, a
66 modified work schedule, light duty assignments, and leave to recover from childbirth.

67 "Related medical conditions" includes lactation.

68 B. No employer shall:

69 1. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to
70 such individual's compensation, terms, conditions, or privileges of employment on the basis of
71 pregnancy, childbirth, or related medical conditions.

72 2. Refuse to make reasonable accommodation to the known limitations of a person related to
73 pregnancy, childbirth, or related medical conditions, unless the employer can demonstrate that the
74 accommodation would impose an undue hardship on the employer.

75 a. In determining whether an accommodation would constitute an undue hardship on the employer,
76 the following shall be considered:

77 (1) Hardship on the conduct of the employer's business, considering the nature of the employer's
78 operation, including composition and structure of the employer's workforce;

79 (2) The size of the facility where employment occurs; and

80 (3) The nature and cost of the accommodations needed.

81 b. The fact that the employer provides or would be required to provide a similar accommodation to
82 other classes of employees shall create a rebuttable presumption that the accommodation does not
83 impose an undue hardship on the employer.

84 3. Take adverse action against an employee who requests or uses a reasonable accommodation
85 pursuant to this section. As used in this subdivision, "adverse action" includes failure to reinstate any
86 such employee to her previous position or an equivalent position with equivalent pay, seniority, and
87 other benefits when her need for a reasonable accommodation ceases.

88 4. Deny employment or promotion opportunities to an otherwise qualified applicant or employee
89 because such employer will be required to make reasonable accommodation to the known limitations of
90 such applicant or employee related to pregnancy, childbirth, or related medical conditions.

91 5. Require an employee to take leave if another reasonable accommodation can be provided to the
92 known limitations related to the pregnancy, childbirth, or related medical conditions of such employee.

93 C. Each employer shall engage in a timely, good faith interactive process with an employee who has
94 requested an accommodation pursuant to this section to determine if the requested accommodation is
95 reasonable and, if such accommodation is determined not to be reasonable, discuss alternative
96 accommodations that may be provided.

97 D. An employer shall post in a conspicuous location and include in any employee handbook
98 information concerning (i) the prohibition against unlawful discrimination on the basis of pregnancy,
99 childbirth, or related medical conditions and (ii) an employee's rights to reasonable accommodation for
100 known limitations related to pregnancy, childbirth, or related medical conditions. Such information shall
101 also be directly provided to (a) new employees upon commencement of their employment and (b) any
102 employee within 10 days of such employee's providing notice to the employer that she is pregnant.

103 E. An employee or applicant who has been denied any of the rights afforded under subsection B may
104 bring an action in a general district or circuit court having jurisdiction over the employer that allegedly
105 denied such rights. Any such action shall be brought within two years from the date of the unlawful
106 denial of rights, or, if the employee or applicant has filed a complaint with the Division of Human
107 Rights of the Department of Law or a local human rights or human relations agency or commission
108 within two years of the unlawful denial of rights, such action shall be brought within 90 days from the
109 date that the Division or a local human rights or human relations agency or commission has rendered a
110 final disposition on the complaint.

111 If the court or jury finds that an unlawful denial of rights afforded under subsection B has occurred,
112 the court or jury may award to the plaintiff, as the prevailing party, compensatory damages, back pay,
113 and other equitable relief. The court may also award reasonable attorney fees and costs and may grant
114 as relief any permanent or temporary injunction, temporary restraining order, or other order, including
115 an order enjoining the defendant from engaging in such practice, or order such affirmative action as
116 may be appropriate.

117 The court may award to the defendant reasonable attorney fees and costs if the defendant prevails in
118 an action brought under this subsection and the court finds that the claim of the person bringing the
119 action was clearly frivolous, clearly vexatious, or brought in bad faith.

120 F. The provisions of this section regarding the provision of reasonable accommodation for known
121 limitations related to pregnancy, childbirth, and related medical conditions shall not be construed to

122 *affect any other provision of law relating to discrimination on the basis of sex or pregnancy.*
123 **2. That all employers shall provide the notice required by subsection D of § 2.2-3904 of the Code**
124 **of Virginia, as created by this act, to all existing employees of such employer within 120 days of**
125 **the effective date of this act.**