

SUBCOMMITTEE:

HOUSE BILL NO. 2155

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws

on January 28, 2021)

(Patron Prior to Substitute--Delegate Watts)

A BILL to amend and reenact §§ 2.2-522, 2.2-3905, 2.2-3907, and 2.2-3908 of the Code of Virginia, relating to the Virginia Human Rights Act; nondiscrimination in employment; sexual harassment and workplace harassment.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-522, 2.2-3905, 2.2-3907, and 2.2-3908 of the Code of Virginia are amended as follows:

§ 2.2-522. Filing with Division deemed filing with other state agencies.

Filing of a written complaint with the Division of Human Rights shall be deemed filing with any state agency for the purpose of complying with any time limitation on the filing of a complaint, provided the time limit for filing with the other agency has not expired. The time limit for filing with other agencies shall be tolled while the Division is either investigating the complaint or making a decision to refer it. Complaints under this article shall be filed with the Division within ~~180 days~~ two years of the alleged discriminatory event.

§ 2.2-3905. Nondiscrimination in employment; definitions; exceptions.

A. As used in this section:

"Age" means being an individual who is at least 40 years of age.

"Employee" means an individual employed by an employer.

"Employer" means a person employing ~~15~~ 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. ~~However, (i) for purposes of unlawful discharge under subdivision B-1 on the basis of race, color, religion, national origin, status as a veteran, sex, sexual orientation, gender identity, marital status, pregnancy, or childbirth or related medical conditions including lactation, "employer" means any employer employing~~

27 ~~more than five persons and (ii) for purposes of unlawful discharge under subdivision B 1 on the basis of~~
28 ~~age, "employer" means any employer employing more than five but fewer than 20 persons.~~

29 "Employment agency" means any person, or an agent of such person, regularly undertaking with
30 or without compensation to procure employees for an employer or to procure for employees opportunities
31 to work for an employer.

32 "Joint apprenticeship committee" means the same as that term is defined in § 40.1-120.

33 "Labor organization" means an organization engaged in an industry, or an agent of such
34 organization, that exists for the purpose, in whole or in part, of dealing with employers on behalf of
35 employees concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions
36 of employment. "Labor organization" includes employee representation committees, groups, or
37 associations in which employees participate.

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

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

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

52 B. It is an unlawful ~~employment~~ discriminatory practice for:

53 1. An employer to:

54 a. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to
55 such individual's compensation, terms, conditions, or privileges of employment because of such
56 individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
57 childbirth or related medical conditions including lactation, age, status as a veteran, or national origin; or

58 b. Limit, segregate, or classify employees or applicants for employment in any way that would
59 deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect an
60 individual's status as an employee, because of such individual's race, color, religion, sex, sexual
61 orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including
62 lactation, age, status as a veteran, or national origin.

63 2. An employment agency to:

64 a. Fail or refuse to refer for employment, or otherwise discriminate against, any individual because
65 of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
66 childbirth or related medical conditions, age, status as a veteran, or national origin; or

67 b. Classify or refer for employment any individual on the basis of such individual's race, color,
68 religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
69 conditions, age, status as a veteran, or national origin.

70 3. A labor organization to:

71 a. Exclude or expel from its membership, or otherwise discriminate against, any individual because
72 of such individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
73 childbirth or related medical conditions, age, status as a veteran, or national origin;

74 b. Limit, segregate, or classify its membership or applicants for membership, or classify or fail to
75 or refuse to refer for employment any individual, in any way that would deprive or tend to deprive such
76 individual of employment opportunities, or would limit such employment opportunities or otherwise
77 adversely affect an individual's status as an employee or as an applicant for employment, because of such
78 individual's race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy,
79 childbirth or related medical conditions, age, status as a veteran, or national origin; or

80 c. Cause or attempt to cause an employer to discriminate against an individual in violation of
81 subdivisions a or b.

82 4. An employer, labor organization, or joint apprenticeship committee to discriminate against any
83 individual in any program to provide apprenticeship or other training program on the basis of such
84 individual's race, color, religion, sex, sexual orientation, gender identity, pregnancy, childbirth or related
85 medical conditions, age, status as a veteran, or national origin.

86 5. An employer, in connection with the selection or referral of applicants or candidates for
87 employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the
88 results of employment-related tests on the basis of race, color, religion, sex, sexual orientation, gender
89 identity, marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or
90 national origin.

91 6. Except as otherwise provided in this chapter, an employer to use race, color, religion, sex, sexual
92 orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age, status
93 as a veteran, or national origin as a motivating factor for any employment practice, even though other
94 factors also motivate the practice.

95 7. (i) An employer to discriminate against any employees or applicants for employment, (ii) an
96 employment agency or a joint apprenticeship committee controlling an apprenticeship or other training
97 program to discriminate against any individual, or (iii) a labor organization to discriminate against any
98 member thereof or applicant for membership because such individual has opposed any practice made an
99 ~~unlawful employment~~ discriminatory practice by this chapter or because such individual has made a
100 charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under
101 this chapter.

102 8. An employer, labor organization, employment agency, or joint apprenticeship committee
103 controlling an apprenticeship or other training program to print or publish, or cause to be printed or
104 published, any notice or advertisement relating to (i) employment by such an employer, (ii) membership
105 in or any classification or referral for employment by such a labor organization, (iii) any classification or
106 referral for employment by such an employment agency, or (iv) admission to, or employment in, any

107 program established to provide apprenticeship or other training by such a joint apprenticeship committee
108 that indicates any preference, limitation, specification, or discrimination based on race, color, religion,
109 sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions,
110 age, status as a veteran, or national origin, except that such a notice or advertisement may indicate a
111 preference, limitation, specification, or discrimination based on religion, sex, age, or national origin when
112 religion, sex, age, or national origin is a bona fide occupational qualification for employment.

113 9. An employer, labor organization, or employment agency to engage in workplace harassment. In
114 determining whether conduct constitutes workplace harassment, the following shall apply:

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

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

120 c. Factors to be considered in determining whether conduct constitutes workplace harassment
121 include (i) the frequency of the conduct; (ii) the duration of the conduct; (iii) the location where the
122 conduct occurred; (iv) the number of individuals engaged in the conduct; (v) the nature of the conduct,
123 which may be physical, verbal, pictorial, auditory, or visual and which may occur in person or by
124 transmittal, such as by electronic means; (vi) whether the conduct is threatening; (vii) any power
125 differential between the alleged harasser and the person allegedly harassed; (viii) any use of epithets, slurs,
126 or other conduct that is humiliating or degrading; and (ix) whether the conduct reflects stereotypes about
127 individuals in the protected class involved.

128 d. Conduct may be workplace harassment regardless of whether (i) the complaining party is the
129 individual being harassed; (ii) the complaining party acquiesced or otherwise submitted to or participated
130 in the conduct; (iii) the conduct is also experienced by others outside of the protected class involved; (iv)
131 the complaining party was able to continue carrying out the duties and responsibilities of such complaining
132 party's job despite the conduct; (v) the conduct caused a tangible or psychological injury; or (vi) the
133 conduct occurred outside of the workplace.

134 e. An employer shall be liable for workplace harassment pursuant to this section under the
135 following conditions:

136 (1) With regard to workplace harassment based on a hostile work environment created by the
137 actions of a supervisor where there is no tangible employment action, the employer shall be vicariously
138 liable. However, an employer may be relieved of liability if it can show that (i) the employer exercised
139 reasonable care to prevent and correct promptly any harassing behavior and (ii) the plaintiff employee
140 unreasonably failed to take advantage of any preventive or corrective opportunities provided by the
141 employer or to otherwise avoid harm.

142 (2) With regard to sexual harassment by a supervisor that has taken the form of a tangible
143 employment action or quid pro quo harassment, the employer shall be vicariously liable for the actions of
144 the supervisor. Unfulfilled threats by a supervisor to take a tangible employment action shall not constitute
145 quid pro quo harassment; however, such threats shall be deemed to create or contribute to an atmosphere
146 of harassment. In the case of unfulfilled threats, an employer may be relieved of liability if it can show
147 that (i) the employer exercised reasonable care to prevent and correct promptly any harassing behavior
148 and (ii) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective
149 opportunities provided by the employer or to otherwise avoid harm.

150 (3) With regard to workplace harassment created by coworkers, the employer shall not be
151 vicariously or automatically liable, but the employer shall be liable if it knew or should have known of
152 the conduct, unless it can show that it took immediate and appropriate corrective action.

153 (4) With regard to workplace harassment created by nonemployees, the employer shall not be
154 vicariously or automatically liable, but the employer shall be liable if it has the ability to control the
155 nonemployee and knew or should have known of the conduct. An employer shall be relieved of liability
156 if it can show that that it took immediate and appropriate corrective action.

157 C. Notwithstanding any other provision of this chapter, it is not an unlawful-employment
158 discriminatory practice:

159 1. For (i) an employer to hire and employ employees; (ii) an employment agency to classify, or
160 refer for employment, any individual; (iii) a labor organization to classify its membership or to classify or

161 refer for employment any individual; or (iv) an employer, labor organization, or joint apprenticeship
162 committee to admit or employ any individual in any apprenticeship or other training program on the basis
163 of such individual's religion, sex, or age in those certain instances where religion, sex, or age is a bona
164 fide occupational qualification reasonably necessary to the normal operation of that particular employer,
165 employment agency, labor organization, or joint apprenticeship committee;

166 2. For an elementary or secondary school or institution of higher education to hire and employ
167 employees of a particular religion if such elementary or secondary school or institution of higher education
168 is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by
169 a particular religious corporation, association, or society or if the curriculum of such elementary or
170 secondary school or institution of higher education is directed toward the propagation of a particular
171 religion;

172 3. For an employer to apply different standards of compensation, or different terms, conditions, or
173 privileges of employment, pursuant to a bona fide seniority or merit system, or a system that measures
174 earnings by quantity or quality of production, or to employees who work in different locations, provided
175 that such differences are not the result of an intention to discriminate because of race, color, religion, sex,
176 sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions, age,
177 status as a veteran, or national origin;

178 4. For an employer to give and to act upon the results of any professionally developed ability test,
179 provided that such test, its administration, or an action upon the results is not designed, intended, or used
180 to discriminate because of race, color, religion, sex, sexual orientation, gender identity, marital status,
181 pregnancy, childbirth or related medical conditions, age, status as a veteran, or national origin;

182 5. For an employer to provide reasonable accommodations related to pregnancy, childbirth or
183 related medical conditions, and lactation, when such accommodations are requested by the employee; or

184 6. For an employer to condition employment or premises access based upon citizenship where the
185 employer is subject to any requirement imposed in the interest of the national security of the United States
186 under any security program in effect pursuant to or administered under any statute or regulation of the
187 federal government or any executive order of the President of the United States.

188 D. Nothing in this chapter shall be construed to require any employer, employment agency, labor
189 organization, or joint apprenticeship committee to grant preferential treatment to any individual or to any
190 group because of such individual's or group's race, color, religion, sex, sexual orientation, gender identity,
191 marital status, pregnancy, childbirth or related medical conditions, age, status as a veteran, or national
192 origin on account of an imbalance that may exist with respect to the total number or percentage of persons
193 of any race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth
194 or related medical conditions, age, status as a veteran, or national origin employed by any employer,
195 referred or classified for employment by any employment agency or labor organization, admitted to
196 membership or classified by any labor organization, or admitted to or employed in any apprenticeship or
197 other training program, in comparison with the total number or percentage of persons of such race, color,
198 religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical
199 conditions, age, status as a veteran, or national origin in any community.

200 E. The provisions of this section shall not apply to the employment of individuals of a particular
201 religion by a religious corporation, association, educational institution, or society to perform work
202 associated with its activities.

203 **§ 2.2-3907. Procedures for a charge of unlawful discrimination; notice; investigation; report;**
204 **conciliation; notice of the right to file a civil action; temporary relief.**

205 A. Any person claiming to be aggrieved by an unlawful discriminatory practice may file a
206 complaint in writing under oath or affirmation with the Division of Human Rights of the Department of
207 Law (the Division) within two years of the alleged unlawful discriminatory practice. The Division itself
208 or the Attorney General may in a like manner file such a complaint. The complaint shall be in such detail
209 as to substantially apprise any party properly concerned as to the time, place, and facts surrounding the
210 alleged unlawful discrimination.

211 B. Upon perfection of a complaint filed pursuant to subsection A, the Division shall timely serve
212 a charge on the respondent and provide all parties with a notice informing the parties of the complainant's
213 rights, including the right to commence a civil action, and the dates within which the complainant may
214 exercise such rights. In the notice, the Division shall notify the complainant that the charge of unlawful

215 discrimination will be dismissed with prejudice and with no right to further proceed if a written complaint
216 is not timely filed with the appropriate general district or circuit court.

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

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

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

230 F. If the report on a charge of discrimination concludes that there is reasonable cause to believe
231 the alleged unlawful discrimination has been committed, the complainant and respondent shall be notified
232 of such determination and the Division shall immediately endeavor to eliminate any alleged unlawful
233 discriminatory practice by informal methods such as conference, conciliation, and persuasion. When the
234 Division determines that further endeavor to settle a complaint by conference, conciliation, and persuasion
235 is unworkable and should be bypassed, the Division shall issue a notice that the case has been closed and
236 the complainant shall be given notice of his right to commence a civil action.

237 G. At any time after a notice of charge of discrimination is issued, the Division or complainant
238 may petition the appropriate court for temporary relief, pending final determination of the proceedings
239 under this section, including an order or judgment restraining the respondent from doing or causing any
240 act that would render ineffectual an order that a court may enter with respect to the complainant. Whether
241 it is brought by the Division or by the complainant, the petition shall contain a certification by the Division

242 that the particular matter presents exceptional circumstances in which irreparable injury will result from
243 unlawful discrimination in the absence of temporary relief.

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

248 **§ 2.2-3908. Civil actions by private parties.**

249 A. An aggrieved person who has been provided a notice of his right to file a civil action pursuant
250 to § 2.2-3907 may, within one year of receiving such notice, commence a ~~timely~~ civil action in an
251 appropriate general district or circuit court having jurisdiction over the person who allegedly unlawfully
252 discriminated against such person in violation of this chapter.

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

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

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