

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

S

1

SENATE BILL 786

Short Title: BE HEARD in the Workplace/Funds. (Public)

Sponsors: Senator Smith (Primary Sponsor).

Referred to: Rules and Operations of the Senate

May 18, 2020

1 A BILL TO BE ENTITLED
2 AN ACT TO ENACT THE "BE HEARD IN THE WORKPLACE ACT," INCLUDING
3 RAISING THE MINIMUM WAGE OF TIPPED EMPLOYEES, TO DEFINE
4 PROTECTED CLASSES AND UNLAWFUL DISCRIMINATORY PRACTICES, AND
5 TO APPROPRIATE FUNDS TO IMPLEMENT THE PROVISIONS OF THIS ACT.

6 The General Assembly of North Carolina enacts:

7 SECTION 1. BE HEARD. – Chapter 99D of the General Statutes reads as rewritten:

8 "Chapter 99D.

9 "Civil Rights.

10 "Article 1.

11 "General Provisions.

12 "§ 99D-1. Interference with Civil Rights.

13 ...

14 (c) No civil action may be brought or maintained, and no liability may be imposed, under
15 this Chapter against a governmental unit, a government official with respect to actions taken
16 within the scope of ~~his~~the person's official governmental duties, or an employer or ~~his~~the
17 employer's agent with respect to actions taken concerning ~~his~~the employer's employees within
18 the scope of the employment relationship.

19 "Article 2.

20 "Unlawful Discriminatory Practices.

21 "Part 1. BE HEARD in the Workplace Act.

22 "§ 99D-2. Definitions; statutory construction.

23 (a) The following definitions apply in this Part:

24 (1) Employee. – A person employed by an employer. The term includes an
25 independent contractor (regardless of business structure, including
26 organization as a legal or commercial entity), an intern, a fellow, a volunteer,
27 or a trainee, whether or not the individual receives compensation, academic
28 credit, or other remuneration from the employer. The term also includes an
29 individual who applies or seeks to become such an independent contractor,
30 intern, fellow, volunteer, or trainee, for the employer.

31 (2) Employer. – A person employing one or more employees in this State. The
32 term includes an employment agency or labor organization.

33 (3) Protected classes or protected categories. – Includes the following:

34 a. Age.

35 b. Creed.

36 c. Disability.



- 1 d. Domestic violence victim status.
2 e. Gender identity or expression.
3 f. Familial status.
4 g. Lawful source of income (in reference to housing only).
5 h. Marital status.
6 i. Military status.
7 j. National origin.
8 k. Predisposing genetic characteristics.
9 l. Pregnancy-related condition.
10 m. Prior arrest or conviction record.
11 n. Race or color.
12 o. Sex.
13 p. Sexual orientation.
14 q. Retaliation for opposing unlawful discriminatory practices.
15 (4) Sexual harassment. – Conduct that includes a sexual advance, a request for
16 sexual favors, or any other conduct of a sexual nature.
17 (5) Workplace harassment. – Conduct-based protected class status regardless of
18 whether it is direct or indirect, or verbal or nonverbal, that unreasonably alters
19 an individual's terms, conditions, or privileges of employment, including by
20 creating an intimidating, hostile, or offensive work environment.
21 (b) The term "gender identity" includes the gender-related identity, appearance,
22 mannerisms, or other gender-related characteristics of an individual, regardless of the individual's
23 designated sex at birth.
24 (c) The term "including" means including, but not limited to.
25 (d) The term "sex" includes a sex stereotype.
26 (e) The term "sexual orientation" means homosexuality, heterosexuality, or bisexuality.
27 (f) Protected class status includes other persons with whom an individual who is a class
28 member is, or has been, associated with and may be based upon a perception or belief, even if
29 inaccurate, concerning an individual's protected class status.
30 (g) This Part is to be liberally construed without reference to any federal law that may
31 lead to a more restrictive result.
32 **§ 99D-3. Title; purpose.**
33 (a) This Part shall be known and may be cited as the "Bringing an End to Harassment by
34 Enhancing Accountability and Rejecting Discrimination in the Workplace Act" or the "BE
35 HEARD in the Workplace Act."
36 (b) The purpose of this Part is to protect victims of harassment, including sexual
37 harassment, and to protect the civil rights of individuals who are members of protected classes.
38 **§ 99D-4. Unlawful discriminatory practices by employers.**
39 (a) It is an unlawful discriminatory practice for an employer to subject any individual to
40 harassment because of an individual's protected class status or because the individual has opposed
41 any practices forbidden under this Article or because the individual has filed a complaint,
42 testified, or assisted in any proceeding under this Article, regardless of whether such harassment
43 would be considered severe or pervasive under precedent applied to harassment claims. It is an
44 unlawful discriminatory practice to subject an individual to inferior terms, conditions, or
45 privileges of employment because of the individual's membership in one or more protected
46 categories. The fact that the individual did not make a complaint about the harassment to the
47 employer shall not be determinative of whether such employer is liable. Nothing in this
48 subsection shall imply that an employee must demonstrate the existence of an individual to whom
49 the employee's treatment must be compared. It shall be an affirmative defense to liability under
50 this subsection that the harassing conduct does not rise above the level of what a reasonable

1 victim of discrimination with the same protected characteristic would consider petty slights or
2 trivial inconveniences.

3 (b) It is an unlawful discriminatory practice to permit discrimination against a
4 nonemployee in the employer's workplace. An employer may be held liable to a nonemployee
5 who is a contractor, subcontractor, vendor, consultant, or other person providing services
6 pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor,
7 vendor, consultant, or other person providing services pursuant to a contract in the workplace,
8 with respect to an unlawful discriminatory practice, when the employer, its agents, or supervisors
9 knew or should have known that such nonemployee was subjected to an unlawful discriminatory
10 practice in the employer's workplace, and the employer failed to take immediate and appropriate
11 corrective action. In reviewing such cases involving nonemployees, the extent of the employer's
12 control and any other legal responsibility which the employer may have with respect to the
13 conduct of the person who engaged in the unlawful discriminatory practice shall be considered.

14 (c) An unlawful discriminatory practice is established under this Part when the
15 complaining party demonstrates that the complaining party's protected class status was a
16 motivating factor for any employment practice, even though other factors also motivated the
17 employer. As used in this section, the term "demonstrates" means meeting the burdens of
18 production and persuasion.

19 **"§ 99D-5. Harassment in the workplace.**

20 (a) It is an unlawful discriminatory practice:

- 21 (1) For an employer to require an employee to submit to sexual harassment either
22 explicitly or implicitly as a term or condition of employment.
- 23 (2) For an employer to base an employment decision affecting an individual's
24 employment upon submission to or rejection of sexual harassment.
- 25 (3) When sexual harassment alters an individual's terms, conditions, or privileges
26 of employment, including by creating an intimidating, hostile, or offensive
27 work environment.

28 (b) In determining, for purposes of this section, whether conduct constitutes workplace
29 harassment because the conduct unreasonably alters an individual's terms, conditions, or
30 privileges of employment, including by creating an intimidating, hostile, or offensive work
31 environment, the following rules shall apply:

- 32 (1) That determination shall be made on the basis of the record as a whole,
33 according to the totality of the circumstances. A single incident may constitute
34 workplace harassment.
- 35 (2) Incidents that may be workplace harassment shall be considered in the
36 aggregate, with the following:
 - 37 a. Conduct of varying types (such as expressions of sex-based hostility,
38 requests for sexual favors, and denial of employment opportunities due
39 to sexual orientation) viewed in totality, rather than in isolation.
 - 40 b. Conduct based on multiple protected characteristics (such as sex and
41 race) viewed in totality, rather than in isolation.
- 42 (3) The following factors are among the factors to be considered in determining
43 whether conduct constitutes workplace harassment and shall not be construed
44 to be exhaustive. No one of those factors shall be considered to be
45 determinative in establishing whether conduct constitutes workplace
46 harassment. Such factors are each of the following:
 - 47 a. The frequency of the conduct.
 - 48 b. The duration of the conduct.
 - 49 c. The location where the conduct occurred.
 - 50 d. The number of individuals engaged in the conduct.

- 1 e. The nature of the conduct, which may include physical, verbal,
 2 pictorial, or visual conduct, and conduct that occurs in person or is
 3 transmitted, such as electronically.
 4 f. Whether the conduct is threatening.
 5 g. Any power differential between the alleged harasser and the person
 6 allegedly harassed.
 7 h. Any use of epithets, slurs, or other conduct that is humiliating or
 8 degrading.
 9 i. Whether the conduct reflects stereotypes about individuals in the
 10 protected class involved.
 11 (c) Conduct may be workplace harassment regardless of whether, for example:
 12 (1) The complaining party is not the individual being harassed.
 13 (2) The complaining party acquiesced or otherwise submitted to, or participated
 14 in, the conduct.
 15 (3) The conduct is also experienced by others outside the protected class involved.
 16 (4) The complaining party was able to continue carrying out duties and
 17 responsibilities of the party's job despite the conduct.
 18 (5) The conduct did not cause a tangible injury or psychological injury.
 19 (6) The conduct occurred outside of the workplace.

20 **"§ 99D-6. Employer liability for harassment.**

21 An employer is liable for the acts of any individual whose harassment of an employee has
 22 created or continued a retaliatory hostile work environment that is unlawful under this Part if, at
 23 the time of the harassment, (i) such individual was authorized by the employer to undertake or
 24 recommend tangible employment actions affecting the employee or to direct the employee's daily
 25 work activities or (ii) the negligence of the employer led to the creation or continuation of that
 26 retaliatory hostile work environment.

27 **"§ 99D-7. Civil action; limitations.**

28 (a) Any right or obligation created by this Part is enforceable by a civil action in addition
 29 to any other remedies at law or in equity. Punitive damages and attorney's fees may be awarded
 30 against employers and others who violate this Part.

31 (b) A civil action under this section alleging sexual harassment must be brought within
 32 three years of the alleged unlawful discriminatory practice giving rise to the action. All other
 33 civil actions under this section must be brought within one year of the alleged unlawful
 34 discriminatory practice.

35 **"§ 99D-8. Severability.**

36 If any provision of this Part or the application of a provision is held to be unconstitutional,
 37 the remainder of this Part and its application shall not be affected.

38 "Part 2. Nondiscrimination.

39 **"§ 99D-9. Prevention efforts.**

40 The North Carolina Human Relations Commission, the Civil Rights Division of the North
 41 Carolina Office of Administrative Hearings, and the Department of Labor shall jointly:

- 42 (1) Develop training materials for employers and the general public that are
 43 designed to prevent unlawful discriminatory practices.
 44 (2) Establish grant programs to prevent and respond to workplace discrimination
 45 and harassment."

46 **SECTION 2.** Nonretaliation. – G.S. 95-241(a)(1) reads as rewritten:

47 "(a) No person shall discriminate or take any retaliatory action against an employee
 48 because the employee in good faith does or threatens to do any of the following:

- 49 (1) File a claim or complaint, initiate any inquiry, investigation, inspection,
 50 proceeding or other action, or testify or provide information to any person
 51 with respect to any of the following:

- a. Chapter 97 of the General Statutes.
- b. Article 2A or Article 16 of this Chapter.
- c. Article 2A of Chapter 74 of the General Statutes.
- d. G.S. 95-28.1.
- e. Article 16 of Chapter 127A of the General Statutes.
- f. G.S. 95-28.1A.
- g. Article 52 of Chapter 143 of the General Statutes.
- h. Article 5F of Chapter 90 of the General Statutes.
- i. Chapter 99D of the General Statutes."

SECTION 3. Housing protections. – G.S. 41A-3 reads as rewritten:

"§ 41A-3. Definitions.

For the purposes of this Chapter, the following definitions apply:

...

(5a) "Protected class status" means being in a protected class of persons or having the attributes of a protected category of persons as defined in G.S. 99D-(a)(3).

...."

SECTION 4. Fair Housing. – G.S. 41A-4 reads as rewritten:

"§ 41A-4. Unlawful discriminatory housing practices.

(a) It is an unlawful discriminatory housing practice for any person in a real estate transaction, because of ~~race, color, religion, sex, national origin, handicapping condition, or familial status~~ to a person's protected class status to do any of the following:

- (1) Refuse to engage in a real estate transaction;
- (2) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;
- (2a), (2c) Repealed by Session Laws 2009-388, s. 1, effective October 1, 2009.
- (3) Refuse to receive or fail to transmit a bona fide offer to engage in a real estate transaction;
- (4) Refuse to negotiate for a real estate transaction;
- (5) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or fail to bring a property listing to his attention, or refuse to permit him to inspect real property;
- (6) Make, print, circulate, post, or mail or cause to be so published a statement, advertisement, or sign, or use a form or application for a real estate transaction, or make a record or inquiry in connection with a prospective real estate transaction, which indicates directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;
- (7) Offer, solicit, accept, use, or retain a listing of real property with the understanding that any person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith; or
- (8) Otherwise make unavailable or deny housing.

...

(b1) It is an unlawful discriminatory housing practice for any person or other entity whose business includes engaging in residential real estate related transactions to discriminate against any person in making available such a transaction, or in the terms and conditions of such a transaction, because of ~~race, color, religion, sex, national origin, handicapping condition, or familial~~ that person's protected class status. As used in this subsection, "residential real estate related transaction" means:

1 (1) The making or purchasing of loans or providing financial assistance (i) for
 2 purchasing, constructing, improving, repairing, or maintaining a dwelling, or
 3 (ii) where the security is residential real estate; or

4 (2) The selling, brokering, or appraising of residential real estate.

5 The provisions of this subsection shall not prohibit any financial institution from using a loan
 6 application which inquires into a person's financial and dependent obligations or from basing its
 7 actions on the income or financial abilities of any person.

8 (c) It is an unlawful discriminatory housing practice for a person to induce or attempt to
 9 induce another to enter into a real estate transaction from which such person may profit:

10 (1) By representing that a change has occurred, or may or will occur in the
 11 composition of the residents of the block, neighborhood, or area in which the
 12 real property is located with respect to ~~race, color, religion, sex, national~~
 13 ~~origin, handicapping condition, or familial~~ the protected class status of the
 14 owners or occupants; or

15 (2) By representing that a change has resulted, or may or will result in the
 16 lowering of property values, an increase in criminal or antisocial behavior, or
 17 a decline in the quality of schools in the block, neighborhood, or area in which
 18 the real property is located.

19 (d) It is an unlawful discriminatory housing practice to deny any person who is otherwise
 20 qualified by State law access to or membership or participation in any real estate brokers'
 21 organization, multiple listing service, or other service, organization, or facility relating to the
 22 business of engaging in real estate transactions, or to discriminate in the terms or conditions of
 23 such access, membership, or participation because of ~~race, color, religion, sex, national origin,~~
 24 ~~handicapping condition, or familial~~ that person's protected class status.

25 ...
 26 (g) It is an unlawful discriminatory housing practice to discriminate in land-use decisions
 27 or in the permitting of development based on ~~race, color, religion, sex, national origin,~~
 28 ~~handicapping condition, familial~~ a person's protected class status, or, except as otherwise
 29 provided by law, the fact that a development or proposed development contains affordable
 30 housing units for families or individuals with incomes below eighty percent (80%) of area median
 31 income. It is not a violation of this Chapter if land-use decisions or permitting of development is
 32 based on considerations of limiting high concentrations of affordable housing."

33 **SECTION 5. Housing Violations.** – G.S. 41A-5(a) reads as rewritten:

34 "**§ 41A-5. Proof of violation.**

35 (a) It is a violation of this Chapter if:
 36 (1) A person by his act or failure to act intends to discriminate against a person.
 37 A person intends to discriminate if, in committing an unlawful discriminatory
 38 housing practice described in G.S. 41A-4 he was motivated in full, or in any
 39 part at all, by ~~race, color, religion, sex, national origin, handicapping~~
 40 ~~condition, or familial~~ a person's protected class status. An intent to
 41 discriminate may be established by direct or circumstantial evidence.
 42 (2) A person's act or failure to act has the effect, regardless of intent, of
 43 discriminating, as set forth in G.S. 41A-4, against a person ~~of a particular race,~~
 44 ~~color, religion, sex, national origin, handicapping condition, or familial~~ of a
 45 protected class status. However, it is not a violation of this Chapter if a person
 46 whose action or inaction has an unintended discriminatory effect, proves that
 47 his action or inaction was motivated and justified by business necessity.

48"

49 **SECTION 6. Religious Exemption.** – G.S. 41A-6(a) reads as rewritten:

50 "**§ 41A-6. Exemptions.**

1 (a) The provisions of G.S. 41A-4, except for subdivision (a)(6), do not apply to the
2 following:

3 ...

4 (3) Religious institutions or organizations or charitable or educational
5 organizations operated, supervised, or controlled by religious institutions or
6 organizations which give preference to members of the same religion in a real
7 estate transaction, as long as membership in such religion is not restricted by
8 ~~race, color, sex, national origin, handicapping condition, or familial status;~~
9 protected class status other than religion;

10"

11 **SECTION 7.** Equal Employment Opportunity. – G.S. 143-422.2, as amended by this
12 act, reads as rewritten:

13 **"§ 143-422.2. Legislative declaration.**

14 It is the public policy of this State to protect and safeguard the right and opportunity of all
15 persons to seek, obtain and hold employment without discrimination or abridgement on account
16 of ~~race, religion, color, national origin, age, sex or handicap~~ protected class status as set forth in
17 G.S. 99D-2(a)(3) by employers which regularly employ ~~15~~ one or more employees. It is
18 recognized that the practice of denying employment opportunity and discriminating in the terms
19 of employment foments domestic strife and unrest, deprives the State of the fullest utilization of
20 its capacities for advancement and development, and substantially and adversely affects the
21 interests of employees, employers, and the public in general."

22 **SECTION 8.** State Employee Equal Opportunity. – G.S. 126-16 reads as rewritten:

23 **"§ 126-16. Equal opportunity for employment and compensation by State departments and**
24 **agencies and local political subdivisions.**

25 All State agencies, departments, and institutions and all local political subdivisions of North
26 Carolina shall give equal opportunity for employment and compensation, without regard to ~~race,~~
27 ~~religion, color, national origin, sex, age, disability, or genetic information~~ protected class status
28 as set forth in G.S. 99D-2(a)(3) to all persons otherwise qualified."

29 **SECTION 9.** State Employee Grievances. – G.S. 126-34.02(b) reads as rewritten:

30 "(b) The following issues may be heard as contested cases after completion of the agency
31 grievance procedure and the Office of State Human Resources review:

32 (1) Discrimination or harassment. – An applicant for State employment, a State
33 employee, or former State employee may allege discrimination or harassment
34 based on ~~race, religion, color, national origin, sex, age, disability, genetic~~
35 ~~information,~~ protected class status as set forth in G.S. 99D-2(a)(3) or political
36 affiliation if the employee believes that he or she has been discriminated
37 against in his or her application for employment or in the terms and conditions
38 of the employee's employment, or in the termination of his or her employment.

39 (2) Retaliation. – An applicant for State employment, a State employee, or former
40 State employee may allege retaliation for protesting discrimination based on
41 ~~race, religion, color, national origin, sex, age, disability, political affiliation,~~
42 ~~or genetic information~~ protected class status as set forth in G.S. 99D-2(a)(3)
43 if the employee believes that he or she has been retaliated against in his or her
44 application for employment or in the terms and conditions of the employee's
45 employment, or in the termination of the employee's employment.

46 (3) Just cause for dismissal, demotion, or suspension. – A career State employee
47 may allege that he or she was dismissed, demoted, or suspended for
48 disciplinary reasons without just cause. A dismissal, demotion, or suspension
49 which is not imposed for disciplinary reasons shall not be considered a
50 disciplinary action within the meaning of this section. However, in contested
51 cases conducted pursuant to this section, an employee may appeal an

1 involuntary nondisciplinary separation due to an employee's unavailability in
2 the same fashion as if it were a disciplinary action, but the agency shall only
3 have the burden to prove that the employee was unavailable. In cases of such
4 disciplinary action the employee shall, before the action is taken, be furnished
5 with a statement in writing setting forth the specific acts or omissions that are
6 the reasons for the disciplinary action and the employee's appeal rights. The
7 employee shall be permitted 15 days from the date the statement is delivered
8 to appeal under the agency grievance procedure. However, an employee may
9 be suspended without warning pending the giving of written reasons in order
10 to avoid undue disruption of work, to protect the safety of persons or property,
11 or for other serious reasons.

12 (4) Veteran's preference. – An applicant for State employment or a State
13 employee may allege that he or she was denied veteran's preference in
14 violation of the law.

15 (5) Failure to post or give priority consideration. – An applicant for State
16 employment or a State employee may allege that he or she was denied hiring
17 or promotion because a position was not posted in accordance with this
18 Chapter; or a career State employee may allege that he or she was denied a
19 promotion as a result of a failure to give priority consideration for promotion
20 as required by G.S. 126-7.1; or a career State employee may allege that he or
21 she was denied hiring as a result of the failure to give him or her a
22 reduction-in-force priority.

23 (6) Whistleblower. – A whistleblower grievance as provided for in this Chapter."

24 **SECTION 10.** Repeal/No Tip Count Toward Minimum Wage. – Effective January
25 1, 2021, G.S. 95-25.3(f) reads as rewritten:

26 "(f) Tips earned by a tipped employee ~~may be counted as wages only up to the amount~~
27 ~~permitted in section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m), if the tipped~~
28 ~~employee is notified in advance, is permitted to retain all tips and the employer maintains~~
29 ~~accurate and complete records of tips received by each employee as such tips are certified by the~~
30 ~~employee monthly or for each pay period. Even if the employee refuses to certify tips accurately,~~
31 ~~tips may still be counted as wages when the employer complies with the other requirements of~~
32 ~~this section and can demonstrate by monitoring tips that the employee regularly receives tips in~~
33 ~~the amount for which the credit is taken. shall not be counted as wages. Tip pooling shall also be~~
34 ~~permissible among employees who customarily and regularly receive tips; however, no~~
35 ~~employee's tips may be reduced by more than fifteen percent (15%) under a tip pooling~~
36 ~~arrangement."~~

37 **SECTION 11.** LRC Study Nondisparagement. – The Legislative Research
38 Commission shall study the use of nondisparagement and nondisclosure agreements in the
39 workplace and report its findings and any legislative proposals to the 2021 General Assembly
40 upon its convening.

41 **SECTION 12.** Human Relations Commission Appropriation. – There is appropriated
42 from the General Fund to the Department of Administration, North Carolina Human Relations
43 Commission, the sum of five hundred thousand dollars (\$500,000) for the 2020-2021 fiscal year
44 to implement the provisions of this act.

45 **SECTION 13.** Civil Rights Division Appropriation. – There is appropriated from
46 the General Fund to the Office of Administrative Hearings, Civil Rights Division, the sum of five
47 hundred thousand dollars (\$500,000) for the 2020-2021 fiscal year to implement the provisions
48 of this act.

49 **SECTION 14.** Labor Department Appropriation. – There is appropriated from the
50 Department of Labor the sum of five hundred thousand dollars (\$500,000) for the 2020-2021
51 fiscal year to implement the provisions of this act.

1 **SECTION 15.** Effective Date. – This act becomes effective July 1, 2020, except as
2 otherwise provided.