

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

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HOUSE BILL 1394*

Short Title: Retaliatory Discrimination.

(Public)

Sponsors: Representatives Fitch, Barnes, Cunningham, Howard, Sam Hunt, McLaughlin, Payne, H. Hunter; Blue, Albertson, Barnhill, Beard, Black, Bowen, Bowman, Brown, Buchanan, Chapin, Colton, N. J. Crawford, Dawkins, DeVane, Dial, Diamont, Easterling, Ethridge, Flaherty, Fletcher, Gamble, Gist, Gottovi, Green, Greenwood, Hackney, Hardaway, Jeffus, Justus, Kennedy, Lilley, Lineberry, Luebke, McAllister, Mercer, Michaux, Miller, Nesbitt, Oldham, Redwine, Stamey, Stewart, Wainwright, Warner, Wicker, Wilson, and Withrow.

Referred to: Courts, Justice, Constitutional Amendments, and Referenda.

May 28, 1992

1 A BILL TO BE ENTITLED
2 AN ACT TO PROTECT EMPLOYEES FROM RETALIATORY DISCRIMINATION
3 IN EMPLOYMENT FOR ENGAGING IN PROTECTED ACTIVITIES.

4 The General Assembly of North Carolina enacts:

5 Section 1. Chapter 95 of the General Statutes is amended by adding the
6 following new Article:

7 **"ARTICLE 21.**

8 **"RETALIATORY EMPLOYMENT DISCRIMINATION.**

9 **"§ 95-240. Discrimination prohibited.**

10 (a) No person shall discriminate or take any retaliatory action against an
11 employee because the employee does or is about to do any of the following:

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

15 a. A workers compensation claim;

16 b. A violation of Article 2A (Wage and Hour Act) or Article 16
17 (Occupational Safety and Health Act of North Carolina) of this
18 Chapter; or

1 c. A violation of Article 2A of Chapter 74 of the General Statutes
2 (Mine Safety and Health Act of North Carolina).

3 (2) Cause any of the activities listed in subdivision (1) of this subsection
4 to be initiated on the employee's behalf.

5 (3) Exercise any right on behalf of the employee or any other employee
6 afforded by Article 2A or Article 16 of this Chapter or by Article 2A
7 of Chapter 74 of the General Statutes.

8 For purposes of this Article, 'retaliatory action' means the discharge, suspension, or
9 demotion of an employee, or other adverse employment action taken against an
10 employee in the terms and conditions of employment.

11 **"§ 95-241. Remedies.**

12 (a) An employee aggrieved by an alleged violation of G.S. 95-240 may pursue
13 the administrative remedy provided under G.S. 95-242 or the private remedy provided
14 under G.S. 95-243.

15 (b) An employee that pursues the administrative remedy under G.S. 95-242 and
16 receives a determination from the Commissioner that no violation of G.S. 95-240 has
17 occurred may commence an action under G.S. 95-243 within one year of the date on
18 which the Commissioner notifies the employee of the determination.

19 **"§ 95-242. Administrative remedy; Commissioner investigation and orders.**

20 (a) An employee aggrieved by an alleged violation of G.S. 95-240 may, within
21 180 days after the violation occurs, file (or have filed by any person on the employee's
22 behalf) a complaint with the Commissioner alleging the discrimination or retaliatory
23 action. The Commissioner shall immediately forward a copy of the complaint to the
24 person alleged to have violated G.S. 95-240 (who shall be referred to as the respondent).

25 (b) Not later than 60 days after receipt of a complaint filed under subsection (a),
26 the Commissioner shall conduct an investigation and determine whether there is
27 reasonable cause to believe that the complaint has merit and shall notify the
28 complainant and the respondent of the findings. Where the Commissioner has
29 concluded that there is reasonable cause to believe that a violation has occurred, the
30 Commissioner shall accompany the findings with a preliminary order providing the
31 relief prescribed by subsection (d). The respondent or the complainant may, within 30
32 days thereafter, file objections to the findings or preliminary order, or both, and request
33 a hearing on the record, except that the filing of such objections shall not operate to stay
34 any reinstatement remedy contained in the preliminary order. The hearings shall be
35 expeditiously conducted. If a hearing is not timely requested, the preliminary order is
36 deemed a final order not subject to judicial review.

37 (c) The Commissioner shall issue a final order within 120 days of the last
38 hearing. In the interim, the proceedings may be terminated at any time by written
39 agreement of the Commissioner, the complainant, and the respondent.

40 (d) If the Commissioner determines that a violation of G.S. 95-240 has occurred,
41 the Commissioner shall order the respondent to:

42 (1) Take action to correct the violation;

1 (2) Reinstate the complainant to the complainant's former position
2 together with the compensation (including backpay), terms, conditions,
3 and privileges of the complainant's employment; and

4 (3) Pay the complainant compensatory damages.

5 (e) At the complainant's request, the Commissioner may assess the complainant's
6 costs and expenses (including attorneys' fees) against the respondent if a final order is
7 issued providing any of the relief prescribed in subsection (d). At the respondent's
8 request, the Commissioner may assess the respondent's costs and expenses (including
9 attorneys' fees) against the complainant upon a determination that the claim filed by the
10 complainant was frivolous.

11 (f) Any person adversely affected or aggrieved by a final order issued under this
12 section may obtain review of the order in the superior court of the county in which the
13 violation occurred, in which the complainant or respondent resides, or in which the
14 respondent has its principal place of business by filing a petition with the court within
15 30 days after receipt of the final order from the Commissioner. A person who fails to
16 file a petition within the required time waives the right to judicial review under this
17 section. For good cause shown, however, the superior court may accept an untimely
18 petition.

19 (g) Whenever a person has failed to comply with an order issued under this
20 section, the Commissioner shall file a civil action in the Superior Court of Wake County
21 or in the county in which the violation occurred in order to enforce the order. In actions
22 brought under this subsection, the superior court shall have jurisdiction to grant all
23 appropriate relief, including injunctive relief, reinstatement, back pay, and
24 compensatory damages.

25 **"§ 95-243. Private right of action.**

26 (a) An employee aggrieved by an alleged violation of G.S. 95-240 may, within
27 one year after the violation occurs (except as provided in G.S. 95-241), commence a
28 civil action in the superior court in which the violation occurred, in which the
29 complainant resides, or in which the defendant resides or has its principal place of
30 business.

31 (b) The plaintiff may seek and the court may award any or all of the following
32 types of relief:

33 (1) An injunction to enjoin continued violation of this Article.

34 (2) Reinstatement of the employee to the same position held before the
35 retaliatory action or discrimination, or to an equivalent position.

36 (3) Reinstatement of full fringe benefits and seniority rights.

37 (4) Compensation for lost wages, benefits, and other remuneration,
38 including compensatory damages.

39 (5) Punitive damages.

40 The court may award to the plaintiff and assess against the defendant the reasonable
41 costs and expenses (including attorneys' fees) of the plaintiff in bringing an action
42 pursuant to this section. If the court determines that the plaintiff's action is frivolous, it
43 may award to the defendant and assess against the plaintiff the reasonable costs and

1 expenses (including attorneys' fees) of the defendant in defending the action brought
2 pursuant to this section.

3 **"§ 95-244. Effect of Article on other rights.**

4 Nothing in this Article shall be deemed to diminish the rights or remedies of any
5 employee under any collective bargaining agreement or employment contract or at
6 common law."

7 Sec. 2. G.S. 95-130 reads as rewritten:

8 **"§ 95-130. Rights and duties of employees.**

9 Rights and duties of employees shall include but are not limited to the following
10 provisions:

- 11 (1) Employees shall comply with occupational safety and health standards
12 and all rules, regulations and orders issued pursuant to this Article
13 which are applicable to their own actions and conduct.
- 14 (2) Employees and representatives of employees are entitled to participate
15 in the development of standards by submission of comments on
16 proposed standards, participation in hearings on proposed standards, or
17 by requesting the development of standards on a given issue under
18 G.S. 95-131.
- 19 (3) Employees shall be notified by their employer of any application for a
20 temporary order granting the employer a variance from any provision
21 of this Article or standard or regulation promulgated pursuant to this
22 Article.
- 23 (4) Employees shall be given the opportunity to participate in any hearing
24 which concerns an application by their employer for a variance from a
25 standard promulgated under this Article.
- 26 (5) Any employee who may be adversely affected by a standard or
27 variance issued pursuant to this Article may file a petition for review
28 with the Commissioner who shall review the matters set forth and
29 alleged in the petition.
- 30 (6) Any employee who has been exposed or is being exposed to toxic
31 materials or harmful physical agents in concentrations or at levels in
32 excess of that provided for by any applicable standard shall have a
33 right to file a petition for review with the Commissioner who shall
34 investigate and pass upon same.
- 35 (7) Subject to regulations issued pursuant to this Article any employee or
36 authorized representative of employees shall be given the right to
37 request an inspection and to consult with the Commissioner, Director,
38 or their agents, at the time of the physical inspection of any work place
39 as provided by the inspection provision of this Article.
- 40 ~~(8) No employee shall be discharged or discriminated against because~~
41 ~~such employee has filed any complaint or instituted or caused to be~~
42 ~~instituted any proceeding or inspection under or related to this Article~~
43 ~~or has testified or is about to testify in any such proceeding or because~~

1 of the exercise by such employee on behalf of himself or others of any
2 right afforded by this Article.

3 (9) Any employee who believes that he has been discharged or otherwise
4 discriminated against by any person in violation of (8) hereinafter
5 mentioned may, within 30 days after such violation occurs, file a
6 complaint with the Commissioner alleging such discrimination. Upon
7 receipt of such complaint, the Commissioner shall cause such
8 investigation to be made as he deems appropriate. If the
9 Commissioner determines that the provisions of the above subdivision
10 have been violated, he shall bring an action against such person in the
11 superior court division of the General Court of Justice in the county
12 wherein the discharge or discrimination occurred. In any such action
13 the superior court shall have jurisdiction, for cause shown to restrain
14 violations of subdivision (8) of this section and order all appropriate
15 relief including rehiring or reinstatement of the employee to his former
16 position with back pay.

17 (10) Within 90 days of the receipt of a complaint filed under subdivision
18 (9) above the Commissioner shall notify the complainant of his
19 determination.

20 (11) Any employee or representative of employees who believes that any
21 period of time fixed in the citation given to his employer for correction
22 of a violation is unreasonable has the right to contest such time for
23 correction by filing a written and signed notice within 20 days from
24 the date the citation is posted within the establishment.

25 (12) Nothing in this or any other provision of this Article shall be deemed
26 to authorize or require medical examination, immunization, or
27 treatment for those who object thereto on religious grounds, except
28 where such is necessary for the protection of the health or safety of
29 others."

30 Sec. 3. G.S. 95-25.20 reads as rewritten:

31 "~~§ 95-25.20. Complainants protected. Records. (a) No employer shall discharge or in~~
32 ~~any manner discriminate against any employee because the employee~~
33 ~~files a complaint or participates in any investigation or proceeding under~~
34 ~~this Article. Any employee who believes that he has been discharged or~~
35 ~~otherwise discriminated against in violation of this section may, within 60~~
36 ~~days after such violation occurs, file a complaint with the Commissioner~~
37 ~~alleging such discrimination. If the Commissioner determines that the~~
38 ~~provisions of this section have been violated, he shall bring an action~~
39 ~~against the employer in the superior court division of the General Court~~
40 ~~of Justice in the county wherein the discharge or discrimination~~
41 ~~occurred. In any such action, the superior court shall have jurisdiction,~~
42 ~~for cause shown, to restrain violations of this section and order all~~
43 ~~appropriate relief, including rehiring or reinstatement of the employee to~~
44 ~~his former position with back pay.~~

1 ~~(b)~~ Files and other records relating to investigations and enforcement
2 proceedings pursuant to this Article, or pursuant to Article 21 of this Chapter with
3 respect to Wage and Hour Act violations, shall not be subject to inspection and
4 examination as authorized by G.S. 132-6 while such investigations and proceedings are
5 pending."

6 Sec. 4. G.S. 97-6.1 is repealed.

7 Sec. 5. G.S. 74-24.15 reads as rewritten:

8 **"§ 74-24.15. Rights and duties of miners.**

9 ~~(a)~~ Miners shall comply with all safety and health standards and all rules,
10 regulations, or orders issued pursuant to this Article which are applicable to their own
11 actions and ~~conduct.~~ conduct and shall have the rights afforded under Article 21 of
12 Chapter 95 of the General Statutes.

13 ~~(b)~~ ~~No person shall discharge or in any other way discriminate against or cause to~~
14 ~~be discharged or discriminated against any miner or any authorized representative of~~
15 ~~miners by reason of the fact that such miner or representative (i) has notified the~~
16 ~~Commissioner of any alleged violation or danger, (ii) has filed, instituted, or caused to~~
17 ~~be filed or instituted any proceeding under this Article, or (iii) has testified or is about to~~
18 ~~testify in any proceeding resulting from the administration or enforcement of the~~
19 ~~provisions of this Article.~~

20 ~~(c)~~ ~~Any miner or a representative of miners who believes that he has been~~
21 ~~discharged or otherwise discriminated against by any person in violation of this section~~
22 ~~may, within 30 days after such violation occurs, apply to the Commissioner for a review~~
23 ~~of such alleged discharge or discrimination. A copy of the application shall be sent to~~
24 ~~such person who shall be the respondent. Upon receipt of such application, the~~
25 ~~Commissioner shall cause such investigation to be made as he deems appropriate. Upon~~
26 ~~receiving the report of such investigation, the Commissioner shall make findings of fact.~~
27 ~~If he finds that such violation did occur, he shall issue a decision, incorporating an order~~
28 ~~therein, requiring the person committing such violation to take such affirmative action~~
29 ~~to abate the violation as the Commissioner deems appropriate, including, but not limited~~
30 ~~to, the rehiring or reinstatement of the miner or representative of miners to his former~~
31 ~~position with back pay. If he finds that there was no such violation, he shall issue an~~
32 ~~order denying the application. Such order shall incorporate the Commissioner's findings~~
33 ~~therein. An order issued by the Commissioner under this subsection is subject to~~
34 ~~administrative and judicial review in accordance with Chapter 150B of the General~~
35 ~~Statutes. Enforcement of a final order or decision issued under this subsection shall be~~
36 ~~subject to the provisions of G.S. 74-24.12.~~

37 ~~(d)~~ ~~Whenever an order is issued under this section at the request of the applicant,~~
38 ~~a sum equal to the aggregate amount of all costs and expenses (including attorney's~~
39 ~~fees) as determined by the Commissioner to have been reasonably incurred by the~~
40 ~~applicant for, or in connection with, the institution and prosecution of such proceedings,~~
41 ~~shall be assessed against the person committing such violation."~~

42 Sec. 6. G.S. 126-86 reads as rewritten:

43 **"§ 126-86. Civil actions for injunctive relief or other remedies.**

1 Any State employee injured by a violation of G.S. 126-85 may maintain an action in
2 superior court for damages, an injunction, or other remedies provided in this Article
3 against the person or agency who committed the violation within one year after the
4 occurrence of the alleged violation of this ~~Article~~ Article; provided, however, any claim
5 arising under Article 21 of Chapter 95 of the General Statutes may be maintained
6 pursuant to the provisions of that Article only and may be redressed only by the
7 remedies and relief available under that Article."

8 Sec. 7. This act becomes effective October 1, 1992, and applies to violations
9 occurring on or after that date.