

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

H

3

HOUSE BILL 1394*
Committee Substitute Favorable 6/19/92
Third Edition Engrossed 6/23/92

Short Title: Retaliatory Discrimination.

(Public)

Sponsors:

Referred to:

May 28, 1992

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

The General Assembly of North Carolina enacts:

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

"ARTICLE 21.

"RETALIATORY EMPLOYMENT DISCRIMINATION.

"§ 95-240. Discrimination prohibited.

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

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

- a. A workers' compensation claim;
- b. A violation of Article 2A (Wage and Hour Act) or Article 16 (Occupational Safety and Health Act of North Carolina) of this Chapter; or
- c. A violation of Article 2A of Chapter 74 of the General Statutes (Mine Safety and Health Act of North Carolina).

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

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

4 (b) For purposes of this Article, 'retaliatory action' means the discharge,
5 suspension, demotion, or retaliatory relocation of an employee, or other adverse
6 employment action taken against an employee in the terms and conditions of
7 employment.

8 (c) It shall not be a violation of this Article for an employer to discharge or take
9 any other unfavorable action with respect to an employee who has engaged in protected
10 activity as set forth herein if the employer proves by the greater weight of the evidence
11 that it would have taken the same unfavorable action in the absence of the protected
12 activity of the employee.

13 **"§ 95-241. Complaint; investigation; conciliation.**

14 An employee allegedly aggrieved by a violation of G.S. 95-240 may file a written
15 complaint with the Commissioner alleging the violation. The complaint shall be filed
16 within 180 days of the alleged violation. Within 10 days of the receipt of the complaint,
17 the Commissioner shall forward a copy of the complaint to the person alleged to have
18 committed the violation (hereinafter, 'respondent') and shall initiate an investigation. If
19 the Commissioner determines after the investigation that there is not reasonable cause to
20 believe that the allegation is true, the Commissioner shall dismiss the complaint,
21 promptly notify the employee and the respondent, and issue a right-to-sue letter to the
22 complainant that will enable the complainant to bring a civil action pursuant to G.S. 95-
23 242. If the Commissioner determines after investigation that there is reasonable cause
24 to believe that the allegation is true, the Commissioner shall endeavor to eliminate the
25 alleged violation by informal methods of conference, conciliation and persuasion. The
26 Commissioner shall make a determination as soon as possible, and in any event, not
27 later than 90 days after the filing of the complaint.

28 If the Commissioner is unable to resolve the alleged violation through the informal
29 procedures, the Commissioner shall notify the parties in writing that conciliation efforts
30 have failed. The Commissioner shall then either file a civil action on behalf of the
31 employee pursuant to G.S. 95-242 or issue a right-to-sue letter to the employee enabling
32 the employee to bring a civil action pursuant to G.S. 95-242.

33 An employee may make a written request to the Commissioner for a right-to-sue
34 letter after 180 days following the filing of a complaint if the Commissioner has not
35 issued a notice of conciliation failure and has not commenced an action pursuant to G.S.
36 95-242.

37 Nothing said or done during the course of these informal procedures may be made
38 public by the Commissioner or used as evidence in a subsequent proceeding under this
39 Article without the written consent of the persons concerned.

40 **"§ 95-242. Civil action.**

41 (a) An employee who has been issued a right-to-sue letter or the Commissioner
42 may commence a civil action in the superior court in which the violation occurred, in
43 which the complainant resides, or in which the defendant resides or has its principal
44 place of business.

1 (b) A civil action under this section must be commenced by an employee within
2 90 days of the date upon which the right-to-sue letter was issued or by the
3 Commissioner within 90 days of the date on which the Commissioner notifies the
4 parties in writing that conciliation efforts have failed.

5 (c) The employee or the Commissioner may seek and the court may award any or
6 all of the following types of relief:

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

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

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

11 (4) Compensation for lost wages, lost benefits, and other economic losses
12 that were proximately caused by the retaliatory action or
13 discrimination.

14 If in an action under this Article the court finds that the employee was injured by a
15 willful violation of G.S. 95-240, the court shall treble the amount awarded under
16 subdivision (4) of this subsection.

17 The court may award to the plaintiff and assess against the defendant the reasonable
18 costs and expenses (including attorneys' fees) of the plaintiff in bringing an action
19 pursuant to this section. If the court determines that the plaintiff's action is frivolous, it
20 may award to the defendant and assess against the plaintiff the reasonable costs and
21 expenses (including attorneys' fees) of the defendant in defending the action brought
22 pursuant to this section.

23 (d) Parties to a civil action brought pursuant to this section shall have the right to
24 a jury trial as provided for by the North Carolina Rules of Civil Procedure.

25 **"§ 95-243. Effect of Article on other rights.**

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

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

30 **"§ 95-130. Rights and duties of employees.**

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

33 (1) Employees shall comply with occupational safety and health standards
34 and all rules, regulations and orders issued pursuant to this Article
35 which are applicable to their own actions and conduct.

36 (2) Employees and representatives of employees are entitled to participate
37 in the development of standards by submission of comments on
38 proposed standards, participation in hearings on proposed standards, or
39 by requesting the development of standards on a given issue under
40 G.S. 95-131.

41 (3) Employees shall be notified by their employer of any application for a
42 temporary order granting the employer a variance from any provision
43 of this Article or standard or regulation promulgated pursuant to this
44 Article.

- 1 (4) Employees shall be given the opportunity to participate in any hearing
2 which concerns an application by their employer for a variance from a
3 standard promulgated under this Article.
- 4 (5) Any employee who may be adversely affected by a standard or
5 variance issued pursuant to this Article may file a petition for review
6 with the Commissioner who shall review the matters set forth and
7 alleged in the petition.
- 8 (6) Any employee who has been exposed or is being exposed to toxic
9 materials or harmful physical agents in concentrations or at levels in
10 excess of that provided for by any applicable standard shall have a
11 right to file a petition for review with the Commissioner who shall
12 investigate and pass upon same.
- 13 (7) Subject to regulations issued pursuant to this Article any employee or
14 authorized representative of employees shall be given the right to
15 request an inspection and to consult with the Commissioner, Director,
16 or their agents, at the time of the physical inspection of any work place
17 as provided by the inspection provision of this Article.
- 18 ~~(8) No employee shall be discharged or discriminated against because~~
19 ~~such employee has filed any complaint or instituted or caused to be~~
20 ~~instituted any proceeding or inspection under or related to this Article~~
21 ~~or has testified or is about to testify in any such proceeding or because~~
22 ~~of the exercise by such employee on behalf of himself or others of any~~
23 ~~right afforded by this Article.~~
- 24 ~~(9) Any employee who believes that he has been discharged or otherwise~~
25 ~~discriminated against by any person in violation of (8) hereinafter~~
26 ~~mentioned may, within 30 days after such violation occurs, file a~~
27 ~~complaint with the Commissioner alleging such discrimination. Upon~~
28 ~~receipt of such complaint, the Commissioner shall cause such~~
29 ~~investigation to be made as he deems appropriate. If the~~
30 ~~Commissioner determines that the provisions of the above subdivision~~
31 ~~have been violated, he shall bring an action against such person in the~~
32 ~~superior court division of the General Court of Justice in the county~~
33 ~~wherein the discharge or discrimination occurred. In any such action~~
34 ~~the superior court shall have jurisdiction, for cause shown to restrain~~
35 ~~violations of subdivision (8) of this section and order all appropriate~~
36 ~~relief including rehiring or reinstatement of the employee to his former~~
37 ~~position with back pay.~~
- 38 ~~(10) Within 90 days of the receipt of a complaint filed under subdivision~~
39 ~~(9) above the Commissioner shall notify the complainant of his~~
40 ~~determination.~~
- 41 (11) Any employee or representative of employees who believes that any
42 period of time fixed in the citation given to his employer for correction
43 of a violation is unreasonable has the right to contest such time for

1 correction by filing a written and signed notice within 20 days from
2 the date the citation is posted within the establishment.

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

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

9 "~~§ 95-25.20. Complainants protected. Records. (a) No employer shall discharge or in~~
10 ~~any manner discriminate against any employee because the employee~~
11 ~~files a complaint or participates in any investigation or proceeding under~~
12 ~~this Article. Any employee who believes that he has been discharged or~~
13 ~~otherwise discriminated against in violation of this section may, within 60~~
14 ~~days after such violation occurs, file a complaint with the Commissioner~~
15 ~~alleging such discrimination. If the Commissioner determines that the~~
16 ~~provisions of this section have been violated, he shall bring an action~~
17 ~~against the employer in the superior court division of the General Court~~
18 ~~of Justice in the county wherein the discharge or discrimination~~
19 ~~occurred. In any such action, the superior court shall have jurisdiction,~~
20 ~~for cause shown, to restrain violations of this section and order all~~
21 ~~appropriate relief, including rehiring or reinstatement of the employee to~~
22 ~~his former position with back pay.~~

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

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

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

30 "**§ 74-24.15. Rights and duties of miners.**

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

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

42 (c) Any miner or a representative of miners who believes that he has been
43 discharged or otherwise discriminated against by any person in violation of this section
44 may, within 30 days after such violation occurs, apply to the Commissioner for a review

1 of such alleged discharge or discrimination. A copy of the application shall be sent to
2 such person who shall be the respondent. Upon receipt of such application, the
3 Commissioner shall cause such investigation to be made as he deems appropriate. Upon
4 receiving the report of such investigation, the Commissioner shall make findings of fact.
5 If he finds that such violation did occur, he shall issue a decision, incorporating an order
6 therein, requiring the person committing such violation to take such affirmative action
7 to abate the violation as the Commissioner deems appropriate, including, but not limited
8 to, the rehiring or reinstatement of the miner or representative of miners to his former
9 position with back pay. If he finds that there was no such violation, he shall issue an
10 order denying the application. Such order shall incorporate the Commissioner's findings
11 therein. An order issued by the Commissioner under this subsection is subject to
12 administrative and judicial review in accordance with Chapter 150B of the General
13 Statutes. Enforcement of a final order or decision issued under this subsection shall be
14 subject to the provisions of G.S. 74-24.12.

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

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

21 **"§ 126-86. Civil actions for injunctive relief or other remedies.**

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

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