

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

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HOUSE BILL 1071*
Committee Substitute Favorable 4/27/99

Short Title: Handicapped Law Changes.

(Public)

Sponsors:

Referred to:

April 15, 1999

A BILL TO BE ENTITLED
AN ACT TO MAKE CHANGES TO THE HANDICAPPED PERSONS PROTECTION
ACT, CHAPTER 168A OF THE GENERAL STATUTES.

The General Assembly of North Carolina enacts:

Section 1. Chapter 168A of the General Statutes reads as rewritten:

"CHAPTER 168A.

"HANDICAPPED PERSONS WITH DISABILITIES PROTECTION ACT.

"§ 168A-1. Title.

This Chapter may be cited as the North Carolina ~~Handicapped~~—Persons With Disabilities Protection Act.

"§ 168A-2. Statement of purpose.

(a) The purpose of this Chapter is to encourage and enable all ~~handicapped people~~ persons with disabilities to participate fully to the maximum extent of their abilities in the social and economic life of the State, to engage in remunerative employment, to use available public accommodations and public services, and to otherwise pursue their rights and privileges as inhabitants of this State.

(b) The General Assembly finds that: the practice of discrimination based upon a ~~handicapping-disabling~~ condition is contrary to the public interest and to the principles of freedom and equality of opportunity; the practice of discrimination on the basis of a

1 ~~handicapping~~ disabling condition threatens the rights and proper privileges of the
2 inhabitants of this State; and such discrimination results in a failure to realize the
3 productive capacity of individuals to their fullest extent.

4 **"§ 168A-3. Definitions.**

5 As used in this Chapter, unless the context otherwise ~~requires, the term:~~ requires:

- 6 (1) "Discriminatory practice" means any practice prohibited by this Chapter.
7 (2) "Employer" means any person employing 15 or more full-time
8 employees within the State, but excluding a person whose only
9 employees are hired to work as domestic or farm workers at that
10 person's home or farm.
11 (3) "Employment agency" means a person regularly undertaking with or
12 without compensation to procure for employees opportunities to work
13 for an employer and includes an agent of such a person.
14 (4) ~~"Handicapped person"~~ "Person with a disability" means any person who (i)
15 has a physical or mental impairment which substantially limits one or
16 more major life activities; (ii) has a record of such an impairment; or
17 (iii) is regarded as having such an impairment. As used in this
18 subdivision, the term:
19 a. "Physical or mental impairment" means (i) any physiological
20 disorder or abnormal condition, cosmetic disfigurement, or
21 anatomical loss, caused by bodily injury, birth defect or illness,
22 affecting one or more of the following body systems:
23 neurological; musculoskeletal; special sense organs; respiratory,
24 including speech organs; cardiovascular; reproductive; digestive;
25 genitourinary; hemic and lymphatic; skin; and endocrine; or (ii)
26 any mental disorder, such as mental retardation, organic brain
27 syndrome, mental illness, specific learning disabilities, and other
28 developmental disabilities, but (iii) excludes (A) sexual
29 preferences; (B) active alcoholism or drug addiction or abuse;
30 and (C) any disorder, condition or disfigurement which is
31 temporary in nature leaving no residual impairment.
32 b. "Major life activities" means functions such as caring for one's
33 self, performing manual tasks, walking, seeing, hearing,
34 speaking, breathing, ~~and learning.~~ learning, and working.
35 c. "Has a record of such an impairment" means has a history of, or
36 has been misclassified as having, a mental or physical
37 impairment that substantially limits major life activities.
38 d. "Is regarded as having an impairment" means (i) has a physical or
39 mental impairment that does not substantially limit major life
40 activities but that is treated as constituting such a limitation; (ii)
41 has a physical or mental impairment that substantially limits
42 major life activities because of the attitudes of others; or (iii) has

- 1 none of the impairments defined in paragraph a. of this
2 subdivision but is treated as having such an impairment.
- 3 (5) ~~"Handicapping—"~~"Disabling condition" means any condition or
4 characteristic that renders a person a ~~handicapped person,~~ person with a
5 disability.
- 6 (6) "Labor organization" means an organization of any kind, an agency or
7 employee representation committee, a group association, or a plan, in
8 which employees participate and which exists for the purpose, in whole
9 or in part, of dealing with employers concerning grievances, labor
10 disputes, wages, rates of pay, hours, or other terms or conditions of
11 employment.
- 12 (7) "Person" includes any individual, partnership, association, corporation,
13 labor organization, legal representative, trustee, receiver, and the State
14 and its departments, agencies, and political subdivisions.
- 15 (8) "Place of public accommodations" includes, but is not limited to, any
16 place, facility, store, other establishment, hotel, or motel, which supplies
17 goods or services on the premises to the public or which solicits or
18 accepts the patronage or trade of any person.
- 19 (9) "Qualified ~~handicapped person~~ person with a disability" means:
20 a. With regard to employment, a ~~handicapped~~ person with a
21 disability who can satisfactorily perform the duties of the job in
22 question, with or without reasonable accommodation, (i)
23 provided that the ~~handicapped~~ person with a disability shall not be
24 held to standards of performance different from other employees
25 similarly employed, and (ii) further provided that the
26 ~~handicapping~~ disabling condition does not create an unreasonable
27 risk to the safety or health of the ~~handicapped person,~~ person with
28 a disability, other employees, the employer's customers, or the
29 public;
30 b. With regard to places of public accommodation a ~~handicapped~~
31 person with a disability who can benefit from the goods or
32 services provided by the place of public accommodation; and
33 c. With regard to public services and public transportation a
34 ~~handicapped~~ person with a disability who meets prerequisites for
35 participation that are uniformly applied to all participants, such
36 as income or residence, and that do not have the effect of
37 discriminating against the ~~handicapped~~ persons with a disability.
- 38 (10) "Reasonable accommodations" means:
39 a. With regard to employment, making reasonable physical changes in the
40 workplace, including, but not limited to, making facilities accessible,
41 modifying equipment and providing mechanical aids to assist in
42 operating equipment, or making reasonable changes in the duties of the
43 job in question that would accommodate the known ~~handicapping~~

1 disabling conditions of the ~~handicapped~~ person with a disability seeking
2 the job in question by enabling him or her to satisfactorily perform the
3 duties of that job; provided that "reasonable accommodation" does not
4 require that an employer:

- 5 1. Hire one or more employees, other than the ~~handicapped~~
6 ~~person,~~ person with a disability, for the purpose, in whole
7 or in part, of enabling the ~~handicapped~~ person with a
8 disability to be employed; or
- 9 2. Reassign duties of the job in question to other employees
10 without assigning to the ~~handicapped~~ employee with a
11 disability duties that would compensate for those
12 reassigned; or
- 13 3. Reassign duties of the job in question to one or more other
14 employees where such reassignment would increase the
15 skill, effort or responsibility required of such other
16 employee or employees from that required prior to the
17 change in duties; or
- 18 4. Alter, modify, change or deviate from bona fide seniority
19 policies or practices; or
- 20 5. Provide accommodations of a personal nature, including,
21 but not limited to, eyeglasses, hearing aids, or prostheses,
22 except under the same terms and conditions as such items
23 are provided to the employer's employees generally; or
- 24 6. Make physical changes to accommodate a ~~handicapped~~
25 person with a disability where:
 - 26 I. For a new employee the cost of such changes
27 would exceed five percent (5%) of the annual
28 salary or annualized hourly wage for the job in
29 question; or
 - 30 II. For an existing employee the cost of the changes
31 would bring the total cost of physical changes
32 made to accommodate the employee's ~~handicapping~~
33 disabling conditions since the beginning of the
34 employee's employment with the employer to
35 greater than five percent (5%) of the employee's
36 current salary or current annualized hourly wage;
37 or
- 38 7. Make any changes that would impose on the employer an
39 undue hardship, provided that the costs of less than five
40 percent (5%) of an employee's salary or annualized wage
41 as determined in subsection (6) above shall be presumed
42 not to be an undue hardship.

- 1 b. With regard to a place of public accommodations, making
2 reasonable efforts to accommodate the ~~handicapping-disabling~~
3 conditions of a ~~handicapped person,~~ person with a disability,
4 including, but not limited to, making facilities accessible to and
5 usable by ~~handicapped persons,~~ persons with a disability,
6 redesigning equipment, provide mechanical aids or other
7 assistance, or using alternative accessible locations, provided that
8 reasonable accommodations does not require efforts which would
9 impose an undue hardship on the entity involved.

10 **"§ 168A-4. Reasonable accommodation duties.**

11 (a) A qualified ~~handicapped~~ person with a disability requesting a reasonable
12 accommodation must apprise the employer, employment agency, labor organization, or
13 place of public accommodation of his or her ~~handicapping-disabling~~ condition, submit any
14 necessary medical documentation, make suggestions for such possible accommodations
15 as are known to such ~~handicapped person,~~ person with a disability, and cooperate in any
16 ensuing discussion and evaluation aimed at determining possible or feasible
17 accommodations.

18 (b) Once a qualified ~~handicapped~~ person with a disability has requested an
19 accommodation, or if a potential accommodation is obvious in the circumstances, an
20 employer, employment agency, labor organization or place of public accommodation
21 shall investigate whether there are reasonable accommodations that can be made and
22 make reasonable accommodations as defined in G.S. 1 68A-3(10).

23 **"§ 168A-5. Discrimination in employment; exemptions.**

24 (a) Discriminatory practices. – It is a discriminatory practice for:

- 25 (1) An employer to fail to hire or consider for employment or promotion, to
26 discharge, or otherwise to discriminate against a qualified ~~handicapped~~
27 person with a disability on the basis of a ~~handicapping-disabling~~
28 condition with respect to compensation or the terms, conditions, or
29 privileges of employment;
- 30 (2) An employment agency to fail or refuse to refer for employment, or
31 otherwise to discriminate against a qualified ~~handicapped~~ person with a
32 disability on the basis of a ~~handicapping-disabling~~ condition;
- 33 (3) A person controlling an apprenticeship, on-the-job, or other training or
34 retraining program, to discriminate against a qualified ~~handicapped~~
35 person with a disability on the basis of a ~~handicapping-disabling~~
36 condition in admission to, or employment in, a program established to
37 provide apprenticeship or other training; ~~or~~
- 38 (4) An employer or employment agency to require an applicant to identify
39 himself as ~~handicapped~~ a person with a disability prior to a conditional
40 offer of employment; however, any employer may invite an applicant to
41 identify himself as ~~handicapped~~ a person with a disability in order to act
42 affirmatively on his ~~behalf.~~ behalf; or

- 1 (5) An employer, labor organization, or employment agency to fail to meet
2 the duties imposed on them by G.S. 168A-4(b).
- 3 (b) Exemptions. – It is not a discriminatory action for an employer, employment
4 agency, or labor organization:
- 5 (1) To make an employment decision on the basis of State and federal laws
6 or regulations imposing physical, health, mental or psychological job
7 requirements;
- 8 (2) To fail to hire, transfer or promote, or to discharge a ~~handicapped~~-person
9 with a disability who has a history of drug abuse or who is unlawfully
10 using drugs where the job in question is in an establishment that
11 manufactures, distributes, dispenses, conducts research, stores, sells or
12 otherwise handles controlled substances regulated by the North Carolina
13 Controlled Substances Act, G.S. 90-86 et seq.;
- 14 (3) To fail to hire, transfer, or promote, or to discharge a ~~handicapped~~-person
15 with a disability because the person has a communicable disease which
16 would disqualify a ~~non-handicapped~~-person without a disability from
17 similar employment;
- 18 (4) To fail to make reasonable accommodations where the ~~handicapped~~
19 person with a disability has not fulfilled the duties imposed by G.S.
20 168A-4;
- 21 (5) To inquire whether a person has the ability to perform the duties of the
22 job in question;
- 23 (6) To require or request a person to undergo a medical examination, which
24 may include a medical history, for the purpose of determining the
25 person's ability or capacity to safely and satisfactorily perform the duties
26 of available jobs for which the person is otherwise qualified, or to aid in
27 determining possible accommodations for a ~~handicapping-disabling~~
28 condition, provided (i) that an offer of employment has been made on
29 the condition that the person meets the physical and mental
30 requirements of the job with or without reasonable accommodation; and
31 (ii) that the examination, unless limited to determining the extent to
32 which a person's ~~handicapping-disabling~~ condition would interfere with
33 his or her ability or capacity to safely and satisfactorily perform the
34 duties of the the job in question or the possible accommodations for a
35 ~~handicapping-disabling~~ condition, is required of all persons conditionally
36 offered employment for the same position regardless of ~~handicapping~~
37 disabling condition;
- 38 (7) To obtain medical information or to require or request a medical
39 examination where such information or examination is for the purpose
40 of establishing an employee health record;
- 41 (8) To administer pre-employment tests, provided that the tests (i) measure
42 only job-related abilities, (ii) are required of all applicants for the same
43 position unless such tests are limited to determining the extent to which

1 the person's ~~handicapping~~ disabling condition would interfere with his or
2 her ability to safely and satisfactorily perform the duties of the job in
3 question or the possible accommodations for the job in question, and
4 (iii) accurately measure the applicant's aptitude, achievement level, or
5 whatever factors they purport to measure rather than reflecting the
6 ~~handicapped person's~~ impaired sensory, manual or speaking skills of a
7 person with a disability except when those skills are requirements of the
8 job in question, provided that an employer shall not be liable for
9 improper testing which was administered by a State agency acting as an
10 employment agency.

11 **"§ 168A-6. Discrimination in public accommodations.**

12 It is a discriminatory practice for a person to deny a qualified ~~handicapped~~ person with
13 a disability the full and equal enjoyment of the goods, services, facilities, privileges,
14 advantages, and accommodations of a place of public accommodation on the basis of a
15 ~~handicapping~~ disabling condition. In the area of structural modifications, this section may
16 be satisfied by compliance with the North Carolina Building Code.

17 **"§ 168A-7. Discrimination in public service.**

18 It is a discriminatory practice for a State department, institution, or agency, or any
19 political subdivision of the State or any person that contracts with the above for the
20 delivery of public services including but not limited to education, health, social services,
21 recreation, and rehabilitation, to refuse to provide reasonable aids and adaptations
22 necessary for a known qualified ~~handicapped~~ person with a disability to use or benefit
23 from existing public services operated by such entity; provided that the aids and
24 adaptations do not impose an undue hardship on the entity involved.

25 **"§ 168A-8. Discrimination in public transportation.**

26 It is a discriminatory practice for any transportation system providing transportation
27 to the general public to fail to ensure access to and the benefits of public transportation to
28 a qualified ~~handicapped person;~~ person with a disability; however, public transportation
29 systems may use alternative methods to provide transportation for ~~handicapped persons;~~
30 persons with a disability, as long as ~~handicapped persons~~ with a disability are offered
31 transportation that, in relation to the transportation offered to other persons, is:

- 32 (1) In a similar geographic area of operation;
- 33 (2) For fares not greater in price;
- 34 (3) With similar or no restrictions as to trip purpose;
- 35 (4) With reasonable response time; and
- 36 (5) With similar hours of operations.

37 Nothing in this section shall apply to privately owned, local transit or transportation
38 systems existing on October 1, 1985, or to interstate air carriers complying with federal
39 regulations promulgated by the Civil Aeronautics Board and administered by the United
40 States Department of Transportation.

41 **"§ 168A-9. Affirmative defenses.**

42 Any employer may assert affirmative defenses in any action brought under this
43 Chapter. This section shall not create any inference that an employment action which is

1 not listed as an affirmative defense is therefore, by implication, a discriminatory practice,
2 so long as the employment action is not otherwise prohibited by this Chapter. The
3 following is a non-exclusive list of affirmative defenses:

- 4 (1) The ~~qualified handicapped person's~~ failure of the qualified person with a
5 disability to comply with or meet the employer's work rules and policies
6 or performance standards, provided that such person is not held to rules
7 or standards different from other ~~non-handicapped employees~~ without a
8 disability similarly employed;
- 9 (2) The ~~qualified handicapped person's~~ excessive, willful or habitual tardiness
10 or ~~absence,~~ absence of a qualified person with a disability, provided that
11 the standard used by the employer in determining whether such
12 tardiness or absence is excessive is the same as that applied by the
13 employer to ~~non-handicapped employees~~ without a disability similarly
14 employed; or
- 15 (3) A bona fide seniority or merit system, or a system which measures
16 earnings by quantity or quality of work or production, or differences in
17 location of employment.

18 **"§ 168A-10. Retaliation prohibited.**

19 No employer shall discharge, expel, refuse to hire, or otherwise discriminate against
20 any person or applicant for employment, nor shall any employment agency discriminate
21 against any person, nor shall a labor organization discriminate against any member or
22 applicant for membership because such person has opposed any practice made a
23 discriminatory practice by this Chapter or because he has testified, assisted or
24 participated in any manner in proceedings under this Chapter.

25 **"§ 168A-11. Civil action.**

26 (a) A ~~handicapped person~~ with a disability aggrieved by a discriminatory practice
27 prohibited by G.S. 168A-5 through 168A-8, or a person aggrieved by conduct prohibited
28 by G.S. 168A-10, may bring a civil action to enforce rights granted or protected by this
29 Chapter against any person described in G.S. 168A-5 through 168A-8 or in G.S. 168A-10
30 who is alleged to have committed such practices or engaged in such conduct. The action
31 shall be commenced in superior court in the county where the alleged discriminatory
32 practice or prohibited conduct occurred or where the plaintiff or defendant resides. Such
33 action shall be tried to the court without a jury.

34 (b) Any relief granted by the court shall be limited to declaratory and injunctive
35 relief, including orders to hire or reinstate an aggrieved person or admit such person to a
36 labor organization. In a civil action brought to enforce provisions of this Chapter relating
37 to employment, the court may award back pay. Any such back pay liability shall not
38 accrue from a date more than two years prior to the filing of an action under this Chapter.
39 Interim earnings or amounts earnable with reasonable diligence by the aggrieved person
40 shall operate to reduce the back pay otherwise allowable.

41 (c) No court shall have jurisdiction over an action filed under this Chapter where
42 the plaintiff has commenced federal judicial or administrative proceedings under Section
43 503 or Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and

1 794, as amended, or federal regulations promulgated ~~thereunder~~, under those sections; or
2 under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., as
3 amended, or federal regulations promulgated under that Act, involving or arising out of
4 the facts and circumstances involved in the alleged discriminatory practice under this
5 Chapter. If such proceedings are commenced after a civil action has been commenced
6 under this Chapter, the State court's jurisdiction over the civil action shall end and the
7 action shall be forthwith dismissed.

8 (d) In any civil action brought under this Chapter, the court, in its discretion, may
9 award reasonable attorney's fees to the substantially prevailing party as part of costs.

10 **"§ 168A-12. Statute of limitations.**

11 A civil action regarding employment discrimination brought pursuant to this Chapter
12 shall be commenced within 180 days after the date on which the aggrieved person
13 became aware of or, with reasonable diligence, should have become aware of the alleged
14 discriminatory practice or prohibited conduct. A civil action brought pursuant to this
15 Chapter regarding any other complaint of discrimination shall be commenced within two
16 years after the date on which the aggrieved person became aware of or, with reasonable
17 diligence, should have become aware of the alleged discriminatory practice or prohibited
18 conduct."

19 Section 2. This act becomes effective October 1, 1999, and applies to actions
20 filed on or after that date.