

SENATE COMMITTEE OF REFERENCE REPORT

Chair of Committee

April 5, 2023
Date

Committee on Judiciary.

After consideration on the merits, the Committee recommends the following:

SB23-172 be amended as follows, and as so amended, be referred to the Committee on Appropriations with favorable recommendation:

- 1 Amend corrected printed bill, page 5, strike lines 3 through 27.
- 2 Page 6, strike lines 1 through 13.
- 3 Renumber succeeding sections accordingly.
- 4 Page 6, line 16, strike "(1)(j)" and substitute "(1.3)".
- 5 Page 7, strike lines 1 and 2 and substitute "unfair employment practice for
6 an employer to ~~act as provided in this subsection (1)(a)~~ REFUSE TO HIRE,
7 TO DISCHARGE, OR TO PROMOTE OR DEMOTE AN INDIVIDUAL WITH A
8 DISABILITY if there is no".
- 9 Page 7, line 4, before "AND" insert "THAT WOULD ALLOW THE INDIVIDUAL
10 TO SATISFY THE ESSENTIAL FUNCTIONS OF THE JOB".
- 11 Page 7, strike lines 14 through 21.
- 12 Page 8, line 13, before "AND" insert "THAT WOULD ALLOW THE
13 INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF THE JOB".
- 14 Page 9, line 22, before "AND" insert "THAT WOULD ALLOW THE
15 INDIVIDUAL TO SATISFY THE ESSENTIAL FUNCTIONS OF THE PROGRAM".
- 16 Page 10, strike lines 13 through 21.
- 17 Page 10, before line 22 insert:

1 "(1.3) (a) AS USED IN SUBSECTIONS (1)(a) AND (1.5) OF THIS
2 SECTION AND IN THIS SUBSECTION (1.3), "HARASS" OR "HARASSMENT"
3 MEANS TO ENGAGE IN, OR THE ACT OF ENGAGING IN, ANY UNWELCOME
4 PHYSICAL OR VERBAL CONDUCT OR ANY WRITTEN, PICTORIAL, OR VISUAL
5 COMMUNICATION DIRECTED AT AN INDIVIDUAL OR GROUP OF INDIVIDUALS
6 BECAUSE OF THAT INDIVIDUAL'S OR GROUP'S MEMBERSHIP IN, OR
7 PERCEIVED MEMBERSHIP IN, A PROTECTED CLASS, AS DESCRIBED IN
8 SUBSECTION (1)(a) OF THIS SECTION, WHICH CONDUCT OR
9 COMMUNICATION IS SUBJECTIVELY OFFENSIVE TO THE INDIVIDUAL
10 ALLEGING HARASSMENT AND IS OBJECTIVELY OFFENSIVE TO A
11 REASONABLE INDIVIDUAL WHO IS A MEMBER OF THE SAME PROTECTED
12 CLASS. THE CONDUCT OR COMMUNICATION NEED NOT BE SEVERE OR
13 PERVASIVE TO CONSTITUTE A DISCRIMINATORY OR AN UNFAIR
14 EMPLOYMENT PRACTICE UNDER SUBSECTION (1)(a) OF THIS SECTION AND
15 IS A VIOLATION OF SUBSECTION (1)(a) OF THIS SECTION IF:

16 (I) SUBMISSION TO THE CONDUCT OR COMMUNICATION IS
17 EXPLICITLY OR IMPLICITLY MADE A TERM OR CONDITION OF THE
18 INDIVIDUAL'S EMPLOYMENT;

19 (II) SUBMISSION TO, OBJECTION TO, OR REJECTION OF THE
20 CONDUCT OR COMMUNICATION IS USED AS A BASIS FOR EMPLOYMENT
21 DECISIONS AFFECTING THE INDIVIDUAL; OR

22 (III) THE CONDUCT OR COMMUNICATION HAS THE PURPOSE OR
23 EFFECT OF UNREASONABLY INTERFERING WITH THE INDIVIDUAL'S WORK
24 PERFORMANCE OR CREATING AN INTIMIDATING, HOSTILE, OR OFFENSIVE
25 WORKING ENVIRONMENT.

26 (b) THE NATURE OF THE WORK OR THE FREQUENCY WITH WHICH
27 HARASSMENT IN THE WORKPLACE OCCURRED IN THE PAST IS NOT
28 RELEVANT TO WHETHER THE CONDUCT OR COMMUNICATION IS A
29 DISCRIMINATORY OR AN UNFAIR EMPLOYMENT PRACTICE UNDER
30 SUBSECTION (1)(a) OF THIS SECTION.

31 (c) (I) NOTWITHSTANDING SUBSECTION (1)(a) OF THIS SECTION,
32 PETTY SLIGHTS, MINOR ANNOYANCES, AND LACK OF GOOD MANNERS DO
33 NOT CONSTITUTE HARASSMENT UNLESS THE SLIGHTS, ANNOYANCES, OR
34 LACK OF MANNERS, WHEN TAKEN INDIVIDUALLY OR IN COMBINATION AND
35 UNDER THE TOTALITY OF THE CIRCUMSTANCES, MEET THE STANDARDS SET
36 FORTH IN SUBSECTION (1.3)(a) OF THIS SECTION.

37 (II) FACTORS TO CONSIDER UNDER THE TOTALITY OF THE
38 CIRCUMSTANCES INCLUDE:

39 (A) THE FREQUENCY OF THE CONDUCT OR COMMUNICATION,
40 RECOGNIZING THAT A SINGLE INCIDENT MAY RISE TO THE LEVEL OF
41 HARASSMENT;

42 (B) THE NUMBER OF INDIVIDUALS ENGAGED IN THE CONDUCT OR
43 COMMUNICATION;

- 1 (C) THE TYPE OR NATURE OF THE CONDUCT OR COMMUNICATION,
2 RECOGNIZING THAT CONDUCT OR COMMUNICATION THAT, AT ONE TIME,
3 WAS OR IS WELCOME BETWEEN TWO OR MORE INDIVIDUALS MAY BECOME
4 UNWELCOME TO ONE OR MORE OF THOSE INDIVIDUALS;
5 (D) THE DURATION OF THE CONDUCT OR COMMUNICATION;
6 (E) THE LOCATION WHERE THE CONDUCT OR COMMUNICATION
7 OCCURRED;
8 (F) WHETHER THE CONDUCT OR COMMUNICATION IS
9 THREATENING;
10 (G) WHETHER ANY POWER DIFFERENTIAL EXISTS BETWEEN THE
11 INDIVIDUAL ALLEGED TO HAVE ENGAGED IN HARASSMENT AND THE
12 INDIVIDUAL ALLEGING THE HARASSMENT;
13 (H) ANY USE OF EPITHETS, SLURS, OR OTHER CONDUCT OR
14 COMMUNICATION THAT IS HUMILIATING OR DEGRADING; AND
15 (I) WHETHER THE CONDUCT OR COMMUNICATION REFLECTS
16 STEREOTYPES ABOUT AN INDIVIDUAL OR GROUP OF INDIVIDUALS IN A
17 PROTECTED CLASS."

18 Page 10, line 22, after "(1.5)" insert "(a)".

19 Page 10, line 26, strike "(a)" and substitute "(I)".

20 Page 11, line 1, strike "HARASSMENT;" and substitute "HARASSMENT. AN
21 EMPLOYER'S PROGRAM SATISFIES THIS SUBSECTION (1.5)(a)(I) IF THE
22 EMPLOYER CAN DEMONSTRATE THAT:

23 (A) THE EMPLOYER CONDUCTS PROMPT, REASONABLE
24 INVESTIGATIONS OF ALLEGED DISCRIMINATORY OR UNFAIR EMPLOYMENT
25 PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION; AND

26 (B) THE EMPLOYER TAKES PROMPT, REASONABLE REMEDIAL
27 ACTIONS, WHEN WARRANTED, IN RESPONSE TO COMPLAINTS OF
28 DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN
29 SUBSECTION (1)(a) OF THIS SECTION."

30 Page 11, strike lines 2 through 11.

31 Page 11, line 12, strike "(c)" and substitute "(II)".

32 Page 11, line 13, strike "(1.5)(a)" and substitute "(1.5)(a)(I)".

33 Page 11, strike lines 15 through 19 and substitute:

34 "(III) THE EMPLOYER MAINTAINS AN ACCURATE, DESIGNATED
35 REPOSITORY OF ALL WRITTEN OR ORAL COMPLAINTS OF DISCRIMINATORY

1 OR UNFAIR EMPLOYMENT PRACTICES, AS DESCRIBED IN SUBSECTION (1)(a)
2 OF THIS SECTION, THAT INCLUDES THE DATE OF THE COMPLAINT, THE
3 IDENTITY OF THE COMPLAINING PARTY, THE IDENTITY OF THE ALLEGED
4 PERPETRATOR, AND THE SUBSTANCE OF THE COMPLAINT; AND".

5 Page 11, line 20, strike "(e)" and substitute "(IV)".

6 Page 11, strike lines 22 and 23 and substitute "(1.5)(a)(I) OF THIS
7 SECTION.

8 (b) NOTHING IN THIS SUBSECTION (1.5) SUPERSEDES OR
9 ELIMINATES ANY OTHER ANALYSES, EVALUATIONS, OR STANDARDS OF
10 LIABILITY FOR HARASSMENT ESTABLISHED IN THIS SECTION AND THROUGH
11 JUDICIAL INTERPRETATION OF TITLE VII OF THE FEDERAL "CIVIL RIGHTS
12 ACT OF 1964", AS AMENDED, 42 U.S.C. SEC. 2000e ET SEQ.; THE FEDERAL
13 "AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967", AS AMENDED, 29
14 U.S.C. SEC. 621 ET SEQ.; TITLES I AND V OF THE FEDERAL "AMERICANS
15 WITH DISABILITIES ACT OF 1990", AS AMENDED, 42 U.S.C. SEC. 12111 ET
16 SEQ.; AND THE FEDERAL "CIVIL RIGHTS ACT OF 1991", AS AMENDED, 42
17 U.S.C. SEC. 1981a."

18 Page 11, line 24, after "24-34-407" insert "and 24-34-408".

19 Page 12, line 14, strike "To" and substitute "INCLUDING DISCLOSING THE
20 EXISTENCE AND TERMS OF A SETTLEMENT AGREEMENT, TO".

21 Page 12, line 16, after "PROVIDER," insert "MENTAL OR BEHAVIORAL
22 HEALTH THERAPEUTIC SUPPORT GROUP,".

23 Page 13, strike lines 3 through 9 and substitute:

24 "(d) THE AGREEMENT INCLUDES A CONDITION THAT IF A
25 NONDISPARAGEMENT PROVISION IS INCLUDED IN THE AGREEMENT AND THE
26 EMPLOYER DISPARAGES THE EMPLOYEE OR PROSPECTIVE EMPLOYEE TO A
27 THIRD PARTY, THE EMPLOYER MAY NOT SEEK TO ENFORCE THE
28 NONDISPARAGEMENT OR NONDISCLOSURE PROVISIONS OF THE AGREEMENT
29 OR SEEK DAMAGES AGAINST THE EMPLOYEE OR ANY OTHER PARTY TO THE
30 AGREEMENT FOR VIOLATING THOSE PROVISIONS, BUT ALL OTHER
31 REMAINING TERMS OF THE AGREEMENT REMAIN ENFORCEABLE;".

32 Page 13, line 16, strike "AND".

33 Page 13, after line 16 insert:

1 "(II) VARIED BASED ON THE NATURE OR SEVERITY OF THE BREACH;
2 AND".

3 Renumber succeeding subparagraph accordingly.

4 Page 14, after line 15 insert:

5 "(4) IN ANY ACTION BROUGHT UNDER THIS SECTION, IF THE
6 EMPLOYER SHOWS THAT THE ACT OR OMISSION GIVING RISE TO THE ACTION
7 WAS COMMITTED IN GOOD FAITH AND THAT THE EMPLOYER HAS
8 REASONABLE GROUNDS FOR BELIEVING THAT THE EMPLOYER'S ACT OR
9 OMISSION DID NOT VIOLATE THIS SECTION, THE COURT MAY, IN ITS
10 DISCRETION, DECLINE TO AWARD A PENALTY OR REDUCE THE AMOUNT OF
11 THE PENALTY SPECIFIED IN SUBSECTION (2)(a) OF THIS SECTION.

12 **24-34-408. Employer record keeping - definition.** (1) AN
13 EMPLOYER SHALL PRESERVE ANY PERSONNEL OR EMPLOYMENT RECORD
14 THE EMPLOYER MADE, RECEIVED, OR KEPT FOR AT LEAST FIVE YEARS
15 AFTER THE LATER OF:

16 (a) THE DATE THE EMPLOYER MADE OR RECEIVED THE RECORD; OR

17 (b) THE DATE OF THE PERSONNEL ACTION ABOUT WHICH THE
18 RECORD PERTAINS OR OF THE FINAL DISPOSITION OF A CHARGE OF
19 DISCRIMINATION OR RELATED ACTION, AS APPLICABLE.

20 (2) AS USED IN THIS SECTION, "PERSONNEL OR EMPLOYMENT
21 RECORD" INCLUDES REQUESTS FOR ACCOMMODATION; EMPLOYEE
22 COMPLAINTS OF DISCRIMINATORY OR UNFAIR EMPLOYMENT PRACTICES;
23 APPLICATION FORMS SUBMITTED BY APPLICANTS FOR EMPLOYMENT;
24 OTHER RECORDS RELATED TO HIRING, PROMOTION, DEMOTION, TRANSFER,
25 LAYOFF, TERMINATION, RATES OF PAY OR OTHER TERMS OF
26 COMPENSATION, AND SELECTION FOR TRAINING OR APPRENTICESHIP; AND
27 RECORDS OF TRAINING PROVIDED TO OR FACILITATED FOR EMPLOYEES."

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