

GENERAL ASSEMBLY OF NORTH CAROLINA
1985 SESSION

CHAPTER 571
SENATE BILL 272

AN ACT TO PROTECT HANDICAPPED PERSONS.

The General Assembly of North Carolina enacts:

Section 1. The General Statutes are amended by adding a new Chapter 168A to read:

"Chapter 168A.

"Handicapped Persons Protection Act.

"§ 168A-1. **Title.**—This Chapter may be cited as the North Carolina Handicapped Persons Protection Act.

"§ 168A-2. **Statement of purpose.**—(a) The purpose of this Chapter is to encourage and enable all handicapped people 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 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 handicapping condition threatens the rights and proper privileges of the inhabitants of this State; and such discrimination results in a failure to realize the productive capacity of individuals to their fullest extent.

"§ 168A-3. **Definitions.**—As used in this Chapter, unless the context otherwise requires, the term:

- (1) 'Discriminatory practice' means any practice prohibited by this Chapter.
- (2) 'Employer' means any person employing fifteen or more full-time employees within the State, but excluding a person whose only employees are hired to work as domestic or farm workers at that person's home or farm.
- (3) 'Employment agency' means a person regularly undertaking with or without compensation to procure for employees opportunities to work for an employer and includes an agent of such a person.
- (4) 'Handicapped person' means any person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. As used in this subdivision, the term:

a. 'Physical or mental impairment' means (i) any physiological disorder or abnormal condition, cosmetic disfigurement, or anatomical loss, caused by bodily injury, birth defect or illness, affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental disorder, such as mental retardation, organic brain syndrome, mental illness, specific learning disabilities, and other developmental disabilities, but (iii) excludes (A) sexual preferences; (B) active alcoholism or drug addiction or abuse; and (C) any disorder, condition or disfigurement which is temporary in nature leaving no residual impairment.

b. 'Major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning.

c. 'Has a record of such an impairment' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits major life activities.

d. 'Is regarded as having an impairment' means (i) has a physical or mental impairment that does not substantially limit major life activities but that is treated as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities because of the attitudes of others; or (iii) has none of the impairments defined in paragraph a. of this subdivision but is treated as having such an impairment.

(5) 'Handicapping condition' means any condition or characteristic that renders a person a handicapped person.

(6) 'Labor organization' means an organization of any kind, an agency or employee representation committee, a group association, or a plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

(7) 'Person' includes any individual, partnership, association, corporation, labor organization, legal representative, trustee, receiver, and the State and its departments, agencies, and political subdivisions.

(8) 'Place of public accommodations' includes, but is not limited to, any place, facility, store, other establishment, hotel, or motel, which supplies goods or services on the premises to the public or which solicits or accepts the patronage or trade of any person.

(9) 'Qualified handicapped person' means:

a. With regard to employment, a handicapped person who can satisfactorily perform the duties of the job in question, with or without reasonable accommodation, (i) provided that the

handicapped person shall not be held to standards of performance different from other employees similarly employed, and (ii) further provided that the handicapping condition does not create an unreasonable risk to the safety or health of the handicapped person, other employees, the employer's customers, or the public;

b. With regard to places of public accommodation a handicapped person who can benefit from the goods or services provided by the place of public accommodation; and

c. With regard to public services and public transportation a handicapped person who meets prerequisites for participation that are uniformly applied to all participants, such as income or residence, and that do not have the effect of discriminating against the handicapped.

(10) 'Reasonable accommodation' means:

a. With regard to employment, making reasonable physical changes in the workplace, including, but not limited to, making facilities accessible, modifying equipment and providing mechanical aids to assist in operating equipment, or making reasonable changes in the duties of the job in question that would accommodate the known handicapping conditions of the handicapped person seeking the job in question by enabling him or her to satisfactorily perform the duties of that job; provided that 'reasonable accommodation' does not require that an employer:

1. hire one or more employees, other than the handicapped person, for the purpose, in whole or in part, of enabling the handicapped person to be employed; or
2. reassign duties of the job in question to other employees without assigning to the handicapped employee duties that would compensate for those reassigned; or
3. reassign duties of the job in question to one or more other employees where such reassignment would increase the skill, effort or responsibility required of such other employee or employees from that required prior to the change in duties; or
4. alter, modify, change or deviate from bona fide seniority policies or practices; or
5. provide accommodations of a personal nature, including, but not limited to, eyeglasses, hearing aids, or prostheses, except under the same terms and conditions as such items are provided to the employer's employees generally; or
6. make physical changes to accommodate a handicapped person where:

I. for a new employee the cost of such changes would exceed five percent (5%) of the annual salary or annualized hourly wage for the job in question; or II. for an existing employee the cost of the changes would bring the total cost of physical changes made to accommodate the employee's handicapping conditions since the beginning of the employee's employment with the employer to greater than five percent (5%) of the employee's current salary or current annualized hourly wage; or

7. make any changes that would impose on the employer an undue hardship, provided that the costs of less than five percent (5%) of an employee's salary or annualized wage as determined in subsection (6) above shall be presumed not to be an undue hardship.

b. With regard to a place of public accommodations, making reasonable efforts to accommodate the handicapping conditions of a handicapped person, including, but not limited to, making facilities accessible to and usable by handicapped persons, redesigning equipment, provide mechanical aids or other assistance, or using alternative accessible locations, provided that reasonable accommodation does not require efforts which would impose an undue hardship on the entity involved.

"§ 168A-4. Reasonable accommodation duties.—(a) A qualified handicapped person requesting a reasonable accommodation must apprise the employer, employment agency, labor organization, or place of public accommodation of his or her handicapping condition, submit any necessary medical documentation, make suggestions for such possible accommodations as are known to such handicapped person, and cooperate in any ensuing discussion and evaluation aimed at determining possible or feasible accommodations.

(b) Once a qualified handicapped person has requested an accommodation, or if a potential accommodation is obvious in the circumstances, an employer, employment agency, labor organization or place of public accommodation shall investigate whether there are reasonable accommodations that can be made and make reasonable accommodations as defined in G.S. 168A-3(10).

"§ 168A-5. Discrimination in employment; exemptions.—(a) Discriminatory practices. It is a discriminatory practice for:

- (1) An employer to fail to hire or consider for employment or promotion, to discharge, or otherwise to discriminate against a qualified handicapped person on the basis of a handicapping condition with respect to compensation or the terms, conditions, or privileges of employment;
- (2) An employment agency to fail or refuse to refer for employment, or otherwise to discriminate against a qualified handicapped person on the basis of a handicapping condition;
- (3) A person controlling an apprenticeship, on-the-job, or other training or retraining program, to discriminate against a qualified handicapped person on the basis of a handicapping condition in admission to, or

employment in, a program established to provide apprenticeship or other training; or

- (4) An employer or employment agency to require an applicant to identify himself as handicapped prior to a conditional offer of employment; however, any employer may invite an applicant to identify himself as handicapped in order to act affirmatively on his behalf.
- (5) An employer, labor organization, or employment agency to fail to meet the duties imposed on them by G.S. 168A-4(b).

(b) Exemptions. It is not a discriminatory action for an employer, employment agency, or labor organization:

- (1) To make an employment decision on the basis of State and federal laws or regulations imposing physical, health, mental or psychological job requirements;
- (2) To fail to hire, transfer or promote, or to discharge a handicapped person who has a history of drug abuse or who is unlawfully using drugs where the job in question is in an establishment that manufactures, distributes, dispenses, conducts research, stores, sells or otherwise handles controlled substances regulated by the North Carolina Controlled Substances Act, G.S. 90-86 et seq.;
- (3) To fail to hire, transfer, or promote, or to discharge a handicapped person because the person has a communicable disease which would disqualify a non-handicapped person from similar employment;
- (4) To fail to make reasonable accommodations where the handicapped person has not fulfilled the duties imposed by G.S. 168A-4;
- (5) To inquire whether a person has the ability to perform the duties of the job in question;
- (6) To require or request a person to undergo a medical examination, which may include a medical history, for the purpose of determining the person's ability or capacity to safely and satisfactorily perform the duties of available jobs for which the person is otherwise qualified, or to aid in determining possible accommodations for a handicapping condition, provided (i) that an offer of employment has been made on the condition that the person meets the physical and mental requirements of the job with or without reasonable accommodation; and (ii) that the examination, unless limited to determining the extent to which a person's handicapping condition would interfere with his or her ability or capacity to safely and

satisfactorily perform the duties of the job in question or the possible accommodations for a handicapping condition, is required of all persons conditionally offered employment for the same position regardless of handicapping condition;

- (7) To obtain medical information or to require or request a medical examination where such

information or examination is for the purpose of establishing an employee health record;

- (8) To administer pre-employment tests, provided that the tests (i) measure only job-related abilities, (ii) are required of all applicants for the same position unless such tests are limited to determining the extent to which a person's handicapping condition would interfere with his or her ability to safely and satisfactorily perform the duties of the job in question or the possible accommodations for the job in question, and (iii) accurately measure the applicant's aptitude, achievement level, or whatever factors they purport to measure rather than reflecting the handicapped person's impaired sensory, manual or speaking skills except when those skills are requirements of the job in question, provided that an employer shall not be liable for improper testing which was administered by a State agency acting as an employment agency.

"§ 168A-6. Discrimination in public accommodations.—It is a discriminatory practice for a person to deny a qualified handicapped person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of a handicapping condition. In the area of structural modifications, this section may be satisfied by compliance with the North Carolina Building Code.

"§ 168A-7. Discrimination in public service.—It is a discriminatory practice for a State department, institution, or agency, or any political subdivision of the State or any person that contracts with the above for the delivery of public services including but not limited to education, health, social services, recreation, and rehabilitation, to refuse to provide reasonable aids and adaptations necessary for a known qualified handicapped person to use or benefit from existing public services operated by such entity; provided that the aids and adaptations do not impose an undue hardship on the entity involved.

"§ 168A-8. Discrimination in public transportation.—It is a discriminatory practice for any transportation system providing transportation to the general public to fail to ensure access to and the benefits of public transportation to a qualified handicapped person; however, public transportation systems may use alternative methods to provide transportation for handicapped persons, as long as handicapped persons are offered transportation that, in relation to the transportation offered to other persons, is:

- (1) In a similar geographic area of operation;
- (2) For fares not greater in price;
- (3) With similar or no restrictions as to trip purpose;
- (4) With reasonable response time; and
- (5) With similar hours of operations. Nothing in this section shall apply to privately owned, local transit or transportation systems existing on October 1, 1985, or to interstate air carriers complying with federal regulations promulgated by the Civil Aeronautics Board and administered by the United States Department of Transportation.

"§ 168A-9. Affirmative defenses.—Any employer may assert affirmative defenses in any action brought under this Chapter. This section shall not create any inference that an employment action which is not listed as an affirmative defense is therefore, by implication, a discriminatory practice, so long as the employment action is not otherwise prohibited by this Chapter. The following is a non-exclusive list of affirmative defenses:

- (a) The qualified handicapped person's failure to comply with or meet the employer's work rules and policies or performance standards, provided that such person is not held to rules or standards different from other non-handicapped employees similarly employed;
- (b) The qualified handicapped person's excessive, willful or habitual tardiness or absence, provided that the standard used by the employer in determining whether such tardiness or absence is excessive is the same as that applied by the employer to non-handicapped employees similarly employed; or
- (c) A bona fide seniority or merit system, or a system which measures earnings by quantity or quality of work or production, or differences in location of employment.

"§ 168A-10. Retaliation prohibited.—No employer shall discharge, expel, refuse to hire, or otherwise discriminate against any person or applicant for employment, nor shall any employment agency discriminate against any person, nor shall a labor organization discriminate against any member or applicant for membership because such person has opposed any practice made a discriminatory practice by this Chapter or because he has testified, assisted or participated in any manner in proceedings under this Chapter.

"§ 168A-11. Civil action.—(a) A handicapped person aggrieved by a discriminatory practice prohibited by G.S. 168A-5 through 168A-8, or a person aggrieved by conduct prohibited by G.S. 168A-10, may bring a civil action to enforce rights granted or protected by this Chapter against any person described in G.S. 168A-5 through 168A-8 or in G.S. 168A-10 who is alleged to have committed such practices or engaged in such conduct. The action shall be commenced in superior court in the county where the alleged discriminatory practice or prohibited conduct occurred or where the plaintiff or defendant resides. Such action shall be tried to the court without a jury.

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

(c) No court shall have jurisdiction over an action filed under this Chapter where the plaintiff has commenced federal judicial or administrative proceedings under Section 503 or Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794, as amended, or federal regulations promulgated thereunder, involving or

arising out of the facts and circumstances involved in the alleged discriminatory practice under this Chapter. If such proceedings are commenced after a civil action has been commenced under this Chapter, the State court's jurisdiction over the civil action shall end and the action shall be forthwith dismissed.

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

"§ 168A-12. Statute of limitations.—A civil action brought pursuant to this Chapter shall be commenced within 180 days after the date on which the aggrieved person became aware or, with reasonable diligence, should have become aware of the alleged discriminatory practice or prohibited conduct."

Sec. 2. G.S. 126-16 is amended in the first sentence by deleting the words "physical disability" and substituting the phrase "handicapping condition as defined in G.S. 168A-3".

Sec. 3. G.S. 168-6 is repealed. Sec. 4. This act shall become effective October 1, 1985.

In the General Assembly read three times and ratified, this the 3rd day of July, 1985.