

**§ 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:

- (1) The failure of the qualified person with a disability to comply with or meet the employer's work rules and policies or performance standards, absent a reasonable accommodation excusing noncompliance, provided that the person is not held to rules or standards different from other employees without a disability similarly employed;
- (2) The excessive, willful or habitual tardiness or absence of a qualified person with a disability, absent a reasonable accommodation that allows for flexible working hours, 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 employees without a disability similarly employed; or
- (3) 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. (1985, c. 571, s. 1; 1999-160, s. 1; 2011-94, s. 4.)