

2126

2009-2010 Regular Sessions

I N A S S E M B L Y

January 15, 2009

Introduced by M. of A. JOHN, BENEDETTO, MILLMAN, CLARK, CHRISTENSEN, PERALTA, SCHROEDER -- Multi-Sponsored by -- M. of A. ABBATE, BOYLAND, BRADLEY, BRENNAN, CAHILL, CANESTRARI, COLTON, COOK, CUSICK, DeMONTE, DESTITO, DINOWITZ, FARRELL, FIELDS, GLICK, GORDON, GUNTHER, HEASTIE, JACOBS, McENENY, PHEFFER, REILLY, N. RIVERA, SWEENEY, WEISENBERG, ZEBROWSKI -- read once and referred to the Committee on Labor

AN ACT to amend the labor law and the civil service law, in relation to protection of employees against retaliatory action by employers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

- 1 Section 1. Section 740 of the labor law, as added by chapter 660 of
2 the laws of 1984, paragraph (g) of subdivision 1 as added and paragraph
3 (a) of subdivision 2 as amended by chapter 442 of the laws of 2006 and
4 paragraph (d) of subdivision 4 as added by chapter 24 of the laws of
5 2002, is amended to read as follows:
6 S 740. Retaliatory personnel action by employers; prohibition. 1.
7 Definitions. For purposes of this section, unless the context specifically indicates otherwise:
8 (a) "Employee" means an individual who performs services for and under
9 the control and direction of an employer for wages or other remuneration.
10 (b) "Employer" means any person, firm, partnership, institution,
11 corporation, or association that employs one or more employees.
12 (c) "Law, rule or regulation" includes: (I) any duly enacted FEDERAL,
13 STATE OR LOCAL statute or ordinance [or]; (II) any rule or regulation
14 promulgated pursuant to [any federal, state or local] SUCH statute or
15 ordinance; OR (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR
16 ORDER.
17 (d) "Public body" includes the following:
18
19

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [] is old law to be omitted.

LBD02606-01-9

1 (i) the United States Congress, any state legislature, or any [popu-
2 larly-elected] ELECTED local governmental body, or any member or employ-
3 ee thereof;

4 (ii) any federal, state, or local [judiciary] COURT, or any member or
5 employee thereof, or any grand or petit jury;

6 (iii) any federal, state, or local regulatory, administrative, or
7 public agency or authority, or instrumentality thereof; [or]

8 (iv) any federal, state, or local law enforcement agency, prosecutori-
9 al office, or police or peace officer;

10 (V) ANY FEDERAL, STATE OR LOCAL DEPARTMENT OF AN EXECUTIVE BRANCH OF
11 GOVERNMENT; OR

12 (VI) ANY DIVISION, BOARD, BUREAU, OFFICE, COMMITTEE, OR COMMISSION OF
13 ANY OF THE PUBLIC BODIES DESCRIBED IN SUBPARAGRAPHS (I) THROUGH (V) OF
14 THIS PARAGRAPH.

15 (e) "Retaliatory personnel action" means the discharge, suspension [or
16 demotion of], DEMOTION, PENALIZATION OR DISCRIMINATION AGAINST an
17 employee, or other adverse employment action taken against an employee
18 in the terms and conditions of employment.

19 (f) "Supervisor" means any individual within an employer's organiza-
20 tion who has the authority to direct and control the work performance of
21 [the affected] AN employee; or who has [managerial] authority to take
22 corrective action regarding the [violation of the law, rule or regu-
23 lation] ILLEGAL BUSINESS ACTIVITY of which the employee complains.

24 (g) "Health care fraud" means health care fraud as defined by article
25 one hundred seventy-seven of the penal law.

26 (H) "AGENT" MEANS ANY INDIVIDUAL, PARTNERSHIP, ASSOCIATION, CORPO-
27 RATION OR GROUP OF PERSONS ACTING ON BEHALF OF AN EMPLOYER.

28 (I) "ILLEGAL BUSINESS ACTIVITY" MEANS ANY PRACTICE, PROCEDURE, ACTION
29 OR FAILURE TO ACT BY AN EMPLOYER, OR AN EMPLOYEE OR AGENT OF SUCH
30 EMPLOYER, TAKEN IN THE COURSE OF THE EMPLOYER'S BUSINESS, WHETHER OR NOT
31 WITHIN THE SCOPE OF EMPLOYMENT OR AGENCY, WHICH IS IN VIOLATION OF ANY
32 LAW, RULE OR REGULATION.

33 2. Prohibitions. An employer shall not take any retaliatory personnel
34 action against an employee because such employee does any of the follow-
35 ing:

36 (a) discloses, or threatens to disclose to a supervisor or to a public
37 body INFORMATION ABOUT an ILLEGAL BUSINESS activity[, policy or practice
38 of the employer that is in violation of law, rule or regulation which
39 violation creates and presents a substantial and specific danger to the
40 public health or safety, or which constitutes health care fraud];

41 (b) provides information to, or testifies before, any public body
42 conducting an investigation, hearing or inquiry into any such [violation
43 of a law, rule or regulation by such employer] ILLEGAL BUSINESS
44 ACTIVITY; or

45 (c) objects to, or refuses to participate in any [such] ILLEGAL BUSI-
46 NESS activity[, policy or practice in violation of a law, rule or regu-
47 lation].

48 3. Application. The protection against retaliatory personnel action
49 provided by SUBDIVISION TWO OF THIS SECTION SHALL APPLY TO ANY EMPLOYEE
50 WHO IN GOOD FAITH REASONABLY BELIEVES THAT AN ILLEGAL BUSINESS ACTIVITY
51 HAS OCCURRED OR WILL OCCUR, BASED ON INFORMATION THAT THE EMPLOYEE IN
52 GOOD FAITH REASONABLY BELIEVES TO BE TRUE; PROVIDED, HOWEVER, THAT THE
53 PROTECTION AGAINST RETALIATORY PERSONNEL ACTION PROVIDED BY paragraph
54 (a) of subdivision two of this section pertaining to disclosure to a
55 public body shall not apply to an employee who makes such disclosure to
56 a public body unless the employee has [brought] MADE A GOOD FAITH EFFORT

1 TO NOTIFY HIS OR HER EMPLOYER BY BRINGING the ILLEGAL BUSINESS activ-
2 ity[, policy or practice in violation of law, rule or regulation] to the
3 attention of a supervisor [of the employer] and has afforded such
4 employer a reasonable opportunity to correct such activity[, policy or
5 practice]. EMPLOYER NOTIFICATION SHALL NOT BE REQUIRED WHERE: (A) THE
6 EMPLOYER HAS NOT COMPLIED WITH THE PUBLICATION REQUIREMENTS OF SUBDIVI-
7 SION EIGHT OF THIS SECTION; (B) THERE IS AN IMMINENT AND SERIOUS DANGER
8 TO THE PUBLIC HEALTH OR SAFETY; OR (C) THE EMPLOYEE REASONABLY BELIEVES
9 THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN A DESTRUCTION OF
10 EVIDENCE OR OTHER CONCEALMENT OF THE ILLEGAL BUSINESS ACTIVITY.

11 4. Violation; remedy. (a) An employee who has been the subject of a
12 retaliatory personnel action in violation of this section may institute
13 a civil action in a court of competent jurisdiction for relief as set
14 forth in subdivision five of this section within [one year] TWO YEARS
15 after the alleged retaliatory personnel action was taken.

16 (b) Any action authorized by this section may be brought in the county
17 in which the alleged retaliatory personnel action occurred, in the coun-
18 ty in which the complainant resides, or in the county in which the
19 employer has its principal place of business.

20 (c) It shall be a defense to any action brought pursuant to this
21 section that the personnel action was predicated upon grounds other than
22 the employee's exercise of any rights protected by this section. It
23 shall also be a defense that the individual was an independent contrac-
24 tor.

25 (d) [Notwithstanding the provisions of paragraphs (a) and (c) of this
26 subdivision, a health care employee who has been the subject of a retal-
27 iatory action by a health care employer in violation of section seven
28 hundred forty-one of this article may institute a civil action in a
29 court of competent jurisdiction for relief as set forth in subdivision
30 five of this section within two years after the alleged retaliatory
31 personnel action was taken.] In addition to the relief set forth in
32 [that] subdivision FIVE OF THIS SECTION, the court, in its discretion,
33 based upon a finding that the employer acted in bad faith in the retali-
34 atory action, may assess the employer a civil penalty of an amount not
35 to exceed ten thousand dollars, to be paid to the improving quality of
36 patient care fund, established pursuant to section ninety-seven-aaaa of
37 the state finance law.

38 5. Relief. In any action brought pursuant to subdivision four of this
39 section, the court may order relief as follows:

40 (a) [an injunction to restrain continued violation of this section;

41 (b)] the reinstatement of the employee to the same position held
42 before the retaliatory personnel action, or to an equivalent position;

43 [(c)] (B) the reinstatement of full fringe benefits and seniority
44 rights;

45 [(d)] (C) the compensation for lost wages, benefits and other remuner-
46 ation; [and

47 (e)] (D) COMPENSATORY DAMAGES FOR ECONOMIC LOSS;

48 (E) the payment by the employer of reasonable costs, disbursements,
49 and attorney's fees;

50 (F) AN INJUNCTION TO RESTRAIN THE EMPLOYER'S CONTINUED VIOLATION OF
51 THIS SECTION WITH RESPECT TO THE EMPLOYEE; AND

52 (G) A CIVIL PENALTY OF AN AMOUNT NOT TO EXCEED TEN THOUSAND DOLLARS,
53 IF THE COURT, IN ITS DISCRETION, FINDS THAT THE EMPLOYER ACTED IN BAD
54 FAITH IN THE RETALIATORY ACTION.

55 6. Employer relief. A court, in its discretion, may also order that
56 reasonable attorneys' fees and court costs and disbursements be awarded

1 to an employer if the court determines that an action brought by an
2 employee under this section was without REASONABLE basis in law or in
3 fact.

4 7. Existing rights. Nothing in this section shall be deemed to dimin-
5 ish the rights, privileges, or remedies of any employee under any other
6 law or regulation or under any collective bargaining agreement or
7 employment contract; except that the institution of an action in accord-
8 ance with this section shall be deemed a waiver of the rights and reme-
9 dies available under any other contract, collective bargaining agree-
10 ment, law, rule or regulation or under the common law.

11 8. PUBLICATION. EVERY EMPLOYER SHALL INFORM EMPLOYEES OF THEIR
12 PROTECTIONS, RIGHTS AND OBLIGATIONS UNDER THIS SECTION, BY POSTING A
13 NOTICE THEREOF. SUCH NOTICES SHALL BE POSTED CONSPICUOUSLY IN EASILY
14 ACCESSIBLE AND WELL-LIGHTED PLACES CUSTOMARILY FREQUENTED BY EMPLOYEES
15 AND APPLICANTS FOR EMPLOYMENT.

16 S 2. Subdivision 2 of section 75-b of the civil service law, as added
17 by chapter 660 of the laws of 1984 and paragraph (a) as amended by chap-
18 ter 899 of the laws of 1986, is amended to read as follows:

19 2. (a) A public employer shall not dismiss, SUSPEND, DEMOTE, PENALIZE
20 OR DISCRIMINATE AGAINST, or take other disciplinary or other adverse
21 personnel action against a public employee regarding the employee's
22 employment because the employee:

23 (I) discloses OR THREATENS TO DISCLOSE to a governmental body
24 information[:(i)] regarding a violation of a law, rule or regulation
25 which violation creates and presents a substantial and specific danger
26 to the public health or safety[; or (ii) which the employee reasonably
27 believes to be true and reasonably believes] OR WHICH constitutes an
28 improper governmental action[. "Improper governmental action" shall mean
29 any action by a public employer or employee, or an agent of such employ-
30 er or employee, which is undertaken in the performance of such agent's
31 official duties, whether or not such action is within the scope of his
32 employment, and which is in violation of any federal, state or local
33 law, rule or regulation.];

34 (II) PROVIDES INFORMATION TO, OR TESTIFIES BEFORE, ANY PUBLIC BODY
35 CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY INTO ANY VIOLATION OR
36 ACTION DESCRIBED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH; OR

37 (III) OBJECTS TO, OR REFUSES TO PARTICIPATE IN, ANY SUCH VIOLATION OR
38 ACTION.

39 (b) THE PROTECTION AGAINST RETALIATORY PERSONNEL ACTION PROVIDED IN
40 PARAGRAPH (A) OF THIS SUBDIVISION SHALL APPLY TO ANY EMPLOYEE WHO IN
41 GOOD FAITH REASONABLY BELIEVES THAT A VIOLATION OR IMPROPER GOVERNMENTAL
42 ACTION HAS OCCURRED OR WILL OCCUR, BASED ON INFORMATION THAT THE EMPLOY-
43 EE IN GOOD FAITH REASONABLY BELIEVES TO BE TRUE.

44 (C) Prior to disclosing information pursuant to [paragraph (a)]
45 SUBPARAGRAPH (I) OF PARAGRAPH (A) of this subdivision, an employee shall
46 have made a good faith effort to provide the appointing authority or his
47 or her designee the information to be disclosed and shall provide the
48 appointing authority or designee a reasonable time to take appropriate
49 action unless there is imminent and serious danger to public health or
50 safety. For the purposes of this subdivision, an employee who acts
51 pursuant to this paragraph shall be deemed to have disclosed information
52 to a governmental body under paragraph (a) of this subdivision. NOTIFI-
53 CATION TO THE APPOINTING AUTHORITY OR DESIGNEE SHALL NOT BE REQUIRED
54 WHERE: (I) THE PUBLIC EMPLOYER HAS NOT COMPLIED WITH THE PUBLICATION
55 REQUIREMENTS OF SUBDIVISION FIVE OF THIS SECTION; (II) THERE IS AN IMMI-
56 NENT AND SERIOUS DANGER TO THE PUBLIC HEALTH OR SAFETY; OR (III) THE

1 EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE APPOINTING AUTHORITY
2 OR DESIGNEE WOULD RESULT IN A DESTRUCTION OF EVIDENCE OR OTHER CONCEAL-
3 MENT OF THE ILLEGAL BUSINESS ACTIVITY.

4 (D) "IMPROPER GOVERNMENTAL ACTION" SHALL MEAN ANY PRACTICE, PROCEDURE,
5 ACTION OR FAILURE TO ACT BY A PUBLIC EMPLOYER OR EMPLOYEE, OR AN AGENT
6 OF SUCH EMPLOYER OR EMPLOYEE, WHICH IS UNDERTAKEN IN THE PERFORMANCE OF
7 SUCH AGENT'S OFFICIAL DUTIES, WHETHER OR NOT SUCH ACTION IS WITHIN THE
8 SCOPE OF SUCH PERSON'S EMPLOYMENT, AND WHICH IS IN VIOLATION OF ANY LAW,
9 RULE OR REGULATION. "LAW, RULE OR REGULATION" INCLUDES: (I) ANY DULY
10 ENACTED FEDERAL, STATE OR LOCAL STATUTE OR ORDINANCE; (II) ANY RULE OR
11 REGULATION PROMULGATED PURSUANT TO ANY SUCH STATUTE OR ORDINANCE; OR
12 (III) ANY JUDICIAL OR ADMINISTRATIVE DECISION, RULING OR ORDER.

13 S 3. Paragraph (c) of subdivision 3 of section 75-b of the civil
14 service law, as added by chapter 660 of the laws of 1984, is amended to
15 read as follows:

16 (c) [where] IN ADDITION TO OR IN LIEU OF THE PROCEDURES SET FORTH IN
17 PARAGRAPHS (A) AND (B) OF THIS SUBDIVISION, OR WHERE an employee is not
18 subject to any of the provisions of [paragraph (a) or (b) of this subdivi-
19 sion] SUCH PARAGRAPHS, the employee may commence an action in a court
20 of competent jurisdiction under the same terms and conditions AND FOR
21 THE SAME RELIEF as set forth in article twenty-C of the labor law.

22 S 4. Section 75-b of the civil service law is amended by adding a new
23 subdivision 5 to read as follows:

24 5. EVERY PUBLIC EMPLOYER SHALL INFORM EMPLOYEES OF THEIR PROTECTIONS,
25 RIGHTS AND OBLIGATIONS UNDER THIS SECTION, BY POSTING A NOTICE THEREOF.
26 SUCH NOTICES SHALL BE POSTED CONSPICUOUSLY IN EASILY ACCESSIBLE AND
27 WELL-LIGHTED PLACES CUSTOMARILY FREQUENTED BY EMPLOYEES AND APPLICANTS
28 FOR EMPLOYMENT.

29 S 5. This act shall take effect on the ninetieth day after it shall
30 have become a law.