

5414--B

2009-2010 Regular Sessions

I N A S S E M B L Y

February 13, 2009

Introduced by M. of A. ENGLEBRIGHT, COLTON, GUNTHER, MILLMAN, LAVINE, JAFFEE, SCHROEDER, GABRYSZAK, BARRA, SCHIMEL, STIRPE, KELLNER, ROSENTHAL, BOYLAND, CASTRO, ESPAILLAT, SKARTADOS, J. RIVERA, ROBINSON -- Multi-Sponsored by -- M. of A. ALFANO, BOYLE, CARROZZA, CUSICK, GALEF, HOOPER, JEFFRIES, LATIMER, LIFTON, McDONOUGH, McENENY, McKEVITT, MENG, O'DONNELL, PAULIN, PERRY, SALADINO, THIELE, TOBACCO, TOWNS, TOWNSEND -- read once and referred to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Labor in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to establishing a private cause of action for an abusive work environment

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

1 Section 1. The labor law is amended by adding a new article 20-D to
2 read as follows:

3 ARTICLE 20-D

4 ABUSIVE WORK ENVIRONMENT

5 SECTION 760. LEGISLATIVE FINDINGS AND INTENT.
6 761. DEFINITIONS.
7 762. ABUSIVE WORK ENVIRONMENT.
8 763. EMPLOYER LIABILITY.
9 764. DEFENSES.
10 765. RETALIATION.
11 766. REMEDIES.
12 767. ENFORCEMENT.
13 768. EFFECT ON COLLECTIVE BARGAINING AGREEMENTS.
14 769. EFFECT OF OTHER LAWS.

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

LBD00743-05-0

1 S 760. LEGISLATIVE FINDINGS AND INTENT. THE LEGISLATURE HEREBY FINDS
2 THAT THE SOCIAL AND ECONOMIC WELL-BEING OF THE STATE IS DEPENDENT UPON
3 HEALTHY AND PRODUCTIVE EMPLOYEES. SURVEYS AND STUDIES HAVE DOCUMENTED
4 THAT BETWEEN SIXTEEN AND TWENTY-ONE PERCENT OF EMPLOYEES DIRECTLY EXPERIENCE
5 HEALTH ENDANGERING WORKPLACE BULLYING, ABUSE AND HARASSMENT.
6 SUCH BEHAVIOR IS FOUR TIMES MORE PREVALENT THAN SEXUAL HARASSMENT. THESE
7 SURVEYS AND STUDIES HAVE FURTHER FOUND THAT ABUSIVE WORK ENVIRONMENTS
8 CAN HAVE SERIOUS EFFECTS ON THE TARGETED EMPLOYEES, INCLUDING FEELINGS
9 OF SHAME AND HUMILIATION, STRESS, LOSS OF SLEEP, SEVERE ANXIETY,
10 DEPRESSION, POST-TRAUMATIC STRESS DISORDER, REDUCED IMMUNITY TO
11 INFECTION, STRESS-RELATED GASTROINTESTINAL DISORDERS, HYPERTENSION, AND
12 PATHOPHYSIOLOGIC CHANGES THAT INCREASE THE RISK OF CARDIOVASCULAR
13 DISEASES.

14 FURTHERMORE, THE LEGISLATURE FINDS THAT ABUSIVE WORK ENVIRONMENTS CAN
15 HAVE SERIOUS CONSEQUENCES FOR EMPLOYERS, INCLUDING REDUCED EMPLOYEE
16 PRODUCTIVITY AND MORALE, HIGHER TURNOVER AND ABSENTEEISM RATES, AND
17 SIGNIFICANT INCREASES IN MEDICAL AND WORKERS' COMPENSATION CLAIMS.

18 THE LEGISLATURE HEREBY FINDS THAT UNLESS MISTREATED EMPLOYEES HAVE
19 BEEN SUBJECTED TO ABUSIVE TREATMENT IN THE WORKPLACE ON THE BASIS OF
20 RACE, COLOR, SEX, NATIONAL ORIGIN OR AGE, SUCH EMPLOYEES ARE UNLIKELY TO
21 HAVE LEGAL RECOURSE TO REDRESS SUCH TREATMENT.

22 THE LEGISLATURE HEREBY DECLARES THAT LEGAL PROTECTION FROM ABUSIVE
23 WORK ENVIRONMENTS SHOULD NOT BE LIMITED TO BEHAVIOR GROUNDED IN A
24 PROTECTED CLASS STATUS AS REQUIRED BY EMPLOYMENT DISCRIMINATION STAT-
25 UTES. EXISTING WORKERS' COMPENSATION PROVISIONS AND COMMON LAW TORT LAW
26 ARE INADEQUATE TO DISCOURAGE SUCH ABUSIVE CONDUCT AND PROVIDE ADEQUATE
27 REDRESS TO EMPLOYEES WHO HAVE BEEN HARMED BY ABUSIVE WORK ENVIRONMENTS.

28 THE PURPOSE OF THIS ARTICLE SHALL BE TO PROVIDE LEGAL REDRESS FOR
29 EMPLOYEES WHO HAVE BEEN HARMED PSYCHOLOGICALLY, PHYSICALLY OR ECONOM-
30 ICALLY BY BEING DELIBERATELY SUBJECTED TO ABUSIVE WORK ENVIRONMENTS; AND
31 TO PROVIDE LEGAL INCENTIVES FOR EMPLOYERS TO PREVENT AND RESPOND TO
32 MISTREATMENT OF EMPLOYEES AT WORK.

33 S 761. DEFINITIONS. AS USED IN THIS ARTICLE, THE FOLLOWING TERMS SHALL
34 HAVE THE FOLLOWING MEANINGS:

35 1. "ABUSIVE CONDUCT" MEANS CONDUCT, WITH MALICE, TAKEN AGAINST AN
36 EMPLOYEE BY AN EMPLOYER OR ANOTHER EMPLOYEE IN THE WORKPLACE, THAT A
37 REASONABLE PERSON WOULD FIND TO BE HOSTILE, OFFENSIVE AND UNRELATED TO
38 THE EMPLOYER'S LEGITIMATE BUSINESS INTERESTS. IN CONSIDERING WHETHER
39 SUCH CONDUCT IS OCCURRING, THE TRIER OF FACT SHOULD WEIGH THE SEVERITY,
40 NATURE AND FREQUENCY OF THE CONDUCT. ABUSIVE CONDUCT SHALL INCLUDE, BUT
41 NOT BE LIMITED TO, REPEATED INFLICTION OF VERBAL ABUSE, SUCH AS THE USE
42 OF DEROGATORY REMARKS, INSULTS AND EPITHETS; VERBAL OR PHYSICAL CONDUCT
43 THAT A REASONABLE PERSON WOULD FIND THREATENING, INTIMIDATING OR HUMILI-
44 ATING; OR THE GRATUITOUS SABOTAGE OR UNDERMINING OF AN EMPLOYEE'S WORK
45 PERFORMANCE. A SINGLE ACT SHALL NOT CONSTITUTE ABUSIVE CONDUCT, UNLESS
46 THE TRIER OF FACT FINDS SUCH ACT TO BE ESPECIALLY SEVERE OR EGREGIOUS.

47 2. "ABUSIVE WORK ENVIRONMENT" MEANS A WORKPLACE IN WHICH AN EMPLOYEE
48 IS SUBJECTED TO ABUSIVE CONDUCT THAT IS SO SEVERE THAT IT CAUSES PHYS-
49 ICAL OR PSYCHOLOGICAL HARM TO SUCH EMPLOYEE, AND WHERE SUCH EMPLOYEE
50 PROVIDES NOTICE TO THE EMPLOYER THAT SUCH EMPLOYEE HAS BEEN SUBJECTED TO
51 ABUSIVE CONDUCT AND SUCH EMPLOYER AFTER RECEIVING NOTICE THEREOF, FAILS
52 TO ELIMINATE THE ABUSIVE CONDUCT.

53 3. "CONDUCT" MEANS ALL FORMS OF BEHAVIOR, INCLUDING ACTS AND OMISSIONS
54 TO ACT.

55 4. "CONSTRUCTIVE DISCHARGE" MEANS ABUSIVE CONDUCT AGAINST AN EMPLOYEE
56 THAT CAUSES SUCH EMPLOYEE TO RESIGN FROM HIS OR HER EMPLOYMENT.

1 5. "MALICE" MEANS THE INTENT TO CAUSE ANOTHER PERSON TO SUFFER PSYCHO-
2 LOGICAL, PHYSICAL OR ECONOMIC HARM, WITHOUT LEGITIMATE CAUSE OR JUSTI-
3 FICATION. MALICE MAY BE INFERRED FROM THE PRESENCE OF FACTORS SUCH AS
4 OUTWARD EXPRESSIONS OF HOSTILITY, HARMFUL CONDUCT INCONSISTENT WITH AN
5 EMPLOYER'S LEGITIMATE BUSINESS INTERESTS, A CONTINUATION OF HARMFUL AND
6 ILLEGITIMATE CONDUCT AFTER A COMPLAINANT REQUESTS THAT IT CEASE OR
7 DISPLAYS OUTWARD SIGNS OF EMOTIONAL OR PHYSICAL DISTRESS IN THE FACE OF
8 THE CONDUCT, OR ATTEMPTS TO EXPLOIT THE COMPLAINANT'S KNOWN PSYCHOLOG-
9 ICAL OR PHYSICAL VULNERABILITY.

10 6. "NEGATIVE EMPLOYMENT DECISION" MEANS A TERMINATION, CONSTRUCTIVE
11 DISCHARGE, DEMOTION, UNFAVORABLE REASSIGNMENT, REFUSAL TO PROMOTE OR
12 DISCIPLINARY ACTION.

13 7. "PHYSICAL HARM" MEANS THE MATERIAL IMPAIRMENT OF A PERSON'S PHYS-
14 ICAL HEALTH OR BODILY INTEGRITY, AS DOCUMENTED BY A COMPETENT PHYSICIAN
15 OR SUPPORTED BY COMPETENT EXPERT EVIDENCE AT TRIAL.

16 8. "PSYCHOLOGICAL HARM" MEANS THE MATERIAL IMPAIRMENT OF A PERSON'S
17 MENTAL HEALTH, AS DOCUMENTED BY A COMPETENT PHYSICIAN OR SUPPORTED BY
18 COMPETENT EXPERT EVIDENCE AT TRIAL.

19 S 762. ABUSIVE WORK ENVIRONMENT. IT SHALL BE UNLAWFUL TO SUBJECT AN
20 EMPLOYEE TO AN ABUSIVE WORK ENVIRONMENT.

21 S 763. EMPLOYER LIABILITY. AN EMPLOYER SHALL BE CIVILLY LIABLE FOR THE
22 EXISTENCE OF AN ABUSIVE WORK ENVIRONMENT WITHIN ANY WORKPLACE UNDER ITS
23 CONTROL.

24 S 764. DEFENSES. 1. IT SHALL BE AN AFFIRMATIVE DEFENSE TO A CAUSE OF
25 ACTION FOR ABUSIVE WORK ENVIRONMENT, THAT THE EMPLOYER EXERCISED REASON-
26 ABLE CARE TO PREVENT AND PROMPTLY CORRECT THE ABUSIVE CONDUCT WHICH IS
27 THE BASIS OF SUCH CAUSE OF ACTION AND THE PLAINTIFF UNREASONABLY FAILED
28 TO TAKE ADVANTAGE OF THE APPROPRIATE PREVENTIVE OR CORRECTIVE OPPORTU-
29 NITIES PROVIDED BY SUCH EMPLOYER. SUCH AFFIRMATIVE DEFENSE SHALL NOT BE
30 AVAILABLE TO AN EMPLOYER WHEN THE ABUSIVE CONDUCT CULMINATES IN A NEGA-
31 TIVE EMPLOYMENT DECISION WITH REGARD TO THE PLAINTIFF.

32 2. IT SHALL BE AN AFFIRMATIVE DEFENSE TO A CAUSE OF ACTION FOR ABUSIVE
33 WORK ENVIRONMENT, THAT THE EMPLOYER MADE A NEGATIVE EMPLOYMENT DECISION
34 WITH REGARD TO THE PLAINTIFF WHICH IS CONSISTENT WITH SUCH EMPLOYER'S
35 LEGITIMATE BUSINESS INTERESTS, SUCH AS TERMINATION OR DEMOTION BASED ON
36 THE PLAINTIFF'S POOR PERFORMANCE OR THE COMPLAINT IS BASED PRIMARILY
37 UPON THE EMPLOYER'S REASONABLE INVESTIGATION OF POTENTIALLY DANGEROUS,
38 ILLEGAL OR UNETHICAL ACTIVITY.

39 S 765. RETALIATION. ANY RETALIATORY ACTION AGAINST ANY EMPLOYEE ALLEG-
40 ING A VIOLATION OF THIS ARTICLE SHALL BE DEEMED TO BE A RETALIATORY
41 PERSONNEL ACTION AS PROHIBITED BY SECTION SEVEN HUNDRED FORTY OF THIS
42 CHAPTER.

43 S 766. REMEDIES. 1. WHERE A DEFENDANT HAS BEEN FOUND TO HAVE ENGAGED
44 IN ABUSIVE CONDUCT, OR CAUSED OR MAINTAINED AN ABUSIVE WORK ENVIRONMENT,
45 THE COURT MAY ENJOIN SUCH DEFENDANT FROM ENGAGING IN SUCH ILLEGAL ACTIV-
46 ITY AND MAY ORDER ANY OTHER RELIEF THAT IS APPROPRIATE INCLUDING, BUT
47 NOT LIMITED TO, REINSTATEMENT, REMOVAL OF THE OFFENDING PARTY FROM THE
48 PLAINTIFF'S WORK ENVIRONMENT, REIMBURSEMENT FOR LOST WAGES, MEDICAL
49 EXPENSES, COMPENSATION FOR EMOTIONAL DISTRESS, PUNITIVE DAMAGES AND
50 ATTORNEY FEES.

51 2. WHERE AN EMPLOYER HAS BEEN FOUND TO HAVE CAUSED OR MAINTAINED AN
52 ABUSIVE WORK ENVIRONMENT THAT DID NOT RESULT IN A NEGATIVE EMPLOYMENT
53 DECISION, SUCH EMPLOYER'S LIABILITY FOR DAMAGES FOR EMOTIONAL DISTRESS
54 SHALL NOT EXCEED TWENTY-FIVE THOUSAND DOLLARS AND SHALL HAVE NO LIABIL-
55 ITY FOR PUNITIVE DAMAGES. THE PROVISIONS OF THIS SUBDIVISION SHALL NOT
56 APPLY TO ANY EMPLOYEE WHO ENGAGES IN ABUSIVE CONDUCT.

1 S 767. ENFORCEMENT. 1. THE PROVISIONS OF THIS ARTICLE ARE ENFORCEABLE
2 BY MEANS OF A CIVIL CAUSE OF ACTION COMMENCED BY AN INJURED EMPLOYEE.
3 2. NOTWITHSTANDING THE PROVISIONS OF THE CIVIL PRACTICE LAW AND RULES,
4 AN ACTION TO ENFORCE THE PROVISIONS OF THIS ARTICLE SHALL BE COMMENCED
5 WITHIN ONE YEAR OF THE LAST ABUSIVE CONDUCT WHICH IS THE BASIS OF THE
6 ALLEGATION OF ABUSIVE WORK ENVIRONMENT.
7 S 768. EFFECT ON COLLECTIVE BARGAINING AGREEMENTS. THIS ARTICLE SHALL
8 NOT PREVENT, INTERFERE, EXEMPT OR SUPERSEDE ANY CURRENT PROVISIONS OF AN
9 EMPLOYEE'S EXISTING COLLECTIVE BARGAINING AGREEMENT WHICH PROVIDES
10 GREATER RIGHTS AND PROTECTIONS THAN PRESCRIBED IN THIS ARTICLE NOR SHALL
11 THIS ARTICLE PREVENT ANY NEW PROVISIONS OF THE COLLECTIVE BARGAINING
12 AGREEMENT WHICH PROVIDE GREATER RIGHTS AND PROTECTIONS FROM BEING IMPLE-
13 MENTED AND APPLICABLE TO SUCH EMPLOYEE WITHIN SUCH COLLECTIVE BARGAINING
14 AGREEMENT. WHERE THE COLLECTIVE BARGAINING AGREEMENT PROVIDES GREATER
15 RIGHTS AND PROTECTIONS THAN PRESCRIBED IN THIS ARTICLE, THE RECOGNIZED
16 COLLECTIVE BARGAINING AGENT MAY OPT TO ACCEPT OR REJECT TO BE COVERED BY
17 THE PROVISIONS OF THIS ARTICLE.
18 S 769. EFFECT OF OTHER LAWS. 1. NO PROVISION OF THIS ARTICLE SHALL BE
19 DEEMED TO EXEMPT ANY PERSON OR ENTITY FROM ANY LIABILITY, DUTY OR PENAL-
20 TY PROVIDED BY ANY OTHER STATE LAW, RULE OR REGULATION.
21 2. THE REMEDIES OF THIS ARTICLE SHALL BE GRANTED IN ADDITION TO ANY
22 COMPENSATION AVAILABLE PURSUANT TO THE WORKERS' COMPENSATION LAW;
23 PROVIDED, HOWEVER, THAT NO PERSON WHO HAS COLLECTED WORKERS' COMPEN-
24 SATION BENEFITS FOR CONDITIONS ARISING OUT OF AN ABUSIVE WORK ENVIRON-
25 MENT, SHALL BE AUTHORIZED TO COMMENCE A CAUSE OF ACTION PURSUANT TO THIS
26 ARTICLE FOR THE SAME SUCH CONDITIONS.
27 S 2. This act shall take effect immediately, and shall apply to
28 abusive conduct occurring on or after such date.