S T A T E O F N E W Y O R K

2838

2009-2010 Regular Sessions

I N S E N A T E

March 4, 2009

Introduced by Sen. STACHOWSKI -- read twice and ordered printed, and when printed to be committed 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:

Section 1. Section 740 of the labor law, as added by chapter 660 of the laws of 1984, paragraph (g) of subdivision 1 as added and paragraph (a) of subdivision 2 as amended by chapter 442 of the laws of 2006, paragraph (d) of subdivision 4 as added by chapter 24 of the laws of 2002, is amended to read as follows:

S 740. Retaliatory personnel action by employers; prohibition. 1. Definitions. For purposes of this section, unless the context specifically indicates otherwise:

(a) "Employee" means an individual who performs services for and under the control and direction of an employer for wages or other remuneration.

(b) "Employer" means any person, firm, partnership, institution, corporation, or association that employs one or more employees.

(c) "Law, rule or regulation" includes any duly enacted statute or ordinance or any rule or regulation promulgated pursuant to any federal, state or local statute or ordinance.

(d) "Public body" includes the following:

(i) the United States Congress, any state legislature, or any popularly-elected local governmental body, or any member or employee thereof;

(ii) any federal, state, or local judiciary, or any member or employee thereof, or any grand or petit jury;

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

(iv) any federal, state, or local law enforcement agency, prosecutorial office, or police or peace officer.

(e) "Retaliatory personnel action" means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

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

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(f) "Supervisor" means any individual within an employer's organization who has the authority to direct and control the work performance of the affected employee; or who has managerial authority to take corrective action regarding the [violation of the law, rule or regulation] ACTIVITY, POLICY, OR PRACTICE of which the employee complains.

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

2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because such employee, OR A PERSON ACTING ON BEHALF OF SUCH EMPLOYEE, does any of the following:

(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that THE EMPLOYEE REASONABLY BELIEVES is in violation of law, rule or regulation [which violation creates and presents a substantial and specific danger to the public health or safety], THAT POSES A SERIOUS DANGER TO PUBLIC HEALTH OR SAFETY, or which constitutes health care fraud;

(b) provides information to, or testifies before, OR OTHERWISE COOPERATES WITH any public body conducting an investigation, hearing or inquiry into any [such] ACTIVITY, POLICY OR PRACTICE OF SUCH EMPLOYER THAT THE EMPLOYEE REASONABLY BELIEVES IS IN violation of a law, rule or regulation [by such employer] OR INTO ANY ACTIVITY, POLICY OR PRACTICE OF SUCH EMPLOYER WHICH POSES A SERIOUS DANGER TO PUBLIC HEALTH OR SAFETY; or

(c) objects to, or refuses to participate in any [such] activity, policy or practice WHICH THE EMPLOYEE REASONABLY BELIEVES IS in violation of a law, rule or regulation OR WHICH POSES AN IMMEDIATE AND SERIOUS DANGER TO PUBLIC HEALTH OR SAFETY.

3. Application. The protection against retaliatory personnel action provided by paragraph (a) of subdivision two of this section pertaining to disclosure to a public body shall not apply to an employee who makes such disclosure to a public body unless the employee has brought the activity, policy or practice in violation of law, rule or regulation to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice.

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

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

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

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this subdivision, a health care employee who has been the subject of a retaliatory action by a health care employer in violation of section seven hundred forty-one of this article may institute a civil action in a court of competent jurisdiction for relief as set forth in subdivision five of this section within two years after the alleged retaliatory personnel action was taken. In addition to the relief set forth in that

subdivision, the court, in its discretion, based upon a finding that the employer acted in bad faith in the retaliatory action, may assess the employer a civil penalty of an amount not to exceed ten thousand dollars, to be paid to the improving quality of patient care fund, established pursuant to section ninety-seven-aaaa of the state finance law.

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

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

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

(c) the reinstatement of full fringe benefits and seniority rights;

(d) [the compensation for] DAMAGES, lost wages, benefits and other remuneration; and

(e) the payment by the employer of reasonable costs, disbursements, and attorney's fees.

6. Employer relief. A court, in its discretion, may also order that reasonable attorneys' fees and court costs and disbursements be awarded to an employer if the court determines that an action brought by an employee under this section was without basis in law or in fact.

7. Existing rights. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract[; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law].

S 2. Subdivision 1 of section 75-b of the civil service law is amended by adding a new paragraph (e) to read as follows:

(E) "NEWS MEDIA" SHALL MEAN NEWSPAPER, MAGAZINE, NEWS AGENCY, PRESS ASSOCIATION, WIRE SERVICE, PROFESSIONAL JOURNALIST OR NEWSCASTER AS SUCH TERMS ARE DEFINED IN SUBDIVISION (A) OF SECTION SEVENTY-NINE-H OF THE CIVIL RIGHTS LAW.

S 3. Paragraph (a) of subdivision 2 of section 75-b of the civil service law, as amended by chapter 899 of the laws of 1986, is amended to read as follows:

(a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body OR THE NEWS MEDIA information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action, PROVIDED, HOWEVER, THAT IN THE CASE OF DISCLOSURE OF INFORMATION TO THE NEWS MEDIA, SUCH DISCLOSURE OF INFORMATION IS NOT OTHERWISE PROHIBITED BY LAW. "Improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation.

S 4. This act shall take effect on the first of September next succeeding the date on which it shall have become a law and shall apply to any retaliatory personnel action taken on or after such date.