

5414--A

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 -- Multi-Sponsored by -- M. of A. HOOPER, LATIMER, McDOUGH, McENENY, O'DONNELL, PERRY, SALADINO, THIELE, WALKER -- read once and referred to the Committee on Labor -- 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.

15 S 760. LEGISLATIVE FINDINGS AND INTENT. THE LEGISLATURE HEREBY FINDS
16 THAT THE SOCIAL AND ECONOMIC WELL-BEING OF THE STATE IS DEPENDENT UPON
17 HEALTHY AND PRODUCTIVE EMPLOYEES. SURVEYS AND STUDIES HAVE DOCUMENTED
18 THAT BETWEEN SIXTEEN AND TWENTY-ONE PERCENT OF EMPLOYEES DIRECTLY EXPE-
19 RIENCE HEALTH ENDANGERING WORKPLACE BULLYING, ABUSE AND HARASSMENT.
20 SUCH BEHAVIOR IS FOUR TIMES MORE PREVALENT THAN SEXUAL HARASSMENT. THESE

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

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1 SURVEYS AND STUDIES HAVE FURTHER FOUND THAT ABUSIVE WORK ENVIRONMENTS
2 CAN HAVE SERIOUS EFFECTS ON THE TARGETED EMPLOYEES, INCLUDING FEELINGS
3 OF SHAME AND HUMILIATION, STRESS, LOSS OF SLEEP, SEVERE ANXIETY,
4 DEPRESSION, POST-TRAUMATIC STRESS DISORDER, REDUCED IMMUNITY TO
5 INFECTION, STRESS-RELATED GASTROINTESTINAL DISORDERS, HYPERTENSION, AND
6 PATHOPHYSIOLOGIC CHANGES THAT INCREASE THE RISK OF CARDIOVASCULAR
7 DISEASES.

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

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

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

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

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

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

41 2. "ABUSIVE WORK ENVIRONMENT" MEANS A WORKPLACE IN WHICH AN EMPLOYEE
42 IS SUBJECTED TO ABUSIVE CONDUCT THAT IS SO SEVERE THAT IT CAUSES PHYS-
43 ICAL OR PSYCHOLOGICAL HARM TO SUCH EMPLOYEE.

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

46 4. "CONSTRUCTIVE DISCHARGE" MEANS ABUSIVE CONDUCT AGAINST AN EMPLOYEE
47 THAT CAUSES SUCH EMPLOYEE TO RESIGN FROM HIS OR HER EMPLOYMENT WHERE (A)
48 PRIOR TO RESIGNING, THE EMPLOYEE PROVIDES NOTICE TO THE EMPLOYER THAT AN
49 ABUSIVE WORK ENVIRONMENT EXISTS, AND (B) THE EMPLOYER, AFTER RECEIVING
50 NOTICE THEREOF, FAILS TO ELIMINATE THE ABUSIVE CONDUCT.

51 5. "MALICE" MEANS THE INTENT TO CAUSE ANOTHER PERSON TO SUFFER PSYCHO-
52 LOGICAL, PHYSICAL OR ECONOMIC HARM, WITHOUT LEGITIMATE CAUSE OR JUSTI-
53 FICATION. MALICE MAY BE INFERRED FROM THE PRESENCE OF FACTORS SUCH AS
54 OUTWARD EXPRESSIONS OF HOSTILITY, HARMFUL CONDUCT INCONSISTENT WITH AN
55 EMPLOYER'S LEGITIMATE BUSINESS INTERESTS, A CONTINUATION OF HARMFUL AND
56 ILLEGITIMATE CONDUCT AFTER A COMPLAINANT REQUESTS THAT IT CEASE OR

1 DISPLAYS OUTWARD SIGNS OF EMOTIONAL OR PHYSICAL DISTRESS IN THE FACE OF
2 THE CONDUCT, OR ATTEMPTS TO EXPLOIT THE COMPLAINANT'S KNOWN PSYCHOLOG-
3 ICAL OR PHYSICAL VULNERABILITY.

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

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

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

13 S 762. ABUSIVE WORK ENVIRONMENT. IT SHALL BE UNLAWFUL TO SUBJECT AN
14 EMPLOYEE TO AN ABUSIVE WORK ENVIRONMENT.

15 S 763. EMPLOYER LIABILITY. AN EMPLOYER SHALL BE CIVILLY LIABLE FOR THE
16 EXISTENCE OF AN ABUSIVE WORK ENVIRONMENT WITHIN ANY WORKPLACE UNDER ITS
17 CONTROL.

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

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

33 S 765. RETALIATION. ANY RETALIATORY ACTION AGAINST ANY EMPLOYEE ALLEG-
34 ING A VIOLATION OF THIS ARTICLE SHALL BE DEEMED TO BE A RETALIATORY
35 PERSONNEL ACTION AS PROHIBITED BY SECTION SEVEN HUNDRED FORTY OF THIS
36 CHAPTER.

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

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

51 S 767. ENFORCEMENT. 1. THE PROVISIONS OF THIS ARTICLE ARE ENFORCEABLE
52 BY MEANS OF A CIVIL CAUSE OF ACTION COMMENCED BY AN INJURED EMPLOYEE.

53 2. NOTWITHSTANDING THE PROVISIONS OF THE CIVIL PRACTICE LAW AND RULES,
54 AN ACTION TO ENFORCE THE PROVISIONS OF THIS ARTICLE SHALL BE COMMENCED
55 WITHIN ONE YEAR OF THE LAST ABUSIVE CONDUCT WHICH IS THE BASIS OF THE
56 ALLEGATION OF ABUSIVE WORK ENVIRONMENT.

1 S 768. EFFECT ON COLLECTIVE BARGAINING AGREEMENTS. THIS ARTICLE SHALL
2 NOT PREVENT, INTERFERE, EXEMPT OR SUPERSEDE ANY CURRENT PROVISIONS OF AN
3 EMPLOYEE'S EXISTING COLLECTIVE BARGAINING AGREEMENT WHICH PROVIDES
4 GREATER RIGHTS AND PROTECTIONS THAN PRESCRIBED IN THIS ARTICLE NOR SHALL
5 THIS ARTICLE PREVENT ANY NEW PROVISIONS OF THE COLLECTIVE BARGAINING
6 AGREEMENT WHICH PROVIDE GREATER RIGHTS AND PROTECTIONS FROM BEING IMPE-
7 MENTED AND APPLICABLE TO SUCH EMPLOYEE WITHIN SUCH COLLECTIVE BARGAINING
8 AGREEMENT. WHERE THE COLLECTIVE BARGAINING AGREEMENT PROVIDES GREATER
9 RIGHTS AND PROTECTIONS THAN PRESCRIBED IN THIS ARTICLE, THE RECOGNIZED
10 COLLECTIVE BARGAINING AGENT MAY OPT TO ACCEPT OR REJECT TO BE COVERED BY
11 THE PROVISIONS OF THIS ARTICLE.

12 S 769. EFFECT OF OTHER LAWS. 1. NO PROVISION OF THIS ARTICLE SHALL BE
13 DEEMED TO EXEMPT ANY PERSON OR ENTITY FROM ANY LIABILITY, DUTY OR PENAL-
14 TY PROVIDED BY ANY OTHER STATE LAW, RULE OR REGULATION.

15 2. THE REMEDIES OF THIS ARTICLE SHALL BE GRANTED IN ADDITION TO ANY
16 COMPENSATION AVAILABLE PURSUANT TO THE WORKERS' COMPENSATION LAW;
17 PROVIDED, HOWEVER, THAT NO PERSON WHO HAS COLLECTED WORKERS' COMPEN-
18 SATION BENEFITS FOR CONDITIONS ARISING OUT OF AN ABUSIVE WORK ENVIRON-
19 MENT, SHALL BE AUTHORIZED TO COMMENCE A CAUSE OF ACTION PURSUANT TO THIS
20 ARTICLE FOR THE SAME SUCH CONDITIONS.

21 S 2. This act shall take effect immediately, and shall apply to
22 abusive conduct occurring on or after such date.