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

1565

2011-2012 Regular Sessions

I N A S S E M B L Y

January 10, 2011

Introduced by M. of A. TEDISCO, BURLING, CROUCH, RABBITT -- Multi-Sponsored by -- M. of A. AMEDORE, BARCLAY, BUTLER, CALHOUN, CONTE, FINCH, FITZPATRICK, GIGLIO, HAYES, JORDAN, KOLB, McDONOUGH, J. MILLER, OAKS, RAIA, REILICH, SALADINO, SAYWARD, THIELE -- read once and referred to the Committee on Codes

AN ACT to amend the social services law, in relation to requiring employers and information technology employees to report child pornography to the state police

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

Section 1. The social services law is amended by adding a new section 413-a to read as follows:

S 413-A. REPORTING OF CHILD PORNOGRAPHY BY EMPLOYERS AND INFORMATION TECHNOLOGY EMPLOYEES TO THE STATE POLICE. 1. REPORTING. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, ANY EMPLOYER, ANY COMPUTER ENGINEER, COMPUTER TECHNICIAN, MANAGEMENT INFORMATION ENGINEER OR MANAGEMENT INFORMATION TECHNICIAN WHO HAS KNOWLEDGE OF, OR OBSERVES, WITHIN THE SCOPE OF HIS OR HER PROFESSIONAL CAPACITY OR EMPLOYMENT, ANY COMPUTER IMAGE WHICH DEPICTS A CHILD WHOM THE EMPLOYER, ENGINEER OR TECHNICIAN KNOWS OR REASONABLY SHOULD KNOW, TO BE UNDER THE AGE OF SEVENTEEN, WHERE SUCH CHILD IS:

(A) ACTUALLY, OR BY SIMULATION, ENGAGED IN ANY ACT OF SEXUAL INTERCOURSE WITH ANY PERSON OR ANIMAL;

(B) ACTUALLY, OR BY SIMULATION, ENGAGED IN ANY ACT OF SEXUAL CONTACT INVOLVING THE MOUTH, ANUS OR SEXUAL ORGANS OF THE CHILD AND THE MOUTH, ANUS OR SEXUAL ORGANS OF ANOTHER PERSON OR ANIMAL;

(C) ACTUALLY, OR BY SIMULATION, ENGAGED IN ANY ACT OF MASTURBATION;

(D) ACTUALLY, OR BY SIMULATION, PORTRAYED AS BEING THE OBJECT OF, OR OTHERWISE ENGAGED IN ANY ACT OF LEWD FONDLING, TOUCHING OR CARESSING, INVOLVING ANOTHER PERSON OR ANIMAL;

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

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(E) ACTUALLY, OR BY SIMULATION, ENGAGED IN ANY ACT OF EXCRETION OR URINATION WITHIN A SEXUAL CONTEXT; OR

(F) ACTUALLY, OR BY SIMULATION, PORTRAYED OR DEPICTED AS BOUND, FETTERED, OR SUBJECT TO SADISTIC, MASOCHISTIC OR SADOMASOCHISTIC ABUSE IN ANY SEXUAL CONTACT;

SHALL REPORT SUCH INSTANCES TO THE STATE POLICE IMMEDIATELY OR WITHIN TWENTY-FOUR HOURS OF DISCOVERY.

2. FAILURE TO REPORT. WILLFUL FAILURE TO REPORT SHALL BE PUNISHABLE BY A CLASS A MISDEMEANOR.

3. FALSELY REPORTING. ANY EMPLOYER, COMPUTER ENGINEER, COMPUTER TECHNICIAN, MANAGEMENT INFORMATION ENGINEER OR MANAGEMENT INFORMATION TECHNICIAN WHO FALSELY REPORTS A CASE OF CHILD PORNOGRAPHY SHALL BE SUBJECT TO THE PENALTIES CONTAINED UNDER SECTION 240.50 OF THE PENAL LAW.

4. IMMUNITY FROM LIABILITY. ANY EMPLOYER, COMPUTER ENGINEER, COMPUTER TECHNICIAN, MANAGEMENT INFORMATION ENGINEER OR MANAGEMENT INFORMATION TECHNICIAN PARTICIPATING IN GOOD FAITH, PURSUANT TO THIS SECTION, SHALL HAVE IMMUNITY FROM ANY LIABILITY, CIVIL OR CRIMINAL, THAT MIGHT OTHERWISE RESULT BY REASON OF SUCH ACTION. FOR THE PURPOSES OF ANY CIVIL OR CRIMINAL PROCEEDING, THE GOOD FAITH OF ANY PERSON REQUIRED TO REPORT SUCH CASES SHALL BE PRESUMED, PROVIDED SUCH PERSON WAS ACTING IN DISCHARGE OF THEIR DUTIES AND WITHIN THE SCOPE OR THEIR EMPLOYMENT, AND THAT SUCH LIABILITY DID NOT RESULT FROM THE WILLFUL MISCONDUCT OR GROSS NEGLIGENCE OF SUCH PERSON, OFFICIAL OR INSTITUTION.

5. RETALIATORY PERSONNEL ACTION BY EMPLOYERS; PROHIBITIONS. (A) AN EMPLOYER SHALL NOT TAKE RETALIATORY PERSONNEL ACTION AGAINST AN EMPLOYEE, WHO PURSUANT TO THIS SECTION, REPORTS INSTANCES OF CHILD PORNOGRAPHY TO THE STATE POLICE.

(B)(I) AN EMPLOYEE WHO HAS BEEN THE SUBJECT OF A RETALIATORY PERSONNEL ACTION IN VIOLATION OF THIS SUBDIVISION MAY INSTITUTE A CIVIL ACTION IN A COURT OF COMPETENT JURISDICTION FOR RELIEF AS SET FORTH IN PARAGRAPH (C) OF THIS SUBDIVISION WITHIN ONE YEAR AFTER THE ALLEGED RETALIATORY PERSONNEL ACTION WAS TAKEN.

(II) ANY ACTION AUTHORIZED BY THIS SUBDIVISION 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.

(III) IT SHALL BE A DEFENSE TO ANY ACTION BROUGHT PURSUANT TO THIS SUBDIVISION THAT THE PERSONNEL ACTION WAS PREDICATED UPON GROUNDS OTHER THAN THE EMPLOYEE'S EXERCISE OF ANY RIGHTS PROTECTED BY THIS SUBDIVISION.

(C) IN ANY ACTION BROUGHT PURSUANT TO PARAGRAPH (B) OF THIS SUBDIVISION, THE COURT MAY ORDER RELIEF AS FOLLOWS:

(I) AN INJUNCTION TO RESTRAIN CONTINUED VIOLATION OF THIS SECTION;

(II) THE REINSTATEMENT OF THE EMPLOYEE TO THE SAME POSITION HELD BEFORE THE RETALIATORY PERSONNEL ACTION, OR TO AN EQUIVALENT POSITION;

(III) THE REINSTATEMENT OF FULL FRINGE BENEFITS AND SENIORITY RIGHTS;

(IV) THE COMPENSATION FOR LOST WAGES, BENEFITS AND OTHER REMUNERATION; AND

(V) THE PAYMENT BY THE EMPLOYER OF REASONABLE COSTS, DISBURSEMENTS, AND ATTORNEY'S FEES.

(D) 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 SUBDIVISION WAS WITHOUT BASIS IN LAW OR IN FACT.

(E) NOTHING IN THIS SUBDIVISION 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 SUBDIVISION 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.

6. 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) "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.

S 2. This act shall take effect on the ninetieth day after it shall have become a law.