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

1517

2011-2012 Regular Sessions

I N S E N A T E

January 10, 2011

Introduced by Sens. KLEIN, ADDABBO, OPPENHEIMER, SAVINO -- 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, and 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: (I) any duly enacted FEDERAL, STATE OR LOCAL statute, LAW or ordinance [or]; (II) any rule or regulation promulgated pursuant to [any federal, state or local] SUCH statute, LAW or ordinance; OR (III) THE FINAL DECISION, RULING OR ORDER OF A JUDICIAL OR ADMINISTRATIVE BODY.

(d) "Public body" includes the following:

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

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

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

LBD05005-01-1

(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;

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

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

(e) "Retaliatory personnel action" means the discharge, suspension [or demotion of], DEMOTION OR DISCRIMINATION AGAINST an employee, [or other adverse employment action taken against an employee in the terms and conditions of employment] REGARDING TERMS, CONDITIONS, LOCATION OR PRIVILEGES OF EMPLOYMENT.

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

(H) "FINANCIAL FRAUD" MEANS AN ACTIVITY WHICH IS A MISDEMEANOR OR FELONY UNDER THE BANKING LAW OR ANY OF THE PROVISIONS OF LAW REFERRED TO IN SECTION SEVENTY-EIGHT OF THE BANKING LAW.

(I) "INSURANCE FRAUD" SHALL HAVE THE SAME MEANING AS IS ASCRIBED TO SUCH TERM PURSUANT TO SECTION 176.05 OF THE PENAL LAW.

2. Prohibitions. An employer shall not take any retaliatory personnel action against an employee because 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 is in violation of A law, rule or regulation [which] THE EMPLOYEE REASONABLY BELIEVES EVINCES AN ABUSE OF AUTHORITY, THE MISMANAGEMENT OR WASTE OF PUBLIC ASSETS OR MONIES, OR IS A THREAT TO THE ENVIRONMENT WHERE SUCH violation creates and presents a substantial and specific danger to the public health [or], safety OR GENERAL WELFARE, or which constitutes health care fraud, INSURANCE FRAUD OR FINANCIAL FRAUD;

(b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or

(c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation.

3. Application. The protection against retaliatory personnel action provided by PARAGRAPHS (A) AND (B) OF SUBDIVISION TWO OF THIS SECTION SHALL APPLY TO ANY EMPLOYEE WHO BELIEVES THAT AN ACTIVITY, POLICY OR PRACTICE IN VIOLATION OF A LAW, RULE OR REGULATION HAS OCCURRED OR WILL OCCUR, BASED ON INFORMATION THAT THE EMPLOYEE REASONABLY BELIEVES TO BE TRUE; PROVIDED HOWEVER THAT 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] MADE A GOOD FAITH EFFORT TO NOTIFY HIS OR HER EMPLOYER BY BRINGING 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. EMPLOYER NOTIFICATION SHALL NOT BE REQUIRED

WHERE: (A) THE EMPLOYER HAS NOT POSTED ANY NOTICE REQUIRED BY SUBDIVISION EIGHT OF THIS SECTION; (B) THERE IS AN IMMINENT AND SERIOUS DANGER TO THE PUBLIC HEALTH, SAFETY OR GENERAL WELFARE; (C) THE EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN A DESTRUCTION OF EVIDENCE OR OTHER CONCEALMENT OF THE ILLEGAL BUSINESS ACTIVITY; OR (D) SUCH VIOLATION COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR.

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] TWO YEARS 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] SUCH 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 lost wages, benefits and other remuneration; [and]

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

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

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

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 REASONABLE 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.

8. PUBLICATION. EVERY EMPLOYER SHALL INFORM EMPLOYEES OF THEIR PROTECTIONS, RIGHTS AND OBLIGATIONS UNDER THIS SECTION, BY POSTING A NOTICE THEREOF. SUCH NOTICES SHALL BE POSTED CONSPICUOUSLY IN EASILY ACCESSIBLE AND WELL-LIGHTED PLACES CUSTOMARILY FREQUENTED BY EMPLOYEES AND APPLICANTS FOR EMPLOYMENT. THE DEPARTMENT SHALL PREPARE AND POST ON ITS INTERNET WEBSITE A NOTICE THAT EMPLOYERS MAY USE TO COMPLY WITH THE PROVISIONS OF THIS SUBDIVISION.

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

2. (a) A public employer shall not dismiss, SUSPEND, DEMOTE OR DISCRIMINATE 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 THREATENS TO DISCLOSE IF AN ACTIVITY, POLICY OR PRACTICE IN VIOLATION OF A LAW, RULE OR REGULATION IS NOT REMEDIED, to a governmental body 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 GENERAL WELFARE; or (ii) which the employee reasonably believes to be true and reasonably believes, OR WHICH constitutes an improper governmental action; OR (III) WHICH COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR; OR (IV) WHICH PROVIDES INFORMATION TO, OR TESTIFIES BEFORE, ANY PUBLIC BODY CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY INTO ANY IMPROPER GOVERNMENTAL ACTION; OR (V) WHICH OBJECTS TO, OR REFUSES TO PARTICIPATE IN, ANY IMPROPER GOVERNMENTAL ACTION. "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.

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

(C) Prior to disclosing information pursuant to paragraph (a) of this subdivision, an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision. NOTIFICATION TO THE APPOINTING AUTHORITY OR DESIGNEE SHALL NOT BE REQUIRED WHERE: (I) THE EMPLOYER HAS NOT POSTED ANY NOTICE REQUIRED BY SUBDIVISION FIVE OF THIS SECTION; (II) THERE IS AN IMMINENT AND SERIOUS DANGER TO THE PUBLIC HEALTH, SAFETY OR GENERAL WELFARE; (III) THE EMPLOYEE REASONABLY BELIEVES THAT REPORTING TO THE SUPERVISOR WOULD RESULT IN A DESTRUCTION OF EVIDENCE OR OTHER CONCEAL-

MENT OF THE ILLEGAL BUSINESS ACTIVITY; OR (IV) SUCH VIOLATION COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR.

(D) "LAW, RULE OR REGULATION" INCLUDES: (I) ANY DULY ENACTED FEDERAL, STATE OR LOCAL STATUTE, LAW OR ORDINANCE; (II) ANY RULE OR REGULATION PROMULGATED PURSUANT TO ANY SUCH STATUTE, LAW OR ORDINANCE; OR (III) THE FINAL DECISION, RULING OR ORDER OF A JUDICIAL OR ADMINISTRATIVE BODY.

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

(a) Where an employee is subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure contained in a collectively negotiated agreement, or under section seventy-five of this title or any other provision of state or local law, OR TO THE ELIMINATION OF JOB TITLE OR CLASSIFICATION THAT UNIQUELY FITS AND SINGLES OUT SUCH EMPLOYEE and the employee reasonably believes THAT SUCH dismissal [or], other disciplinary action OR OTHER PERSONNEL ACTION would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision of the matter. If there is a finding that the dismissal or other disciplinary action is based solely on a violation by the employer of such subdivision, the arbitrator or hearing officer shall dismiss or recommend dismissal of the disciplinary proceeding, as appropriate, and, if appropriate, reinstate the employee with back pay, and, in the case of an arbitration procedure, may take other appropriate action as is permitted in the collectively negotiated agreement.

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

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

S 5. This act shall take effect on the one hundred eightieth day after it shall have become a law.