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

4289

2011-2012 Regular Sessions

I N S E N A T E

March 28, 2011

Introduced by Sen. SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

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:

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

ARTICLE 20-D

ABUSIVE WORK ENVIRONMENT

SECTION 760. LEGISLATIVE FINDINGS AND INTENT.
761. DEFINITIONS.
762. ABUSIVE WORK ENVIRONMENT.
763. EMPLOYER LIABILITY.
764. DEFENSES.
765. RETALIATION.
766. REMEDIES.
767. ENFORCEMENT.
768. EFFECT ON COLLECTIVE BARGAINING AGREEMENTS.
769. EFFECT OF OTHER LAWS.

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

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

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PATHOPHYSIOLOGIC CHANGES THAT INCREASE THE RISK OF CARDIOVASCULAR DISEASES.

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

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

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

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

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

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

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

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

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

5. "MALICE" MEANS THE INTENT TO CAUSE ANOTHER PERSON TO SUFFER PSYCHOLOGICAL, PHYSICAL OR ECONOMIC HARM, WITHOUT LEGITIMATE CAUSE OR JUSTIFICATION. MALICE MAY BE INFERRED FROM THE PRESENCE OF FACTORS SUCH AS OUTWARD EXPRESSIONS OF HOSTILITY, HARMFUL CONDUCT INCONSISTENT WITH AN EMPLOYER'S LEGITIMATE BUSINESS INTERESTS, A CONTINUATION OF HARMFUL AND ILLEGITIMATE CONDUCT AFTER A COMPLAINANT REQUESTS THAT IT CEASE OR DISPLAYS OUTWARD SIGNS OF EMOTIONAL OR PHYSICAL DISTRESS IN THE FACE OF THE CONDUCT, OR ATTEMPTS TO EXPLOIT THE COMPLAINANT'S KNOWN PSYCHOLOGICAL OR PHYSICAL VULNERABILITY.

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

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

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

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

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

S 764. DEFENSES. 1. IT SHALL BE AN AFFIRMATIVE DEFENSE TO A CAUSE OF ACTION FOR ABUSIVE WORK ENVIRONMENT, THAT THE EMPLOYER EXERCISED REASONABLE CARE TO PREVENT AND PROMPTLY CORRECT THE ABUSIVE CONDUCT WHICH IS THE BASIS OF SUCH CAUSE OF ACTION AND THE PLAINTIFF UNREASONABLY FAILED TO TAKE ADVANTAGE OF THE APPROPRIATE PREVENTIVE OR CORRECTIVE OPPORTUNITIES PROVIDED BY SUCH EMPLOYER. SUCH AFFIRMATIVE DEFENSE SHALL NOT BE AVAILABLE TO AN EMPLOYER WHEN THE ABUSIVE CONDUCT CULMINATES IN A NEGATIVE EMPLOYMENT DECISION WITH REGARD TO THE PLAINTIFF.

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

S 765. RETALIATION. ANY RETALIATORY ACTION AGAINST ANY EMPLOYEE ALLEGING A VIOLATION OF THIS ARTICLE SHALL BE DEEMED TO BE A RETALIATORY PERSONNEL ACTION AS PROHIBITED BY SECTION SEVEN HUNDRED FORTY OF THIS CHAPTER.

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

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

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

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

S 768. EFFECT ON COLLECTIVE BARGAINING AGREEMENTS. THIS ARTICLE SHALL NOT PREVENT, INTERFERE, EXEMPT OR SUPERSEDE ANY CURRENT PROVISIONS OF AN EMPLOYEE'S EXISTING COLLECTIVE BARGAINING AGREEMENT WHICH PROVIDES

GREATER RIGHTS AND PROTECTIONS THAN PRESCRIBED IN THIS ARTICLE NOR SHALL THIS ARTICLE PREVENT ANY NEW PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT WHICH PROVIDE GREATER RIGHTS AND PROTECTIONS FROM BEING IMPLEMENTED AND APPLICABLE TO SUCH EMPLOYEE WITHIN SUCH COLLECTIVE BARGAINING AGREEMENT. WHERE THE COLLECTIVE BARGAINING AGREEMENT PROVIDES GREATER RIGHTS AND PROTECTIONS THAN PRESCRIBED IN THIS ARTICLE, THE RECOGNIZED COLLECTIVE BARGAINING AGENT MAY OPT TO ACCEPT OR REJECT TO BE COVERED BY THE PROVISIONS OF THIS ARTICLE.

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

2. THE REMEDIES OF THIS ARTICLE SHALL BE GRANTED IN ADDITION TO ANY COMPENSATION AVAILABLE PURSUANT TO THE WORKERS' COMPENSATION LAW; PROVIDED, HOWEVER, THAT NO PERSON WHO HAS COLLECTED WORKERS' COMPENSATION BENEFITS FOR CONDITIONS ARISING OUT OF AN ABUSIVE WORK ENVIRONMENT, SHALL BE AUTHORIZED TO COMMENCE A CAUSE OF ACTION PURSUANT TO THIS ARTICLE FOR THE SAME SUCH CONDITIONS.

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