STATE OF NEW YORK

8669

IN SENATE

July 2, 2020

Introduced by Sens. MYRIE, BAILEY, HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the civil rights law and the civil practice law and rules, in relation to filling the void left by the expansive and over-broad applicability of the qualified immunity doctrine that operates as a near absolute shield to civil liability for public officials and ensure that state officials are justly held accountable for violating an individual's rights, privileges and immunities under state law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as "The Restoring Accountability and Civil Equity Act," or The RACE Act.

§ 2. The civil rights law is amended by adding a new article 3-A to read as follows:

ARTICLE 3-A

THE RESTORING ACCOUNTABILITY AND CIVIL EQUITY ACT

Section 30. Liability for rights violations.
31. Proceedings.
32. Burden of proof.
33. Legal defense of "exemption".
34. Pre-emption.
35. Remedies.

§ 30. Liability for rights violations. a. Any person who, under the color of any statute, ordinance, regulation, custom, or usage, of this state or any of its political subdivisions, subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of this state, or whose exercise or enjoyment of those rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under the color of any statute, ordinance, regulation, custom, or usage, of this state or any of its political subdivisions, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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

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b. If the injured party is incapacitated, deceased, or otherwise unavailable as a matter of law, an action under subdivision a of this section may be brought by and in the name of the surviving spouse, child, parent or guardian, or personal representative of the injured party and on behalf of the spouse, children or parents, or if none of these survive, on behalf of the injured party's estate.

c. If a person, acting under the color of any statute, ordinance, regulation, custom, or usage, of this state or any of its political subdivisions, subjects, or causes to be subjected, any other person the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of this state, or interferes with or attempts to interfere with the exercise or enjoyment of those rights, privileges or immunities secured by the Constitution and laws of this state, by threats, intimidation or coercion, the attorney general may bring a civil action for damages, injunctive relief or other appropriate relief. The civil action shall be brought in the name of the state and may be brought on behalf of the injured party. If the attorney general proceeds with and prevails in an action brought pursuant to this section, the court shall order the distribution of any award of damages to the injured party and shall award reasonable attorney's fees and costs to the attorney general.

§ 31. Proceedings. a. An action brought pursuant to this article shall be filed in a court of competent jurisdiction within the state.

b. Upon application of any party, a jury trial shall be directed.

§ 32. Burden of proof. a. The standard of proof that applies to all actions brought under this article is the preponderance of the evidence standard.

b. Where a defendant has raised a factual defense, that defendant bears the burden of persuasion and must establish the defense by preponderance of the evidence.

§ 33. Legal defense of "exemption". a. A defendant can raise the legal defense of exemption where that defendant can affirmatively show that he or she was not on notice that his or her course of conduct would result in the deprivation, interference or attempted interference of an individual's rights, privileges or immunities secured by the Constitution and laws of this state.

1. A defendant must establish evidence of lack of notice by clear and convincing evidence.

2. In determining whether a defendant is entitled to a defense of exemption, the judge may consider the defendant's level of formal and informal training, experience, and exposure to legal information. Probative evidence that a defendant was on notice could include, but is not limited to, the following sources:

i. Training manuals and guidelines;

ii. Department policies;

iii. Educational background and exposure to statutory law, administrative rules and regulations, and case law;

iv. Verbal instructions;

v. Internal memoranda reflecting prior practice; and

vi. Prior disciplinary actions or investigations, either involving the defendant or involving other members of the defendant's organization, if that information was known to the defendant.

3. Where a defendant establishes, by clear and convincing evidence, that he or she is entitled to the defense of exemption, the plaintiff shall be entitled to recover the same damages under this article from

the defendant's employer as the plaintiff would have recovered from the defendant.

b. The defense of exemption shall be unavailable to any defendant who engages in a course of conduct that subjects, or causes to be subjected, any other person the deprivation, interference or attempted interference of any rights, privileges, or immunities secured by the Constitution and laws of this state, if he or she engaged in that course of conduct intentionally, knowingly or recklessly.

c. In deciding whether the defense of exemption applies, the court shall:

1. Consider all the pleadings in the light most favorable to the non-movant and take all factual pleadings in the complaint as true; and

2. Make a determination as to whether there was a deprivation, interference or attempted interference with an individual's rights, privileges, or immunities secured by the Constitution and laws of this state applying the considerations in paragraph one of this subdivision. The court shall not bypass this inquiry to simply decide the question of whether a defendant was on notice that his or her course of conduct would result in the deprivation, interference or attempted interference of an individual's rights, privileges or immunities secured by the Constitution and laws of this state.

d. Limited discovery confined to information necessary to resolve whether the defense of exemption is applicable is appropriate when the record as presented by defendant in asserting this defense is inadequate and the party opposing the applicability of the defense demonstrates that it can show, through discovery, that the defendant was on notice that his or her course of conduct would result in the deprivation, interference or attempted interference of an individual's rights, privileges or immunities secured by the Constitution and laws of this state.

e. The legal defense of exemption is an affirmative defense that must be raised pursuant to paragraph twelve of subdivision (a) and subdivision (e) of rule three thousand two hundred eleven of the civil practice law and rules prior to the defendant answering the complaint, otherwise the defense shall be waived.

§ 34. Pre-emption. Any action, and defenses hereunder, brought under this article borne of facts that may also give rise to an action under 42 U.S.C. § 1983 are independent of any federal action, and defenses thereunder, where state law provides the standard of conduct for the official acting under the color of any statute, ordinance, regulation, custom, or usage, of this state or any of its political subdivisions.

§ 35. Remedies. a. A civil action under this article can be brought for monetary damages, injunctive relief or any other relief that the court deems appropriate.

b. Punitive damages may be awarded in actions under this article where it is proven by clear and convincing evidence that the defendant's course of conduct was motivated by the victim's race, gender, religion, sexual orientation, nationality, ethnicity or disability.

c. In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to this article, the court may award the prevailing party reasonable attorney's fees and costs.

§ 3. Subdivision (a) of rule 3211 of the civil practice law and rules is amended by adding a new paragraph 12 to read as follows:

12. the party is immune from liability pursuant to subdivision e of section thirty-three of the civil rights law.

§ 4. Subdivision (e) of rule 3211 of the civil practice law and rules, as amended by chapter 616 of the laws of 2005, is amended to read as follows:

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading. **An objection based upon the ground specified in paragraph twelve of subdivision (a) is waived if not made before service of a responsive pleading.**

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