STATE OF NEW YORK

3817--A

2019-2020 Regular Sessions

IN SENATE

February 15, 2019

Introduced by Sens. BIAGGI, HOYLMAN, KRUEGER, RIVERA, SALAZAR -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the executive law, in relation to increased protections for protected classes and special protections for employees who have been sexually harassed

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

Section 1. Subdivisions 5 and 6 of section 292 of the executive law, subdivision 5 as amended by chapter 363 of the laws of 2015 and subdivision 6 as amended by chapter 481 of the laws of 2010, are amended and a new subdivision 37 is added to read as follows:

5. The term "employer" [~~does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term "employer"~~] shall include all employers within the state**, including the state and all political subdivisions thereof**.

6. The term "employee" in this article does not include any individual employed by his or her parents, spouse or child, [~~or in the domestic service of any person~~] except as set forth in section two hundred ninety-six-b of this [~~title~~] **article**.

37. The terms "because of" and "because" in disparate treatment cases means the unlawful motive was a motivating factor. Nothing in this definition is intended to preclude or limit use of the disparate impact method of proving liability.

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

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§ 2. Subdivision 1 of section 296 of the executive law is amended by adding two new paragraphs (h) and (i) to read as follows:

(h) For an employer, licensing agency, employment agency, or labor organization to subject any individual to discriminatory harassment because of the age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status of such individual, or because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment or hostile work environment is severe or pervasive. Such discriminatory or retaliatory harassment constitutes an unlawful discriminatory practice under this subdivision unless the defendant pleads and proves that the harassing conduct does not rise above the level of petty slights or trivial inconveniences.

(i) The aggrieved person's failure to complain about, or utilize any particular complaint procedure to complain about discriminatory harassment or any other unlawful discriminatory practices under this article is not a defense, or partial defense, to liability under this article.

§ 3. Section 296 of the executive law is amended by adding five new subdivisions 1-b, 1-c, 1-d, 1-e and 1-f to read as follows:

1-b. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one of this section only where:

(a) The employee or agent exercised managerial or supervisory responsibility; or

(b) The employer, licensing agency, employment agency or labor organization knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and/or appropriate corrective action; an employer licensing agency, employment agency, or labor organization shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(c) The employer, licensing agency, employment agency, or labor organization should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

1-c. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice committed by an independent contractor, other than an agent of such employer, licensing agency, employment agency, or labor organization's business enterprise only where such discriminatory conduct was committed in the course of such employment or engagement and the employer, licensing agency, employment agency, or labor organization had actual knowledge of and acquiesced in such conduct.

1-d. Where liability of an employer, licensing agency, employment agency, or labor organization has been established pursuant to subdivision one-b of this section, and is based solely on the conduct of an employee, agent or independent contractor, the employer shall be permitted to plead and prove that with respect to the discriminatory conduct for which it was found liable it had:

(a) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by

employees, agents and persons employed as independent contractors, including but not limited to:

(i) a meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) a firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) a program to educate employees and agents about unlawful discriminatory practices under local, state, and federal law; and

(iv) procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and

(b) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

1-e. The demonstration of any or all of the factors in subdivision one-d of this section, in addition to any other relevant factors, shall be considered in mitigation of the amount of civil penalties to be imposed by the division of human rights pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to this article and shall be among the factors considered in determining an employer's liability under paragraph (c) of subdivision one-b of this section.

1-f. An employee or agent of an employer, licensing agency, employment agency, or labor organization is jointly and severally individually liable with their employer, licensing agency, employment agency, or labor organization for an unlawful discriminatory practice if they exercised managerial or supervisory responsibility for the employer, licensing agency, employment agency, or labor organization over employees, agents, or independent contractors of the employer, such that they had authority to direct the employee, agent, or independent contractor's work activities or had the power to do more than carry out personnel decisions made by others. Satisfaction of the requirements of this subdivision is sufficient but not necessary to satisfy the requirements of paragraph (a) of subdivision one-b of this section.

§ 4. Paragraph (b) of subdivision 2 of section 296-b of the executive law, as amended by chapter 8 of the laws of 2019, is amended to read as follows:

(b) Subject a domestic worker to unwelcome harassment based on [~~gender, race, religion, sexual orientation, gender identity or expression or national origin~~] his or her age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status or domestic violence victim status, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

§ 5. Section 296-d of the executive law, as added by section 1 of subpart F of part KK of chapter 57 of the laws of 2018, is amended to read as follows:

§ 296-d. [~~Sexual harassment~~] Unlawful discriminatory practices relating to non-employees. It shall be an unlawful discriminatory practice for an employer to permit [~~sexual harassment of~~] unlawful discrimination

against non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to [~~sexual harassment~~] an unlawful discriminatory practice, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to [~~sexual harassment~~] an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the [~~harasser~~] person who engaged in the unlawful discriminatory practice shall be considered.

§ 6. Subdivision 1, paragraph c of subdivision 4 and subdivisions 9 and 10 of section 297 of the executive law, subdivision 1 and paragraph c of subdivision 4 as amended by chapter 166 of the laws of 2000, subparagraph (vi) of paragraph c of subdivision 4 as amended by section 1 of part AA of chapter 57 of the laws of 2009, subdivision 9 as amended by section 16 of part D of chapter 405 of the laws of 1999 and subdivision 10 as amended by chapter 364 of the laws of 2015, are amended to read as follows:

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or herself or his or her attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney general, or the chair of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any

complaint, evaluating applicants for membership in a place of accommodation without discrimination based on race, creed, color, national origin, sex, disability or marital status, and without retaliation or discrimination based on opposition to practices forbidden by this article or filing a complaint, testifying or assisting in any proceeding under this article; (iii) awarding of compensatory damages to the person aggrieved by such practice; (iv) awarding of punitive damages, **in cases of employment discrimination to the person aggrieved by such practice, and,** in cases of housing discrimination [~~only~~], **with damages in housing discrimination cases** in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (vi) assessing civil fines and penalties, in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious; (vii) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he or she shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he or she has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he or she has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including[~~, in cases of housing discrimination only,~~] punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint

on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of section two hundred four of the civil practice law and rules, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division. Any party to a housing discrimination complaint shall have the right within twenty days following a determination of probable cause pursuant to subdivision two of this section to elect to have an action commenced in a civil court, and an attorney representing the division of human rights will be appointed to present the complaint in court, or, with the consent of the division, the case may be presented by complainant's attorney. A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c) and 42 USC 12117(a) and 29 USC 633(b) shall not constitute the filing of a complaint within the meaning of this subdivision. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a of this article.

10. With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of [~~**employment or**~~] credit discrimination where sex is a basis of such discrimination, **and with respect to a claim in all cases of employment discrimination** in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court [~~**may in its discretion**~~] **shall** award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party to the action or the proceeding in the division's capacity as an employer. In cases of employment discrimination, a respondent shall only be liable for attorney's fees under this subdivision if the respondent has been found liable for having committed an unlawful discriminatory practice. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If

the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

§ 7. Section 300 of the executive law, as amended by chapter 166 of the laws of 2000, is amended to read as follows:

§ 300. Construction. The provisions of this article shall be construed liberally for the accomplishment of the **remedial** purposes thereof**, regardless of whether federal civil and human rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct**. Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination [~~**because of race, creed, color or national origin**~~]; but, as to acts declared unlawful by section two hundred ninety-six of this article, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure herein.

§ 8. This act shall take effect on the thirtieth day after it shall have become a law; provided, however that the amendments made to section 296-b of the executive law made by section four of this act shall take effect on the same date and in the same manner as chapter 8 of the laws of 2019 takes effect.