STATE OF NEW YORK

814

2023-2024 Regular Sessions

IN ASSEMBLY

January 11, 2023

Introduced by M. of A. SOLAGES, THIELE, JEAN-PIERRE, K. BROWN -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, the civil rights law and the education law, in relation to certain discriminatory practices; and to amend the education law, in relation to the hiring and qualification of professionals in education

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

Section 1. Short title. This act shall be known and may be cited as the "Hiring Outstanding Professionals in Education (HOPE) Act".

§ 2. Section 296 of the executive law is amended by adding eleven new subdivisions 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 to read as follows:

23. It shall be an unlawful discriminatory practice for an employer or licensing agency to bar any member of a protected class from employment opportunity by violating an established law or policy that would have provided such member of the protected class with equal employment opportunity.

24. The only legitimate business or occupational necessity exemption for excluding a protected class from equal employment opportunity shall be a real occupational qualification or a lawful protected status oriented contract.

25. It shall be an unlawful discriminatory practice for a person or agency to deny equal opportunity to a full and productive life by assigning or approving an advantage or disadvantage in opportunity to persons according to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, status as a victim of domestic violence or previous condition of servitude.

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

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26. It shall be an unlawful discriminatory practice for a person or agency to violate federal civil rights law or engage in an unlawful discriminatory practice as defined by federal civil rights law.

27. It shall be an unlawful discriminatory practice for a person or agency to engage in disparate treatment. Unlawful discriminatory practice by disparate treatment occurs when:

(a) the individual being discriminated against is a member of a protected class and the employer, institution or person knows the individual's protected class or knows that members of the protected class require equal treatment;

(b) the act favors or assigns advantage to one protected class over another protected class; and

(c) the reason for the act did not include a documented or otherwise verified assessment or evaluation of members of both the favored protected class and the unfavored protected class or the reason for the act did not justify a person of one protected class being favored over a person of another protected class.

28. It shall be an unlawful discriminatory practice for a person or agency to engage in acts of disparate impact. Unlawful discriminatory practice by disparate impact occurs when such person or agency:

(a) identifies a specific policy or practice that favors or assigns advantage to one protected class over another protected class;

(b) establishes adversity or harm to a protected class or a member of a protected class;

(c) establishes a significant disparity between a favored protected class and an unfavored protected class; and

(d) establishes a causal connection, that the policy or practice reasonably or logically led, wholly or in part, to the adversity or harm.

29. It shall be an unlawful discriminatory practice for a person or agency to engage in acts of unlawful discriminatory practice by malicious treatment. Unlawful discriminatory practice by malicious treatment occurs when:

(a) an actor's usage of derogatory or demeaning language related to a protected status of the complainant or executing a demeaning act against the protected status of the complainant before, during or after the alleged act of discrimination within a time equal to the lawful statute of limitations for filing a civil suit against the act;

(b) adversity or harm as a result of such language or act is established.

(c) causal connection, that the act reasonably led, wholly or in part, to adversity or harm is established.

30. It shall be an unlawful discriminatory practice for a public agency to engage in a contractual agreement in an amount greater than fifty thousand dollars without a documented competitive process that provided equal opportunity to persons without favor or advantage to any protected class.

31. It shall be an unlawful discriminatory practice for an employer to give employment opportunity to a candidate of one protected class that does not meet a statutory or published minimum or required qualification while denying employment opportunity to a candidate of a different protected class that meets the same statutory or published minimum or required qualification.

32. It shall be an unlawful discriminatory practice for a person who receives a complaint of discrimination or retaliation to refuse to adju-

dicate the complaint or otherwise address the complaint for relief because it is a complaint claiming discrimination or retaliation.

33. The following acts and only the following acts shall be exemptions and exceptions to the provisions of this article and any of the laws that said article supports and protects:

(a) Acts that set forth in writing an intention to provide equal opportunity to a protected class that has historically been denied equal opportunity.

(b) Acts that set forth in writing an intention to correct unlawful discrimination for or against a protected class.

(c) Acts that for which no possible inference of unlawful discrimination can be established by disparate treatment evidence, disparate impact evidence, malicious treatment evidence or any other direct or indirect evidence.

§ 3. Section 292 of the executive law is amended by adding three new subdivisions 42, 43 and 44 to read as follows:

42. The term "real occupational qualification", means the possession of a governmentally or privately issued certification, license, diploma, or degree, or a scored examination or assessment of knowledge, skills or abilities required for the employment position.

43. The term "lawful protected status oriented contract" shall be defined as a legally binding agreement between two parties to compensate an individual for products or services related directly to that individual's protected status or to compensate a company because of the company's status as a minority or woman-owned enterprise, including but not limited to employing test subjects by race or color because of scientific studies on the effects of suntan lotion, employing physical education teachers by gender because of locker room supervision, employing a leader of a religious institution by creed because of religious integrity, and purchasing from a minority-owned business enterprise or a woman-owned business enterprise in an effort to comply with local, state or federal laws or to diversify spending portfolios fairly amongst the citizenry.

44. The term "significant disparity" shall include but not be limited to the following:

(a) A probability of occurrence less than one-half of one percent.

(b) A protected class being advantaged or disadvantaged with a ratio beyond 4:1 or 1:4 within protected class populations for a specific and reasonable municipal area utilizing mutually agreed upon statistics, relevant data supplied by the municipality, or the most recent census data for said municipality.

(c) The combination of a probability of occurrence less than one percent and a ratio of disproportionality beyond 1:8 or 8:1 as set forth in paragraph (b) of this subdivision.

§ 4. The education law is amended by adding a new section 3009-a to read as follows:

§ 3009-a. Hiring outstanding professionals in education. 1. No person shall be appointed to a certificated position in a public school unless the position was publicly advertised for a minimum of fourteen consecutive days within the period of one hundred eighty days prior to the date of appointment. The fourteen consecutive days may only be reduced to seven consecutive days to appoint a classroom teacher within the fourteen days prior to the first day of student attendance in August or September.

2. No person shall be appointed to a certificated position in a public school without having applied for the certificated position in response

to a public advertisement of the certificated position on or before the published deadline.

3. No person shall be appointed to a certificated position prior to a school-conducted examination or scored assessment of fitness of at least three different persons for the specific certificated position. Such examinations or scored assessments of fitness may be, but are not limited to, one-to-one interviews, panel interviews, content area examinations, writing samples, demonstration lessons, and sample lesson plans with signed records of such examinations or scored assessments along with applicant documents and demographic date being physically filed for a minimum of seven years and electronically filed permanently. The three different persons may be reduced to a competitive examination of two persons or to an examination of one person if and only if less than three persons apply to a public advertisement as defined in subdivision nine of this section.

4. No person shall be appointed to a certificated position without possessing the requisite certificate for the certificated position according to commissioner regulations.

5. No person shall be appointed to a certificated position in a public school because of affinity for or animus against a race, creed, color, national origin, sex, marital status, sexual orientation, gender identity or expression, or disability, as such term is defined in section two hundred ninety-two of the executive law, except when such actions are taken to correct the impacts of a documented unlawful discriminatory practice.

6. The notice of employment opportunity for a certificated position located in subdivision one of this section shall be deemed a civil right for persons who hold the requisite certification, according to commissioner regulations, for the certificated position.

7. Appointments that promote temporary employees to positions as probationary employees without conducting a requirement herein are strictly prohibited.

8. No person shall be appointed to a certificated position without conducting a requirement of this section except as an acting or interim appointment because of an unforeseen resignation, incapacitation, death or dutiful reassignment of an employee. Such appointments are limited to one year in duration and may not be reappointed, renewed or extended.

9. For the purposes of this section, "publicly advertised" shall mean solicited in writing without intentional concealment from any person.

10. Persons appointed to certificated positions outside of the requirements set forth in this section shall be unqualified for the appointed certificated position for all purposes of this chapter.

11. Any person who was qualified for and not appointed to a certificated position has a cause of action for resulting damages against the school, officers or employees that engaged in any violation of subdivisions one through eight of this section.

§ 5. Section 3009 of the education law is amended by adding a new subdivision 3 to read as follows:

3. For the purposes of this section and section three thousand ten of this chapter, an "unqualified teacher" for a public school certificated position shall be any person who does not or did not meet all of the requirements to be appointed to said public school certificated position.

§ 6. The education law is amended by adding a new section 3039 to read as follows:

§ 3039. Discrimination based on affinity for or animus against a protected class is prohibited. Notwithstanding any provision of law to the contrary, no board of education in any city, union free, common or central school district in this state shall hereafter prohibit, prevent, disqualify or discriminate against any person who is physically and mentally qualified from competing, participating, or registering for an examination for or from qualifying for, a position licensed or certificated by the department, or be excluded from and denied equal employment opportunity, or penalized in a final rating by reason of his or her membership in a protected class or retaliated against after he or she formally alleged discrimination. Any such rule, requirement, resolution, regulation, penalization, exclusion, denial, discrimination or retaliation of such board or its employees shall be void. Nothing contained in this section shall prevent such board from adopting reasonable requirements for positions, except where such requirements for such positions are already limited and prescribed by law. Nothing contained in this section shall prevent action to correct the impacts of documented unlawful discriminatory practice.

§ 7. Paragraph (a) of subdivision 1 of section 296 of the executive law, as separately amended by chapters 202 and 748 of the laws of 2022, is amended to read as follows:

(a) For an employer or licensing agency[~~, because of an individual's~~] to refuse to hire or employ or to bar or to discharge from employment an individual, or to discriminate against an individual in compensation or in terms, conditions or privileges of employment, or to deny an individual the opportunity to obtain employment without discrimination, because of malicious treatment, disparate treatment or disparate impact according to age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, or previous condition of servitude to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

§ 8. Subdivision 2 of section 40-c of the civil rights law, as amended by chapter 8 of the laws of 2019, is amended to read as follows:

2. No person shall, because of age, race, creed, color, national origin, sex, marital status, sexual orientation, gender identity or expression, predisposing genetic characteristics, familial status, status as a victim of domestic violence, previous condition of servitude, or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his or her civil rights, [~~or~~] to any harassment, as defined in section 240.25 of the penal law, or to any form of victimization, as defined in articles one hundred twenty, two hundred forty, two hundred forty-one, two hundred forty-two or four hundred eighty-five of the penal law in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

§ 9. Section 40-d of the civil rights law, as amended by chapter 191 of the laws of 1982, is amended to read as follows:

§ 40-d. Penalty for violation. Any person who shall violate any of the provisions of the foregoing section, or subdivision three of section 240.30 or section 240.31 of the penal law, or who shall aid or incite the violation of any of said provisions shall for each and every violation thereof be liable to a penalty of not less than one [~~hundred~~]

thousand dollars nor more than five [~~**hundred**~~] **thousand** dollars, to be recovered by the person aggrieved thereby in any court of competent jurisdiction in the county in which the defendant shall reside. In addition, any person who shall violate any of the provisions of the foregoing section shall be deemed guilty of a class A misdemeanor. At or before the commencement of any action under this section, notice thereof shall be served upon the attorney general.

§ 10. Subdivision 2-b of section 3813 of the education law, as amended by chapter 474 of the laws of 1996, is amended to read as follows:

2-b. Except as provided in subdivision two of this section and, notwithstanding any other provision of law providing a longer period of time in which to commence an action or special proceeding, no action or special proceeding shall be commenced against any entity specified in subdivision one of this section more than one year after the cause of action arose; provided, however, that nothing contained in this subdivision shall **pertain to civil rights or human rights causes of action or** be deemed to modify or supersede any provision of law specifying a shorter period of time in which to commence an action or special proceeding against any such entity. For purposes of this subdivision, a cause of action against the school district of residence for reimbursement of tuition costs incurred pursuant to subdivision four of section thirty-two hundred two of this chapter by the school district in which a family home at board is located shall arise as of the date payment for the amount claimed was denied.

§ 11. The executive law is amended by adding a new section 297-a to read as follows:

§ 297-a. Tolling. Statutes of limitations for filing causes of action according to this article shall be tolled for the length of time a civil rights or human rights administrative agency investigates and makes conclusions about alleged violations of this article, measured from the day a complaint was filed in writing to the day of the conclusion was issued in writing.

§ 12. The civil rights law is amended by adding two new sections 49 and 49-a to read as follows:

§ 49. Cause of action. Any person who is qualified for a public contract who has been deprived of equal opportunity to the public contract shall have a cause of action based on the deprivation thereof.

§ 49-a. Tolling. Statutes of limitations for filing causes of action according to article four of this chapter shall be tolled for the length of time a civil rights or human rights administrative agency investigates and makes conclusions about alleged violations of article four of this chapter, measured from the day a complaint was filed in writing to the day of the conclusion was issued in writing.

§ 13. This act shall take effect immediately.