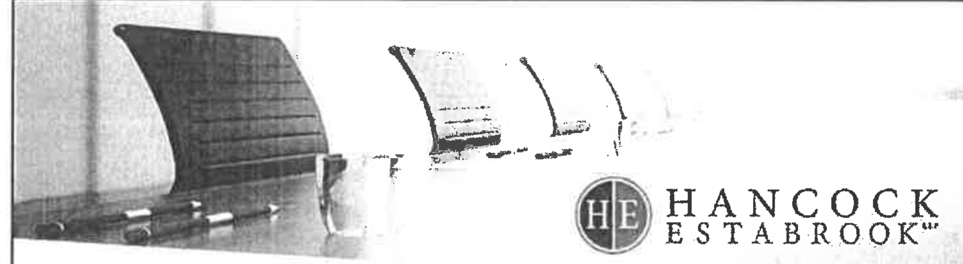
Top Ten Hits for 2023: Recent Developments in Public Sector Labor and Employment Law

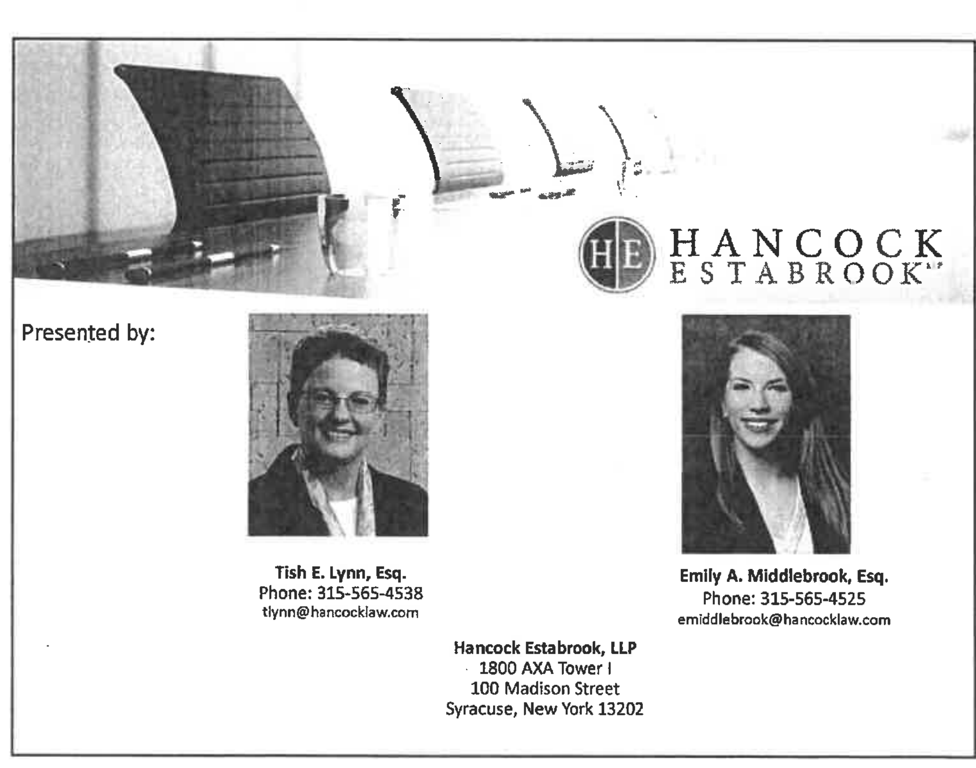
Tish E. Lynn, Esq.
Emily A. Middlebrook, Esq.



The Top Ten Hits for 2023: An Update on Public Sector Labor and Employment Law

The Otesaga, Cooperstown, New York
CAASNY Annual Meeting
May 22, 2023

Presented by:
Tish E. Lynn, Esq.
Emily A. Middlebrook, Esq.



Lactation Accommodation Law

- Effective June 7, 2023.
- Labor Law Section 206-c is amended to require employers to designate a room/location to allow employees to pump breast milk.
- Location must be:
  - In close proximity to work area;
  - Well lit;
  - Shielded from view; and
  - Free from intrusion by other persons.

Lactation Accommodation Law

- The designated location must include:
  - A chair;
  - A small table;
  - Nearby access to running water; and
  - An electrical outlet, if the workplace is supplied with electricity.
- An employer can qualify for an exemption if the employer can demonstrate undue hardship based on:
  - Size;
  - Financial resources; and
  - The nature of its business.
- The room may not be a restroom or toilet stall.

Lactation Accommodation Law

- If the workplace has refrigeration, the employee must be provided with access for storage of pumped milk.
- The Commissioner is to develop and implement a written policy.
- Employer must develop, implement and distribute a policy re: the rights of nursing mothers to express breast milk at work. The policy must include a request procedure. Response to requests must occur within 5 business days.
- The policy must be provided to employees upon hire, annually thereafter, and upon return from leave for birth of a child.
- Employer may not discriminate or retaliate against any employee for the exercise of her rights under this law.

Sexual Harassment Hotline

- On July 14, 2022, Section 295 of the Executive Law was modified to require the Division of Human Rights to establish a toll-free confidential hotline for individuals with complaints of workplace sexual harassment.
- The hotline provides free legal assistance and counsel to callers.
- The hotline is open Monday – Friday, 9:00 AM to 5:00 PM. 1-800-HARASS-3.

New Model Sexual Harassment Prevention Policy

- On April 11, 2023, New York State issued a revised model sexual harassment prevention policy.
- Key changes to model sexual harassment prevention policy:
  - Greater emphasis on harassment/discrimination based upon an individual identifying as transgender
  - Revised definition of harassment
  - New examples of harassment and examples of retaliation
    - Dress code policies that primarily focus on women's clothing and meetings which exclude parents or caregivers.
    - The public release of personnel files, the assignment of less favorable shifts and "providing an unwarranted negative reference."
  - New section on "Bystander Intervention"

New Model Sexual Harassment Prevention Policy

- Key changes to model sexual harassment prevention policy, continued:
  - Model policy makes clear that conduct in the remote workplace can be the subject of harassment or discrimination complaints
    - Examples: Pictures or displays others can see in virtual meetings or remarks made on messaging apps
  - Explicit reference that the intent of someone's harassing behavior is irrelevant. The model policy explicitly states "making a joke" does not provide defense to a harassment claim.
  - The policy requires employers to acknowledge that investigation might retraumatize an employee and investigators will handle complaints with sensitivity.
  - Policies must include a reference to the New York State sexual harassment hotline.

New Model Sexual Harassment Prevention Policy

- New training video issued by New York State
- Training materials include sexual harassment prevention training assessment form
- Review and update your sexual harassment prevention policy and training program!

New Model Sexual Harassment Prevention Policy

- Sexual harassment and discrimination cases continue to be viewed with intense scrutiny at the Division of Human Rights
- Remember, however, in 2018 New York State expanded the definition of "harassment," to cover all protected classes in New York State.
  - There is an emphasis on sexual harassment and discrimination, but all cases of harassment and discrimination should be viewed with similar sense of importance and urgency.

Electronic Notices

- Legislation concerning posting of electronic notices (S6805)
- Amendment to Labor Law Section 201 concerning posting notices in "conspicuous place," at worksite
- In addition to physical notices, the amendment requires that where employers must post notices under federal law, New York State law and/or regulation, the employer provides the notices either: (1) via email to employees with electronic copies of the notices; or (2) post electronic copies on the employer's website.
- Employers must also inform employees that notices are available electronically.

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New Posting Requirement

- Effective January 1, 2023
- All public sector employers with more than 50 full-time equivalent employees must post "Veterans' Benefits and Services" poster
- Includes certain information regarding services available to veterans:
  - Contact and website information for the division of veterans' services and the department's veterans' program
  - Substance abuse and mental health treatment
  - Educational, workforce, and training resources
  - Tax benefits
  - New York State veteran drivers' licenses and non-driver identification cards
  - Eligibility for unemployment insurance benefits under state and/or federal law
  - Legal services
  - Contact information for the U.S. Department of Veterans Affairs Veteran Crisis Line

Paid Leave for COVID Vaccinations

- NYS Civil Service Law Section 159-c requires public employers to grant paid vaccine leave for a "sufficient period of time" not to exceed four hours per each COVID vaccine injection, unless a greater amount of time is required under a CBA or employer policy. "Sufficient period of time" is undefined.
- Paid at regular rate of pay with no charge to paid leave accruals like sick leave. Only available to employee and not employee's family members.
- Law effective until December 31, 2023.

Firefighter Bill of Rights

- Amendment to Section 75 of Civil Service Law
- Effective March 1, 2023
- Applies to paid firefighters who work for cities, towns, villages and fire districts with a population of less than 1,000,000 and represented by union
- Requires that in disciplinary hearings involving firefighters that the hearing officer be an "independent" hearing officer
- Requires that in the event of disciplinary hearings involving firefighters, if parties cannot agree to a hearing officer, such hearing officers would have to be selected from a list maintained by the Public Employment Relation Board (PERB).
- In addition, the union will have an opportunity to strike names from the list provided by PERB.

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Firefighter Bill of Rights

- Cost incurred with obtaining independent hearing officer must be shared equally by the employer and union. However, hearing officer can allocate costs differently if there is a frivolous claim or defense made.
  - For claim or defense to be frivolous, one of the following must be met: (i) the claim or defense was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the action or to harass or maliciously injure another; or (ii) the claim or defense was commenced or continued in bad faith without any reasonable basis in law or fact.
- The above rights "shall be in addition to, and shall not supplant, modify or replace any rights provided to an employee pursuant to agreements negotiated by a public employer and an employee organization."

Firefighter Bill of Rights

- Also amends the Taylor Law
- Section 201 of the Civil Service Law now explicitly states that terms and conditions of employment for firefighters include discipline and disciplinary procedures, "including alternatives to any statutory disciplinary system."
- Section 204-a of the Civil Service Law is amended to state that the terms of any current or expired agreement or interest arbitration award representing firefighters relating to discipline of firefighters shall be deemed valid and enforceable when the amendments to law became effective.

Protections for Nurses

- Amendments to Labor Law Section 167 which places limitations on consecutive hours of work for nurses
- The limitations on consecutive hours for nurses has been in effect since 2009, but there are new changes to this law which go into effect June 28, 2023
- Applies, in relevant part, to facilities operated by New York State, municipalities or public corporations, including Article 28 facilities

Protections for Nurses

- In addition to existing restrictions for mandatory overtime, new amendments to the law state that a health care employer cannot require nurses to work more than regularly scheduled work hours, except if:
  - an employer determines there is an emergency, necessary to provide safe patient care, in which case the employer must, before requiring an on-duty employee to remain, make a good faith effort to have overtime covered on a voluntary basis, including, but not limited to, calling per diems, agency nurses, assigning floats, or requesting an additional day of work from off-duty employees, to the extent such staffing options exist.

Protections for Nurses

- A health care employer cannot require nurses to work more than regularly scheduled work hours, except if:
  - the employer determines there is an emergency, necessary to provide safe patient care.
- "Emergency", includes an unanticipated staffing emergency, an unforeseen event that could not be prudently planned for by an employer and does not regularly occur.
- New monetary penalties for violations of mandatory overtime restrictions for nurses found after investigation: (i) $1,000 for a first violation, (ii) $2,000 for a second violation, and (iii) $3,000 for third, or subsequent, violation.
- For each violation, employer required to pay nurse an additional 15% of the overtime payment.

Collective Bargaining Trends

- Recruitment and retention
  - Wage demands and employer increases
  - Retention "bonuses"
  - Flexible scheduling
  - 4-day work weeks
  - Remote work
- Settlement trends going up
  - The new "R & R"
  - Inflation

First Amendment

- *Connelly v. Cnty. of Rockland*, 61 F.4th 322 (2d Cir. 2023)
- A group of Probation Department employees sent letter to Rockland County Legislature expressing many objections to proposed office relocation.
- Director of Probation held staff meetings and sent each employee who signed letter a Memorandum of Warning.
- Each Memorandum of Warning criticized employees for raising concern outside the chain of command, being disrespectful of the county executive and "ignorance of potential repercussions."

First Amendment

- Employees filed lawsuit claiming First Amendment retaliation.
- Trial court determined that employees spoke on matter of public concern and employees did not speak solely as public employees.
- Jury determined Memorandum of Warning and meetings did not constitute adverse employment action. Trial court vacated jury's determination finding that Memorandum of Warning and meetings were "textbook examples of adverse action."
- Employer appealed to the Second Circuit Court of Appeals.

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First Amendment

- Second Circuit determined a reasonable jury could conclude that the test for adverse action was not met.
- Although there is authority for the proposition that reprimands could be considered adverse action, there is also authority not every criticism of an employee "rises to the level of 'an adverse employment action.'"
- Relevant factor: Infrequency of discipline.
- Whether criticism constitutes adverse employment action is fact intensive inquiry.
- Second Circuit reversed decision of trial court and directed to enter judgment in favor of defendants.

Pending Legislation

- Ban "No Re-Hire" Clauses (Senate Bill 14)
  - Make release of any employee claim unenforceable if the employee is prohibited from applying for, accepting, or engaging in future employment with the employer.
- Restricting non-disclosure agreements in certain cases (Senate Bill S4516)
  - Prohibit non-disclosure conditions in the settlement of any sexual harassment or discrimination claim that would require the complainant to pay defendant liquidated damages in the event of violation of non-disclosure terms.

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Pending Legislation

- Automated Employment decision tools (Assembly Bill 567)
  - Disparate impact analysis must be conducted by the employer at least annually.
  - A summary of the most recent analysis must be made publicly available on the employer's website.
  - Employer must provide the NYSDOL with a summary of the most recent disparate impact analysis.
  - The AG may initiate an investigation if there is a concern regarding possible discrimination.
  - The AG may also initiate court action re: same.
  - NYSDOL may promulgate rules and regulations.

Other Potential Developments

- On the federal level, employers should be mindful of potential changes to worker classification rules.
- The United States Department of Labor issued a proposed rule concerning whether individual is properly classified as independent contractor versus employee.
- Restates the "economic realities test."
- Public comment period ended in December 2022.

Thank You! Questions?

Tish E. Lynn, Esq.
Phone: 315-565-4538
tlynn@hancocklaw.com

Emily A. Middlebrook, Esq.
Phone: 315-565-4525
emiddlebrook@hancocklaw.com

Hancock Estabrook, LLP
1800 AXA Tower I
100 Madison Street
Syracuse, New York 13202

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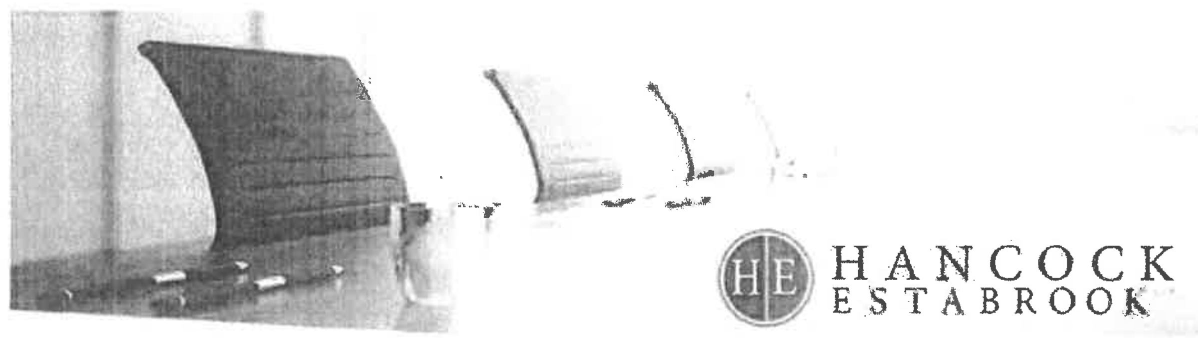

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Supplemental Materials

Lactation Accommodation Law

S4844B (ACTIVE) - SUMMARY

Expands the rights of nursing employees to express breast milk.

S4844B (ACTIVE) - SPONSOR MEMO

BILL NUMBER: S4844B

SPONSOR: BIAGGI

TITLE OF BILL:

An act to amend the labor law, in relation to expanding the rights of nursing employees to express breast milk

PURPOSE:

To expand accommodations for nursing employees in the workplace.

SUMMARY OF PROVISIONS:

Section 1 amends section 206-c of the labor law to require employers to designate a room or location to allow employees to pump breast milk. Such room or location shall be a place, other than a restroom, that is:
(i) in close proximity to the work area; (ii) well lit; (iii) shielded from view; (iv) free from intrusion from other persons in the workplace or the public.
Such room or other location shall provide, at minimum, a chair, a small table, nearby access to running water and, if the work-place is supplied with electricity, an electrical outlet. Employers may be exempt from the physical requirements of the location for employees to pump breast milk if provision of such room would impose an undue hardship on the employer. Further, employers must develop, implement, and distribute a written policy regarding the rights of nursing mothers
to express breast milk at work pursuant to the provisions of this section. Additionally, employers may not discriminate or

retaliate against any employee for exercising their rights under this section.

Section 2 sets forth the effective date.

JUSTIFICATION:

Under current New York law, employers must give reasonable break times and make reasonable efforts to provide a space for employees to pump breast milk. These accommodations fall below the standards in place for New York State, New York City, and federal government employees. The purpose of this bill is to require all employers in New York provide the same accommodations for nursing mothers that already exist for certain public employees.

In New York State, all state-owned buildings are required to have lactation rooms with a chair, working surface, and electrical outlet. In New York City, a 2018 ordinance was passed requiring City employers to provide similar lactation room accommodations. The U.S. Department of Labor ("DOL") has also promulgated similar lactation room requirements for federal government employers. (1) These provisions, which certain employers provide to their employees, should be applied uniformly to nursing mothers employed by other agencies as well.

This bill's provisions mirror the current lactation room requirements in state buildings, and would codify the DOL's lactation room guidelines by requiring employers to ensure that pumping spaces be private and include a chair, access to running water, a working space, and an electrical outlet and expands these protections to all employees. This bill also requires employers to develop and implement a written policy regarding the rights of nursing mothers to express breast milk at work.

Nursing mothers statewide should share the same healthcare protections, regardless of where they are employed. The health benefits of breast milk to babies are widely recognized, (2) and women who wish to pump should be encouraged to do so by having a safe, hygienic and convenient place to pump within their workplaces.

LEGISLATIVE HISTORY:

2019-2020: S8258A/A9987A - Died in Labor Committee.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:
This act shall take effect on the one hundred eightieth day after it shall have become a law.
1 Patient Protection and Affordable Care Act, P.L. 111-148 (2010).
2 Verduci, Banderali, Barberi, Radaelli, Lops, Betti, Riva & Giovannini, Epigenetic Effects of Human Breast Milk, NUTRIENTS, no. 4 (2014) at Abstract.

- VIEW LESS

S4844B (ACTIVE) - BILL TEXT DOWNLOAD PDF

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

4844--B

2021-2022 Regular Sessions

I N S E N A T E

February 16, 2021

Introduced by Sens. BIAGGI, BROUK, GOUNARDES, MANNION -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to expanding the rights of nursing employees to express breast milk

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 206-c of the labor law, as added by chapter 574 of the laws of 2007, is amended to read as follows:
§ 206-c. Right of nursing [mothers] EMPLOYEES to express breast milk.
1. An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time [each day] to allow an employee to express breast milk for her nursing child EACH TIME SUCH EMPLOYEE HAS REASONABLE NEED TO EXPRESS BREAST MILK for up to three years following child birth. [The employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy.] No employer shall discriminate in any way against an employee who chooses to express breast milk in the work place.
2. (A) UPON REQUEST OF AN EMPLOYEE WHO CHOOSES TO EXPRESS BREAST MILK IN THE WORKPLACE, AN EMPLOYER SHALL DESIGNATE A ROOM OR OTHER LOCATION WHICH SHALL BE MADE AVAILABLE FOR USE BY SUCH EMPLOYEE TO EXPRESS BREAST MILK. SUCH ROOM OR OTHER LOCATION SHALL BE A PLACE THAT IS: (I) IN CLOSE PROXIMITY TO THE WORK AREA; (II) WELL LIT; (III) SHIELDED FROM VIEW; AND IV) FREE FROM INTRUSION FROM OTHER PERSONS IN THE WORKPLACE OR THE PUBLIC. SUCH ROOM OR OTHER LOCATION SHALL PROVIDE, AT MINIMUM, A CHAIR, A WORKING SURFACE, NEARBY ACCESS TO CLEAN RUNNING WATER AND, IF THE

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

LBD02122-05-2

WORKPLACE IS SUPPLIED WITH ELECTRICITY, AN ELECTRICAL OUTLET. THE ROOM OR LOCATION PROVIDED BY THE EMPLOYER FOR THIS PURPOSE SHALL NOT BE A RESTROOM OR TOILET STALL.
(B) IF THE SOLE PURPOSE OR FUNCTION OF SUCH ROOM OR OTHER LOCATION IS NOT DEDICATED FOR USE BY EMPLOYEES TO EXPRESS BREAST MILK, SUCH ROOM OR OTHER LOCATION SHALL BE MADE AVAILABLE TO SUCH AN EMPLOYEE WHEN NEEDED AND SHALL NOT BE USED FOR ANY OTHER PURPOSE OR FUNCTION WHILE IN USE BY SUCH EMPLOYEE. EMPLOYERS SHALL PROVIDE NOTICE TO ALL EMPLOYEES AS SOON AS PRACTICABLE WHEN SUCH ROOM OR OTHER LOCATION HAS BEEN DESIGNATED FOR USE BY EMPLOYEES TO EXPRESS BREAST MILK.
(C) WHERE COMPLIANCE WITH THE REQUIREMENTS OF PARAGRAPHS (A) OR (B) OF THIS SUBDIVISION IS IMPRACTICABLE BECAUSE IT WOULD IMPOSE AN UNDUE HARDSHIP ON THE EMPLOYER BY CAUSING

SIGNIFICANT DIFFICULTY OR EXPENSE WHEN CONSIDERED IN RELATION TO THE SIZE, FINANCIAL RESOURCES, NATURE, OR STRUCTURE OF THE EMPLOYER'S BUSINESS, SUCH EMPLOYER SHALL MAKE REASONABLE EFFORTS TO PROVIDE A ROOM OR OTHER LOCATION, OTHER THAN A RESTROOM OR TOILET STALL, THAT IS IN CLOSE PROXIMITY TO THE WORK AREA WHERE AN EMPLOYEE CAN EXPRESS BREAST MILK IN PRIVACY. PROVIDED, HOWEVER, NOTHING IN THIS SUBDIVISION SHALL OTHERWISE EXEMPT AN EMPLOYER FROM THE REQUIREMENTS OF SUBDIVISION ONE OF THIS SECTION.

(D) IF THE WORKPLACE HAS ACCESS TO REFRIGERATION, THE EMPLOYER SHALL EXTEND SUCH ACCESS TO REFRIGERATION FOR THE PURPOSES OF STORING THE EXPRESSED MILK.

3. THE COMMISSIONER SHALL DEVELOP AND IMPLEMENT A WRITTEN POLICY REGARDING THE RIGHTS OF NURSING EMPLOYEES TO EXPRESS BREAST MILK IN THE WORKPLACE PURSUANT TO THE PROVISIONS OF THIS SECTION. EMPLOYERS SHALL PROVIDE SUCH WRITTEN POLICY TO EACH EMPLOYEE UPON HIRE AND ANNUALLY THEREAFTER, AND TO EMPLOYEES UPON RETURNING TO WORK FOLLOWING THE BIRTH OF A CHILD. SUCH POLICY SHALL:

(A) INFORM EMPLOYEES OF THEIR RIGHTS PURSUANT TO THIS SECTION;

(B) SPECIFY THE MEANS BY WHICH A REQUEST MAY BE SUBMITTED TO THE EMPLOYER FOR A ROOM OR OTHER LOCATION FOR USE BY EMPLOYEES TO EXPRESS BREAST MILK; AND

(C) REQUIRE THE EMPLOYER TO RESPOND TO SUCH REQUEST WITHIN A REASONABLE TIMEFRAME, BUT NOT TO EXCEED FIVE BUSINESS DAYS.

4. NO EMPLOYER OR THEIR AGENT, OR THE OFFICER OR AGENT OF ANY CORPORATION, PARTNERSHIP, OR LIMITED LIABILITY COMPANY, OR ANY OTHER PERSON, SHALL DISCHARGE, THREATEN, PENALIZE, OR IN ANY OTHER MANNER DISCRIMINATE OR RETALIATE AGAINST ANY EMPLOYEE BECAUSE SUCH EMPLOYEE HAS EXERCISED THEIR RIGHTS AFFORDED UNDER THIS SECTION.

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

[Signed into law December 9, 2022.]

Sexual Harassment Hotline

Segment of Executive Law section 295

Effective: July 14, 2022

McKinney's Executive Law § 295

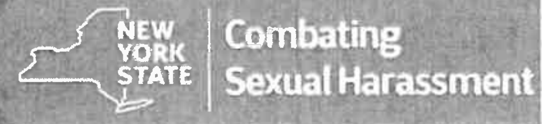
§ 295. General powers and duties of division

The division, by and through the commissioner or his or her duly authorized officer or employee, shall have the following functions, powers and duties:

. . .

18. To establish a toll free confidential hotline to provide individuals with complaints of workplace sexual harassment counsel and assistance. The division shall operate this hotline during regular business hours and disseminate information about this hotline in order to ensure public knowledge of the hotline, including by working with the department of labor to ensure that information on the hotline is included in any materials employers must post or provide to employees regarding sexual harassment. The division will work with organizations representing attorneys, including but not limited to the New York state bar association, to recruit attorneys experienced in providing counsel related to sexual harassment matters who can provide pro bono assistance and counsel to individuals that contact the hotline. The hotline shall comply with all of the requirements for a program operated under the New York Rules of Professional Conduct, 12 NYCRR, Rule 6.5 (Participation in limited pro bono legal service programs). Attorneys may not solicit, or permit employees or agents of the attorneys to solicit on the attorney's behalf, further representation of any individuals they advise through the hotline relating to discussed sexual harassment complaint.

Sexual Harassment Policy for All Employers in New York State



This model policy is a template that can be used by employers to meet the New York State Labor Law requirements for a sexual harassment prevention policy. Employers are encouraged to tailor this policy to their individual needs, though as the minimum standard, no section in this policy should be omitted. The list of examples provided in this model policy is not meant to be exhaustive.

Purpose and Goals

[*Employer Name*] is committed to maintaining a workplace free from harassment and discrimination. Sexual harassment is a form of workplace discrimination that subjects an employee to inferior conditions of employment due to their gender, gender identity, gender expression (perceived or actual), and/or sexual orientation. Sexual harassment is often viewed simply as a form of gender-based discrimination, but *[Employer name]* recognizes that discrimination can be related to or affected by other identities beyond gender. Under the New York State Human Rights Law, it is illegal to discriminate based on sex, sexual orientation, gender identity or expression, age, race, creed, color, national origin, military status, disability, pre-disposing genetic characteristics, familial status, marital status, criminal history, or status as a victim of domestic violence. Our different identities impact our understanding of the world and how others perceive us. For example, an individual's race, ability, or immigration status may impact their experience with gender discrimination in the workplace. While this policy is focused on sexual harassment and gender discrimination, the methods for reporting and investigating discrimination based on other protected identities are the same. The purpose of this policy is to teach employees to recognize discrimination, including discrimination due to an individual's intersecting identities, and provide the tools to take action when it occurs. All employees, managers, and supervisors are required to work in a manner designed to prevent sexual harassment and discrimination in the workplace. This policy is one component of [*Employer Name's*] commitment to a discrimination-free work environment.

Goals of this Policy:

Sexual harassment and discrimination are against the law. After reading this policy, employees will understand their right to a workplace free from harassment. Employees will also learn what harassment and discrimination look like, what actions they can take to prevent and report harassment, and how they are protected from retaliation after taking action. The policy will also explain the investigation process into any claims of harassment. Employees are encouraged to report sexual harassment or discrimination by filing a complaint internally with [*Employer Name*]. Employees can also file a complaint with a government agency or in court under federal, state, or local antidiscrimination laws. To file an employment complaint with the New York State Division of Human Rights, please visit https://dhr.ny.gov/complaint. To file a complaint with the United States Equal Employment Opportunity Commission, please visit https://www.eeoc.gov/filing-charge-discrimination.

{H5080615.1}Adoption of this policy does not constitute a defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

Sexual Harassment and Discrimination Prevention Policy:

1. [*Employer Name's*] policy applies to all employees, applicants for employment, and interns, whether paid or unpaid. The policy also applies to additional covered individuals. It applies to anyone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in our workplace. These individuals include persons commonly referred to as independent contractors, gig workers, and temporary workers. Also included are persons providing equipment repair, cleaning services, or any other services through a contract with [*Employer Name*]. For the remainder of this policy, we will use the term "covered individual" to refer to these individuals who are not direct employees of the company.

2. Sexual harassment is unacceptable. Any employee or covered individual who engages in sexual harassment, discrimination, or retaliation will be subject to action, including appropriate discipline for employees. In New York, harassment does not need to be severe or pervasive to be illegal. Employees and covered individuals should not feel discouraged from reporting harassment because they do not believe it is bad enough, or conversely because they do not want to see a colleague fired over less severe behavior. Just as harassment can happen in different degrees, potential discipline for engaging in sexual harassment will depend on the degree of harassment and might include education and counseling. It may lead to suspension or termination when appropriate.

3. Retaliation is prohibited. Any employee or covered individual that reports an incident of sexual harassment or discrimination, provides information, or otherwise assists in any investigation of a sexual harassment or discrimination complaint is protected from retaliation. No one should fear reporting sexual harassment if they believe it has occurred. So long as a person reasonably believes that they have witnessed or experienced such behavior, they are protected from retaliation. Any employee of [*Employer Name*] who retaliates against anyone involved in a sexual harassment or discrimination investigation will face disciplinary action, up to and including termination. All employees and covered individuals working in the workplace who believe they have been subject to such retaliation should inform a supervisor, manager, or [*name of appropriate person*]. All employees and covered individuals who believe they have been a target of such retaliation may also seek relief from government agencies, as explained below in the section on Legal Protections.

4. Discrimination of any kind, including sexual harassment, is a violation of our policies, is unlawful, and may subject [*Employer Name*] to liability for the harm experienced by targets of discrimination. Harassers may also be individually subject to liability and employers or supervisors who fail to report or act on harassment may be liable for aiding and abetting such behavior. Employees at every level who engage in harassment or discrimination, including managers and supervisors who engage in harassment or discrimination or who allow such behavior to continue, will be penalized for such misconduct.

5. [*Employer Name*] will conduct a prompt and thorough investigation that is fair to all parties. An investigation will happen whenever management receives a complaint about discrimination or sexual harassment, or when it otherwise knows of possible discrimination or sexual harassment occurring. [*Employer Name*] will keep the investigation confidential to the extent possible. If an investigation ends with the finding that discrimination or sexual harassment occurred, [*Employer Name*] will act as required. In addition to any required discipline, [*Employer Name*] will also take steps to ensure a safe work environment for the employee(s) who experienced the discrimination

or harassment. All employees, including managers and supervisors, are required to cooperate with any internal investigation of discrimination or sexual harassment.

6. All employees and covered individuals are encouraged to report any harassment or behaviors that violate this policy. All employees will have access to a complaint form to report harassment and file complaints. Use of this form is not required. For anyone who would rather make a complaint verbally, or by email, these complaints will be treated with equal priority. An employee or covered individual who prefers not to report harassment to their manager or employer may instead report harassment to the New York State Division of Human Rights and/or the United States Equal Employment Opportunity Commission. Complaints may be made to both the employer and a government agency.

   Managers and supervisors are **required** to report any complaint that they receive, or any harassment that they observe or become aware of, to [*person or office designated*].

7. This policy applies to all employees and covered individuals, such as contractors, subcontractors, vendors, consultants, or anyone providing services in the workplace, and all must follow and uphold this policy. This policy must be provided to all employees in person or digitally through email upon hiring and will be posted prominently in all work locations. For those offices operating remotely, in addition to sending the policy through email, it will also be available on the organization's shared network.

What Is Sexual Harassment?

Sexual harassment is a form of gender-based discrimination that is unlawful under federal, state, and (where applicable) local law. Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity, and the status of being transgender. Sexual harassment is not limited to sexual contact, touching, or expressions of a sexually suggestive nature. Sexual harassment includes all forms of gender discrimination including gender role stereotyping and treating employees differently because of their gender.

Understanding gender diversity is essential to recognizing sexual harassment because discrimination based on sex stereotypes, gender expression and perceived identity are all forms of sexual harassment. The gender spectrum is nuanced, but the three most common ways people identify are cisgender, transgender, and non-binary. A cisgender person is someone whose gender aligns with the sex they were assigned at birth. Generally, this gender will align with the binary of male or female. A transgender person is someone whose gender is different than the sex they were assigned at birth. A non-binary person does not identify exclusively as a man or a woman. They might identify as both, somewhere in between, or completely outside the gender binary. Some may identify as transgender, but not all do. Respecting an individual's gender identity is a necessary first step in establishing a safe workplace.

Sexual harassment is unlawful when it subjects an individual to inferior terms, conditions, or privileges of employment. Harassment does not need to be severe or pervasive to be illegal. It can be any harassing behavior that rises above petty slights or trivial inconveniences. Every instance of harassment is unique to those experiencing it, and there is no single boundary between petty slights and harassing behavior. However, the Human Rights Law specifies that whether harassing conduct is considered petty or trivial is to be viewed from the standpoint of a reasonable victim of discrimination with the same protected characteristics. Generally, any behavior in which an employee or covered individual is treated worse because of their gender (perceived or actual), sexual orientation, or gender expression is considered a

violation of [*Employer Name's*] policy. The intent of the behavior, for example, making a joke, does not neutralize a harassment claim. Not intending to harass is not a defense. The impact of the behavior on a person is what counts. Sexual harassment includes any unwelcome conduct which is either directed at an individual because of that individual's gender identity or expression (perceived or actual), or is of a sexual nature when:

- The purpose or effect of this behavior unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment. The impacted person does not need to be the intended target of the sexual harassment;

- Employment depends implicitly or explicitly on accepting such unwelcome behavior; or

- Decisions regarding an individual's employment are based on an individual's acceptance to or rejection of such behavior. Such decisions can include what shifts and how many hours an employee might work, project assignments, as well as salary and promotion decisions.

There are two main types of sexual harassment:

- Behaviors that contribute to a **hostile work environment** include, but are not limited to, words, signs, jokes, pranks, intimidation, or physical violence which are of a sexual nature, or which are directed at an individual because of that individual's sex, gender identity, or gender expression. Sexual harassment also consists of any unwanted verbal or physical advances, sexually explicit derogatory, or discriminatory statements which an employee finds offensive or objectionable, causes an employee discomfort or humiliation, or interferes with the employee's job performance.

- Sexual harassment also occurs when a person in authority tries to trade job benefits for sexual favors. This can include hiring, promotion, continued employment or any other terms, conditions, or privileges of employment. This is also called **quid pro quo** harassment.

Any employee or covered individual who feels harassed is encouraged to report the behavior so that any violation of this policy can be corrected promptly. Any harassing conduct, even a single incident, can be discrimination and is covered by this policy.

Examples of Sexual Harassment

The following describes some of the types of acts that may be unlawful sexual harassment and that are strictly prohibited. **This list is just a sample of behaviors and should not be considered exhaustive**. Any employee who believes they have experienced sexual harassment, even if it does not appear on this list, should feel encouraged to report it:

- Physical acts of a sexual nature, such as:
  - Touching, pinching, patting, kissing, hugging, grabbing, brushing against another employee's body, or poking another employee's body; or
  - Rape, sexual battery, molestation, or attempts to commit these assaults, which may be considered criminal conduct outside the scope of this policy (please contact local law enforcement if you wish to pursue criminal charges).

- Unwanted sexual comments, advances, or propositions, such as:
  - Requests for sexual favors accompanied by implied or overt threats concerning the target's job performance evaluation, a promotion, or other job benefits;

        - This can include sexual advances/pressure placed on a service industry employee by customers or clients, especially those industries where hospitality and tips are essential to the customer/employee relationship;
    - Subtle or obvious pressure for unwelcome sexual activities; or
    - Repeated requests for dates or romantic gestures, including gift-giving.

- Sexually oriented gestures, noises, remarks or jokes, or questions and comments about a person's sexuality, sexual experience, or romantic history which create a hostile work environment. This is not limited to interactions in person. Remarks made over virtual platforms and in messaging apps when employees are working remotely can create a similarly hostile work environment.

- Sex stereotyping, which occurs when someone's conduct or personality traits are judged based on other people's ideas or perceptions about how individuals of a particular sex should act or look:
    - Remarks regarding an employee's gender expression, such as wearing a garment typically associated with a different gender identity; or
    - Asking employees to take on traditionally gendered roles, such as asking a woman to serve meeting refreshments when it is not part of, or appropriate to, her job duties.

- Sexual or discriminatory displays or publications anywhere in the workplace, such as:
    - Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials, or other materials that are sexually demeaning or pornographic. This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace;
    - This also extends to the virtual or remote workspace and can include having such materials visible in the background of one's home during a virtual meeting.

- Hostile actions taken against an individual because of that individual's sex, sexual orientation, gender identity, or gender expression, such as:
    - Interfering with, destroying, or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
    - Sabotaging an individual's work;
    - Bullying, yelling, or name-calling;
    - Intentional misuse of an individual's preferred pronouns; or
    - Creating different expectations for individuals based on their perceived identities:
        - Dress codes that place more emphasis on women's attire;
        - Leaving parents/caregivers out of meetings.

Who Can be a Target of Sexual Harassment?

Sexual harassment can occur between any individuals, regardless of their sex or gender. Harassment does not have to be between members of the opposite sex or gender. New York Law protects employees and all covered individuals described earlier in the policy. **Harassers can be anyone in the workplace**. A supervisor, a supervisee, or a coworker can all be harassers. Anyone else in the workplace can also be harassers including an independent contractor, contract worker, vendor, client, customer, patient, constituent, or visitor.

Sexual harassment does not happen in a vacuum and discrimination experienced by an employee can be impacted by biases and identities beyond an individual's gender. For example:

- Placing different demands or expectations on black women employees than white women employees can be both racial and gender discrimination;
- An individual's immigration status may lead to perceptions of vulnerability and increased concerns around illegal retaliation for reporting sexual harassment; or
- Past experiences as a survivor of domestic or sexual violence may lead an individual to feel re-traumatized by someone's behaviors in the workplace.

Individuals bring personal history with them to the workplace that might impact how they interact with certain behavior. It is especially important for all employees to be aware of how words or actions might impact someone with a different experience than their own,in the interest of creating a safe and equitable workplace.

Where Can Sexual Harassment Occur?

Unlawful sexual harassment is not limited to the physical workplace itself. It can occur while employees are traveling for business or at employer or industry sponsored events or parties. Calls, texts, emails, and social media usage by employees or covered individuals can constitute unlawful workplace harassment, even if they occur away from the workplace premises, on personal devices, or during non-work hours.

Sexual harassment can occur when employees are working remotely from home as well. Any behaviors outlined above that leave an employee feeling uncomfortable, humiliated, or unable to meet their job requirements constitute harassment even if the employee or covered individual is at home when the harassment occurs. Harassment can happen on virtual meeting platforms, in messaging apps, and after working hours between personal cell phones.

Retaliation

Retaliation is unlawful and is any action by an employer or supervisor that punishes an individual upon learning of a harassment claim, that seeks to discourage a worker or covered individual from making a formal complaint or supporting a sexual harassment or discrimination claim, or that punishes those who have come forward. These actions need not be job-related or occur in the workplace to constitute unlawful retaliation. For example, threats of physical violence outside of work hours or disparaging someone on social media would be covered as retaliation under this policy.

Examples of retaliation may include, but are not limited to:

- Demotion, termination, denying accommodations, reduced hours, or the assignment of less desirable shifts;
- Publicly releasing personnel files;
- Refusing to provide a reference or providing an unwarranted negative reference;
- Labeling an employee as "difficult" and excluding them from projects to avoid "drama";
- Undermining an individual's immigration status; or
- Reducing work responsibilities, passing over for a promotion, or moving an individual's desk to a less desirable office location.

Such retaliation is unlawful under federal, state, and (where applicable) local law. The New York State Human Rights Law protects any individual who has engaged in "protected activity." Protected activity occurs when a person has:

- Made a complaint of sexual harassment or discrimination, either internally or with any government agency;
- Testified or assisted in a proceeding involving sexual harassment or discrimination under the Human Rights Law or any other anti-discrimination law;
- Opposed sexual harassment or discrimination by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of suspected harassment;
- Reported that another employee has been sexually harassed or discriminated against; or
- Encouraged a fellow employee to report harassment.

Even if the alleged harassment does not turn out to rise to the level of a violation of law, the individual is protected from retaliation if the person had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of harassment.

Reporting Sexual Harassment

Everyone must work toward preventing sexual harassment, but leadership matters. Supervisors and managers have a special responsibility to make sure employees feel safe at work and that workplaces are free from harassment and discrimination. Any employee or covered individual is encouraged to report harassing or discriminatory behavior to a supervisor, manager or [*person or office designated*]. Anyone who witnesses or becomes aware of potential instances of sexual harassment should report such behavior to a supervisor, manager, or [*person or office designated*].

Reports of sexual harassment may be made verbally or in writing. A written complaint form is attached to this policy if an employee would like to use it, but the complaint form is not required. Employees who are reporting sexual harassment on behalf of other employees may use the complaint form and should note that it is on another employee's behalf. A verbal or otherwise written complaint (such as an email) on behalf of oneself or another employee is also acceptable.

Employees and covered individuals who believe they have been a target of sexual harassment may at any time seek assistance in additional available forums, as explained below in the section on Legal Protections.

Supervisory Responsibilities

Supervisors and managers have a responsibility to prevent sexual harassment and discrimination. All supervisors and managers who receive a complaint or information about suspected sexual harassment, observe what may be sexually harassing or discriminatory behavior, or for any reason suspect that sexual harassment or discrimination is occurring, are required to report such suspected sexual harassment to [*person or office designated*]. Managers and supervisors should not be passive and wait for an employee to make a claim of harassment. If they observe such behavior, they must act.

Supervisors and managers can be disciplined if they engage in sexually harassing or discriminatory behavior themselves. Supervisors and managers can also be disciplined for failing to report suspected sexual harassment or allowing sexual harassment to continue after they know about it.

Supervisors and managers will also be subject to discipline for engaging in any retaliation.

While supervisors and managers have a responsibility to report harassment and discrimination, supervisors and managers must be mindful of the impact that harassment and a subsequent investigation has on victims. Being identified as a possible victim of harassment and questioned about harassment and discrimination can be intimidating, uncomfortable and re-traumatizing for individuals. Supervisors and managers must accommodate the needs of individuals who have experienced harassment to ensure the workplace is safe, supportive, and free from retaliation for them during and after any investigation.

Bystander Intervention

Any employee witnessing harassment as a bystander is encouraged to report it. A supervisor or manager that is a bystander to harassment is **required** to report it. There are five standard methods of bystander intervention that can be used when anyone witnesses harassment or discrimination and wants to help.

1. A bystander can interrupt the harassment by engaging with the individual being harassed and distracting them from the harassing behavior;
2. A bystander who feels unsafe interrupting on their own can ask a third party to help intervene in the harassment;
3. A bystander can record or take notes on the harassment incident to benefit a future investigation;
4. A bystander might check in with the person who has been harassed after the incident, see how they are feeling and let them know the behavior was not ok; and
5. If a bystander feels safe, they can confront the harassers and name the behavior as inappropriate. When confronting harassment, physically assaulting an individual is never an appropriate response.

Though not exhaustive, and dependent on the circumstances, the guidelines above can serve as a brief guide of how to react when witnessing harassment in the workplace. Any employee witnessing harassment as a bystander is encouraged to report it. A supervisor or manager that is a bystander to harassment is required to report it.

Complaints and Investigations of Sexual Harassment

All complaints or information about sexual harassment will be investigated, whether that information was reported in verbal or written form. An investigation of any complaint, information, or knowledge of suspected sexual harassment will be prompt, thorough, and started and completed as soon as possible. The investigation will be kept confidential to the extent possible. All individuals involved, including those making a harassment claim, witnesses, and alleged harassers deserve a fair and impartial investigation.

Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment. [*Employer Name*] will take disciplinary action against anyone engaging in retaliation against employees who file complaints, support another's complaint, or participate in harassment investigations.

[*Employer Name*] recognizes that participating in a harassment investigation can be uncomfortable and has the potential to retraumatize an employee. Those receiving claims and leading investigations will handle complaints and questions with sensitivity toward those participating.

While the process may vary from case to case, investigations will be done in accordance with the following steps. Upon receipt of a complaint, [*person or office designated*]:

1. Will conduct a prompt review of the allegations, assess the appropriate scope of the investigation, and take any interim actions (for example, instructing the individual(s) about whom the complaint was made to refrain from communications with the individual(s) who reported the harassment), as appropriate. If complaint is verbal, request that the individual completes the complaint form in writing. If the person reporting prefers not to fill out the form, [*person or office designated*] will prepare a complaint form or equivalent documentation based on the verbal reporting;

2. Will take steps to obtain, review, and preserve documents sufficient to assess the allegations, including documents, emails or phone records that may be relevant to the investigation. [*Person or office delegated*] will consider and implement appropriate document request, review, and preservation measures, including for electronic communications;

3. Will seek to interview all parties involved, including any relevant witnesses;

4. Will create a written documentation of the investigation (such as a letter, memo or email), which contains the following:
   a. A list of all documents reviewed, along with a detailed summary of relevant documents;
   b. A list of names of those interviewed, along with a detailed summary of their statements;
   c. A timeline of events;
   d. A summary of any prior relevant incidents disclosed in the investigation, reported or unreported; and
   e. The basis for the decision and final resolution of the complaint, together with any corrective action(s).

5. Will keep the written documentation and associated documents in a secure and confidential location;

6. Will promptly notify the individual(s) who reported the harassment and the individual(s) about whom the complaint was made that the investigation has been completed and implement any corrective actions identified in the written document; and

7. Will inform the individual(s) who reported of the right to file a complaint or charge externally as outlined in the next section.

Legal Protections and External Remedies

Sexual harassment is not only prohibited by [*Employer Name*], but it is also prohibited by state, federal, and, where applicable, local law.

The internal process outlined in the policy above is one way for employees to report sexual harassment. Employees and covered individuals may also choose to pursue legal remedies with the following governmental entities. While a private attorney is not required to file a complaint with a governmental agency, you may also seek the legal advice of an attorney.

New York State Division of Human Rights:

The New York State Human Rights Law (HRL), N.Y. Executive Law, art. 15, § 290 *et seq.*, applies to all employers in New York State and protects employees and covered individuals, regardless of immigration status. A complaint alleging violation of the Human Rights Law may be filed either with the New York State Division of Human Rights (DHR) or in New York State Supreme Court.

Complaints of sexual harassment filed with DHR may be submitted any time **within three years** of the harassment. If an individual does not file a complaint with DHR, they can bring a lawsuit directly in state court under the Human Rights Law, **within three years** of the alleged sexual harassment. An individual may not file with DHR if they have already filed a HRL complaint in state court.

Complaining internally to [*Employer Name*] does not extend your time to file with DHR or in court. The three years are counted from the date of the most recent incident of harassment.

You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that sexual harassment has occurred. Probable cause cases receive a public hearing before an administrative law judge. If sexual harassment is found at the hearing, DHR has the power to award relief. Relief varies but it may include requiring your employer to take action to stop the harassment, or repair the damage caused by the harassment, including paying of monetary damages, punitive damages, attorney's fees, and civil fines.

DHR's main office contact information is: NYS Division of Human Rights, One Fordham Plaza, Fourth Floor, Bronx, New York 10458. You may call (718) 741-8400 or visit: www.dhr.ny.gov.

Go to dhr.ny.gov/complaint for more information about filing a complaint with DHR. The website has a digital complaint process that can be completed on your computer or mobile device from start to finish. The website has a complaint form that can be downloaded, filled out, and mailed to DHR as well as a form that can be submitted online. The website also contains contact information for DHR's regional offices across New York State.

Call the DHR sexual harassment hotline at **1(800) HARASS3** for more information about filing a sexual harassment complaint. This hotline can also provide you with a referral to a volunteer attorney experienced in sexual harassment matters who can provide you with limited free assistance and counsel over the phone.

The United States Equal Employment Opportunity Commission:

The United States Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws, including Title VII of the 1964 federal Civil Rights Act, 42 U.S.C. § 2000e *et seq.* An individual can file a complaint with the EEOC anytime within 300 days from the most recent incident of harassment. There is no cost to file a complaint with the EEOC. The EEOC will investigate the complaint and determine whether there is reasonable cause to believe that discrimination has occurred. If the EEOC determines that the law may have been violated, the EEOC will try to reach a voluntary settlement with the employer. If the EEOC cannot reach a settlement, the EEOC (or the Department of Justice in certain cases) will decide whether to file a lawsuit. The EEOC will issue a Notice of Right to Sue permitting

workers to file a lawsuit in federal court if the EEOC closes the charge, is unable to determine if federal employment discrimination laws may have been violated, or believes that unlawful discrimination occurred by does not file a lawsuit.

Individuals may obtain relief in mediation, settlement or conciliation. In addition, federal courts may award remedies if discrimination is found to have occurred. In general, private employers must have at least 15 employees to come within the jurisdiction of the EEOC.

An employee alleging discrimination at work can file a "Charge of Discrimination." The EEOC has district, area, and field offices where complaints can be filed. Contact the EEOC by calling 1-800-669-4000 (TTY: 1-800-669-6820), visiting their website at www.eeoc.gov or via email at info@eeoc.gov.

If an individual filed an administrative complaint with the New York State Division of Human Rights, DHR will automatically file the complaint with the EEOC to preserve the right to proceed in federal court.

Local Protections

Many localities enforce laws protecting individuals from sexual harassment and discrimination. An individual should contact the county, city or town in which they live to find out if such a law exists. For example, employees who work in New York City may file complaints of sexual harassment or discrimination with the New York City Commission on Human Rights. Contact their main office at Law Enforcement Bureau of the NYC Commission on Human Rights, 22 Reade Street, 1st Floor, New York, New York; call 311 or (212) 306-7450; or visit www.nyc.gov/html/cchr/html/home/home.shtml.

Contact the Local Police Department

If the harassment involves unwanted physical touching, coerced physical confinement, or coerced sex acts, the conduct may constitute a crime. Those wishing to pursue criminal charges are encouraged to contact their local police department.

Conclusion

The policy outlined above is aimed at providing employees at [*Employer Name*] and covered individuals an understanding of their right to a discrimination and harassment free workplace. All employees should feel safe at work. Though the focus of this policy is on sexual harassment and gender discrimination, the New York State Human Rights law protects against discrimination in several protected classes including sex, sexual orientation, gender identity or expression, age, race, creed, color, national origin, military status, disability, pre-disposing genetic characteristics, familial status, marital status, criminal history, or domestic violence survivor status. The prevention policies outlined above should be considered applicable to all protected classes.

STATE OF NEW YORK

6805

2021-2022 Regular Sessions

IN SENATE

May 18, 2021

Introduced by Sen. HARCKHAM -- 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 requiring copies of certain documents physically posted in a workplace to be made available to employees electronically

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

1 Section 1. Section 201 of the labor law, as amended by chapter 457 of
2 the laws of 1946, is amended to read as follows:
3 § 201. Laws and orders to be posted. Wherever persons are employed who
4 are affected by the provisions of this chapter or of the industrial
5 code, the commissioner shall furnish to the employer copies or abstracts
6 of such provisions, rules and orders as he may deem necessary affecting
7 such persons. The copies or abstracts shall be in such language as the
8 commissioner may require and shall be kept posted by the employer in a
9 conspicuous place on each floor of the premises. *Digital versions of*
10 *such copies and abstracts shall also be made available through the*
11 *employer's website or by email. Employers shall provide notice that*
12 *documents required for physical posting are also available electron-*
13 *ically. All other documents required to be physically posted at a work-*
14 *site pursuant to state or federal law or regulation shall also be made*
15 *electronically available in the manner described pursuant to this*
16 *section.*
17 § 2. This act shall take effect immediately.

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

LBD11379-04-1

VETERAN BENEFITS AND SERVICES

The following resources and hotlines are available at no-cost to help veterans understand their rights, protections, benefits, and accommodations:

dol.ny.gov/veteran-benefits-and-services

MENTAL HEALTH AND SUBSTANCE ABUSE RESOURCES

All calls and texts are free and confidential

U.S. Department of Veterans Affairs Veterans Crisis Line: www.veteranscrisisline.net

Call: 988, press 1 Text: 838255

Suicide and Crisis Lifeline: www.veteranscrisisline.net

Call: 988 Text: 988

Crisis Textline:

Text: 741741 Chat: crisistextline.org

NYS Office of Mental Health (OMH): www.omh.ny.gov

NYS Office of Addiction Services and Supports (OASAS): www.oasas.ny.gov/hopeline

Call: 1-877-8-HOPENY (467469)

Text: HOPENY (467369)

LEGAL SERVICES

Veterans Treatment Courts (VTC): ww2.nycourts.gov/courts/problem_solving/vet/courts.shtml

Email: ProblemSolving@courts.state.ny.us

NYS Defenders Association Veteran Defense Program: www.nysda.org/page/AboutVDP

TAX BENEFITS

NYS Department of Tax and Finance

- Information for military personnel and veterans: tax.ny.gov/pit/file/military_page.htm
- Property tax exemptions: tax.ny.gov/pit/property/exemption/vetexempt.htm

EDUCATION, WORKFORCE, AND TRAINING RESOURCES

Veteran Readiness and Employment (VR&E) Program: www.benefits.va.gov/vocrehab

New York State Civil Service Credits for Veterans Program: www.cs.ny.gov

ADDITIONAL RESOURCES

NYS Domestic and Sexual Violence Hotline:

Call: 800-942-6906 Text: 844-997-2121

NYS Workplace Sexual Harassment Hotline:

Call: 1-800-HARASS-3

NYS Department of Motor Vehicles:

- Veteran Status Designation Photo Document: dmv.ny.gov/more-info/veteran-status-designation-photo-document
- Veteran License Plate: dmv.ny.gov/plates/military-and-veterans

NEW YORK STATE DEPARTMENT OF VETERANS' SERVICES

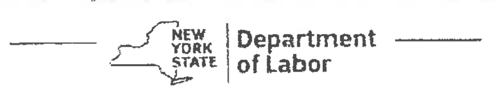
Website: veterans.ny.gov
Help Line: 1-888-838-7697
Email: DVSInfo@veterans.ny.gov

Services: Legal, education, employment and volunteer, financial, health care, and more.

NEW YORK STATE DEPARTMENT OF LABOR VETERANS' PROGRAM

Website: dol.ny.gov/services-veterans
Help Line: 1-888-469-7365
Email: Ask.Vets@labor.ny.gov

Services: Workforce and training resources, unemployment insurance, the Experience Counts program, and more.



P37 (3/23)

The New York State Department of Labor is an Equal Opportunity Employer/Program. Auxiliary aides and services are available upon request and free of charge to individuals with disabilities. TTY/TDD 711 or 1-800-662-1220 (English) / 1-877-662-4886.

Paid Leave for COVID Vaccinations

Effective: March 12, 2021

McKinney's Civil Service Law § 159-c

§ 159-c. Leave time for COVID-19 vaccination

Currentness

<[Expires and deemed repealed Dec. 31, 2023, pursuant to L.2021, c. 77, § 4. As added by L.2020, c. 77, § 1.

1. Every public officer, employee of this state, employee of any county, employee of any community college, employee of any public authority, employee of any public benefit corporation, employee of any board of cooperative educational services (BOCES), employee of any vocational education and extension board, or a school district enumerated in section one of chapter five hundred sixty-six of the laws of nineteen hundred sixty-seven, employee of any municipality, employee of any school district or any employee of a participating employer in the New York state and local employees' retirement system or any employee of a participating employer in the New York state teachers' retirement system shall be entitled to absent himself or herself and shall be deemed to have a paid leave of absence from his or her duties or service for a sufficient period of time, not to exceed four hours per vaccine injection, unless such officer or employee shall receive a greater number of hours pursuant to a collectively bargained agreement or as otherwise authorized by the employer, to be vaccinated for COVID-19.
2. The entire period of the leave of absence granted pursuant to this section shall be excused leave and shall not be charged against any other leave such public officer or employee is otherwise entitled to.
3. Nothing in this section shall be deemed to impede, infringe, diminish or impair the rights of a public employee or employer under any law, rule, regulation or collectively negotiated agreement, or the rights and benefits which accrue to employees through collective bargaining agreements, or otherwise diminish the integrity of the existing collective bargaining agreement.

STATE OF NEW YORK

8481

IN SENATE

March 4, 2022

Introduced by Sen. JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to independent hearing officers for certain disciplinary hearings

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

1 Section 1. Short title. This act shall be known and may be cited as
2 the "New York State firefighter bill of rights act".
3 § 2. Section 75 of the civil service law is amended by adding a new
4 subdivision 2-a to read as follows:
5 *2-a. Independent hearing officer. (a) Notwithstanding any other*
6 *provision of law to the contrary, including but not limited to subdivi-*
7 *sion four of section seventy-six of this title, any paid officer or*
8 *member of an organized fire company or fire department of a city of less*
9 *than one million population, or town, village or fire district who is*
10 *represented by a certified or recognized employee organization pursuant*
11 *to article fourteen of this chapter shall not be subjected to the penal-*
12 *ty of dismissal from service or any other discipline if the hearing,*
13 *upon such charge, has been conducted by someone other than an independ-*
14 *ent hearing officer to be agreed to by the employer and the person*
15 *against whom disciplinary action is proposed. If the parties are unable*
16 *to agree upon a hearing officer, the hearing officer shall be selected*
17 *from a list of seven names to be provided by the public employment*
18 *relations board. The public employment relations board shall maintain a*
19 *list of independent hearing officers for this purpose. The parties shall*
20 *select the hearing officer by alternately striking names from the list*
21 *of seven. The hearing officer shall be vested with all powers of the*
22 *appointing authority, shall conduct and make a record of the hearing,*
23 *and shall render a final decision. The cost incurred in obtaining such*
24 *independent hearing officer shall be divided equally between the*
25 *parties; provided that as may be determined upon the circumstances of*
26 *the case, the hearing officer shall be authorized to allocate such cost*
27 *on the basis of the frivolous nature of any claim made or any defense*
28 *interposed. In order to find a claim or defense to be frivolous, the*
29 *hearing officer must find at least one of the following:*

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

LBD14590-02-2

1 (i) the claim or defense was commenced, used or continued in bad
2 faith, solely to delay or prolong the resolution of the action or to
3 harass or maliciously injure another; or
4 (ii) the claim or defense was commenced or continued in bad faith
5 without any reasonable basis in law or fact. If the claim or defense was
6 promptly discontinued when the party learned or should have learned that
7 the claim or defense lacked such reasonable basis, the hearing officer
8 may find that the party did not act in bad faith. A person served with
9 charges may then, however, elect in writing to proceed with a hearing
10 pursuant to the procedures established in subdivision two of this
11 section in lieu of the procedures set forth in this subdivision.
12 (b) The rights set forth in paragraph (a) of this subdivision shall be
13 in addition to, and shall not supplant, modify or replace any rights
14 provided to an employee pursuant to agreements negotiated by a public
15 employer and an employee organization pursuant to article fourteen of
16 this chapter, or pursuant to any other provision of law, including but
17 not limited to other provisions of this section.
18 § 3. Subdivision 4 of section 201 of the civil service law, as amended
19 by chapter 606 of the laws of 1992, is amended to read as follows:
20 4. The term "terms and conditions of employment" means:
21 (a) salaries, wages, hours and other terms and conditions of employ-
22 ment provided, however, that such term shall not include any benefits
23 provided by or to be provided by a public retirement system, or payments
24 to a fund or insurer to provide an income for retirees, or payment to
25 retirees or their beneficiaries. No such retirement benefits shall be
26 negotiated pursuant to this article, and any benefits so negotiated
27 shall be void.
28 (b) in addition, the terms and conditions of employment for firefight-
29 ers shall include discipline and disciplinary procedures including
30 alternatives to any statutory disciplinary system, provided, however,
31 that any right of firefighters under the terms of any state law to elect
32 coverage under either a statutory disciplinary system or a disciplinary
33 system established by collective negotiations shall not be impaired,
34 unless any such state law authorizes exclusivity of a negotiated disci-
35 plinary system and provided further that no provision contained in the
36 town law, general city law, second class cities law, general municipal
37 law, municipal home rule law, county law, or other state, local, special
38 law or charter provision, or any special police act or other special act
39 created by local law or charter or otherwise created, or this chapter
40 shall prevent or impair the right to collective bargaining for or
41 modification of disciplinary procedures.
42 § 4. Section 204-a of the civil service law is amended by adding a new
43 subdivision 4 to read as follows:
44 4. The terms of any current or expired agreement or interest arbi-
45 tration award between any public employer and any public employee organ-
46 ization representing firefighters relating to the discipline of any
47 firefighters shall be deemed valid and enforceable from the effective
48 date of this subdivision.
49 § 5. This act shall take effect on the first of March next succeeding
50 the date on which it shall have become a law and shall apply to
51 proceedings commenced on or after such effective date. Effective imme-
52 diately, the addition, amendment and/or repeal of any rule or regulation
53 necessary for the implementation of the provisions of this act on its
54 effective date are authorized to be made and completed on or before such
55 effective date.

STATE OF NEW YORK

1997--A

2021-2022 Regular Sessions

IN SENATE

January 16, 2021

Introduced by Sens. JACKSON, BIAGGI, BROUK, HOYLMAN, MANNION, RAMOS, SALAZAR -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to the restrictions on consecutive hours of work for nurses

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

1 Section 1. Section 167 of the labor law, as added by chapter 493 of
2 the laws of 2008, is amended to read as follows:
3 § 167. Restrictions on consecutive hours of work for nurses. 1. When
4 used in this section:
5 a. "Health care employer" shall mean any individual, partnership,
6 association, corporation, limited liability company or any person or
7 group of persons acting directly or indirectly on behalf of or in the
8 interest of the employer, which provides health care services (i) in a
9 facility licensed or operated pursuant to article twenty-eight of the
10 public health law, including any facility operated by the state, a poli-
11 tical subdivision or a public corporation as defined by section sixty-
12 six of the general construction law, or (ii) in a facility operated by
13 the state, a political subdivision or a public corporation as defined by
14 section sixty-six of the general construction law, operated or licensed
15 pursuant to the mental hygiene law, the education law [or], the
16 correction law, or section five hundred four of the executive law.
17 b. "Nurse" shall mean a registered professional nurse or a licensed
18 practical nurse as defined by article one hundred thirty-nine of the
19 education law who provides direct patient care.
20 c. "Regularly scheduled work hours", including pre-scheduled on-call
21 time and the time spent for the purpose of communicating shift reports

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

LBD02199-03-2

1 regarding patient status necessary to ensure patient safety, shall mean
2 those hours a nurse has agreed to work and is normally scheduled to work
3 pursuant to the budgeted hours allocated to the nurse's position by the
4 health care employer; and if no such allocation system exists, some
5 other measure generally used by the health care employer to determine
6 when an employee is minimally supposed to work, consistent with the
7 collective bargaining agreement, if any. Nothing in this section shall
8 be construed to permit an employer to use on-call time as a substitute
9 for mandatory overtime.
10 2. a. Notwithstanding any other provision of law no health care
11 employer shall require a nurse to work more than that nurse's regularly
12 scheduled work hours, except pursuant to subdivision three of this
13 section.
14 b. Nothing in this section shall prohibit a nurse from voluntarily
15 working overtime.
16 3. The limitations provided for in this section shall not apply in the
17 case of:
18 a. a health care disaster, such as a natural or other type of disaster
19 that increases the need for health care personnel, unexpectedly affect-
20 ing the county in which the nurse is employed or in a contiguous county;
21 or
22 b. a federal, state or county declaration of emergency in effect in
23 the county in which the nurse is employed or in a contiguous county; or
24 c. where a health care employer determines there is an emergency,
25 necessary to provide safe patient care, in which case the health care
26 provider shall, before requiring an on-duty employee to remain, make a
27 good faith effort to have overtime covered on a voluntary basis, includ-
28 ing, but not limited to, calling per diems, agency nurses, assigning
29 floats, or requesting an additional day of work from off-duty employees,
30 to the extent such staffing options exist. For the purposes of this
31 paragraph, "emergency", including an unanticipated staffing emergency,
32 is defined as an unforeseen event that could not be prudently planned
33 for by an employer and does not regularly occur; or
34 d. an ongoing medical or surgical procedure in which the nurse is
35 actively engaged and whose continued presence through the completion of
36 the procedure is needed to ensure the health and safety of the patient.
37 4. The provisions of this section are intended as a remedial measure
38 to protect the public health and the quality of patient care, and shall
39 not be construed to diminish or waive any rights of any nurse pursuant
40 to any other law, regulation, or collective bargaining agreement.
41 5. If, after investigation, the commissioner determines that an
42 employer has violated this section, the commissioner shall issue to the
43 employer an order directing compliance therewith, which shall describe
44 particularly the alleged violation. A copy of such order shall be
45 provided to any employee who has filed a complaint and to his or her
46 authorized representative. The commissioner shall assess the employer a
47 civil penalty in an amount not to exceed one thousand dollars for a
48 first violation, two thousand dollars for a second violation, or three
49 thousand dollars for a third or subsequent violation. The employee
50 shall receive an additional fifteen percent of the overtime payment from
51 the employer for each violation as damages.
52 § 2. This act shall take effect on the sixtieth day after it shall
53 have become a law.

61 F.4th 322
United States Court of Appeals, Second Circuit.

Laureen CONNELLY, Donna Delarm, Jill Donovan, Jean Freer, Stefanie Gaudelli, Eleanor Gold, Grace Henriquez, Marion Leavey, Margaret Mackey, Diane Reeves, Christina Sagaria, Erica Salerno, Antoinette White, Deborah Whittaker, Civil Service Association, Inc., Local 1000 AFSCME, AFL-CIO, Rockland County Local 844, County of Rockland Unit 8350, Ann Cole-Hatchard, and Carol Schuler, Plaintiffs-Appellees,
Heather Bennett, William Bennett, and Andrew Schwartz, Plaintiffs,

v.

COUNTY OF ROCKLAND and Kathleen Tower-Bernstein, in her individual capacity, Defendants-Appellants.

No. 21-2597
|
August Term 2022
|
Argued: February 10, 2023
|
Decided: March 7, 2023

Synopsis

Background: County employees and their union brought action against county and director of their department alleging that director violated their First Amendment rights by retaliating against them for sending letter to county legislature objecting to proposed relocation of their office. After jury verdict in defendants' favor, the United States District Court for the Southern District of New York, Kathryn H. Vratil, J., granted employees' motion for judgment as matter of law, 2020 WL 1434523, and granted their motion for permanent injunction, 2021 WL 4199848. County appealed.

[Holding:] The Court of Appeals, Nathan, Circuit Judge, held that there was sufficient evidence to support jury's determination that memorandum of warning and mandatory department-wide meetings did not constitute adverse employment actions.

Reversed and rendered.

West Headnotes (5)

[1] **Federal Courts** Taking case or question from jury; judgment as a matter of law

Court of Appeals reviews de novo grant of motion for judgment as matter of law. Fed. R. Civ. P. 50.

[2] **Federal Civil Procedure** Construction of evidence

When deciding motion for judgment as matter of law, district court must view evidence in light most favorable to nonmovant and grant that party every reasonable inference that jury might have drawn in its favor. Fed. R. Civ. P. 50.

[3] **Federal Civil Procedure** Evidence

Motion for judgment as matter of law may only be granted if there exists such complete absence of evidence supporting verdict that jury's findings could only have been result of sheer surmise and conjecture, or evidence in movant's favor is so overwhelming that reasonable and fair minded persons could not arrive at verdict against it. Fed. R. Civ. P. 50.

[4] **Constitutional Law** Retaliation in general

In First Amendment retaliation case, government employer's response to speech constitutes "adverse action" if it would deter similarly situated individual of ordinary firmness from exercising his or her constitutional rights. U.S. Const. Amend. 1.

[5] **Civil Rights** Employment practices

There was sufficient evidence to support jury's determination that memorandum of warning issued by director of county's probation department to department employees after they sent letter to county legislature stating their objections to proposed relocation of their office and mandatory department-wide meetings did not constitute adverse employment actions required to support employees' First Amendment retaliation claims, notwithstanding employees' testimony that department's actions caused them to fear termination and chilled their speech, in light of evidence that letter did not directly or immediately result in any loss of wages or benefits, and that actual disciplinary actions at probation department were very infrequent. U.S. Const. Amend. 1.

***323** Appeal from the United States District Court for the Southern District of New York, No. 17-cv-2573, Kathryn H. Vratil, *Judge*.

Attorneys and Law Firms

Nathaniel K. Charny, (Russell G. Wheeler, on the brief), Charny & Wheeler, P.C., for Plaintiffs-Appellees Laureen Connelly et al.

Matthew G. Parisi, Bleakley Platt & Schmidt, LLP (Vincent W. Crowe, Bleakley Platt & Schmidt, LLP, Thomas E. Humbach, County Attorney, for County of Rockland, on the brief), for Defendants-Appellants County of Rockland and Kathleen Tower-Bernstein.

Before: Jacobs, Nathan, Circuit Judges, and Gonzalez, District Judge.*

Opinion

Nathan, Circuit Judge:

***324** This appeal concerns the standard for finding an adverse action in a First Amendment retaliation case brought by government employees. Following a jury trial, the district court granted a renewed motion for judgment as a matter of law for the Plaintiffs-Appellees, overturning the jury's finding in favor of the Defendants-Appellants. There was sufficient evidence presented at trial to make the jury's original verdict reasonable. Accordingly, we conclude that the district court improperly resolved a factual question and reverse the grant of judgment as a matter of law for the Plaintiffs.

BACKGROUND

On June 9, 2016, a group of employees of the Rockland County Probation Department sent a letter to the Rockland County Legislature (the Letter) that expressed several objections to a proposal to relocate the Probation Department's office. In response to the Letter, Kathleen Tower-Bernstein, the Department's Director of Probation, directed all Probation Department employees to attend one of two mandatory staff meetings scheduled for June 21 and 22. Tower-Bernstein also sent each employee who signed the letter an identical Memorandum of Warning (the Memorandum). The Memorandum states:

> You are reminded that authority to manage the Rockland County workforce, including location of departments, rests solely with the County Executive. Authority to speak on behalf of individual departments rests with the appointing authority, in conjunction with the Executive office. By submitting a letter as 'members of the Rockland County Department of Probation,' you have demonstrated a disregard for chain of command, a disrespect for the Office of the County Executive and an ignorance of potential repercussions of your action, including political, economic and public perception.
>
> You are advised that further communication of this nature may result in disciplinary action taken against you.

Joint App'x 173.

Soon after, a group of the employee-signatories and their union (the Plaintiffs) brought a First Amendment retaliation claim against Tower-Bernstein and the County of Rockland (the Defendants). The Plaintiffs argued that the Letter constituted protected speech because the employees had spoken as private citizens on a matter of public concern. They also alleged that the Memorandum of Warning and the mandatory department-wide meetings were adverse employment actions taken in retaliation for their speech.

A jury trial was held on three liability issues: (1) whether the Plaintiffs had spoken on a matter of public concern; (2) whether the Plaintiffs had spoken solely as public employees or also as private citizens; and (3) whether the Defendants had taken an adverse employment action against the Plaintiffs.

During the trial, the district court granted the Plaintiffs' motion for judgment as a matter of law on Issue (1), concluding that they had spoken on a matter of public concern when they expressed their opposition to the relocation of the Probation Department's offices. The jury was then asked to decide the remaining issues, but a mistrial was declared after it deadlocked on Issue (2).

A new trial commenced two months later on Issues (2) and (3). After the close of evidence, the Plaintiffs moved for judgment ***325** as a matter of law on both issues. The district court granted the Plaintiff's motion on Issue (2), finding that no reasonable jury could have concluded that the Plaintiffs spoke solely as public employees. The jury was then asked to decide only Issue (3). The jury unanimously concluded that the Memorandum of Warning and the emergency meetings did *not* qualify as adverse employment actions taken against the Plaintiffs. The jury therefore entered a verdict in favor of the Defendants.

After trial, the Plaintiffs renewed their motion for judgment as a matter of law on Issue (3). On May 22, 2020, the district court granted the Plaintiff's motion and vacated the jury's verdict for the Defendants. The court stated that the Memorandum and the meetings were a "textbook example of adverse action" and concluded that "as a matter of law, the Memorandum and the emergency meeting—individually or in combination—would have dissuaded a similarly situated person of ordinary firmness from engaging in constitutionally protected speech." Joint App'x 3122–23. "Considering the weight of authority on this issue, and the fact that nothing in the record suggests a good reason why these particular reprimands do not constitute adverse action, a reasonable jury was compelled to find in favor of plaintiffs on this issue." Joint App'x 3124.

The Plaintiffs later moved for a permanent injunction prohibiting the Defendants from using the Memorandum of Warning against any Plaintiff for any reason and removing the Memorandum from all records and files maintained by the Defendants. On September 15, 2021, the district court filed a memorandum and order granting the motion. The Defendants appealed, arguing that the district court erred in granting judgment as a matter of law on Issues (2) and (3). The Defendants also challenge the permanent injunction.

DISCUSSION

[1] [2] [3] "We review de novo the grant ... of a motion for judgment as a matter of law under Rule 50." *Wolf v. Yamin*, 295 F.3d 303, 308 (2d Cir. 2002). When deciding a Rule 50 motion, "[t]he district court must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor[.]" *Id.* "Such a motion may only be granted if there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it." *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 133 (2d Cir. 2008) (cleaned up). Given this standard, we conclude that the district court erred in deciding that the meetings and the Memorandum constituted an adverse employment action as a matter of law.

[4] Often, the question of "whether an undesirable employment action qualifies as being 'adverse' is a heavily fact-specific, contextual determination" that is left for the jury. *Hoyt v. Andreucci*, 433 F.3d 320, 328 (2d Cir. 2006); *see also Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 756 (2d Cir. 2004) (affirming denial of Rule 50 motion because jury could reasonably conclude that a negative performance evaluation did not constitute a materially adverse action by municipal employer). In a First Amendment retaliation case, a government employer's response to speech constitutes an adverse action if it "would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Dillon v. Morano*, 497 F.3d 247, 254 (2d Cir. 2007) (internal quotation marks omitted). When the alleged ***326** adverse action is a reprimand, the factual circumstances specific to a particular workplace are likely to be relevant to this assessment.

[5] The trial record below contains evidence that could lead a reasonable jury to conclude that the test for adverse action was not met. Indeed, the evidence below could support a conclusion that the Memorandum and the meetings were no more than a " 'petty slight,' 'minor annoyance,' or 'trivial' punishment." *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). For example, one of the Plaintiffs testified that only one employee had ever been suspended in the 26 years that she had worked at the Department of Probation. Joint

App'x 2583–84. Another Plaintiff testified that no one had ever been fired during the ten years that Tower-Bernstein served as director. Joint App'x 2449. And a third Plaintiff could not recall a time in which she had ever been told "no" by Tower-Bernstein before June of 2016. Joint App'x 2477. The infrequency of actual disciplinary action at the Probation Department could lead a reasonable jury to infer that the one-page Memorandum and the fifteen-minute meeting would not have deterred a similarly situated employee of ordinary firmness from exercising her First Amendment rights. To be sure, notwithstanding these facts, a reasonable jury could have reached a different conclusion on this record by according greater weight to such evidence as the Probation Department's refusal to withdraw the Memorandum and the testimony of some Plaintiffs that the Department's actions caused them to fear termination and chilled their speech. But there is not "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Brady*, 531 F.3d at 133 (internal quotation marks omitted). Nor is "the evidence in favor of the movant ... so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it." *Id.* (cleaned up).

In overturning the jury's verdict, the district court reasoned that "courts in the Second Circuit have repeatedly listed reprimands as core examples of adverse action." Joint App'x 3123. While it is true that our cases have often mentioned "reprimands" when listing examples of adverse employment actions, *see Wrobel v. County of Erie*, 692 F.3d 22, 31 (2d Cir.2012); *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 226 (2d Cir. 2006); *Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002); *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999), we have also emphasized that not all "criticism of an employee" rises to the level of "an adverse employment action." *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 570 (2d Cir. 2011). *See Zelnik*, 464 F.3d at 217 ("A plaintiff cannot support [an adverse employment action] determination unless he can show that an alleged act of retaliation is more than de minimis."). The question of whether a *particular* criticism or reprimand qualifies as an adverse employment action will often be a fact-intensive inquiry for the jury. *See Millea*, 658 F.3d at 165 ("A reasonable jury *could* conclude" that an employee would be deterred from exercising his rights "even when, as here, the letter does not directly or immediately result in any loss of wages or benefits ...." (emphasis added)); *see also, e.g., Lawrence v. Mehlman*, 389 F. App'x 54, 56 (2d Cir. 2010) (summary order) ("Reprimands or negative evaluation letters *may, in some circumstances*, constitute adverse employment action, and whether they do so is typically a fact for the jury." (emphasis added)) (collecting cases).

***327** While reprimands are often adverse employment actions, the district court was wrong to conclude that *all* reprimands are, as a matter of law. To hold otherwise would give talismanic significance to a label and invite difficult line-drawing problems around exactly what qualifies as a "reprimand" as opposed to a criticism.

Because we conclude that the district court erred in granting judgment as a matter of law on Issue (3), we do not reach the Appellants' remaining arguments regarding Issue (2). And because the Plaintiffs' motion for a permanent injunction required them to prevail on the merits, the district court's order granting the injunction must be reversed.

* * *

For the foregoing reasons, the judgment of the district court is **REVERSED**, and the case is remanded with directions to enter judgment for the Defendants in light of the jury's verdict.

All Citations

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Footnotes

* Judge Hector Gonzalez, of the United States District Court for the Eastern District of New York, sitting by designation.

End of Document

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STATE OF NEW YORK

14

2023-2024 Regular Sessions

IN SENATE

(Prefiled)

January 4, 2023

Introduced by Sens. GOUNARDES, ADDABBO, BROUK, HOYLMAN, KRUEGER, LIU, MAYER, MYRIE, RAMOS, RIVERA, SALAZAR, SANDERS, SEPULVEDA, SKOUFIS, THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the general obligations law, in relation to the release of certain claims by certain employees

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

1 Section 1. The general obligations law is amended by adding a new
2 section 5-338 to read as follows:
3 *§ 5-338. Release of certain employee claims. 1. For purposes of this*
4 *section, the following terms shall have the following meanings:*
5 *(a) "Employer" shall mean all public and private employers within the*
6 *state.*
7 *(b) "Employee" shall mean all public and private employees within the*
8 *state.*
9 *2. No release of any claim by an employee, or independent contractor*
10 *who is a natural person, against an employer, is enforceable if, as part*
11 *of the agreement resolving such claim, the employee or independent*
12 *contractor is prohibited from applying for, accepting, or engaging in*
13 *future employment with such employer, or any entity or entities related*
14 *to such employer. The provisions of this section shall not preclude an*
15 *employee and employer from agreeing to terminate an existing employment*
16 *relationship as part of a settlement of a claim. If a release of a*
17 *claim is rendered unenforceable pursuant to this section, the employer*
18 *shall remain bound by all other provisions of the settlement agreement,*
19 *including the obligation to provide the full consideration to the*
20 *employee as set forth in the agreement.*
21 § 2. This act shall take effect on the sixtieth day after it shall
22 have become a law and shall apply to all agreements entered into on and
23 after such date.

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

LBD01493-01-3

STATE OF NEW YORK

4516

2023-2024 Regular Sessions

IN SENATE

February 9, 2023

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

AN ACT to amend the general obligations law, in relation to violations of nondisclosure agreements in certain settlement agreements

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

1 Section 1. Section 5-336 of the general obligations law, as amended by
2 chapter 160 of the laws of 2019, is amended to read as follows:
3 § 5-336. Nondisclosure agreements. 1. (a) Notwithstanding any other
4 law to the contrary, no employer, its officers or employees shall have
5 the authority to include or agree to include in any settlement, agree-
6 ment or other resolution of any claim, the factual foundation for which
7 involves discrimination, *harassment, or retaliation,* in violation of
8 laws prohibiting discrimination, *including discriminatory harassment or*
9 *retaliation,* including but not limited to, article fifteen of the execu-
10 tive law, any term or condition that would prevent the disclosure of the
11 underlying facts and circumstances to the claim or action unless the
12 condition of confidentiality is the complainant's preference.
13 (b) Any such term or condition must be provided in writing to all
14 parties in plain English, and, if applicable, the primary language of
15 the complainant, and the complainant shall have *up to* twenty-one days to
16 consider such term or condition. If [~~after twenty-one days such term or~~
17 ~~condition~~] *confidentiality* is the complainant's preference, such prefer-
18 ence shall be memorialized in an agreement signed by all parties. For a
19 period of at least seven days following the execution of such agreement,
20 the complainant may revoke the agreement, and the agreement shall not
21 become effective or be enforceable until such revocation period has
22 expired.
23 (c) Any such term or condition shall be void to the extent that it
24 prohibits or otherwise restricts the complainant from: (i) initiating,
25 testifying, assisting, complying with a subpoena from, or participating

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

LBD02527-01-3

1 in any manner with an investigation conducted by the appropriate local,
2 state, or federal agency; or (ii) filing or disclosing any facts neces-
3 sary to receive unemployment insurance, Medicaid, or other public bene-
4 fits to which the complainant is entitled.
5 2. Notwithstanding any provision of law to the contrary, any provision
6 in a contract or other agreement between an employer or an agent of an
7 employer and any employee [~~or~~], potential employee, or independent
8 contractor of that employer entered into on or after January first, two
9 thousand twenty, that prevents the disclosure of factual information
10 related to any future claim of discrimination is void and unenforceable
11 unless such provision notifies the employee [~~or~~], potential employee, or
12 independent contractor that it does not prohibit [~~him or her~~] the
13 complainant from speaking with law enforcement, the equal employment
14 opportunity commission, the state division of human rights, the attorney
15 general, a local commission on human rights, or an attorney retained by
16 the employee or potential employee.
17 3. Notwithstanding any other law to the contrary, no release of any
18 claim, the factual foundation for which involves unlawful discrimi-
19 nation, including discriminatory harassment, or retaliation, shall be
20 enforceable, if as part of the agreement resolving such claim:
21 (a) the complainant is required to pay liquidated damages for
22 violation of a nondisclosure clause or nondisparagement clause;
23 (b) the complainant is required to forfeit all or part of the consid-
24 eration for the agreement, for violation of a nondisclosure clause or
25 nondisparagement clause; or
26 (c) it contains or requires any affirmative statement, assertion, or
27 disclaimer by the complainant that the complainant was not in fact
28 subject to unlawful discrimination, including discriminatory harassment,
29 or retaliation.
30 § 2. This act shall take effect immediately and shall apply to agree-
31 ments entered on or after such date.

Pending Legislation

Automated employment decision tools

STATE OF NEW YORK

567

2023-2024 Regular Sessions

IN ASSEMBLY

January 9, 2023

Introduced by M. of A. JOYNER -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to establishing criteria for the use of automated employment decision tools

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

1 Section 1. The labor law is amended by adding a new section 203-f to
2 read as follows:
3 § 203-f. Use of automated employment decision tools. 1. For purposes
4 of this section, the following terms shall have the following meanings:
5 a. "Automated employment decision tool" means any system used to
6 filter employment candidates or prospective candidates for hire in a way

7 that establishes a preferred candidate or candidates without relying on

8 candidate-specific assessments by individual decision-makers. Automated

9 employment decision tools shall include personality tests, cognitive

10 ability tests, resume scoring systems and any system whose function is

11 governed by statistical theory, or whose parameters are defined by such

12 systems, including inferential methodologies, linear regression, neural

13 networks, decision trees, random forests and other artificial intelli-

14 gence or machine learning algorithms. The term "automated employment

15 decision tool" does not include a tool that does not automate, support,

16 substantially assist or replace discretionary decision-making processes

17 and that does not materially impact natural persons.

18 b. "Disparate impact analysis" means an impartial analysis, including

19 but not limited to testing of the extent to which use of an automated

20 employment decision tool is likely to result in an adverse impact to the

21 detriment of any group on the basis of sex, race, ethnicity, or other

22 protected class under article fifteen of the executive law. The results

23 of such analysis shall be reported to the employer implementing or using

24 an automated employment decision tool. A disparate impact analysis

25 shall differentiate between candidates who were selected and candidates

EXPLANATION--Matter in italics (underscored) is new; matter in brackets

[-] is old law to be omitted.

LBD02768-01-3

A. 567 2

1 who were not selected by the tool and shall include a disparate impact
2 analysis as specified in the uniform guidelines on employee selection
3 procedures promulgated by the United States equal employment opportunity
4 commission.
5 c. "Employment decision" means to screen candidates for employment.
6 2. It shall be unlawful for an employer to implement or use an auto-
7 mated employment decision tool that fails to comply with the following
8 provisions:
9 a. No less than annually, a disparate impact analysis shall be
10 conducted to assess the actual impact of any automated employment
11 decision tool used by any employer to select candidates for jobs within
12 the state. Such disparate impact analysis shall be provided to the
13 employer but shall not be publicly filed and shall be subject to all
14 applicable privileges.
15 b. A summary of the most recent disparate impact analysis of such tool
16 as well as the distribution date of the tool to which the analysis
17 applies has been made publicly available on the website of the employer
18 or employment agency prior to the implementation or use of such tool.
19 c. No less than annually, any employer using an automated employment

20 decision tool shall provide to the department such summary of the most
21 recent disparate impact analysis provided to the employer on that tool.
22 3. The attorney general may initiate an investigation if a preponder-
23 ance of the evidence, including the summary of the most recent dispa-
24 rate impact analysis establishes a suspicion of a violation. The
25 attorney general may also initiate in any court of competent jurisdic-
26 tion any action or proceeding that may be appropriate or necessary for
27 correction of any violation issued pursuant this section, including
28 mandating compliance with the provisions of this section or such other
29 relief as may be appropriate.
30 4. The commissioner may initiate an investigation if a preponderance
31 of the evidence, including the summary of the most recent disparate
32 impact analysis establishes a suspicion of a violation. The commission-
33 er may also initiate in a court of competent jurisdiction any action or
34 proceeding that may be appropriate or necessary for the correction of
35 any violation issued pursuant to this section, including mandating
36 compliance with the provisions of this section or such other relief as
37 may be appropriate.
38 5. The department may promulgate rules and regulations as it deems
39 necessary to effectuate the purposes of this section, on or before such
40 effective date.
41 § 2. This act shall take effect immediately.