

Testimony of Miriam F. Clark, President of NELA/NY

Good morning. Thank you for the opportunity to testify at this morning's hearing.

I am Miriam Clark, the president of National Employment Lawyers Association, New York affiliate. I have been representing employees, including victims of sexual and other forms of harassment, for more than thirty years.

I am here to describe how New York law throws up barrier after barrier to victims of unlawful harassment who seek justice, and instead protects employers from liability in most circumstances. Only comprehensive legislative changes, such as those in NELA NY's proposed legislation, will eliminate these barriers.

I don't have time this morning to discuss every one of these obstacles, but I will focus on three that are especially egregious and that would be eliminated by our proposed legislation.

Before I do so, I want to emphasize that we seek to expand these protections to victims of all forms of discrimination and harassment, not only victims of sexual harassment. Hostile work environments based on race, for example -- such as workplaces in which employees face nooses, -- are just as damaging and invidious as those based on sex.

**A HOSTILE WORK ENVIRONMENT SHOULD BE UNLAWFUL EVEN IF THE
CONDUCT IS NOT "SEVERE OR PERVASIVE"**

First, in order for a hostile work environment to be unlawful under New York state law, a court has to conclude that the harassment was severe or pervasive. Hernandez v. Kaisman, 103 A.D.3d 106, 957 N.Y.S.2d 53 (1st Dep't 2012).

Here are some recent examples of conduct that appellate courts have not held to be severe or pervasive under New York law:

- Defendant told plaintiff she should get breast implants and offered to take her to a doctor who could perform the procedure;
- Defendant told plaintiff that her underwear was exposed but told her that she should not have adjusted her pants because he had been “enjoying himself”;
- Defendant placed whipped cream on the side of his mouth and asked plaintiff if this “looked familiar”;
- Defendant repeatedly told plaintiff that she needed to lose weight;
- Defendant once touched plaintiff’s rear end and told her she needed to “tighten it up”;
- Defendant attempted to get plaintiff to socialize with his male friends despite her refusal;
- Defendant took females, including other female employees, into rooms for extended periods of time;
- Defendant often spoke in public about his affinity for women with large breasts;
- Defendant frequently walked around the office in only long johns and a tee shirt;
- Defendant showed plaintiffs a pen holder which was a model of a person and in which the pen would be inserted into its “rectum”.

Hernandez v. Kaisman, 103 A.D.3d 106, 957 N.Y.S.2d 53 (1st Dep’t 2012). The court found that these actions, taken against two women over a period of time, were not sufficiently severe or pervasive to violate New York State law. In other words, this kind of behavior is perfectly legal in New York State workplaces, since an employee has no legal means to challenge it and no employer need stop it.

In another case, just two years ago, a court found that the following conduct by a supervisor toward a subordinate was legally permissible:

- Called plaintiff a “dumb blond”, “Blondie”, “Money Bunny” and “Mae West”;
- Claimed at a staff meeting that he and she would be sharing a hotel room during an upcoming business trip;
- Told a client that he and the employee they had showered together;
- Made sporadic remarks about her appearance and work attire;
- Swatted her on the butt with papers that he was holding.
- Jokingly told her that if she didn’t work better he was going to bring his paddle from home;
- On three or four subsequent occasions, stood in the doorway of her office and made

spanking motions with his hands.

Pawson v. Ross, 137 A.D.3d 1536, 29 N.Y.S.3d 600 (3d Dep't 2016)

The same court, the Appellate Division, Third Department, found in 2015 that the following conduct by a supervisor, all perpetrated against the same employee, was legally permissible:

- Pulled on plaintiff's bra straps;
- Pulled her hair twice;
- Suggested that plaintiff purchase certain sexual paraphernalia;
- Rubbed lubricant on plaintiff's arm;
- Called her a sexually derogatory name;
- Described a party that he had attended in sexually graphic terms;
- Claimed that he ejaculated into a plate of food that he had brought into the office to share;
- Called her a derogatory term for lesbian;
- Gave her a refrigerator magnet with a crab on it and said she had crabs.

Minckler v. United Parcel Serv., Inc., 132 A.D.3d 1186, 19 N.Y.S.3d 602 (3d Dep't 2015)

NELA-NY's legislation would eliminate the "severe or pervasive" barrier. We propose a different minimum threshold based on the New York City Human Rights Law: the employer is not liable if it can show that the conduct was a "petty slight" or "trivial inconvenience".

EMPLOYERS SHOULD BE RESPONSIBLE FOR THE CONDUCT OF THEIR SUPERVISORS

New York employers also escape liability because they are often held to be not responsible for hostile work environments created by their low-level and mid-level supervisors. Under current state law, the only exception is in the rare situation where the employee can prove that the employer encouraged, condoned, or expressly or impliedly approved the supervisor's conduct. See Human Rights ex rel. Greene v. St. Elizabeth's Hosp., 66 N.Y.2d 684, 687, 487

N.E.2d 268, 496 N.Y.S.2d 411 (1985). Most New York state courts follow the federal standard, which gets the employer completely off the hook if the employee failed to promptly use a “reasonable avenue of complaint” provided by the employer. See e.g. Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998).

In the real world, only a small number of those who experience harassment (one in ten) ever formally report incidents of harassment. Elyse Shaw et al., Institute for Women’s Policy Research, Sexual Harassment and Assault at Work: Understanding the Costs (2018), https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf. (last accessed Feb. 11, 2019), citing Lilith M. Cortina & Jennifer L. Berdahal, Sexual Harassment in Organizations: A Decade of Research in Review, 1 *The Sage Handbook of Organizational Behavior* 469-497 (2008).

Those who do complain often find their lawsuits dismissed because courts hold that they waited too long to complain, or complained to the wrong person.

For example, in Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999) plaintiff’s supervisor harassed her for months, including unwanted sexual touching. Her claim against the employer was dismissed because she delayed reporting the harassment for a few months, finally breaking down in tears in a disciplinary hearing concerning her absenteeism.

Many victims of sexual harassment don’t complain of harassment by their supervisors because they are afraid of retaliation. Their claims are dismissed unless they can come forward with evidence that their fear of retaliation is “credible”, which means they have to prove that the employer ignored or resisted similar complaints or took adverse action against employees in

response to complaints. Finnerty v. William H. Sadler, Inc., 176 Fed. App'x 158, 163, 2006 U.S. App. LEXIS 8620 (2d Cir. 2006)

Thus, victims are routinely found to have no claims against their employers where they hesitated to report harassment because they are told their complaints will not be kept confidential, Finnerty v. William H. Sadler, Inc., *supra* at 162, or because they learn from co-workers that the managers they were thinking of reporting “tend to get people fired from their jobs.” Payano v. Fordham Tremont CMHC, 287 F. Supp. 2d 470 (S.D.N.Y. 2003).

In a particularly egregious example, Joyner v. City of N.Y., 2012 U.S. Dist. LEXIS 146787 (S.D.N.Y. Oct. 11, 2012), a corrections officer was subjected to almost a year of sexual harassment by a captain, a supervisor many levels above her in rank.

She described numerous occasions on which he attempted to kiss her, blocked her from exiting spaces, or physically interacted with her in overly familiar ways. For example, he twice took a beverage from her hand and drank from it, saying on one occasion, “I don’t drink from just anybody, baby girl.” He knocked on the door to the locker room, calling to the plaintiff by name; when she exited, he explained that he wanted to see what she was wearing and how she acted when she was by herself. Finally, he allegedly said to the plaintiff, “Why don’t you let me make love to you four, five times so I can get it out of my system. Stop acting like you don’t like me.”

The corrections officer did not complain about the captain’s behavior until a month after the last incident, because she was afraid of retaliation. She called co-workers as witnesses to testify that they shared her belief that the Department of Corrections systematically retaliates against officers who report sexual harassment by their supervisors. The witnesses asserted that the

Department punished female officers who complained and testified that they themselves were afraid of backlash if they supported victims.

None of this was enough for the court, which dismissed plaintiff's claim against the Department on the ground that she waited too long to complain and that her fear of retaliation was unreasonable.

On its face, the law protects women and others from retaliation if they complain of unlawful harassment. N.Y. Exec. Law § 296(1)(e) (2019). You may wonder, given this protection, why so many are afraid to come forward. The answer is that victims are not protected from retaliation unless they can show that at the time they made the complaint, it was reasonable to believe that the conduct they were complaining of was unlawful. If a court decides that "no reasonable person" could believe that the conduct the victim endured was unlawful, the employer is free to fire the complaining employee. See e.g. Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001), cited in Kate Weber Nunez, Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law, 122 Penn St. L. Rev. 463, 483 (2017).

This standard puts victims in an impossible double bind: complain too early, and you are not protected from retaliation. Complain too late, and your employer is not responsible for the harassment you suffer. Nunez, supra, citing Deborah L. Brake & Joanna L. Grossman, The Failure of Title VII as a Rights-Claiming System, 86 N.C. L. Rev. 859, 915 (2008). Not surprisingly, researchers have found that although an increasing number of employers have enacted anti-harassment policies, surveys show no corresponding reduction in the amount of harassment in workplaces. Nunez, supra, at 488, citing Joanna L. Grossman, The

Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law,
26 Harv. Women's L.J. 3, 49–64 (2003).

NELA NY's proposed legislation would make employers responsible for harassment committed by their supervisory employees, even where the victim complains too late, to the wrong person, or is afraid to complain at all.

PUNITIVE DAMAGES ARE NECESSARY TO CHANGE EMPLOYER BEHAVIOR

Finally, unlike federal law and New York City law, the New York State Human Rights Law does not allow punitive damages to be awarded against employers. This means that even where employees successfully prove their cases, the amount of damages awarded is often so low that employers may choose to accept the damages as a cost of doing business, as opposed to terminating popular harassers or changing workplace culture.

The lack of availability of punitive damages especially affects workplaces employing low-wage workers. The damages a plaintiff may claim in a hostile work environment case under the New York State Human Rights Law in court are limited to economic loss and compensatory damages for emotional distress -- and attorney fees if the hostile work environment is based on sex. N.Y. Exec. Law § 297(4), § 297(9), § 297(10)(2019). In many cases of sexual harassment, there is no economic loss at all -- the plaintiff simply suffers and eventually quits, with or without a new job on the horizon. Or the economic loss is limited because the plaintiff is a low wage worker, so the amount of back pay damage the employer is forced to pay after terminating her is minimal, from the employer's point of view.

Damages for emotional distress awarded by juries and the State Division of Human Rights are

frequently and arbitrarily reduced by courts to amounts that are unlikely to affect employers' bottom line or motivate employers to change their behavior.

For example, last year in Matter of Amg Managing Partners, LLC v. New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764 (4th Dep't 2017), the Appellate Division reduced an award by the State Division of Human Rights from \$65,000 to \$25,000, https://dhr.ny.gov/sites/default/files/pdf/Commissioners-Orders/fragale_v_amg_managing_partners_etal.pdf (last accessed Feb. 11, 2019).

In that case, a female employee of a collection agency was frequently called "Polish porn princess" "fucking dyke", "fucking cunt" and "fucking bitch". Her co-workers regularly propositioned her for sex, took photos of her and passed them around the office and asked her to "come sit on my dick." She testified that as a result of the hostile work environment, she had attended many counseling sessions, suffered from insomnia and was constantly upset. Despite this compelling evidence of severe or pervasive harassment, the Appellate Division held that the \$65,000 emotional distress award by the State Division of Human Rights was "excessive" and reduced it to \$25,000.

When a plaintiff chooses to forego her right to a jury trial, and to file an administrative claim with the State Division of Human Rights, the Division may obtain civil penalties against the employer. But again, these penalties are often so low as to be nothing more than a cost of doing business for many employers. In the AMG Partners case described above, the employer was ordered to pay only \$15,000 in civil penalties.

Punitive damages awards, unlike emotional distress awards, are specifically designed to punish employers who allow hostile work environments to thrive, and to deter them from

continuing to violate the law. See United States v. Space Hunters, Inc., 429 F.3d 416, 428 (2d Cir. 2005)(the purpose of punitive damages is to punish violators and deter them from engaging in future unlawful conduct.). Punitive damages are measured not by the amount the employee earned, but by the egregiousness of the conduct she suffered, and the employer's ability to pay, See e.g. Duarte v. St. Barnabas Hosp., 341 F. Supp. 3d 306, (S.D.N.Y. 2018). As such, the fear of a significant punitive damages award therefore could have an actual impact on an employer's calculus as to whether to retain a harasser, or to allow a hostile environment to flourish.

NELA/NY's proposed legislation would provide for punitive damages under the New York State Human Rights Law. Our proposal would allow employers the opportunity to mitigate those damages if they can demonstrate that they maintain robust anti-harassment policies, training and complaint procedures.

CONCLUSION

In many significant ways, the New York State Human Rights Law shields employers from liability for maintaining hostile work environments and disincentivizes victims from exercising their rights. Even when employers are found to be liable, awards are often so low that employers accept them as a cost of doing business. Fundamental legislative change is needed to shift the balance from protecting employers to protecting employees, and we believe that NELA/NY's legislative package is the best way this can be accomplished.



January 28, 2019

Summary of Amendments to the NYSHRL

NELA/NY proposes changes to the New York State Human Rights Law which will:

- Increase protections to all protected classes instead of giving additional or special protections to employees who have been sexually harassed.
- Eliminate the “severe or pervasive” standard currently required in discriminatory harassment cases. This standard is primarily applied to sexual harassment cases, but is also applied to harassment based on all protected categories. This “severe or pervasive” standard has evolved to a standard that prevents many victims from getting “their day in court” because the law allows for a fair amount of sexual and/or racial harassment before a case is “actionable.” While many employers may espouse, on paper, “zero tolerance” for sexual (and, sometimes, racial) harassment, in practice the law tolerates significant amounts of discriminatory harassment. Coupled with the protections now accorded to all protected categories, instead of just victims of sexual and/or racial harassment, this amendment will allow more cases to go forward and be decided on their merits.

- Eliminate the Faragher/Ellerth defense. This affirmative defense enables an employer to avoid liability where supervisors sexually harass employees but no “tangible employment action” follows. It also allows for many cases of co-worker sexual harassment to go unremedied. In the 20 years since it was first recognized, this defense has established barriers to the successful pursuit of harassment claims, while spawning a cottage industry of perfunctory ineffective sexual harassment training for employees to aid in the proof of this affirmative defense.
- Allow attorney’s fees for all protected categories, not just victims of gender discrimination. This will allow employees who might otherwise not be able to afford counsel to prosecute their cases with the help of “private attorney generals.”
- Allow punitive damages. NELA/NY believes that the potential of punitive damage awards will be an important deterrent to employer misconduct.
- Protect independent contractors from all forms of workplace discrimination, not just sexual harassment.
- Establish that “a motivating factor” is the standard for proving all claims under the NYSHRL. Higher standards of causation have been significant barriers to successful prosecution of these claims.
- Clarify that the employer is liable for the conduct of its independent contractors.

The proposed amendments are as follows:

§292(5): Covers employers with four or more employees for all forms of discrimination; and employers with one or more employees for discriminatory harassment.

Text:

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

§292(35): Clarifies that discrimination need only be “a motivating factor.”

Text:

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

§296(1)(h): Extends protection to discriminatory and to retaliatory harassment based on all protected categories; eliminates the “severe or pervasive” standard from discriminatory and retaliatory harassment cases.

Text:

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

§296(1)(i): Eliminates part of the Faragher/ Ellerth defense.

Text:

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

§296(1-b): Sets out the standard for liability of the employer for discriminatory practices of its employees or agents.

Text:

1-b. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subsection (1) of section 296 of this article only where:

- (1) The employee or agent exercised managerial or supervisory responsibility; or
- (2) The employer, licensing agency, employment agency or labor organization knew of the employee’s or agent’s discriminatory conduct, and acquiesced in such conduct or failed to take immediate and/or appropriate corrective action; an employer licensing agency, employment

agency, or labor organization shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

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

§296(1-c): Sets out the standard for liability of employer, licensing agency, employment agency or labor organization for the discriminatory practice(s) committed by its independent contractors.

Text:

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

§296(1-d) and (1-e): Allows employers' actions to be considered in mitigation of the amount of civil penalties or punitive damages.

Text:

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

(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

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

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

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

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

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

1-e. The demonstration of any or all of the factors in subsection 1-d, in addition to any other relevant factors, shall be considered in mitigation of the amount of civil penalties to be imposed by the division of human rights pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to this article and shall be among the factors considered in determining an employer's liability under subsection 1-b(3).

§296(1-f): Sets out standards for joint and several liability of individual employees.

Text:

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

§296-b. Clarifies basis for unlawful discriminatory practices relating to domestic workers

Text:

1. For the purposes of this section: "Domestic workers" shall have the meaning set forth in section two of the labor law.

2. It shall be an unlawful discriminatory practice for an employer to:

(a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual ; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

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

§296-d: Addresses circumstances under which employers are liable to non-employees in the workplace, and extends liability for all forms of unlawful discriminatory conduct.

Text:

§296-d. Unlawful discriminatory practices ~~Sexual harassment~~ relating to non-employees.

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

§297(4)(c)(iv): Extends punitive damages to employment discrimination actions, without limitation on the amount, to cases brought before the State Division of Human Rights.

Text:

...(iv) awarding of punitive damages, in cases of employment discrimination to the person aggrieved by such practice, and, in cases of housing discrimination ~~only~~, with damages in housing discrimination cases in an amount not to exceed ten thousand dollars;

§297(9): Provides for punitive damages.

Text:

Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, ~~in cases of housing discrimination only~~, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section ...

§297(10): Provides for attorneys' fees to prevailing plaintiffs in all employment discrimination cases, not just those based on sex discrimination.

Text:

With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of credit discrimination where sex is the basis of such discrimination, and with respect to a claim in all cases of employment discrimination in an action or proceeding under this section or section two hundred ninety-eight of this article, the commissioner or the court ~~may in its discretion~~ shall

award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section.

§300: Adds language to beginning of Construction section to explain that the statute is to be construed liberally, regardless of how federal civil and human rights laws are construed.

Text:

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



**SUPPLEMENT TO NELA/NY SUMMARY OF AMENDMENTS
TO THE NEW YORK STATE HUMAN RIGHTS LAW (NYSHRL)**

February 5, 2019

The Human Rights Law was passed to provide equal employment opportunity in the workplace. Section 291(1) specifically states: “The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right.”

As an organization whose attorneys represent employees in employment matters, NELA/NY has identified portions of the statute that need amendment to ensure that the right to equal employment opportunity is available to all employees and that the right is actually enforceable in practice, not just on paper.

THE PROPOSED AMENDMENTS ARE AS FOLLOWS:

**SUBJECT: PROTECTION FROM DISCRIMINATORY HARASSMENT FOR ALL
EMPLOYEES – PROPOSED BILL AMENDS EXISTING §292(5):**

PROPOSED AMENDMENT TO TEXT:

§292(5): The term “employer” does not include any employer with fewer than four employees or independent contractors ~~persons~~ in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination ~~based on sex~~ pursuant to subdivision one of section two hundred ninety-six of this article, with respect to ~~sexual~~ discriminatory harassment only, the term “employer” shall include all employers within the state.

RATIONALE:

This amendment first establishes that for purposes of counting individual persons to determine whether the employer has four employees, and is thereby prohibited from engaging in

employment discrimination, all individual persons who are classified as independent contractors shall be included in the calculation.

This bill also establishes that all employees within the state are protected by law from discriminatory harassment, not just sexual harassment, regardless of the size of the employer. While the legislature has already recognized that, domestic workers are particularly vulnerable to harassment where it exists *precisely because* they are isolated in their jobs (see § 296-b), other kinds of workers can also be susceptible to harassment in very small workplaces. This amendment protects all workers from discriminatory harassment, not just sexual harassment.

SUBJECT: STANDARD FOR PROVING CAUSATION IN DISPARATE TREATMENT CLAIMS – PROPOSED BILL ADDS A NEW §292(35) TO CLARIFY THAT DISCRIMINATION NEED ONLY BE A “MOTIVATING FACTOR” TO BE ILLEGAL:

PROPOSED TEXT:

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

RATIONALE:

To ensure that the Human Rights Law is “construed liberally for the accomplishment of the remedial purposes” of the law, as set forth in Section 300, the proposed standard of proof allows a finding of liability if the jury finds that discrimination was a factor in a decision. Recent federal court decisions have required that claims for age discrimination, and all claims for retaliation, can only be established if “but-for” the discrimination, the challenged action would not have taken place. Because the NYSHRL has been interpreted to follow with federal law (which NELA/NY seeks to change through amendment of Section 300), this standard has been applied in cases brought under the NYSHRL as well.

The “but-for” discrimination standard is unduly restrictive and confusing in its application by jurors. Moreover, application of the standard often means that some amount of discrimination is acceptable if an employer can show other reasons for its actions. If employees are to be truly protected from discrimination, then it should be sufficient to show that the action taken against them was motivated, at least in part, by discrimination or retaliation. This is the current standard for disparate treatment claims of discrimination under the federal Title VII of the Civil Rights Act. Thus, this amendment simply eliminates confusion and makes the more liberal standard of proof applicable in all claims of discrimination and retaliation.

NELA/NY is amenable to limiting this section to employment as it could be interpreted to cover claims of credit, public accommodation and housing.

SUBJECT: EXTENDING PROTECTION TO ALL PROTECTED CATEGORIES; AND ELIMINATING THE “SEVERE’ OR “PERVASIVE” STANDARD – PROPOSED BILL ADDS A NEW §296(1)(h):

PROPOSED TEXT:

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

RATIONALE:

The rule that harassment must be “severe or pervasive” to constitute actionable discrimination, first set forth by the Supreme Court in 1986, has undermined employees’ right to be free from discrimination in the workplace (as compared to being fired for discriminatory reasons) and has precluded many employees from stating claims even though they have been treated less well than others for discriminatory reasons. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 73 (1st Dep’t 2009)(citing *Meritor Sav. Bank, FSB v Vinson*, 477 US 57, 67 (1986) and Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be “Severe or Pervasive” Discriminates among “Terms and Conditions” of Employment*, 62 Md L Rev 85, 87 (2003)). Time after time, courts have dismissed claims of harassment that included outrageous behavior such as the touching of intimate body parts or use highly offensive language on the basis that either the action alone was not “severe” enough to trigger liability or the action did not happen frequently enough to be considered “pervasive” and thereby trigger liability. In short, the NYSHRL, which currently adheres to this standard, currently allows for some amount of discriminatory harassment in the workplace. New York State workers should not have to suffer any discriminatory harassment.

The provision of an affirmative defense for employers who can prove that the actions complained of did not rise above the level of petty slights or trivial inconveniences will ensure that employers will not be liable for behavior that could not reasonably be considered harassment.

Note: The Governor’s bill makes this the new Section 296(21) and apparently intends it to cover credit, public accommodation and housing (“in any area of jurisdiction as set forth in this article”). Governor also says “such actions [hostile work environments and tangible job detriments] are an unlawful discriminatory practice when they result in a person or persons being treated not as well as others because of a protected characteristic. Harassment is not limited only to those actions that are severe or pervasive. Harassment does not include what a reasonable person with the same protected characteristic would consider petty slights or trivial inconveniences.” The standard of reasonableness being explicitly tied to someone with the same

protected characteristic of the plaintiff ensures a broad interpretation of reasonable. However, the Governor's bill does not make the determination of whether the challenged action is a petty slight or trivial inconvenience an affirmative defense to be pleaded and proven by a defendant. This oversight places the burden of proving a claim is not petty or trivial on the plaintiff, in effect forcing the employee to prove a negative in addition to proving she was harassed.

SUBJECT: ELIMINATION OF FARAGHER/ELLERTH DEFENSE FOR SUPERVISOR HARASSMENT

Elimination of the Faragher/Ellerth defense is accomplished through the addition of new sections to Section 296(1): Sections 296(1)(i), 296(1-b), 296(1-d) and 296(1-e).

PROPOSED TEXT 296(1)(i):

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

RATIONALE:

In 1998, the Supreme Court ruled that when harassment committed by supervisory employees does not rise to the level of a tangible action (e.g., firing, demotion), employers have "an affirmative defense to liability that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-07 (1998). The Court made the same ruling in a companion case decided at the same time, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998). Originally crafted to address sexual harassment, the affirmative defense has been made available in cases involving discriminatory harassment based on other categories of discrimination as well.

While seeming, in theory, to prevent employers from being liable for supervisory harassment that takes them completely by surprise, for example, when an employee inexplicably said nothing about the harassment before filing a lawsuit, the affirmative defense has proved, in practice, to be one more means by which employers evade liability while sexual harassment in the workplace proceeded without any meaningful impediment. *See generally* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L.J. 3, 3 (2003).

§296(1-b): Sets out the standard for liability of the employer for discriminatory practices of its employees or agents.

PROPOSED TEXT OF § 296(1-b):

1-b. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subsection (1) of section 296 of this article only where:

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

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

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

RATIONALE:

This bill would codify the legal principle that an employer is strictly liable for illegal actions taken by an employee's employee or agent who exercises managerial or supervisory responsibility. § 296(1-b)(1). The imposition of supervisory liability provides the greatest incentive for employers to ensure their managers and supervisors do not engage in discriminatory harassment. In situations where the discrimination is perpetrated by employees or agents who are not managers or supervisors, the employer will be held liable where the employer knew of the discrimination and failed to act or should have known of the discriminatory conduct and failed to prevent it. §§ 296(1-b)(2) and (3). Thus, employers are not strictly liable for the illegal acts of non-supervisory employees or agents but can be liable if the plaintiff can show that the employer effectively allowed the discriminatory acts to take place.

The proposed Section 296(1-b) tracks the language of the New York City Human Rights Law. Following amendments by the New York City Council to ensure that the New York City Human Rights Law was construed broadly to provide the greatest protection, the New York Court of Appeals ruled that the statute clearly precludes application of the Faragher/Ellerth affirmative defense that applies to federal and state law. *Zakrzewska v. The New School*, 14 N.Y.3d 469, 479-80 (2010). Instead, an employer's efforts to prevent discrimination can mitigate damages assessed against an employer but can only permit the employer to evade liability where the employer should have known of a non-supervisory employee's discriminatory acts. *Id.*

Employees across New York State should have the same high level of protection that is afforded when employers are liable for the acts of their supervisors and managers and have strong incentives to prevent harassment by non-supervisory employees.

SUBJECT: EMPLOYER LIABILITY FOR ACTS OF ITS INDEPENDENT CONTRACTORS

PROPOSED TEXT OF §296(1-c):

1-c. An employer, licensing agency, employment agency, or labor organization shall be liable for an unlawful discriminatory practice committed by an independent contractor, other than an agent of such employer, employer or engaged to carry out work in furtherance of the employer, licensing agency, employment agency, or labor organization's business enterprise only where such discriminatory conduct was committed in the course of such employment or engagement

and the employer, licensing agency, employment agency, or labor organization had actual knowledge of and acquiesced in such conduct.

RATIONALE:

This proposed bill is adapted from New York City Human Rights Law, Administrative Code 8-107(13)(c). This will prevent employers from evading responsibility when their independent contractors discriminate against employees, but it clearly holds employers accountable only when the discriminatory conduct occurs in the course of employment for the employer and the employer had actual knowledge of and acquiesced in such conduct.

SUBJECT: EMPLOYERS' EFFORTS TO PREVENT DISCRIMINATION CAN MITIGATE DAMAGES – NEW §§ 296(1-d) AND (1-e):

PROPOSED TEXT:

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

(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

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

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

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

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

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

1-e. The demonstration of any or all of the factors in subsection 1-d, in addition to any other relevant factors, shall be considered in mitigation of the amount of civil penalties to be imposed by the division of human rights pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to this article and shall be among the factors considered in determining an employer's liability under subsection 1-b(3).

RATIONALE:

These proposed new provisions, which are adapted from the New York City Human Rights Law, Administrative Code 8-107(13)(d) and (e), will ensure that employers' actions to prevent harassment will be considered in mitigation of the amount of civil penalties or punitive damages. Such efforts are important and should be recognized in the context of damages but should never be used as tools for employers to evade liability where harassment occurs.

SUBJECT: JOINT AND SEVERAL LIABILITY OF INDIVIDUAL EMPLOYEES THROUGH A NEW §296(1-f)**PROPOSED TEXT:**

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

RATIONALE:

Adapted from common law developed under NYS HRL. This law derives from *Patrowich v. Chemical Bank*, 63 NY 541, 542 (N.Y. 1984) which held that individuals were not liable under NYS HRL unless they had an ownership interest in the employer or had power to do more than carry out personnel decisions made by others. *See e.g., Malena v. Victoria's Secret*, 886 F.Supp.2d 349, 366-67 (S.D.N.Y. 2012):

Individual liability... under § 296(1)... is "limited to individuals with ownership interest or supervisors, who themselves, have the authority to hire and fire employees." *Banks v. Corr. Servs. Corp.*, 475 F.Supp.2d 189, 199 (E.D.N.Y. 2007) (internal quotation marks and citation omitted); *see also Hubbard v. No Parking Today, Inc.*, No. 08 Civ. 7228(DAB), 2010 WL 3835034, at *10, 2010 U.S. Dist. LEXIS 101218, at *29-30 (S.D.N.Y. Sept. 22, 2010); *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 542, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984) (per curiam); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317 (2d Cir.1995) (citing *Patrowich*).

The proposed language also tracks common law as it interprets the New York City Human Rights Law. *See e.g. Emmer v. Trustees of Columbia University*, 2014 NY Slip Op 31200 at *21-22 (Sup. Ct., N.Y. County, April 24, 2014):

Administrative Code § 8-107 (1) (a) also states that it is a discriminatory practice for an "employer or an employee or agent thereof" to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's religion and age. Under the NYCHRL, individual employees may be held liable when they "act with

or on behalf of the employer in hiring, firing, paying, or in administering the ‘terms, conditions or privileges of employment.’” *Priore v New York Yankees*, 307 AD2d 67, 74 (1st Dept 2003).

SUBJECT: EXPANDS PROTECTION FOR DOMESTIC WORKERS FROM ALL FORMS OF DISCRIMINATORY HARASSMENT BY AMENDING § 296-b

PROPOSED AMENDMENT TO TEXT:

1. For the purposes of this section: “Domestic workers” shall have the meaning set forth in section two of the labor law.
2. It shall be an unlawful discriminatory practice for an employer to:
 - (a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual ; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, or offensive working environment.
 - (b) Subject a domestic worker to unwelcome harassment based on gender, race, religion or national origin or his or her age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, where such harassment has the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile or offensive working environment.

RATONALE:

This amendment broadens the categories of unwelcome harassment from gender, race, religion or national origin to include all other forms of unlawful discrimination. There is no reason domestic workers should not be protected from harassment based on each of the categories of persons given protection in other parts of the law.

SUBJECT: PROTECTION OF INDEPENDENT CONTRACTORS FROM DISCRIMINATION BY WAY OF AMENDMENT TO §296-d

PROPOSED AMENDMENT TO TEXT:

§296-d. Unlawful discriminatory practices ~~Sexual harassment~~ relating to non-employees.

It shall be an unlawful discriminatory practice for an employer to permit unlawful discrimination against ~~sexual harassment~~ of non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to an unlawful discriminatory practice ~~sexual harassment~~, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice ~~sexual harassment~~ in the employer’s workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such

cases involving non-employees, the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of the ~~harasser~~ person who engaged in the unlawful discriminatory practice shall be considered.

RATIONALE:

Section 296-d was first added to the NYSHRL in 2018 and made employers liable for sexual harassment of certain categories of non-employees (“contractor[s], subcontractor[s], vendor[s], consultant[s] or other person providing services pursuant to a contract in the workplace or is an employee of such [any of the enumerated categories of non-employees.]”) This proposed amendment thus extends an employer’s liability when these non-employees are subjected to “unlawful discriminatory practice[s]” (pursuant to § 296(1)), and not just when they are victims of sexual harassment.

The proposed amendments level the playing field by extending liability to an employer when “employer, its agents or supervisors **knew or should have known**” about the discriminatory practice[s] that these non-employees were subjected to and “failed to take immediate and corrective action.” That is the same standard of liability imposed on an employer when there is co-worker harassment or discrimination.

What is new is the extension of liability based on all “unlawful discriminatory practices” based on all protected categories, not just sexual harassment. What is not new is the “knew or should have known” and “failed to take immediate and corrective action” which has been the practice under federal law and under the NYSHRL for co-worker liability inasmuch as state law follows the federal law.

SUBJECT: PUNITIVE DAMAGES AS A NEW REMEDY AMENDING §§ 297(4)(c)(iv) AND 297(9)

Amendment of §297(4)(c)(iv): Extends punitive damages to employment discrimination actions, without limitation on the amount, to cases brought before the State Division of Human Rights.

PROPOSED AMENDMENT TO TEXT:

...(iv) awarding of punitive damages, in cases of employment discrimination to the person aggrieved by such practice, and, in cases of housing discrimination only, with damages in housing discrimination cases in an amount not to exceed ten thousand dollars;

RATIONALE:

The addition here is adding punitive damages as a possible form of damages in employment discrimination cases. The NYSHRL already permits unlimited compensatory damages but, unlike federal law, does not permit punitive damages at all. This amendment provides for punitive damages. It is a much-needed deterrent. Section 297(4)(iv) applies to cases before the SDHR. As can be seen from the original text, the NYSHRL has long allowed limited punitive damages (and unlimited compensatory damages) in housing discrimination cases. The amendment does not disturb the limit imposed in housing discrimination cases.

Amendment of §297(9): Provides for punitive damages in civil actions for employment discrimination.

PROPOSED AMENDMENT TO TEXT:

Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, ~~in cases of housing discrimination only,~~ punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section ...

RATIONALE:

Section 297(9) is the election of remedies provision: Under the NYSHRL, an individual can bring an action before the SDHR or in court. If the individual files with SDHR, it is deemed to have elected to pursue its remedy with the SDHR and not in court. However, under certain circumstances set forth in the circumstances in § 297(9), an individual can obtain a dismissal or annulment which will allow the individual to pursue his or her claims in court.

This amendment ensures that an individual who goes to court (as well as an individual who has originally filed in SDHR and then obtains a dismissal or annulment to pursue his or her claims in court) will be entitled to unlimited punitive damages as a possible form of damages in employment discrimination for those cases that are litigated in court. This brings the provision of punitive damages in line with NYSHRL's provision of unlimited compensatory damages. It is a much-needed deterrent. As can be seen from the original text, the NYSHRL has long allowed limited punitive damages (and unlimited compensatory damages) in housing discrimination cases. The amendment does not disturb the limit imposed in housing discrimination cases.

SUBJECT: ATTORNEY'S FEES FOR ALL CATEGORIES OF DISCRIMINATION BY AMENDING §297(10):

PROPOSED AMENDMENT TO TEXT:

With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of credit discrimination where sex is the basis of such discrimination, and with respect to a claim in all cases of employment discrimination in an action or proceeding under this section or section two hundred ninety-eight of this article, the commissioner or the court ~~may in its discretion shall~~ award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section.

RATIONALE:

This provision allows the prevailing party to receive an award of attorneys’ fees in all employment discrimination cases. This will level the playing field. Federal law allows for an award of attorneys’ fees. These cases take a long time to litigate. This will allow meritorious plaintiffs to have their attorneys’ fees paid by the defendants—thus bringing this in line with federal law. It also limits the awarding of attorneys’ fees to prevailing defendants; this is not new, but is merely a continuation of prior law. This will go a long way to protecting employees who can then find “private attorney generals” to take their cases.

SUBJECT: EXPANSION OF THE NYSHRL CONSTRUCTION CLAUSE BY AMENDING §300

PROPOSED AMENDMENT TO TEXT:

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

RATIONALE:

The proposed additions to this language track the New York City Human Rights Law. This Construction provision protects the rest of the amendments: Until now, the State has followed the federal law. Having said that, there are also state law cases, e.g., *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 819 N.E.2d 998, 786 N.Y.S.2d 382 (2004), which are relied on in state court cases but which have a more cramped view of the NYSHRL, not in keeping with having the law serve the remedial purposes outlined in these amendments (as well as the amendments of the last several years that have expanded the definition of sexual harassment and added protections in that regard).

The amendments to the Construction provision give discretion to the courts to construe the NYSHRL liberally, and construe exceptions and exemptions narrowly. The notes to the law should expressly overrule *Forrest* and recognize that its construction is narrowing, as that is how it has been used.
