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**REPORT ON LEGISLATION
BY THE SEX AND LAW COMMITTEE**

**A.7083-A
S.3817-A**

**M. of A. Simotas
Sen. Biaggi**

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

THIS LEGISLATION IS APPROVED

I. INTRODUCTION

The New York City Bar Association supports enactment of A.7083-A/S.3817-A (the “Bill”), which would amend the New York State Human Rights Law to increase protections for protected classes, provide targeted protections for employees who have been sexually harassed, and remove significant and unwarranted legal barriers to those who attempt to come forward and seek justice from their employers. This comprehensive legislation removes these barriers.

II. THE PROPOSED LEGISLATION

Under the chief amendments in the Bill:

- A hostile work environment based on sex, race and/or another protected class, is unlawful unless the employer shows the conduct complained of is a “petty slight” or “trivial inconvenience;”
- Employers are held responsible for the conduct of their supervisors;
- Employers are faced with the prospect of punitive damages in order to change behavior;
- Sex discrimination and harassment are treated the same as other forms of discrimination and harassment;
- Adverse actions against employees are unlawful if they are motivated by discriminatory or retaliatory motives.

The Bill also expands protection to independent contractors, domestic workers, and

employees of small businesses¹. It also provides for the recovery of attorney fees for victims of all forms of discrimination and harassment who prove their cases.²

a. Elimination of the “Severe or Pervasive” Standard for Proving Unlawful Harassment

Time after time, courts have dismissed claims of harassment that included extremely offensive and psychologically damaging behavior such as the touching of intimate body parts, or the use of demeaning racial and sexual slurs on the basis that either the action alone was not “severe” enough to trigger liability and/or the action did not happen frequently enough to be considered “pervasive.”³ The elimination of this standard will allow victims of workplace

¹ Specifically, the Bill removes the requirement that an employer have at least four employees to be covered.

² With these changes, the Bill brings State anti-discrimination law closer to New York City law, while some differences with federal law will remain. Federal courts are well-equipped to handle cases brought under federal, state and city law notwithstanding varying standards of proof, recovery and coverage. As it currently stands, employment discrimination cases may be brought in federal court under federal law (Title VII, the ADEA, and the ADA) and under the NYC and NYS Human Rights Laws (NYCHRL and NYSHRL), with federal courts exercising supplemental jurisdiction, and applying appropriate legal standards. In applying NYCHRL claims, federal courts “must analyze NYCHRL claims separately and independently from any federal and state law claims” and construe “the NYCHRL’s provisions “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.” Thus, even if the challenged conduct is not actionable under federal and state law, federal courts must consider separately whether it is actionable under the broader New York City standards. *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013) (citations omitted). This same application of standards will apply to claims under NYSHRL brought in federal court if the NYSHRL is amended as per the Bill.

³ Here are some recent examples of conduct that New York appellate courts have *not* held to be severe or pervasive under New York law.

In *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, where plaintiffs alleged that defendant:

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

In *Minckler v. United Parcel Serv., Inc.*, 132 A.D.3d 1186, 19 N.Y.S.3d 602 (3d Dep’t 2015), the Third Department found that the following were not severe or pervasive, where plaintiff alleged that a supervisor did the following:

- Pulled on plaintiff’s bra straps;
- Pulled her hair twice;
- Suggested that plaintiff purchase certain sexual paraphernalia;
- Rubbed lubricant on plaintiff’s arm;

harassment to obtain redress and provide a strong incentive for employers to prevent harassment. At the same time, the bill allows employers to defend themselves by proving that the actions complained of did not rise above the level of petty slights or trivial inconveniences.

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 and has precluded many employees from stating claims even though they have been treated less well than others for discriminatory reasons.⁴ The NYSHRL, which currently adheres to this standard, allows for some amount of discriminatory harassment in the workplace. New York State workers should not have to suffer any discriminatory harassment.

Harassment is not just gender-based. The current “severe or pervasive” standard in State law has set a very high barrier for New York State employees challenging non-gender based harassment discrimination as well, as recent decisions applying the current Executive Law make clear.⁵ By eliminating the “severe or pervasive” standard for all forms of employment discrimination, the Bill will protect the rights of all New York State employees.

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- 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.

In *Pawson v. Ross*, 137 A.D.3d 1536, 29 N.Y.S.3d 600 (3d Dep’t 2016), the Third Department found that the following were not severe or pervasive, where plaintiff alleged that defendant:

- 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 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.

⁴ *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)). The “severe and pervasive” standard does not apply when the employee claims that she has been fired or demoted (or otherwise suffered an adverse employment action) for discriminatory reasons.

⁵ In *Berrie v. Bd. of Educ. of the Port-Chester Rye Union Free School District*, 750 Fed. Appx. 41 (2d Cir. 2018), the Second Circuit affirmed a district court decision (2017 U.S. Dist. LEXIS 83623 (S.D.N.Y. May 31, 2017)) holding that the following conduct experienced by an African-American public school gym teacher did not constitute a hostile work environment under federal law and the New York State Human Rights Law because it was not “severe or pervasive”:

- Plaintiff’s colleague forwarded an email, with the subject line “New Species of Man,” containing a “photograph of a minority teenager, who Plaintiff and others believed to be African American, with his pants worn well below the waist, accompanied by two drawings — one of a man from behind with a long back, as if his waist was where the teen in the photograph wore his pants, and the other of a skeleton with the same long back, Below the photograph and drawings, the email read: “They are referred to as homo slackass-erectus created by a natural genetic downward evolution through constant spineless posturing, and spasmodic

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.

b. Employer Liability for Discrimination and Harassment by Supervisors

Current state law applies the “*Faragher/ Ellerth*” doctrine: Except where an employee is subjected to tangible adverse employment actions, an employer is not responsible for harassment committed by co-workers and low level supervisors so long as the employer had a harassment policy and can show that the victim failed to promptly make a complaint under that policy.⁶ Because the great majority of harassment victims are afraid to complain, many employers escape liability for the unlawful acts of their supervisors.

Under the Bill, employers would be liable for unlawful harassment committed by employees who exercise managerial or supervisory responsibility. The imposition of supervisory liability provides the greatest incentive for employers to ensure their managers and supervisors do not engage in discriminatory harassment.

upper limb gestures, which new research has shown to cause shorter legs and an inability to ambulate other than in an awkward shuffling gait. The “drag-crotch” shape also seems to effect [sic] brain function. Expect no eye contact or verbal communication. This species receives benefits and full government care. Unfortunately most are highly fertile.”

- Another teacher referred to African Americans as “Alabama porch monkey[s].”
- Another teacher complained that she did not want “another Hernandez” in her class,
- The same teacher told Plaintiff in front of his class that it was her right as an American to use the N-word.
- A baseball coach told an African-American student that “he runs as fast as a runaway slave” and called the student stupid.

The district court held that these comments did not rise to the level of a hostile work environment because they were a “few isolated incidents” and not a “steady barrage of opprobrious racial comments.” *Id.* at *35. The Second Circuit affirmed, holding that eleven incidents over five years is not “severe or pervasive” enough to create an environment that would reasonably be perceived, and is perceived, as hostile or abusive, citing, *inter alia* *Stembridge v. City of New York*, 88 F. Supp. 2d 276, 286 (S.D.N.Y. 2000) (seven racially insensitive comments over three years, including one instance of calling the plaintiff the “n-word,” were not pervasive).

In *Nofal v Jumeirah Essex House*, 2013 N.Y. Misc. LEXIS 2289, 2013 NY Slip Op 31161(U) (Sup. Ct., Queens County, 2013), plaintiff was a Muslim whose supervisor mockingly said to plaintiff on three or four occasions, “Salaam Aleikum,” the traditional Arabic greeting spoken by Muslims, while touching his forehead and chewing on bacon, a meat prohibited for consumption in the Islamic religion. The supervisor insisted on describing to plaintiff his sexual relations with his Lebanese Arab wife, made comments such as “No Jihad” with reference to plaintiff’s religion and negative comments about Ramadan while denying plaintiff’s request for time off. Other comments included “Guys move faster, it’s not a Mexican Taco Bell here.”

The court granted summary judgment on the NYS Human Rights Law claim on the ground that the conduct was not objectively offensive and pervasive enough to have created a hostile work environment. However, it found that under the New York City Human Rights Law, the conduct was actionable because it indicated that plaintiff’s supervisor found it appropriate to foster a workplace that degraded employees’ religious beliefs.

⁶ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

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.”⁷ 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.⁸

This Bill will codify the legal principle that an employer is strictly liable for discriminatory actions taken by an employer's employee or agent who exercises managerial or supervisory responsibility. 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 co-workers 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 correct or prevent it. 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 Bill tracks the language of the New York City Human Rights Law (NYCHRL). Following amendments by the New York City Council to ensure that the NYCHRL was construed broadly to provide the greatest protection⁹, the New York Court of Appeals confirmed that the statute clearly precludes application of the *Faragher/Ellerth* affirmative defense. The *Faragher/Ellerth* defense thus applies to claims under federal and state law, but not under the NYCHRL.¹⁰ Under the NYCHRL, and the proposed Bill, an employer's efforts to prevent discrimination can mitigate damages assessed against an employer but can permit the

⁷ *Faragher, id.* at 805-07 (1998); *Ellerth, id.* at 764-65.

⁸ 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).

⁹ N.Y.C. Admin. Code § 8-107(13)(e).

¹⁰ *Zakrzewska v. The New School*, 14 N.Y.3d 469, 479-80 (2010). While we acknowledge that removing the *Faragher/Ellerth* defense under the NYSHRL would impose some new obligations on New York State employers, New York City employers lack this defense under the NYCHRL and are expected to train their employees accordingly. As a statewide matter, it is our belief that with appropriate anti-harassment training, strict supervisory liability incentivizes the creation of a work environment where harassment is not tolerated and incentivizes employees to come forward with complaints because they feel better protected. In addition to employer-required workplace trainings, organizations such as bar associations, employee/employer groups, and the state and city human rights agencies should continue to engage in public education programs on the topic of workplace harassment so that all employees – managerial, supervisory and non-supervisory - fully understand their rights and obligations.

employer to evade liability only where the employer should not have known of a non-supervisory employee's discriminatory acts. *Id.*

The proposed Bill also provides for employer liability for the discriminatory acts of their independent contractors against employees under certain circumstances. This provision is adapted from the NYCHRL, Administrative Code, 8-107(13)(c). Employers are accountable only when the independent contractor's discriminatory conduct occurs in the course of employment for the employer and the employer had actual knowledge of and acquiesced in such conduct.

Employees across New York State should have the same high level of protection that is afforded when supervisors and managers engage in harassment. This Bill will provide strong incentives for employers to prevent harassment by non-supervisory and lower level supervisory employees.

c. Punitive Damages¹¹

Under the Bill, punitive damages would be available in all employment discrimination cases, in order to deter employers from permitting egregious or persistent harassment. The Bill provides that an employer's efforts to prevent discrimination can mitigate the punitive damages a jury may assess against an employer.

The NYSHRL already permits unlimited compensatory damages but, unlike federal law¹², does not permit punitive damages in employment discrimination cases.¹³ The Bill amends §297(4)(c)(iv) and §297(9) to permit the award of punitive damages (without any cap) in employment discrimination cases brought both before the State Division of Human Rights and in court. It is a much-needed deterrent.

As the Court of Appeals recently ruled in *Chauka v. Abraham*, punitive damages under the NYCHRL are determined by application of the common-law standard: "whether the wrongdoer has engaged in discrimination with willful or wanton negligence, or recklessness, or a "conscious disregard of the rights of others or conduct so reckless as to amount to such disregard."¹⁴ The Bill,

¹¹ The City Bar has supported this proposal in previously introduced legislation. See Report on Legislation (A.1113/S.2782 (2017)) by the Sex and Law Committee and Civil Rights Committee, https://s3.amazonaws.com/documents.nycbar.org/files/3_20072941-ReportonA.113S.758reAwardingAttorneysFeesandExemplaryDamagesinDiscriminationCases.pdf. (All websites cited in this letter were last visited on May 8, 2019.)

¹² Successful plaintiffs under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, for example, may receive punitive damages; 42 U.S.C. § 1988 allows for awards of reasonable attorney's fees and costs in certain federal civil rights actions. Both the City of New York and a number of states allow all three types of relief under appropriate circumstances. See, e.g., N.Y.C. Admin. Code §§ 8-126 & 8-502.

¹³ Executive Law §297(4)(iv) currently allows for limited punitive damages (up to \$10,000) in housing discrimination cases only, in cases litigated before the State Division of Human Rights. Executive Law §297(9) currently provides for punitive damages (with no cap) in court cases litigated under the Executive Law, but in housing discrimination cases only.

¹⁴ *Chauca v. Abraham*, 2017 NY Slip Op 08158, ¶ 5, 30 N.Y.3d 325, 334, 67 N.Y.S.3d 85, 91, 89 N.E.3d 475, 481; <https://law.justia.com/cases/new-york/court-of-appeals/2017/113.html>.

like the NYCHRL, requires explicitly that it is to be construed liberally for the accomplishment of its remedial purposes, notwithstanding comparable federal civil rights law with comparably worded provisions.¹⁵ Accordingly, punitive damages under the Bill would follow the common law standard set forth in *Chauka*, and not the standards applicable to Title VII.¹⁶

d. All Forms of Discrimination Treated the Same¹⁷

Current law provides for attorneys' fees to successful plaintiffs in sex discrimination cases. This bill expands that remedy to victims of all forms of unlawful discrimination, in order to make it easier for victims, especially low-wage workers, to find counsel to protect their rights.

This provision allows the prevailing party to receive an award of attorneys' fees in all employment discrimination cases, not just those based on sex. These cases take a long time to litigate. This change will level the playing field. Federal law allows for an award of attorneys' fees. This provision will allow meritorious plaintiffs to have their attorneys' fees paid by the defendants—thus bringing state law 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 section of the Bill will go a long way towards protecting employees who will now be in a position to find "private attorney generals" to take their cases.

Also, under current law, employees of small employers, and independent contractors, are protected only from sex harassment and discrimination, and not from other forms of discrimination. This bill would extend this protection to include all forms of unlawful harassment and discrimination.

e. Construction Clause: "Motivating Factor"

Finally, this bill specifies that the NYSHRL is to be construed liberally to accomplish the remedial purposes of the law and to maximize the deterrence of discrimination. The NYSHRL includes powerful human rights language, finding and declaring "that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, [or] intolerance . . . menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants."¹⁸

¹⁵ See proposed amendment to Executive Law §300, and Section E, *infra*.

¹⁶ Under the Title VII standard, "[p]unitive damages are limited . . . to cases in which the employer has engaged in intentional discrimination and has done so 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 529-30 (1999) (quoting 42 U.S.C. § 1981a(b)(1)).

¹⁷ The City Bar has supported this proposal in previously introduced legislation. See Report on Legislation (A.1113/S.2782 (2017)) by the Sex and Law Committee and Civil Rights Committee, https://s3.amazonaws.com/documents.nycbar.org/files/3_20072941-ReportonA.113S.758reAwardingAttorneysFeesandExemplaryDamagesinDiscriminationCases.pdf.

¹⁸ N.Y. Exec. Law §290(3).

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 Bill proposes a standard of proof that will allow a jury to find liability if it finds that discrimination was a factor in a decision.

Recent federal court decisions have required that claims for age and disability discrimination, and all claims for retaliation, can be established only if “but-for” the discrimination, the challenged action would not have taken place. Other forms of discrimination under federal law (e.g., race and sex claims brought under Title VII) use a different standard: whether discrimination was a factor in an employment decision.

Because the NYSHRL has been interpreted to follow federal law, this dichotomy of standards is applied in NYSHRL cases as well. In addition, the “but-for” discrimination standard is unduly restrictive and confusing to jurors. Application of the “but-for” standard often means that some 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 for them to show that the action taken against them was motivated, at least in part, by discrimination or retaliation. Thus, this amendment properly eliminates confusion and makes the more liberal standard of proof applicable in all claims of discrimination and retaliation brought under the NYSHRL.

III. CONCLUSION

The Bill is fair and comprehensive legislation that, if passed, will ensure that the right to equal employment opportunity is truly available to all employees in New York State.

The City Bar supports the Bill and urges its passage.

Sex and Law Committee
Mirah E. Curzer, Co-Chair
Melissa S. Lee, Co-Chair
Deborah H. Karpatkin, Subcommittee Chair¹⁹

May 2019

¹⁹ In drafting this report, the subcommittee used as a resource a memorandum issued by the National Employment Lawyers Association/NY, of which Ms. Karpatkin is a board member. This report was reviewed, revised and approved by the full Committee.