Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
August 22, 2019 Edition

HARASSER TIME IS UP IN NEW YORK STATE

On August 12, 2019, Governor Cuomo signed an anti-harassment/anti-discrimination law that squarely places the onus of prevention on employers - private, public and unions in New York State ("NYS"). These amendments to the NYS Human Rights Law, passed by the Legislature June 19, 2019, make it far easier for plaintiffs to bring a case to trial and prevail for substantial damages against those employers who do not take pro-active steps now. Here is what the new law does, and what to do about it.

The law makes it easier for plaintiffs by removing two barriers that courts have used to dismiss harassment lawsuits before trial. Federal and NYS law had always required that to bring a sexual harassment lawsuit, the offensive sex based conduct must be either "severe" or "pervasive." The amended NYS law removes these requirements, substituting instead that the offensive sex based conduct need only subject an individual to "inferior terms, conditions or privileges of employment" and rise above the level of "petty slights and trivial inconveniences" to a reasonable victim. Second, under prior NYS law, employers could block a lawsuit by showing an effective anti-harassment policy and complaint process which plaintiff failed to use. The amendments demote this defense to just one factor for the jury to consider, "which shall not be determinative." The new law also extends its provisions to contractors, vendors and consultants, and beyond sex to all protected categories under the NYS Human Rights law – race, religion, national origin, disability, gender identity or expression, color, creed, age, sexual orientation and more; provides for punitive damages and mandatory attorney's fees to the prevailing plaintiff; largely bars non-disclosure and mandatory arbitration; and establishes a three year limitations period. To ensure pro-plaintiff judicial application, the law directs that its provisions should be "construed liberally" but its exceptions and exemptions narrowly "in order to maximize deterrence . . ." The new law largely takes effect 60 days from August 12, 2019.

While now facing perhaps the most vigorous and plaintiff friendly state or local law, matched only by California and Delaware, New York employers should avoid panic and instead focus on what they can do to preclude liabilities. After all, as the law's proponents have argued, NYS law now parallels New York City's human rights law which has been in effect for years without cataclysm. The keys are effective anti-discrimination/anti-harassment policies, procedures and relief. Since the definition of actionable conduct has been set so low, no longer requiring that offensive conduct based on sex be severe or frequent, it is more imperative than ever for all to understand that such crude behavior cannot be shrugged aside or dismissed as bad humor, hence the need for intense in person training and clear policy. Indeed, New York mandates employer training annually. Since employer liability can so easily arise, employers' agents – supervisors – must form the first defensive line detecting, reporting and intervening against such behavior under well-defined employer procedures. And since the human and legal costs run so high, employers must be sure to promptly and thoroughly investigate and, where warranted, provide fair and effective relief and discipline.

This is not easy, but it is doable, and it is the law. As Governor Cuomo put it at signing the legislation into law, "we are sending a strong message that time is up on sexual harassment in the workplace . . . ."

***WRIGHT LINE* GOING WRONG**

On August 2, 2019, the National Labor Relations Board ("NLRB" or "Board") issued a decision in *Electrolux Home Products*, holding that the Employer did not violate the Act when it discharged an active union supporter and subsequently proffered pretextual reasons for the termination. 368 NLRB No. 34. The case continues a troubling trend of attacks on the framework for evaluating whether conduct is improperly motivated under the National Labor Relations Act ("NLRA"), developed in a 1980 Board decision called *Wright Line*.

Electrolux manufactures ovens at a facility in Memphis, Tennessee, where it employed over 700 workers. IBEW Local 474 was certified as bargaining representative for its employees in October of 2016. During the organizing campaign, J'Vada Mason, an assembly line lead, distributed authorization cards, handed out fliers, and wore a prounion shirt. Approximately one week before the election, in September of 2016, Electrolux conducted a captive-audience meeting. During the meeting, Mason attempted to respond to the Employer's statements but a manager told her to "shut up" and said that Mason didn't know what she was talking about. In April of 2017, Mason's supervisor asked her to deliver microwaves to an assembly line, but Mason did not. Electrolux investigated the incident and terminated Mason for insubordination.

The NLRA prohibits discriminatory action against employees on the basis of union activity. The Board adopted a framework, in *Wright Line,* to determine when an employment action was improperly motivated. *Wright Line* requires the NLRB General Counsel ("GC"), the Board's prosecutor, to show that an employee's protected conduct was a "motivating factor" in an employer's decision. The GC's burden is to show: (1) protected activity; (2) employer knowledge of the activity; and (3) antiunion animus on the part of the employer. If the General Counsel makes the showing, the burden shifts to the employer to show that it would have taken the same action regardless of the protected conduct.

Upon review of the facts here, a NLRB Administrative Law Judge ("ALJ") held that Mason's termination violated the Act because Electrolux harbored animus toward Mason demonstrated in the captive audience meeting. Additionally, the ALJ concluded that Electrolux's justification for termination was a pretext because it had never previously imposed such a harsh penalty for similar cases of insubordination.

The Board reversed the ALJ, concluding that the GC failed to carry his burden under *Wright Line*. The Board agreed with the ALJ that Electrolux's insubordination basis for discharge was pretextual. However, the Board contended that when an employer offers a pretextual reason, "the real reason might be animus against the union or protected concerted activity, but then again it might not." Examining the facts, the Board found no other basis to infer animus other than the pretext, contending that the employer's conduct in the captive audience meeting was lawful, that it was distant in time from the termination, and that the Union and Employer appeared to be bargaining without issue. Accordingly, the Board found no violation of the Act. Member Lauren McFerran dissented, noting that the Board has routinely inferred the existence of discriminatory motive in cases like this one, and that no Board decision

had ever found pretext but not animus. McFerran chided the majority for attempting to meet the Employer's *Wright Line* rebuttal burden for it.

In another case currently before the Board, *Tschiggfrie Properties*, the GC seeks to make the animus showing in *Wright Line* harder to meet. 25-CA-161304. There, the GC is arguing that the Board should require that an employer not only have antiunion animus, but also animus toward the particular employee in question (the so-called "nexus" requirement). This new requirement is inconsistent with the purpose of *Wright Line* - that the Board can infer that the employer acted based on union activity based upon a showing of protected activity, knowledge, and general animus. Further, given the difficulty already incumbent in demonstrating general animus, a more particularized animus will present even greater challenges to protecting employees under the Act. But the current Board, as demonstrated by *Electrolux*, would likely be inclined to add this "nexus" requirement in the near future and therefore unions should be ready to provide evidence accordingly.

NEW YORK STATE HUMAN RIGHTS LAW EXPANDED: DISCRIMINATION BASED ON NATURAL HAIRSTYLES AND RELIGIOUS ATTIRE AND FACIAL HAIR NOW PROHIBITED

On July 15, 2019, New York became the second state in the country to ban discrimination based on natural hairstyles. New York State amended its Human Rights Law, N.Y Executive Law § 296, *et seq.,* to include within the definition of race, traits which are associated with race, most prominently hairstyles. The law is effective immediately. New York follows California, which became the first state to pass such a law prohibiting discrimination based on hairstyle on July 3, 2019.

The amendment to the New York State Human Rights Law expands the prior law by defining race to include ancestry, color, ethnic group identification, ethnic background, and traits "historically associated with race, including but not limited to, hair texture and protective hairstyles." The law explains that the "term 'protective hairstyles' includes, but is not limited to, such hairstyles as braids, locks, and twists."

In addition, the bill amended the Dignity for All Students Act, part of the New York State Education Law, by updating the definition of race in existing law to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles."

On signing the law, Governor Cuomo said: "For much of our nation's history, people of color — particularly women — have been marginalized and discriminated against simply because of their hair style or texture. By signing this bill into law, we are taking an important step toward correcting that history and ensuring people of color are protected from all forms of discrimination."

In a related move, on August 9, 2019, Governor Cuomo signed a bill amending the Human Rights Law to prohibit employment discrimination based on religious attire and facial hair. In signing the bill, the Governor stated that the law made it "crystal clear…that New York has zero tolerance for bigotry of any kind." The law amends the New York State Human Rights Law to prevent employers from refusing to hire, employ, or promote any individual based on wearing attire or facial hair in accordance with their religion. This takes effect on October 8, 2019, sixty days after the law's signing.

This amendment stems in part from concerns in the Sikh community over an incident in the aftermath of the September 11 attacks in which a Sikh MTA employee was directed to either remove his religious head covering or be removed from public contact in his work. Eventually, in 2012, the MTA relented and permitted employees to work with their religion based head coverings or facial hair, but the long running dispute revealed a significant issue of employers discriminating against employees based on an employee's appearance and the perception of an employees' background or religion, thus giving momentum to a push for legislation.

The New York State Assembly had passed this legislation every year since 2013, but it never had sufficient support in the Republican controlled Senate until this year, after the Senate majority flipped to Democratic control.

Due to the anti-hair discrimination law's immediate effect, employers should ensure that dress codes and grooming policies are inclusive and race-neutral both in their language and in that no particular protected group is being disproportionately targeted or impacted. Similarly, the anti-religious attire and facial hair discrimination law means that employers must review their uniform and office attire policies that may include facial hair and headwear policies.

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