

REAL ESTATE

Evictions Errrrr

By Andrew Lieb

Welcome to your new landlord/tenant practice. On June 11, 2019, we received the Housing Stability and Tenant Protection Act of 2019 and practitioners have been scrambling ever since to make sense of the new law. Below, *The Suffolk Lawyer* lists the major changes applicable to a general landlord/tenant practice from the 74-page Act, in summary, for reference. Practitioners are advised to cross-reference this summary with the entire Act, which is available at: <https://legislation.nysenate.gov/pdf/bills/2019/S6458>.

RPL §223-b was amended to prohibit both an eviction or the offering of a new lease with an unreasonable rent increase in retaliation to a tenant's good faith compliant to a landlord, or its agent, concerning the warranty of habitability, in general, or the the duties to repair, to provide heat or to maintain a clean premises under the MDL or the duty to maintain a clean premises under the MRL. Upon a tenant enforcing its rights hereunder through a private right of action, the amendment also provides the tenant with a right to seek attorney's fees and costs. Notate that the failure to assert retaliation as an affirmative defense is fatal for the tenant, but that the presumption of retaliation was expanded from six months to one year after the complaint was made under the amendment.

RPL §226-c was added to require written notice for non-renewal or rent increases of 5 percent or more. Such notice varies based on the duration of the tenant's occupancy and the term of such tenant's lease. For occupancy and lease terms of less than one year, 30 days' notice is required; for occupancy and lease terms of more than one year, but less

than two years, 60 days' notice is required; for occupancy and lease terms of more than two years 90 days' notice. Failure to so notice voids the non-renewal or rent increase.

RPL §227-e was added to require, without possible waiver, a landlord to mitigate damages if a tenant vacates the premises in violation of the lease terms. Such landlord must undertake reasonable customary actions to rent the premises at fair market value or at the rate agreed to during the term of the tenancy, whichever is lower. The statute places the burden of proof on the landlord to establish such actions were undertaken.

RPL §232-b was amended to provide that only a tenant, and not a landlord, can terminate a monthly tenancy on one month's notice outside of the City of New York. Presumptively, a landlord can terminate by way of RPL §226-c, but the same is not expressly set forth in the statute.

RPL §234 was amended to add a provision that "[a] landlord may not recover attorneys' fees upon a default judgment" with respect to actions or summary proceedings concerning a residential lease. However, RPL §702 more broadly limits a landlord from recovering any "fees" besides "rent" in a summary proceeding. As a result, the purpose of §234 is ambiguous and will likely result in litigation as to whether the court will carve out attorneys' fees from §702's limitation where issue was joined because §234 would otherwise constitute superfluous language.

RPL §235-e was amended to require that "[t]he lessor shall maintain a record of all cash receipts for rent for at least three years."



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Additionally, a new notice requirement was added as a condition precedent to a non-payment proceeding, which notice requirement has a built-in five day grace period from the date of missed rent prior to the notice being available to be sent. Should the landlord fail to make such notice, the tenant now has an affirmative defense to a non-payment proceeding. Further, this statute should be read in conjunction with amended RPAPL §711(2), which now requires at least 14 days' written notice. Cumulatively, a tenant now, arguably, has 19 days from when the rent was due prior to the commencement of an eviction proceeding.

RPL §238-a(2) was added to cap rent payment late charges at the lessor of \$50 or 5 percent of monthly rent. Additionally, the statute provides a five day grace period similar to RPL §235-e.

RPL §702 was added to prohibit the collection of any money besides "rent" in a summary proceeding. Additionally, the term "rent" was defined to mean "monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement." As such, no more additional / added rent clauses shall be effective in a lease without resort to a plenary action.

RPAPL §713(4) was amended to require a landlord to accept the full payment of rent at any time before the hearing on a non-payment proceeding thereby rendering the proceeding moot.

RPAPL §732(1) was amended to expand the amount of time that a petition is returnable from within five to 10 days after service

for non-payment proceedings.

RPAPL §733(1) was amended to expand the amount of time that a petition shall be served to at least 10 and not more than 17 days before the time it is to be heard.

RPAPL §743 was amended to remove a possibility of requiring an answer prior to the date that the petition was noticed to be heard.

RPAPL §745 was amended to enlarge first adjournments from not more than 10 days to not less than 14 days while removing any burden from the tenant in obtaining such adjournment.

RPAPL §749 was amended with respect to warrants to require the court to include "the earliest date upon which execution may occur pursuant to the order of the court" and to permit the court to issue "a stay of re-letting or renovation of the premises for a reasonable period of time." Further, the sheriff now has to give 14 days' notice, rather than 72 hours, to the persons to be evicted. Lastly, the amended statute provides that "the court shall vacate a warrant upon tender or deposit with the court of the full rent due at any time prior to its execution."

RPAPL §753 was amended to expand the availability of a stay for the tenant's failure to "secure suitable premises similar" from NYC to the remainder of the state while enlarging the stay from six months to one year.

Happy litigating to all.

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EMPLOYMENT

New York State Overhauls Discrimination/Harassment Laws Opening the Floodgates to Future Claims

By Mordy Yankovich

On August 12, 2019, Governor Andrew Cuomo signed legislation implementing extensive reforms to the New York State Human Rights Law, which dramatically increases protections for victims of discrimination and harassment in the workplace and makes it exceedingly more difficult for employers to defend against such claims. The following is an analysis of the major changes to the NYSHRL.

"Severe and Pervasive" standard no longer applicable

Prior to the enactment of the new law, in order to establish a claim of harassment based on a protected class pursuant to the NYSHRL, the alleged conduct had to be "severe and pervasive." The new law expressly eliminates the "severe and pervasive" requirement. Rather, the conduct must only "subject an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of [the] protected categories." In

addition, an employer may raise as an affirmative defense that the conduct does not "rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." While the minimum conduct necessary to establish a claim of harassment under the new law will be subject to judicial interpretation, it is likely that isolated incidents of unequal treatment based on a protected class can now constitute unlawful harassment.

Faragher Ellerth affirmative defense is diminished

Under the new law, whether an employee complained about the harassment to his or her employer is not "determinative" as to employer liability. As a result, the effect of the *Faragher Ellerth* affirmative defense to liability will undoubtedly be weakened. The *Faragher Ellerth* defense is an affirmative defense to liability where the em-



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ployer can show that: 1) the employer exercised reasonable care to prevent and correct promptly any discriminatory or harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. See *Faragher v. City of Boca Raton*, 524 U.S.

775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Adams v. City of New York*, 837 F.Supp.2d 108 (E.D.N.Y. 2011); *Zakrzewska v. The New School*, 14 N.Y.3d 469 (2010) (This affirmative defense is not available under New York City law). While this defense is technically still available, the effect, if any, of such a defense moving forward is unknown since the second prong of the defense is contradicted by the new law.

An employer is liable for claims of discrimination/harassment by non-employees

An employer may now be liable for discrimination or harassment claims by

non-employees based on any protected class (previously limited to claims of sexual harassment). An independent contractor, sub-contractor, vendor or consultant now have standing to file a discrimination/harassment claim against a company based on any protected class.

Employees may recover punitive damages and attorneys' fees

Attorneys often strategically avoid filing discrimination claims, on behalf of their clients, in New York State Court (unless the claim arose in New York City) because of the inability to obtain punitive damages and reasonable attorneys' fees for claims brought under the NYSHRL (attorneys' fees and punitive damages are available under NYCHRL and attorneys' fees and capped punitive damages are available under Title VII). Now that attorneys' fees and unlimited punitive damages are available under the NYSHRL, more cases arising outside of New York City will undoubtedly be filed in New York State Court.

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Leadership and Law: Historic Examples of Leading American Lawyers (Continued from page 9)

soldiers accused of murder at the Boston Massacre in March 1770, despite both his objections to British actions towards the colonies and his own fear of tarnishing his reputation, believing that everyone should get a fair trial. Thurgood Marshall (1908-1993) had a long and distinguished career arguing civil rights cases, starting with *Murray v. Pearson* (1934) and culminating in *Brown v. Board of Education of Topeka* (1954). His success provided a legal basis for arguments that separate but equal was unconstitutional and helped pave the way for the Civil Rights Act of 1964. The actions of these lawyers were strictly within the law, their stage was the courtroom and yet their words set lasting precedent for women's rights, civil rights and the belief that the law should be impartial and just to all.

American lawyers have also shown leadership by applying the law outside the

courtroom. Henry Clay (1777-1852) had his own legal practice for over 50 years but was also a U.S. Senator, Representative and Secretary of State. He was influential in developing the early U.S. legal system as distinct from but built upon the English tradition, and his debate, oratory and compromise abilities helped prevent the Civil War for several decades. Richard Henry Dana, Jr. (1815-1882) joined the Merchant Marines in his youth and eventually specialized in maritime law but was also a distinguished writer. In his *Two Years Before the Mast* (1840), a memoir from his years at sea and an American classic, he brought the plight of sailors to the public's attention. Belva Lockwood (1830-1917) became the first female attorney to be allowed to practice before the U.S. Supreme Court. She also ran for president in 1884 and 1888 – the first woman to appear on official ballots – and drafted an anti-dis-

crimination bill passed by Congress in 1879. From applying law to the political sphere to the field of writing and to women's rights, these American lawyers were also leaders outside the courtroom.

Finally, some American lawyers have led by acting outside the law, only to be vindicated by history and time. Perhaps we could point to Abraham Lincoln (1809-1865), who suspended *habeas corpus* in 1861 and 1862 to preserve the Union and was retroactively granted the power to do so by Congress in 1863. Or we could speak of Lyda Burton Conley (1869-1946) who challenged the government in court over the sale of the Huron Cemetery in Kansas City. The first attorney to argue that burial grounds for Native Americans should be entitled to federal protection, when she lost the case, she and her sisters took to guarding the cemetery themselves against all trespassers.

In 1916, with the support of the Kansas governor, the Huron Cemetery was established as a federal park.

There are as many ways to exhibit leadership as there are ways in which to practice and apply the study of law. What is clear is that law and progress are inextricably bound together, and that American lawyers hold a unique place in their ability to utilize the law to lead America into the future.

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Five Practical Suggestions for Leaders (Continued from page 10)

enthusiasm may help develop future leaders. If you doubt this, just think about who your role models have been.

Suggestion #4: Ask for help and guidance

No matter what leadership position you are in, someone has gone before you, literally and/or otherwise. There is no need to re-invent the wheel even if you are hoping to bring change to an organization. Call upon other leaders, including former leaders within the organization and otherwise, and staff and longtime committed members of your organization. We are all tremendous resources to one another. None of us are an island, regardless of what we may otherwise believe about ourselves.

Suggestion #5: Strive for balance

Leadership is important, especially for anyone who has undertaken an intentional commitment to be a leader, but it cannot be everything. If you are a leader to the detriment to the other important parts of your life, your leadership will not be as effective or meaningful. Your family, your practice or career, your other genuine interests and your own needs are all important. Eating, exercising, having fun . . . all important, and hope-

fully they are not all mutually exclusive of one another. Balance between them is all the difference between a successful leadership role and a fulfilling and satisfying life.

Effective scheduling and listening, enthusiasm, seeking assist and striving for balance in your life are all very important leadership "skills," but there are so many others as well. If leadership is a topic that interests you, speak to your peers, attend leadership training programs, go online or to a library or even a bookstore (yes, there is still value to books!). The topic is vast, interesting, exciting and extremely relevant to your personal and professional satisfaction and success, which is what I hope for all of you!

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Employment (Continued from page 14)

Non-disclosure/confidentiality provisions are prohibited

Provisions in agreements settling discrimination claims that require employees/non-employees to keep the underlying facts or circumstances confidential are prohibited unless the employee prefers to include such a provision in the agreement. It is unclear whether a mutual confidentiality/non-disclosure provision would satisfy such a requirement.

While the full effect of many of these changes to the NYSHRL may not yet be known, employers should immediately train human resources and supervisors

on the new law and update their anti-discrimination/harassment policies to minimize potential exposure. For employers that have not already conducted the required annual sexual harassment training for all employees (which must be completed by October 9, 2019), they would be well served to include these changes in the training.

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Tales of the Pied Piper: A Litmus Test for Leadership (Continued from page 10)

ing to one authority on leadership, in order to set oneself apart from the masses as a L.E.A.D.E.R., the following aptitudes are essential:

Listening — This is the ability to hear all voices and acknowledge points of view, even those which are contrary to yours. Listening is an essential part of effective communication and if effective communication is not exercised, trust levels will be low, which results in the festering of defensiveness, protectiveness and disrespect, thus creating a hostile work environment.⁴

Empathy — This means the ability to appreciate and understand what other people are experiencing.⁵ Once a leader is able to empathize, then it is important not to disregard or minimize another person's feelings about a situation.

Accountability — This requires creating an atmosphere in which people accept responsibility for their own successes and losses, while simultaneously prompting professional freedom. Without a leader's transparency, it is difficult for others to understand work expectations and the ultimate vision for the organization.⁶

Delegation — This means more than passing a task along to someone else; delegation involves putting people in place to complete a task who share the same vision and are qualified to complete that task. To delegate effectively, it is necessary to have confidence in the abilities of others and to communicate expectations clearly. Done well, delegation can significantly boost the morale of an organization.⁷

Enthusiasm — Good energy inspires. Leaders who are enthusiasts are a source of inspiration and serve a pivotal role for a team working towards a common goal.⁸

Responsibility — Similar to accountability, a leader's acceptance of responsibility for the entire team instills confidence and comradery.⁹

Though the tactics of a Pied Piper may seem alluring and elicit a following, ear-

nest leaders will seek to embody the abovementioned qualities which serve as a foundation for great leadership and a litmus test to measure the success of a leader. It is fortunate for everyone that these elements of great leadership involve skill sets that can be developed and strengthened over time — especially through membership in the Suffolk County Bar Association. By participating in SCBA committees and foundations, attending CLE's and being involved in the Association's special events, active members have unique opportunities to develop meaningful relationships and leadership skills and to experience professional and personal, while simultaneously helping to shape current and future leaders. That is why I join our current SCBA President Lynn Poster-Zimmerman in saying - "Get involved and start by doing one thing."

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5 Sarmad Hasan. *Qualities That Define a Good Leader (13 Personal Traits)* (2017, Feb. 13). Retrieved from <https://blog.taskque.com/characteristics-good-leaders>

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7 id

8 id

9 id