NELA|NY

ADVOCATES FOR EMPLOYEE RIGHTS

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<u>Memorandum In Support</u>

S04467B (Mayer)/A01396A (Bichotte Hermelyn)

The National Employment Lawyers Association/New York ("NELA/NY") submits this memorandum in support of S04467B/A01396A, which clarifies that the standard for proving intentional employment discrimination is "motivating factor" rather than the more restrictive "but-for cause" standard. This will ensure that the NYSHRL will be construed "liberally for the accomplishment of [its] remedial purposes," (N.Y. Exec. Law § 300) and protect New York employees and independent contractors from the current trends in the federal courts, which have become increasingly restrictive.

The National Employment Lawyers Association (NELA) is a national organization of attorneys dedicated to the vindication of workers' rights. NELA/NY, incorporated as a bar association under the laws of New York State, is NELA's New York State affiliate, comprising more than 350 members.

Over the past 15 years, federal courts have increasingly required plaintiffs in various categories of federal discrimination cases (and in federal retaliation cases based on the plaintiff-employees' opposition to discrimination) to prove that the discrimination and/or retaliation was the "but for" cause of the negative conduct they faced, as opposed to the more lenient "motivating factor" standard that had been applied in the past. The categories thus far restricted currently include, but are not limited to: age under the federal Age Discrimination in Employment Act (ADEA) (*Gross v. FBL Financial Services, Inc.*, 555 U.S. 167 (2009); retaliation under Title VII (the federal law prohibiting retaliation based on race, sex, religion, color and national origin) (*University of Texas Southwestern Medical Ctr. v. Nassar*, 570 U.S. 338 (2013); race discrimination under 42 U.S.C. §

1981 (*Comcast v. National Association of African American-Owned Media*, 589 U.S. ___, 140 S. Ct. 1009 (2020); and disability discrimination under the Americans With Disabilities Act (*Natofsky v. City of New York*. 921 F.3d 337 (2d Cir. 2019); *Gentry v. E.W. Partners Club Mgmt. Co., Inc*, 816 F.3d 228, 235-36 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (7th Cir. 2021). The application of the "but for" cause standard instead of the "motivating factor" test has typically resulted in employees being barred from proving discrimination cases that would otherwise have been permitted to proceed to trial. For example, in *Naumovski v. Norris*, 934 F.3d 200, 214-215 and notes 32, 35-38 (2d Cir. 2019), the circuit panel, relying on *Gross* and *Nassar*, required dismissal of plaintiff's § 1983 claim on summary judgment thereby eliminating trial of that claim. While it is possible that some courts will interpret "but-for" causation in a more liberal light in the future, the clarification provided in S04467B/A01396A together with § 300 of the NYSHRL will make it crystal clear that the more lenient "motivating factor" standard is consistent with the remedial purposes of the New York State Human Rights Law, which protects both employees and independent contractors, and covers some 18 protected categories uniformly, unlike the federal statutes which were enacted and amended at different times., .

We urge the Legislature to pass this bill to clarify that "motivating factor" is the appropriate standard for evaluating claims of disparate treatment and retaliation under the New York State Human Rights Law.