Amnesia Oral Argument May 13, 2014, 2pm

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I'm Roy Den Hollander the petitioner-appellant and an attorney representing myself.

I'm appealing the dismissal by the Supreme Court of an Article 78 complaint.

Remedies of law issue

The key issue is one of statutory interpretation.

When the State Human Rights Division dismisses a discrimination complaint for one type of discrimination can the complainant file a grievance with the City HR Commission for a different type of discrimination stemming out of the same fact situation over which the State Division did not have jurisdiction?

Facts

The facts are simple: I and another grey-hair gentleman tried to gain admission to the night club Amnesia. Unlike other customers, we were barred from admission unless we purchased a $350 bottle of brandless vodka. We declined.

I filed a complaint of sex discrimination with the State HR Division, which found no sex discrimination but that it appeared to be age discrimination over which the State had no jurisdiction for public accommodations.

I then filed an age discrimination complaint with the City HR Commission because it did have jurisdiction over age discrimination.

The City HR Commission found that because I had filed a complaint for sex discrimination with the State HR Division, I was barred from filing a complaint for age discrimination with the City Commission.

The lower court upheld the City HR Commission's decision

Remedies of law argument

The pertinent statute is NYC Admin. Code § 8-109(f)(iii) in the City's Human Rights Law that says once the State HR Division makes a final determination in a case, a complaint for the same "grievance" cannot be brought with the City HR Commission.

The question is does "grievance" mean the fact situation or the cause of action?

The lower court held it meant the fact situation.

The problem with that holding is it sets up a trap by which discrimination wins, and given the City Council's policy in enacting its human rights law, I doubt it intended that to happen.

This is how the trap works: If a person complains to the State HR Division about one type of discrimination by a public accommodation over which the State has jurisdiction [race, creed, color, national origin, sex, disability, marital status, sexual orientation, or military status], but the State dismisses the complaint because it finds the discrimination was really based on a type of discrimination over which it does not have jurisdiction [age, partnership status, alienage, or citizenship], then the complainant is left without a remedy.

Under the lower court's holding that grievance means the fact situation, the complainant cannot go to the City HR Commission, which does have jurisdiction because he already filed a complaint with the State HR Division, and he cannot start a new action in court because of Exec. Law § 279(9) and N.Y.C. Admin. Code § 8-502(a) prohibit it.

So he's trapped and the bigots win under the lower court's holding and the City's argument.

Under my argument, "grievance" means a cause of action, so if the State HR Division dismisses a complaint because it believes the type of discrimination that occurred was outside its jurisdiction, the complainant can still find a remedy with City HR Commission, which has jurisdiction over that type of discrimination, such as age, partnership status, alienage, or citizenship.

The City Council was not blind to the difference in the jurisdictional reach of State HR Division and the City HR Commission. The members knew that a citizen might file with an agency that did not have the power to deal with a particular type of discrimination, so rather than preventing him from going to an agency that did have the power, they used the term "grievance"—not the phrase "fact situation," or the terms "incident or occurrence."

Of course, they were also mindful of not wasting an agency's resources on a type of discrimination that was already resolved by another agency. Use of the term "grievance" as a cause of action provides the best of both worlds—protection of rights and conservation of the taxpayers' money.

NYC Admin. Code § 8-109(f)(iii), therefore, only prevents going from the State Human Rights Division to the City Human Rights Commission on a cause of action that either of the two agencies on their own could resolve.

No other recourse

Any appeal of a State's dismissal of the non-jurisdictional cause of action would go nowhere because it does not have jurisdiction.

The person could start a special proceeding and incur the time and cost of such on the cause of action that falls within the State Human Rights jurisdiction. The avoidance of court proceedings, however, was one of the reasons for setting up human rights agencies because the legislators knew that when faced with such costs in money and time, individuals are likely to forego fighting discrimination, which means the bigots win.

City Council Policy

City Council's legislative intent of enacting its human rights law:

> The council . . . [declared] that prejudice, intolerance, bigotry, and discrimination . . . threatened the rights and proper privileges of [the City's] inhabitants and menaced the institutions and foundation of a free democratic state. [City HR Commission] was created with power to eliminate and prevent discrimination from playing any role in actions relating to . . . public accommodations . . . . NYC Admin. Code §8-101.

Another concern of the City Council was that citizens have a low cost means to protect their rights by using government agencies established for that purpose.

Rebuttal to City two bites of the apple

It is important to keep in mind what this case is about and not the specious example the City uses in claiming I want a "second bite at the apple." (City HR Brf. at 28-29). I never got one bite at the apple because the State HR Division's fact-finding showed it did not have jurisdiction and the City HR Commission dismissed. The City's example in its Brief is not on point because color and race are within the jurisdiction of the State Human Rights Division and the City HR Commission. If a person went to any of these bodies, he could allege discrimination under both, and the body would have jurisdiction. If he failed to initially allege one, he could amend, and if he did not, then he sat on his rights, which has nothing to do with election-of-remedies.

It's clear what happen in this case. The bureaucrat Carlos Velez was angered that I complained about him to his boss who overrode his lame conclusion that there was no discrimination because my friend and I could enter if we paid $350. He wasn't about to spend much time investigating this matter, so he slapped together a slipshod decision and threw in some politically correct insults to threaten me off from appealing.

<u>Statutes-Remedies</u>

N.Y. State Exec. Law 297(9): If filed complaint with State HR Division or a local human rights agency, cannot go to court over same "grievance," which = same occurrence. If filed complaint in court, cannot go to State HR Division. If complaint pending before any administrative agency under any other <u>law of the state</u>, cannot go to State HR Division.

N.Y.C. Admin. Code 8-502(a): If filed complaint with City HR Commission or State HR Division, cannot go to court over same "discriminatory practice," which = same occurrence, "grievance" not mentioned.

N.Y.C. Admin. Code 8-109(f)(i): If filed complaint in court, cannot go to City HR over same same "grievance."

8-109(f)(ii): If has complaint pending before any administrative agency under any other state law, cannot go to City HR over same "grievance." that is still pending with the State

8-109(f)(iii): If the State Human Rights Division made a final determination on complaint, cannot go to the City HR Commission on the same "grievance."

Statutes-Discrimination Types

NYC Admin. Code §8-107(4)(a): Protects against public accommodation discrimination based on race, creed, color, national origin, age, sex, disability, marital status, partnership status, sexual orientation or alienage or citizenship status.

State Exec. Law §296(2)(a): Protects against public accommodation discrimination based on race, creed, color, national origin, sex, disability, marital status, sexual orientation, or military status.

Meaning of grievance language in NYC Admin. Code § 8-109(f)(iii)

The lower court assumed the term "grievance" was identical with the "occurrence" or "fact situation" that gave rise to the grievance because that is how the term is used in the State Human Rights law, Exec. Law §297(7), and "discriminatory practice" in Admin. Code 8-502(a).

However, the statute that applies to this case is NYC Admin. Code § 8-109(f)(iii)—not Exec. Law §297(7), which applies to going from an agency to a court, or court to an agency, or from an agency to the State HR Division. As for NYC Admin Code §8-502(a), it also applies to going from an agency to a court but does not use the word "grievance."

Cause of action = grievance

According to Black's Law Dictionary, "grievance" means "an injury, injustice, or wrong that gives ground for a complaint." Without the violation of a right there is no wrong and no complaint, so the violation of a right, no matter what the factual circumstances, is the requirement.

The U.S. Supreme Court ruled "[a] cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927). When the "violations of two individual rights have occurred," even though "both violations spring from a common fact, a single occurrence" there are two injuries, not one. *Herrmann v. Braniff Airways, Inc*., 308 F.Supp. 1094, 1099-1100 (S.D.N.Y. 1969).

The person discriminated against because of his sex is wronged, which means he has a "cause of action" because he was denied something others weren't due to his sex. A person discriminated against because of his age also has a cause of action, because he was denied something due to his

age. The two causes of action are not the same. One was motivated by ill will toward a person's sex while the other was motivated by ill will toward a person's age.

If the same person is discriminated against for both his sex and age on the same occasion at the same time, the person has two causes of action or two grievances stemming from the one incident.

When Amnesia refused to let my friend and I enter the club unless we paid $350 for a bottle, that occurrence gave rise to two potential injuries, injustices, or wrongs: unlawful sex and unlawful age discrimination. The State Human Rights Division made a final determination only on the sex discrimination grievance, which left the age discrimination grievance undecided.

This case is not about agency shopping. Here, the State had jurisdiction over the allege cause of action: sex discrimination, but then the State discovered through its investigation that the real cause of action was apparently age discrimination over which it had no jurisdiction.

The lack of jurisdiction meant I could not amend the complaint.

Res judicata standard of review

The lower court relied on res judicata cases to bolster its remedies holding by stating:

> [My] age discrimination claim 'constitutes the same cause of action as the formerly litigated [gender] claim,' as it arose out of the same transaction or occurrence from January 9, 2010. *Troy v. Goord*, 300 A.D.2d 1086, 1087 (4th Dept. 2002); see also *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185,192-194 (1981); *Tsabbar v. Delena*, 300 A.D.2d 196, 197 (1st Dept. 2002).

(Order and Judgment, Hunter, J., at 3, A-10).

The problem with the lower court's election of remedies analogy with res judicata is that res judicata and collateral estoppel are generally applied to final judgments of courts of limited jurisdiction. *See Hallock v. Dominy*, 69 N.Y. 238, 240-41 (1877); *Firedoor Corp. of Am., Inc. v Merlin Indus., Ltd.*, 86 A.D.2d 577, 446 N.Y.S.2d 325, 327 (1st Dep't 1982).

However, if the limited nature of the court's jurisdiction precludes determination of a particular claim, its decision will not be res judicata or collaterally estopped as to that claim. *Leshin v. Ludwig*, 111 N.Y.S.2d 105, 110 (Dom. Rel. Ct. 1952).

As Judge Cardozo held in a Court of Appeals case:

> An election of remedies presupposes a right to elect. . . . If in truth there is but one remedy, and not a choice between the two, a fruitless recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed.

Schenck v. State Line Tel. Co., 238 N.Y. 308, 311 (1924)(Cardozo, J.).

Since the State HR Division does not have jurisdiction over age discrimination in public accommodations, there was not a choice between two remedies within the State Division, so the lower court's analogy to res judicata actually means the election of remedies doctrine does not apply.

Splitting doctrine

The City in its brief also tried an analogy with the "splitting" doctrine to support its election of remedies argument. (City Brf. at 23).

The splitting doctrine deals with instances in which a plaintiff with a single money claim omits part of what is due him when he sues. Siegel, *New York Practice*, p. 774, 5th ed. The omitted part is waived. *Id.* Even the case cited by City HR deals with a single monetary claim. Such is not the situation here.

Probable cause for discrimination

Requirement: "Where a reasonable person, looking at the evidence as a whole, could reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed." 47 RCNY 1-03.

Image

Two young ladies gain admission without paying $350 for a bottle, two grey hair guys are required to pay $350, then two groups of two young ladies each gain admission without paying $350. So what would a reasonable person conclude?

The lower court concluded: "Amnesia's decision for requiring $350 bottle service [from older males] was based upon a nondiscriminatory, legitimate reason of 'limited space and the goal of furthering the image of Amnesia's establishment.'" (*Order and Judgment*, Hunter, J., at 3, A-10).

Amnesia admitted to the State HR Division that "when the nightclub is crowded, [Amnesia] employs an admissions strategy to limit the number of individuals, male and female, who do not have the appearance respondent desires to maintain the image of the nightclub." (A-50, State Order, emphasis added).

By Amnesia's admission and common sense, Amnesia's image is based on a person's appearance. (A-50, State Order). Its doorman has no other information, other than an identification card, to go on for concluding whether a person meets Amnesia's image. Amnesia couldn't pursue an image of only Christians because there is no way of distinguishing a Christian from the followers of some other religion by just looking at the person and checking their identification, at least in America.

So when Amnesia starts limiting the number of people to enter the club when it is crowded, it necessarily starts discriminating—based on appearance—against those who do not fit its image.

The State Human Rights Division inferred that image is one of youth. The lower court wrongly called the State HR Division's inference *dicta*.

According to the Second Circuit: "In the course of receiving a complaint, the S[tate] HR Regional Office will serve respondents, make sure the S[tate] HR Division has jurisdiction, and if so, begin investigation." *Rosu v. City of New York*, Docket No. 13-243-cv, 2014 U.S. App. LEXIS 2402, at *9 (2d Cir. Feb. 7, 2014).

Conducting a fact-finding visit to "make sure the S[tate] HR Division has jurisdiction" is not *dicta*.

The State's trained investigators made the necessary fact findings to resolve whether the State had jurisdiction—it did not because the reasonable inference was that Amnesia had engaged in age-discrimination.

[Dicta are "statements made by a court in an opinion which are unnecessary to the holding . . . ." *Chiasson v. N.Y.C. Dep't of Consumer Affairs*, 138 Misc. 2d 394, 396 (1988). Among the requirements of the State HR Division's Investigative Procedure is that the investigation be objective and "[r]esolve issues of questionable jurisdiction." (Information for Complaints at 1-2, A-66-67).

Another definition for dicta are expressions in a court's opinion that go beyond the facts. The State DHR, however, reached its conclusion based on the facts its investigators observed—facts of a more probative value than those relied on by the City Commission which used an Internet article and Internet blogs. The lower court places more value on Internet communications than eyewitness accounts by trained investigators.]

Given the State HR Division's fact-findings, a reasonable person would conclude that Amnesia's admitted image is one of youth.

Since Amnesia's image is one of youth, it erects a barrier to deter the un-young from entering—a $ 350 for a bottle of watered down, brandless alcohol. In other words, the back of the bus can hold just so many members of a disfavored group before they are no longer admitted even though there is plenty of room in the front of the bus.

The City argues that Amnesia is not discriminating in favor of its image of youth because of nightclub demographics. Assuming the Court can take judicial notice concerning nightclub demographics, it does not negate that Amnesia's policy of enforcing a youthful image results in discriminating against others based on age. Otherwise, an all-white country club could say everybody there is white because it's white people who typically play golf and tennis.

If Amnesia's image was not one of youth, then it could be discriminating on the basis of color, sex, or perhaps national origin. Regardless of which basis Amnesia was discriminating on in order to preserve its image of appearance when crowded, it still violates N.Y.C. Admin. Code Title 8.

Both the lower court and City Human Rights, however, approved of such discrimination.

Need not be a practice or policy

Even though Amnesia admitted to enforcing a policy and practice to further its youthful image, discrimination does not require a policy or practice, one instance of such is good enough for violating the City's Human Rights Law

Silver Dragon Restaurant v. The City Commission on Human Rights, N.Y.L.J., March 31, 2004, p. 24, col. 3 (Sup. Ct. Kings Co.)(on one occasion a black lady was required to pay for food before it was served while others who were white were served and then paid) and *Joseph v. N.Y. Yankees Partnership*, N.Y.L.J., October 24, 2000, p. 35, col. 5 (S.D.N.Y.)(on one occasion a black lady was refused admission to the Yankee Stadium Club unless she changed attire, which she did, but inside saw that white ladies did not have to wear the same type of attire).

Substantial evidence required for a probable cause determination.

The evidence relied on by the City HR Commission must be "substantial evidence"; otherwise, the Commission's findings will not be conclusive, and a court may then substitute its judgment for that of the Commission. See N.Y.C. Admin. Code §8-123(e); *Okoumou v. Community Agency for Senior Citizens, Inc.*, 17 Misc.3d 827, 833, 842 N.Y.S.2d 881, 887, 2007 N.Y. Misc. LEXIS 6756 *13 (2007).

"Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. . . . Essential attributes are relevance and a probative character. . . . Marked by its substance—its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor. . . . More than seeming or imaginary. . . .'" *Matter of 119-121 E. 97th St. Corp. v New York City Comm'n. on Human Rights*, 220 A.D.2d 79, 81-82 (1996).

Evidence for establishing facts can only be alleged by a person in a position to know the facts. *Penn Troy Mach. Co., Inc. v. Dept. Gen. Services*, OATH Index No. 478/93 (March 2, 1993).

Hearsay is treated skeptically, *Triborough Bridge and Tunnel Auth. v. Simms*, OATH Index No. 1303/97 (May 30, 1997).

Evidence relied on by the lower court

The lower court refers to

(1) the State HR Division's *Determination and Order After Investigation*, which was based on the eyewitness accounts of trained investigators in discrimination and infers age-discrimination. When I examined the City HR Commission's investigation file on February 21, 2013, the only State HR Division document was the State HR Order and a cover letter—there were no investigation report, no supporting materials;

(2) a verified complaint and rebuttal by me, also an eyewitness; and

(3) an answer by Amnesia's corporate officer Henry Rosas who was not an eyewitness. (Order and Judgment, Hunter, J., at 3, A-10). Since Rosas was not an eyewitness, his answer is useless because he did not have personal knowledge of the facts as required by *Kopanski v. Hawk Sales Co.*, 76 Misc. 2d 348, 349; 350 N.Y.S.2d 53, 534 (N.Y. Sup. Ct. Herkimer Cty 1973).

So it appears that the weight of the evidence tips in favor of age-discrimination, yet the lower court upheld City HR's decision of no probable cause that age discrimination occurred.

There must be some missing materials that tipped the balance for the lower court to uphold City HR's decision even though the lower court does not mention them—perhaps out of embarrassment.

Internet blogs are not substantial evidence

The City HR Commission relied on two Internet blogs for substantial evidence that Amnesia also required younger patrons to buy a bottle in order to enter. The problem is that the City HR Commission did not know whether these bloggers were who they said they were, were sober enough that their perceptions and memories were accurate, or were actually at Amnesia when they claimed.

The first blogger "Tasty," April 2010, may not have been allowed in without buying a bottle, but it is not clear, since the City Commission never contacted her. If she was required to buy a bottle, it may have been because she was with gray haired guys or a large group of 12. A-61-62. We don't know.

As for the second blogger Maria, December 2009, she doesn't even mention bottles, just that younger folk were "lining up at the downstairs bar," which is inside the club. A-63. The City Commission assumed they were buying bottles, but bottles can only be purchased at tables within a nightclub. Bottle service is the practice, in which coveted tables at swanky clubs are reserved for a group as long as they buy a high-priced bottle of vodka or champagne. State Liquor Authority, Departmental Bill # 16 (SLA 10-07); Associated Press 2007, *New York Eyes Regulating Bottle Service*. The State HR Division Order confirms this for Amnesia when it stated that Amnesia had "several tables for individual bottle service . . . ." People in clubs who buy bottles place their orders while sitting at tables because waitresses are the ones who serve the bottles along with cantors of mixer and glasses—customers don't line up at bars for bottles of liquor but individual drinks.

More importantly, the blogs do not purport to represent the events that occurred to my friend and me on January 9, 2010.

Probable cause finding not accorded substantial deference

The key case the City cites with no signal that an agency's probable cause finding be given substantial deference does not hold such. *Mitchell v. Comm'n Human Rights*, 234 A.D.2d 128,128 (1st Dep't 1996). That Article 78 proceeding was decided against the petitioner because

he failed to file his City HR complaint within one year of the alleged discrimination as required by N.Y.C. Admin. Code § 8-109(e). Anything else from that case is dicta.
In *Wu v. N.Y.C. Comm'n Human Rights*, 84 A.D.3d 823, 824 (2d Dep't 2011), the Second Department stated a City HR determination requires a rational basis, but *Wu* does not hold or state that City HR determinations are accorded "substantial deference." In *Doin v. Continental Ins. Co.*, 114 A.D.2d 724,725-26 (3d Dep't 1985), the issue was not the "fairness or completeness" of a State Human Rights Division investigation but whether the State had rationally denied a formal hearing.

The Commission conducted an abbreviated, one sided, and irrational investigation.

In *Rosu v. City of New York*, Docket No. 13-243-cv, 2014 U.S. App. LEXIS 2402, at *11 (2d Cir. Feb. 7, 2014), the Second Circuit Court of Appeals held that "[b]efore [a] determination of no probable cause may be reached, the Commission's statute requires a full investigation. N.Y.C. Admin. Code § 8-109(g)." (Emphasis added).

47 RCNY §1-31 requires that the City Commission conduct an accurate and thorough fact-finding.

Failures of investigation

The lower court concluded that the City Commission did not conduct a one-sided and abbreviated investigation, A-10, even though it

(1) failed to interview two of the three eyewitnesses;
(2) relied on Internet blogs by persons identifiable only by their Internet monikers and who, by their own blogs, admitted not even being at Amnesia at the time of the incident;
(3) ignored an Internet blog by one person who was at the nightclub at the time of the incident because it supported a finding of discrimination;
(4) relied on an Internet article by an unknown person using *ad hominem* attacks as a basis for finding no discrimination;
(4) dismissed as dicta the findings of the only government agency, N.Y. State Human Rights Division, to conduct an on-site investigation that age discrimination was likely at work;
(5) relied on an answer by a person who lacked firsthand knowledge of the incident;
(6) ignored that one act of discrimination violates the human rights law;
(7) relied on an alleged missing video that was useless anyway because it had no audio.

Court says adequate

The lower court listed the following actions, A-10, by the City HR Commission as comprising an adequate inquiry:

"[C]onducted an intake interview prior to the filing of his complaint": If Velez of the City Commission had his way, there would have been no interview, and even with the interview,

where I told the City HR Commission about the eyewitness Robert M. Ginsberg, The City Commission failed to contact him.

"[S]erved petitioner's complaint": The mailman did that. Still, what investigation technique meant to discover the truth is mailing a complaint—none.

"[D]emanded and obtained a Verified Answer from Amnesia; gave petitioner an opportunity to submit a Rebuttal": Actually, the demand was a form letter delivered by the mailman with the complaint and I did submit a rebuttal.

As for the "Verified Answer," it was useless because the person making it did not have firsthand knowledge of the facts as required. The City Commission also failed to independently verify the answer's alleged facts. So among the complaint, answer, and rebuttal, only the complaint and rebuttal were made by someone with firsthand knowledge. Yet, The City Commission and the lower court considered a defective answer as more probative than a complaint and rebuttal that followed the legal requirements.

"[The City Commission] obtained and reviewed the [State HR Division's] entire file on [my] previous [sex] discrimination complaint": The only items from State HR Division that were in The City Commission's investigation file were the State's *Determination and Order After Investigation* with a cover letter from State. Not much of a file, besides the City Commission's Order, A-42, discredits the State's investigation anyway.

"[A]ttempted to locate [the doorman]": The only attempt by the City Commission to locate the Amnesia doorman was a letter addressed to only his first name, "David," at Amnesia's business address. The letter was returned as undeliverable. There were no emails, letters, telephone logs, or evidence of in-person visits to Amnesia's manager, or officers, in an attempt to locate "David," or even determine his last name.

"[A]ttempted to obtain Amnesia's surveillance video": An obviously wasted effort, since even had The City Commission acquired it did not have audio.

<u>Reality of investigation</u>

In reality, the City Commission's investigation consisted of its Law Enforcement Officer, Carlos Velez,

- sitting down at his desk and with little work over a short period of time;
- sending out a letter to the Amnesia doorman that was returned;
- contacting Amnesia's attorney—only the number, but not any notes of a conversation were in the investigation file;
- sending an email requesting a complete file from the State that he never received;
- searching the Internet and cherry picking a couple of untrustworthy, irrelevant blogs, and an article that he stretched into supporting a "no probable cause" determination.

Broad discretion

The lower court ruled that the City Commission's efforts were sufficient because City HR has broad discretion in determining the method to be employed in investigating a claim. (Order and Judgment, Hunter, J., at 3, A-10). But how broad is that discretion—is it a blank check?

The lower court cites to three Appellate Division cases: *Wu v. N.Y.C. Commn. on Human Rights*, 84 A.D.3d 823, 824 (2nd Dept. 2011), quoting *Matter of Levin v. N.Y.C. Commn. on Human Rights*, 12 A.D.3d 328, 329 (1st Dept. 2004); see also *Stern v. N.Y.C. Commn. on Human Rights*, 38 A.D.3d 302, 302 (1st Dept. 2007).

The problem with these Appellate decisions is that they do not specify the methods used in the respective investigations conducted by the City HR Commission to reach a no probable cause finding. Without knowing what steps were taken in those investigations, it is impossible to compare them to the City Commission's actions in this case.

Of the three Supreme Court decisions that were appealed to their respective Appellate Divisions. Only one of the decisions, *Stern v. N.Y.C. Commn. On Human Rights*, Sup. Ct. N.Y. 110668/03, at 1-2, A-54-55, cited the investigatory methods used by City HR to find no probable cause. In *Stern*, City HR reached its no probable cause decision based on affidavits from two administrative law judges involved in the fact situation of the alleged discrimination, affidavits from security guards, an affidavit from the N.Y.C. Department of Finance Equal Opportunity Officer, and incident reports from the Department of Finance.

No Internet blogs or articles were involved.

The lower court accepted the City HR's argument that what it did in this case was consistent with other cases. The cases cited by the City HR Commission make clear by comparison that it conducted a slip-shod investigation in this case. (City HR Brf. at 40-41).

Chirgotis v. Mobile Oil Corp., 128 A.D.2d 400, 403 (1st Dep't 1987), found that in light of a 56 page statement by defendant with affidavits and relevant documents that a hearing or conference was not required. Amnesia only submitted a three page answer by a person lacking firsthand knowledge.

Pascual v. N.Y.S. Div. Human Rights, 37 A.D.3d 215, 216 (1st Dep't 2007), found that subpoenaing documents was unnecessary because petitioner had a two hour fact-finding conference to present and rebut information. Here, City HR did not provide a fact-finding conference.

Block v. Gatling, 26 Misc. 3d 1228(A), 2010 N.Y. Misc. LEXIS 352 (Sup. Ct. N.Y. Cty., Feb. 18, 2010), *aff'd*,84 A.D.3d 445 (lst Dep't 2011), found that the people not interviewed were not relevant to plaintiff's allegations of age discrimination and disability discrimination, which were actually disproved by plaintiff's own admissions, a collective bargaining agreement, and defendant's position statement. Amnesia never provided a position statement although it was invited to, and while City HR tried to contact a witness for Amnesia, it failed to even try to

contact my eyewitnesses to the discrimination—attorney Robert M. Ginsberg, which amounted to denying me a "full and fair opportunity" to present my claims, as required by *Matter of Barnes v Beth Israel Med. Ctr.*, 977 N.Y.S.2d 888 (lst Dep't 2014); *Stern v. N.Y.C. Comm'n Human Rights*, 38 A.D.3d 302, 302 (lst Dep't 2007); *Gleason v. W.C. Dean Sr. Trucking*, 228 A.D.2d 678, 678 (2d Dept. 1996).

McFarland v. NYSDHR, 241 A.D.2d 108, 111 (1st Dept. 1998), included a fact-finding conference in which witnesses were presented and numerous documents submitted. Such did not occur here.

David v. N.Y.C. Comm'n Human Rights, 57 A.D.3d 406, 407 (1st Dep't 2008), City HR's investigation included conducting over 20 interviews. Here The City Commission conducted only one with me.

Givens v. Gatling, 2011 N.Y. Misc. Lexis 3551 (Sup. Ct. N.Y. Cty. July 11, 2011), a case not cited by City HR makes clear that its investigation in this matter was insufficient. In *Givens*, City HR "did not interview witnesses, because petitioner failed to provide the Commission with this information during the investigation." *Givens* at *8. Here, City HR simply ignored a key witness, Robert M. Ginsberg, even though it knew about him and how to contact him.

Arbitrary and Capricious

An agency's decision is arbitrary and capricious when it relies on reports that are "inapplicable or irrelevant" on their face. *125 Bar Corp. v. State Liquor Authority*, 24 N.Y.2d 174, 179 (1969).

The Internet article by Jezebel and the blogs by "Tasty 1027" and "Maria W. NY," which the City Commission and apparently the lower court relied on did not even address the discriminatory incident of January 9, 2010, and Amnesia's answer was inapplicable because Rosas did not witness the incident.

In addition, if an agency officer fails to follow the agency's rules in rendering a determination, that determination will be arbitrary and capricious. *Frick v. Bahou*, 56 N.Y.2d 777, 778 (1982). The City Commission's Velez failed to conduct an accurate and thorough fact-finding as required by 47 RCNY §1-31.

Procedural due process violation

The lower court in *dicta* held that a government agency can violate its required procedures, including failing to provide an impartial decision maker, and still adhere to procedural due process in making a decision just because its decision is appealable to a court.

Just because a party has an opportunity for judicial review does not mean an agency's action complied with procedural due process; otherwise, whenever an agency failed to follow its procedures thereby violating procedural due process, and a person appealed to a court, the court would have to say that violation was okay because the person appealed.

The lower court wrongly relies on *Velella v. N.Y.C. Local Conditional Release Commn.*, 13 A.D.3d 201, 202 (1st Dep't 2004). *Velella* actually held that procedural due process requires a post-deprivation review of an agency's actions not that the mere availability of such a review absolves an agency of due process violations.

The procedural due process issue is whether the City Commission's investigation followed City Human Rights procedures. "[N]ot properly conducting an investigation in accordance with the [agency's] procedures would mean [it] did not afford sufficient process . . . ." *Rosu v. The City of New York*, 2012 U.S. Dist. 178875 *14 (S.D.N.Y. 2012).

The City Commission's investigation failed to follow the City HR's procedures and violated its own rule requiring an accurate and thorough fact-finding, 47 RCNY §1-31, because it

- did not interview witnesses;
- did not issue interrogatories;
- did not obtain authenticated documents;
- did not make any telephones logs, which indicates it made no telephone calls, except perhaps to Amnesia's attorney for which there are no logs;
- did not try to contact a potential witness, attorney Robert M. Ginsberg, who was with me on the night of the discrimination and whom the City Commission knew about and how to contact, which alone amounted to denying me a "full and fair opportunity" to present my claims, *Stern v. N.Y.C. Commn. Human Rights*, 38 A.D.3d 302, 302 (lst Dep't 2007);
- did no more than send a letter to Amnesia addressed to the doorman 'David," which was returned as undeliverable;
- did not try to contact anyone familiar with Amnesia's admission policy;
- did not try to contact anyone at Amnesia who may have also witnessed the discrimination even though there were two bouncers standing behind the doorman.

So no interviews with other eye-witnesses or Amnesia officials, no interrogatories of anybody, and no requests for documents other than the State HR's file from which the City Commission only received the State *Determination and Order After Investigation* and a cover letter.

Instead the City Commission relied on inaccurate bits of information on the Internet that comprised the bulk of its investigation into the facts.

- Displayed in a prominent position in the City Commission's investigation file was an Internet article titled "*NYC Attorney Out To Reclaim Ex-Wife From Feminism's Clutches, Get Laid Easier*," written by some unknown person using the pseudonym "Jezebel," whom the City Commission never interviewed. That article was the source of the City

Commission's inclusion in his Order about my prior anti-feminist cases, marital status, and being "bitter" toward my ex-wife.

- The City Commission also relied on "Yelp.com" blogs concerning Amnesia of which only one came close to being relevant. That blog from an unknown person using the moniker Kelly R. Paris France stated that she entered Amnesia around the same time, on the same night that my friend and I were required to buy a bottle for entry. The blogger says that "It wasn't crowded inside!" Next to the blog printout is handwritten, "Same date & time cs Mr. Hollander." Presumably, the writing is that of Velez.
- The City Commission ignored the Kelly R. Paris France blog because it refuted Amnesia's statement that when the club was crowded, it limited admission of individuals, male and female, who do not have the appearance Amnesia desires to maintain the image of the nightclub. So my friend and I were effectively barred not because the club was crowded.
- The City Commission, however, used a blog from "Tasty 1027," as evidence that Amnesia required both older and younger patrons to buy a bottle for admission. The City Commission wrote, "an alleged patron of [Amnesia], whom based on her posted picture appears to be in her 20's or 30's, expressed her frustration on yelp.com about the difficulty in gaining entry into the club, stating '. . . of course the only way to get in was if we bought bottles." A-44.
- What the City Commission intentionally left out of Tasty's blog was that "[I]n the end my party of 12 made it in . . . ." This may indicate that her party entered without buying a bottle, or maybe there were older folks in her party and they had to buy a bottle, or maybe everyone was in her age group and they still had to buy a bottle because of the size of her party. We don't know because the City Commission never contacted her and the City Commission never determined whether Amnesia requires large groups to buy a bottle.
- The City Commission used Tasty's blog from April 25, 2010, as conclusive proof that Amnesia did not engage in the incident of discrimination against the Petitioner and his friend on January 9, 2010, and it did not have a policy at that time of discriminating against older persons. Assuming the blog accurate, it occurred months after Amnesia learned that it had fallen under the scrutiny of the State Division of Human Rights for discriminatory practices, which was clearly an incentive for Amnesia to clean up its act.
- The second "Yelp.com" blogger, "Maria W. NY," said that "Different groups were dancing and lining up at the downstairs bar, people in their 20's, 30's, 40's." This blogger, however, makes no mention of her or anyone in those age groups having to purchase a bottle to gain admission.

Such does not come close to an accurate and thorough fact-finding as required by 47 RCNY §1-31.

Discrimination by the City Human Rights Commission

When I submitted a complaint against Carlos Velez alleging discrimination by him, the City ignored it. Probably because, as Pat Buchanan said, the only group in America against which discrimination is legal is white males.

Velez's Bigotry

Initially, Velez refused to allow me to file a complaint. He responded through one of the City's attorneys that there was no discrimination because had my friend and I agreed to buy a $350 bottle, we could have entered.

Years ago in Montgomery, Alabama, people with relatively darker skin color could enter a public bus, but they would have to sit in the back. By Velez's reasoning, such conduct was not discriminatory because those with a different skin complexion were not barred from entering and riding the buses, as long as they sat in the back. This makes clear a mindset driven by prejudice, which in Velez's case is directed toward me and people like me—Euro-Americans of protestant ancestry.

As often happens when members of previously disfavored groups in America achieve a modicum of power, some of those members abuse that power to vent revenge for discrimination they suffered—both real and imagined. Velez likely believes that Euro-Americans have discriminated against him; therefore, he is justified in settling the score by using his power against a member of that group. Even if Velez's career was hampered by discrimination, it was not I who did such. More importantly, however, two wrongs don't make a right.

Further evidence of Velez's prejudice toward me are his own words in his Order at 3, A-43

> "Complainant is a self-professed advocate for men's rights who identifies himself as an 'anti-feminist lawyer' on his website, www.roydenhollander.com. He has filed a number of lawsuits against bars and clubs that have "Ladies Nights," and admits in several online publications that he is 'bitter' from an ex-wife who used him for his US citizenship and money. Complainant's description of himself is consistent with his pattern of filing several gender discrimination suits."

When the City HR Commission dismisses a complaint for "no probable cause," it is required to issue a written order listing the reasons. 47 RCNY § 1-52. Velez included that paragraph in his Order; therefore, my beliefs, speech, and lawsuits concerning such and my marital status were reasons for him dismissing my complaint. Sounds like bigotry to me when governmental decisions are based on personal traits.

Velez, like so many lefty bureaucrats these days, believe that personal attacks are legitimate reasons for denying someone the protection of the law when that someone does not bow to the edicts of political correctness and Feminism. For such lefties, those who dissent are not disserving of the rule of law because they are so inferior to the "in crowd" that they have no rights for the law to protect. That's Bigotry at its ugliest.

Are you right wing?

Depends on whether one believes SDS, McGovern's Presidential Campaign, New Democratic Coalition, Local 1199, Writer's Guild East and Old Blue Rugby are right wing organizations.

Appendix Dispute

Three weeks after receiving the Appendix, the attorney for the City requested that 172 more pages of documents be added to the 69 page Appendix. I responded with an email dated February 1, 2014:

> When added to the appendix, you will, in effect, have the record on appeal. Your request for what is basically the entire record on appeal makes a mockery of the Advisory Committee's aim to make the appendix method the principal method for an appeal when it amended CPLR 5528 in 1963. David D. Siegel, *Practice Commentaries C5528:1*.
>
> You are clearly trying to make appeals against the City too costly for an individual taxpayer to incur; thereby, winning by default. It was the growing concern over the high and continually increasing cost of printing records on appeal and the use of it by "deep-pockets" to deter appellate review that led to the appendix system.
>
> "We [the Court of Appeals] note that the appendix system was adopted in New York after extended study indicated the need to reduce the cost of printing records on appeal. (*Second Preliminary Report of Advisory Comm. on Practice and Procedure* [N. Y. Legis. Doc., 1958, No. 13], pp. 344-347; Eleventh Annual Report of N. Y. Judicial Council, 1945, pp. 414-416.)" *E. P. Reynolds, Inc., v. Nager Electric Company, Inc.*, 17 N.Y.2d 51, 55-56 (1966).
>
> "In accordance with this policy, paragraph 5 of subdivision (a) of CPLR 5528 provides that an appellant's appendix shall contain 'only such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent.'" *Id.*
>
> "The draftsmen assumed that the main practice problem would be the printing of appendices that were too extensive rather than too attenuated. Thus, while the provision for sanctions in subdivision (e) of CPLR 5528 allows the court to 'withhold or impose costs' for 'any failure to comply with subdivision (a), (b) or (c)' (see 7 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 5528.03, p. 55-208 [1965]), the draftsmen assumed that the power would be exercised 'if unnecessary parts of the record are printed'; (Second Preliminary Report of Advisory Comm. on Practice and Procedure [N. Y. Legis. Doc., 1958, No. 13], p. 354; italics supplied). This, of course, is the situation in which sanctions are most useful." *Id.*
>
> "The most effective guarantee against an inadequate appendix, of course, is an attorney's desire to supply the court with all material necessary to convince it to adopt his client's position. And with the tactical and practical risk of omission so great, the main danger to be guarded against, in the view of the draftsmen, is the too verbose rather than the too cryptic appendix." *Id.*
>
> The dispute in this case centers on several clearly delineated segments of the record that are included in the appendix.

City Brief's Fact Section

The City attorneys wrongly used their Brief's "Fact" section to repeat their legal arguments made in the lower court. This was one reason it requested an additional 172 pages be added to the Appendix—so it could cite to an unnecessarily costly appendix for its lower court arguments in its "Fact" section.

The City actually uses the word "argued" nine times in its "Fact" section.

Factual Misrepresentations

The City states the State Human Rights Division conducted its field investigation at Amnesia with one person, City Brf. at 4, when actually there were two, A-50. Two sets of eyes are always better than one and bolster the reliability of the State's fact-findings.

The City falsely states that the State HR file reviewed by its Executive Director of Law Enforcement, Carlos Velez "included [the State's] decision, investigation report, and supporting materials." (City HR Brf. at 6, 42). It only had the *Determination and Order* and a cover letter from the State.

A probable cause determination does not require the same kind of "proof," which is a synonym for "demonstrate," that an evidentiary hearing does.

The crowd included "people in their 20's, 30's, 40's." (City HR Brf. at 9). I have not seen 40 in over two decades and my friend even longer. So even if this blogger had submitted a sworn affidavit to such—it is irrelevant.

Bigotry accusation by the City

In response to Velez's *Determination and Order*, I filed an appeal within City HR and a complaint against Velez for illegally discriminating against me. City HR ignored the complaint and never issued a determination concerning that complaint. So why is the City now raising the allegations of that complaint in its Brief at 10? To falsely infer that in this case I am motivated by bigotry toward Velez because Velez is apparently of Latin American descendant.

The violators of the rights of others always accuse those others of doing what the violators do. The City's attorney intentionally misrepresents that I "primarily relied on the fact that Velez "[o]n information and belief . . . is Latin-American and Catholic." (City HR Brf. at 10).

The allegation of Velez's bigotry is based on

(1) his initial decision, consistent with a Ku Klux Klan argument, that there is no discrimination if someone is allowed admission, even if they have to sit in the Jim Crow balcony; and

(2) his own words:

> Complainant is a self-professed advocate for men's rights who identifies himself as an "anti-feminist lawyer" on his website, www.roydenhollander.com. He has filed a number of lawsuits against bars and clubs that have "Ladies Nights," and admits in several online publications that he is "bitter" from an ex-wife who used him for his US citizenship and money. Complainant's description of himself is consistent with his pattern of filing several gender discrimination suits.

Number (1) reflects a mind set of bigotry toward me—a Euro-American and (2) those words of Velez are among the reasons City HR dismissed my complaint. When government makes a decision because it disapproves of an individual exercising his rights—that's bigotry. Velez expressed his bigotry toward me for exercising my First Amendment rights, which include the right to file lawsuits to fight for the rights I foolishly thought the U.S. Constitution guaranteed me, *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963), to believe as I choose, and to communicate those beliefs, and to choose a marital status of divorced and say nothing good about my ex-wife.

This type of discrimination, as evinced in an official government document, is the same tactic so commonly used throughout history by small minded conformists and totalitarians: justify violating human rights because the individual does not believe, speak, and act as "right minded" people do, or in this case "left minded," and therefore he belongs to a disfavored group.

The City attorney in this Court uses the same tactic by alleging I'm bigoted toward Latin Americans. (City HR Brf. at 10, 48-49).

Jokes

I use jokes to get the Court's attention and succinctly communicate a serious concept.

Jay Leno used to always include political jokes in his monologue because it's an effective way for driving home a point as opposed to verbalizing the point in a narrative.

Jihada – Jihad means holy war or crusade. I have been doing what I can within this system to defend my rights against this ideological straight jacket of Feminism and political correctionalism that claims everybody is equal, but lefties are more equal than others. Because of the ideological bias in the courts, I have gotten nowhere, except, perhaps, heightening some contradictions.

White trash elite – hopefully they will soon find themselves on the trash heap of history.

Insulting language

As Charlie Chan said, "The truth cannot be an insult."

Take to the streets

It means civil disobedience. I and other members of SDS used that phrase in the 1960s when we opposed the Viet Nam War.

In the mid-60s, a series of lawsuits were brought against the Viet Nam War arguing that the War was unconstitutional. *United States v. Mitchell*, 246 F. Supp. 874 (D. Conn. 1965) rev'd, 354 F.2d 767 (2d Cir. 1966). None of the cases succeeded, so we engaged in civil disobedience, protest and the like. Or, as we referred to it—"took to the streets" for justice.

Pages in Spanish

In an official government document, Velez insulted my prior marriage, my speech, my beliefs, and tried to make any appeal more difficult by not numbering his *Order* for citation.

So, in the spirit of *quid pro quo*, one bad turn deserves another, I insulted him back by numbering the pages in Spanish. He showed disrespect for me, so I did the same to him.

Velez resorted to the all too often PC tactic based on the falsity that the "personal is political," which means "attack the person and you'll be politically victorious."

Feminism and Political Correctionalism

Feminism and Political Correctionalism have assumed the role of the British Queen in Elizabethan days: She is the state, she never dies and she can do no wrong.

Cases

125 Bar Corp. v. State Liquor Authority, 24 N.Y.2d 174, 179 (1969), SLA denied bar license renewal. There must be a rational basis for the administrative agency's action. SLA failed to provide a rational basis.

300 Gramatan Ave. Associates v. State Div. of Human Rights, 45 N.Y.2d 176, 180 (1978), evidence is "[m]arked by its substance—its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor.

Bachman v. State Division of Human Rights, 104 A.D.2d 111, 113 (1st Dep't 1984), answers by a person without firsthand knowledge should be verified.

Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927), "[a] cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." Seaman suffered only one wrong – harm to the right of bodily safety, so could not sue in district court after decision in admiralty. Here there are allegations of two wrongs – sex and age discrimination.

Bellamy v. N.Y.S. Div. Human Rights, 8 A.D.3d 269, 210 (2d Dep't 2004), stated that some reliance on hearsay will not alone result in reversal. It did not hold or infer that hearsay was substantial evidence.

Benjamin v. New York City Dept. of Health, 2007 WL 3226958 (N.Y. App. Div., 2nd Dept. 1994), the court action was precluded by plaintiff's prior filing with City HR under Admin. Code § 8-502(a) and the discontinuance with prejudice by stipulation of an earlier state court action under res judicata. Here, there was no attempt to go from agency to court.

Bhagalia v. State, 228 A.D.2d 882, 883 (N.Y. App. Div., 3rd Dept., 1996), Plaintiff previously filed claim with the State HR Division Human Rights, so Exec. Law § 297(9) barred bring action in court.

Block v. Gatling, 26 Misc. 3d 1228(A), 2010 N.Y. Misc. LEXIS 352 (Sup. Ct. N.Y. Cty., Feb. 18, 2010), *aff'd*,84 A.D.3d 445 (lst Dep't 2011), found that the people not interviewed were not relevant to plaintiff's allegations of age discrimination and disability discrimination, which were actually disproved by plaintiff's own admissions, a collective bargaining agreement, and defendant's position statement. Amnesia never provided a position statement although it was invited to, and while City HR tried to contact a witness for Amnesia, it failed to even try to contact my eyewitnesses to the discrimination—attorney Robert M. Ginsberg, which amounted to denying me a "full and fair opportunity" to present my claims, as required by *Matter of Barnes v Beth Israel Med. Ctr.*, 977 N.Y.S.2d 888 (lst Dep't 2014); *Stern v. N.Y.C. Comm'n Human Rights*, 38 A.D.3d 302, 302 (lst Dep't 2007); *Gleason v. W.C. Dean Sr. Trucking*, 228 A.D.2d 678, 678 (2d Dept. 1996).

Borum v. Village of Hempstead, 590 F. Supp. 2d 376, 383 (E.D.N.Y. 2003), the court barred the action under Exec. Law § 297(9) because plaintiff first filed complaint with the State Division of Human Rights.

Chirgotis v. Mobile Oil Corp., 128 A.D.2d 400, 403 (1st Dep't 1987), found that in light of a 56 page statement by defendant with affidavits and relevant documents that a hearing or conference was not required. Amnesia only submitted a three page answer by a person lacking firsthand knowledge.

Craig-Oriol v. Mt. Sinai Hosp., 607 N.Y.S.2d 391 (A.D. 2 Dept. 1994), involved an individual trying to file a second complaint with the State Division of Human Rights after it had already investigated the first. The State had jurisdiction over all the second complainant's allegations.

C/S Window Installers, Inc. v. N.Y.C. Dep't of Design & Constr., 304 A.D.2d 380, 380 (1st Dep't 2003), does not involve the investigation procedures of a City agency but rather contractual rights. "It is this contractual right, rather than any agency or statutory promulgation, that permitted [the N.Y.C. Dept. of Design & Constr] to disapprove the petitioner." *C/S Window Installers, Inc. v. N.Y.C. Dept. of Design & Constr.*, N.Y. Sup. Ct., Commercial Part 49, No. 12421/01.

David v. N.Y.C. Comm'n Human Rights, 57 A.D.3d 406, 407 (1st Dep't 2008), City HR's investigation included conducting over 20 interviews. Here The City Commission conducted none.

Dept. of Correction v. Whitehead, OATH Index No. 1152/97 (October 10, 1997), no adverse inference was drawn because complainant was responsible for loss of interview tapes of witnesses, since the witnesses were still available.

Doin v. Continental Ins. Co., 114 A.D.2d 724, 725-26 (3d Dep't 1985), the issue was not the "fairness or completeness" of a State Human Rights Division investigation but whether the State had rationally denied a formal hearing. It did because Petitioner produced no factual evidence to support his speculation that Lee was promoted because of Continental's fear that, otherwise, she would bring a sex discrimination charge against it.

Edison Co. v Labor Bd., 305 U.S. 197, 229 (1938), substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Emil v. Dewey, 49 N.Y. 2d 968,968 (1980), the New York Court of Appeals interpreted NY Exec Law §297(9) as precluding a subsequent action that is "based upon the same incident" as the Agency complaint. Prior to commencing the court action, the plaintiff had filed a complaint with the State Division of Human Rights, which was later withdrawn.

Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000), the Court of Appeals stated that "[i]n this case, the administrative record contains substantial evidence" on which the City Housing Authority based its decision. The Authority also called a police officer who testified that he responded to a call concerning a family dispute at petitioner's apartment in August [*553] 1993. At that time, petitioner informed the officer that her son had threatened her with a knife and stabbed her dog. The evidence further established that petitioner had obtained an order of protection against her son and that the August 1993 incident resulted in his conviction for harassment in the second degree, criminal possession of a weapon and menacing.

Firedoor Corp. of Am., Inc. v Merlin Indus., Ltd., 86 A.D.2d 577, 446 N.Y.S.2d 325, 327 (1st Dep't 1982), res judicata dismissed Merlin's defenses, setoffs and counterclaims since they were essentially the same as its previously rejected claim in the bankruptcy proceeding.

Frick v. Bahou, 56 N.Y.2d 777, 778 (1982), the rules of an administrative agency, duly promulgated, are binding upon the agency.

Givens v. Gatling, 2011 N.Y. Misc. Lexis 3551 (Sup. Ct. N.Y. Cty. July 11, 2011), in *Givens*, City HR "did not interview witnesses, because petitioner failed to provide the Commission with this information during the investigation." *Givens* at *8. In my case, City HR simply ignored a key witness, Robert M. Ginsberg, even though it knew about him and how to contact him.

Herrmann v. Braniff Airways, Inc., 308 F.Supp. 1094, 1099-1100 (S.D.N.Y. 1969), in a removal proceeding to state court, the Court found that the complaint in the case asserted separate

wrongful acts, namely, the wrongful invasion of each of the two decedent's right of bodily safety. In this case two violations of two individual rights have occurred. Admittedly, both violations spring from a common fact, a single occurrence: the crash of defendant's airplane. Nevertheless, as the Supreme Court has stated, "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." Baltimore S. S. *1100 Co. v. Phillips, supra, at 321, 47 S.Ct. at 602.

Higgins v. NYP Holdings, Inc., 836 F. Supp.2d 182, 187-189 (S.D.N.Y. 2011), the court barred the action under § 8- 502 because plaintiff first filed a complaint with the State Division of Human Rights, then filed a complaint in federal court.

Horowitz v. Aetna Life Ins., 539 N.Y.S.2d 50 (A.D. 2 Dept. 1989), like *Bhagalia* in which the allegations of rights violated in the initial complaints were virtually identical with the subsequent complaints, so barred under N.Y. Exec. Law § 297(9)

Joseph v. N.Y. Yankees Partnership, N.Y.L.J., October 24, 2000, p. 35, col. 5 (S.D.N.Y.), on one occasion a black lady was refused admission to the Stadium Club unless she changed attire, which she did, but inside saw that white ladies did not have to wear the same type of attire.

Kopanski v. Hawk Sales Co., 76 Misc. 2d 348, 349; 350 N.Y.S.2d 53, 534 (N.Y. Sup. Ct. Herkimer Cty 1973), complaint must be verified by person with personal knowledge.

Lyman v. City of New York, 1997 U.S., Dist. LEXIS 12340 *12-13 (S.D.N.Y Aug. 20, 1997), "an aggrieved individual has the choice of instituting either judicial or administrative proceedings. [She] may not, however, resort to both forums; having invoked one procedure, [she] has elected [her] remedies. . . . Because plaintiff filed an administrative complaint with [City HR] before filing the instant [court] action, her claims under" the State and City Human Rights laws were barred by N.Y. Exec. Law § 297(9) and N.Y. City Admin. Code § 8-502(a).

Matter of 119-121 E. 97th St. Corp. v New York City Comm'n. on Human Rights, 220 A.D.2d 79, 81-82 (1996), "Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. . . . Essential attributes are relevance and a probative character. . . . Marked by its substance—its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor. . . . More than seeming or imaginary. . . .'" There was "sufficient evidence" in the record as a whole to support the determination that landlord discriminated against tenant.

Matter of James v. Coughlin, 508 N.Y.S.2d 231 (A.D. 2d Dept. 1986), complainant filed complaint with the State Division, which under N.Y. Exec. Law § 297(9) precluded the commencement of an action in court based on the same incident.

Matter of Levin v. N.Y.C. Commn. on Human Rights, 12 A.D.3d 328, 329 (1st Dept. 2004), there was no probable cause to believe that coops actions were motivated by knowledge that complainant was gay, since coop did not know that the he was gay.

Matter of Ralph v Board of Estimate of City of N. Y., 306 N.Y. 447, 454 (1954), substantial evidence means that the "[e]ssential attributes are relevance and a probative character.

Matter of T.K. Management Inc. v. Gatling, 2005 N.Y. Misc. LEXIS 3593 *12, the City Commission had the "fact-finding responsibility" to conduct a sufficient investigation that searched for substantial evidence to support a determination.

McFarland v. NYSDHR, 241 A.D.2d 108, 111 (1st Dept. 1998), included a fact-finding conference in which witnesses were presented and numerous documents submitted. Such did not occur with me.

Mitchell v. Comm'n Human Rights, 234 A.D.2d 128,128 (1st Dep't 1996), this Article 78 proceeding was decided against the petitioner because he failed to file his City HR complaint within one year of the alleged discrimination as required by N.Y.C. Admin. Code § 8-109(e). Anything else from that case is dicta.

N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963), freedom of speech protects the right to file lawsuits.

Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 666 (1993), a discrimination injury can be the existence of a "barrier [read $350 bottle of vodka] that makes it more difficult for members of one group [read older guys] to obtain a benefit [read chasing young ladies] than it is for members of another group [read younger guys].

Okoumou v. Community Agency for Senior Citizens, Inc., 17 Misc.3d 827, 833, 842 N.Y.S.2d 881, 887, 2007 N.Y. Misc. LEXIS 6756 *13 (2007), evidence relied on by the Commission must be "substantial evidence." Petitioner's employer and its employees conducted an internal investigation consisting of employee interviews and a review of documents presented by both the petitioner and her supervisors. Apparently, the agency ascertained that Okoumou's resident alien " green card" had expired. Additionally, with respect to the required verification of her work eligibility, the complainant was informed that federal law required the respondent agency, CASC, and its employees, to have the complainant complete an " I-9" form and that the " motivation was not based on animus against her because she is African."

Pascual v. N.Y.S. Div. Human Rights, 37 A.D.3d 215, 216 (1st Dep't 2007), found that subpoenaing documents was unnecessary because petitioner had a two hour fact-finding conference to present and rebut information. In my case, City HR did not provide a fact-finding conference.

Penn Troy Mach. Co., Inc. v. Dept. Gen. Services, OATH Index No. 478/93 (March 2, 1993), evidence for establishing facts can only be alleged by a person in a position to know the facts.

Rosario v. New York City Dept. of Education, 2011 U.S. Dist. LEXIS 41177 (S.D.N.Y. 2011), N.Y. Executive Law § 279(9). The plaintiff filed an administrative complaint with the [State Division of Human Rights, which] preclude[s] Rosario from bringing his state law claims in the

district court under Exec. Law § 279(9) and Admin. Code § 8-502(a) because they stemmed from the same fact situation.

Schenck v. State Line Tel. Co., 238 N.Y. 308, 311 (1924)(Cardozo, J.), "If in truth there is but one remedy, and not a choice between two, a fruitless recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed."

Silver Dragon Restaurant v. The City Commission on Human Rights, N.Y.L.J., March 31, 2004, p. 24, col. 3 (Sup. Ct. Kings Co.)(on one occasion a black lady was required to pay for food before it was served while others who were white were served and then paid).

Stern v. N.Y.C. Commn. on Human Rights, 38 A.D.3d 302, 302 (1st Dept. 2007), *Stern v. N.Y.C. Commn. On Human Rights*, Sup. Ct. N.Y. 110668/03, at 1-2, A-54-55, cited the investigatory methods used by City HR to find no probable cause. In *Stern*, City HR reached its no probable cause decision based on affidavits from two administrative law judges involved in the fact situation of the alleged discrimination, affidavits from security guards, an affidavit from the N.Y.C. Department of Finance Equal Opportunity Officer, and incident reports from the Department of Finance.

Triborough Bridge and Tunnel Auth. v. Simms, OATH Index No. 1303/97 (May 30, 1997), hearsay and is treated skeptically.

Troy v. Goord, 300 A.D.2d 1086, 1087 (4th Dept. 2002), res judicata and collateral estoppel applied because the transactions and occurrences underlying the dismissed federal action were identical to those underlying the instant state action, namely, defendants' repeated rejections of plaintiff's employment applications through September 1998.

Velella v. N.Y.C. Local Conditional Release Comm'n, 13 A.D.3d 201, 202 (lst Dep't 2004), holds that procedural due process requires a post-deprivation review of an agency's actions not that the mere availability of such a review absolves an agency of due process violations. Prisoners were invalidly released and brought Art 78 actions.

Yarbough v. Franco, 95 N.Y.2d 342, 347 (2000), the Court of Appeals required that the Petitioner had to first vacate a Housing Authority order against her and because she had not, there was no record for the courts to review.

Wu v. N.Y.C. Comm'n Human Rights, 84 A.D.3d 823, 824 (2d Dep't 2011), the Second Department stated a City HR determination requires a rational basis, but *Wu* does not hold or state that City HR determinations are accorded "substantial deference."