TO BE ARGUED BY:
ROY DEN HOLLANDER, ESQ.
TIME REQUESTED: 20 MINUTES

COURT OF APPEALS CASE NO.: APL-2014-00240

State of New York
Court of Appeals

In the Matter of

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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DATE COMPLETED: OCTOBER 20, 2014

Supreme Court, New York County, Index No. 100299/13

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Question Presented

Should N.Y.C. Admin. Code § 8-109(f)(iii) be interpreted to prevent the filing of discrimination complaints with the N.Y.C. Commission on Human Rights ("City HR") when the N.Y. State Division of Human Rights ("State DHR") previously dismissed a discrimination complaint because it did not have jurisdiction over a different discriminatory practice arising from the same fact situation but not alleged with State DHR, and City HR does have jurisdiction? No.

For example, a party complains to State DHR about sex discrimination when encountering an admission barrier to a public accommodation. State DHR, however, finds that age discrimination was probably at work, but State DHR lacks jurisdiction over age discrimination by public accommodations, so it dismisses the complaint. City HR, however, does have jurisdiction over age discrimination by a public accommodation, but relies on an interpretation of N.Y.C. Admin. Code § 8-109(f)(iii) that allows it to dismiss an age discrimination complaint under the election of remedies doctrine.

N.Y.C. Admin. Code § 8-109(f) states:

> The Commission shall not have jurisdiction to entertain a complaint if
>
> (iii) the complainant has previously filed a complaint with the State Division of Human Rights alleging an unlawful discriminatory practice as defined by this chapter or an act of discriminatory harassment or violence as set forth in chapter six of this title with respect to the same grievance which is the subject of the complaint under this chapter and a final determination has been made thereon.

Statement of Jurisdiction

This issue was preserved by the New York County Supreme Court in Justice Alexander W. Hunter's *Order and Judgment* at 2-3 (A 14-15) and the Supreme Court, Appellate Division, First Department's *Decision and Order* at 42-43 (A 3-4).

The Appellate Division's final *Decision and Order* disposed of all the issues in this action on June 3, 2014. (A 3-5). This Court, by its Order dated and entered September 16, 2014, granted leave to Petitioner-Appellant to appeal the Appellate Division's *Decision and Order*. (A 2). This Court, therefore, has jurisdiction over this appeal under CPLR 5602(a)(1)(i).

Statement of Facts

Petitioner-Appellant ("Den Hollander") and his friend, both older, middle-aged male lawyers, were denied admission to the nightclub Amnesia unless they agreed to buy a $350 bottle of brandless, watered-down vodka once inside the public accommodation. At the same time, a number of females in their 20s or 30s were allowed admission without having to agree to buy a $350 bottle.

Den Hollander filed a complaint with State DHR for what he believed at the time was sex discrimination.

State DHR issued a decision concluding the discrimination against Den Hollander and his friend was not based on sex. State DHR also found that it did

not have jurisdiction over age discrimination by the nightclub, which State DHR inferred was probably at work:

> Based on observations made during the field visit, the vast majority of the patrons of the nightclub [Amnesia] appeared to be under the age of 30 years. Respondent [Amnesia] asserts that, when the nightclub is crowded, respondent 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 photo on complainant's website suggests that he is significantly older than respondent's patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation.

(State DHR, *Determination and Order After Investigation* at p. 2, A 55). State DHR was powerless to remedy the situation because age discrimination in public accommodations is outside its jurisdiction. N.Y. Exec. § 296(2)(a).

On receiving the State DHR decision, Den Hollander immediately filed an age discrimination complaint with City HR, which does have jurisdiction over age discrimination by a public accommodation. N.Y.C. Admin. Code § 8-107(4)(a).

City HR's Executive Director for Law Enforcement, Carlos Velez, issued a *Determination and Order* that dismissed the age discrimination complaint by concluding that the election of remedies doctrine prevented City HR from having jurisdiction. (Carlos Velez *Determination and Order* at Tres, A 48). Once having decided City HR lacked jurisdiction, the remainder of Velez's conclusions were merely *dicta*.

Den Hollander requested a review of Velez's *Determination and Order*,

which City HR granted. After the review, City HR adopted Velez's *Determination and Order* as its final determination and order on January 11, 2013. (*Determination and Order After Review* A 52-53).

Procedural History in the Lower Courts

Den Hollander filed a petition pursuant to CPLR Article 78 in the Supreme Court, New York County, to annul City HR's final determination and order.

Justice Hunter denied the Article 78 petition with an *Order and Judgment* entered August 6, 2013. (*N.Y. Sup. Order and Judgment* A 12-17).

On appeal to the Appellate Division, First Department, that Court denied Den Hollander's appeal and affirmed Justice Hunter's *Order and Judgment* with a *Decision and Order* dated and entered June 3, 2014. (*Decision and Order* A 3-5).

Both lower courts interpreted N.Y.C. Admin. Code § 8-109(f)(iii) to mean that a complainant is barred from filing with City HR if he first complains to State DHR 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, N.Y. Exec. Law §296(2)(a)), but the State dismisses the complaint because it finds the discrimination was likely based on a type of discrimination over which it does not have jurisdiction (age, partnership status, alienage, or citizenship), but City HR does have jurisdiction

under N.Y.C. Admin. Code § 8-107(4)(a). (*N.Y. Sup. Order and Judgment* at 2-3, A 14-15; Appellant Division *Decision and Order* at 42-43, A 3-4).

Argument

Avoiding a trap for persons discriminated against.

The lower courts' interpretation of N.Y.C. Admin. Code § 8-109(f)(iii) creates a trap for those discriminated against by leaving them without any legal remedy in situations similar to this case—not only for age discrimination but also for partnership status, alienage and citizenship discrimination by a public accommodation. A person cannot go to City HR, which has jurisdiction, because he already filed a complaint with State DHR that was dismissed for lack of jurisdiction over any one of those four discriminatory practices that State DHR finds were likely at work, and he cannot start a new action in court because N.Y. Exec. Law § 297(9) and N.Y.C. Admin. Code § 8-502(a) prevent it. In addition, any appeal of the State DHR's dismissal of the non-jurisdictional cause of action would fail because it did not have jurisdiction to begin with.

It is unlikely that when the New York City Council enacted § 8-109(f)(iii) in 1991, the Council intended the consequences that the lower courts support. At the time, the Council was making the first comprehensive revision of the City's Human Rights Law in 25 years in order to strengthen its protection of civil rights.

At the signing-into-law ceremony in 1991 of the Council's revisions, Mayor David N. Dinkins said:

> Since 1980, the federal government has been steadily marching backward on civil rights issues. Even on the state level, narrow interpretations of civil rights laws have retarded progress. . . . In the face of these state and national developments, we have had no choice but to move forward independently. . . . [W]e have set forth a policy that enables the Commission to ensure that discrimination plays no role in the public life of the City. As the committee report that accompanies this bill makes clear, it is the intention of the Council that judges interpreting the City's Human Rights Law are not to be bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed.

(Remarks by Mayor David N. Dinkins at 1-2, City Hall, June 18, 1991, Addendum 1).

More likely is that when Council Members enacted "one of the strongest, if not the strongest, [human rights laws] in the nation," which expanded protection from additional types of discrimination such as age discrimination, Council Members were not blind to the difference in the jurisdictional reach of State DHR and City HR. (Felica Lee, *Council Passes Civil Rights Bill For New York*, June 6, 1991, New York Times (quote from Corporation Counsel Victor A. Kovner)).

Given the intention behind the 1991 revision that "discrimination plays no role in the public life of the City," Council Members necessarily acted to avoid the trap where State DHR finds no evidence of one type of discrimination but evidence of another over which it has no jurisdiction and dismisses a complaint. Rather than

preventing the complainant from going to City HR, which has jurisdiction, the Council's intent in enacting N.Y.C. Admin. Code § 8-109(f)(iii) must have been to assure that New York City's more expansive protection against discriminatory practices would not be thwarted by the election of remedies law in N.Y. Exec. Law § 297(9). In fact, the Council's 1991 revision removed the prior election of remedies provision in N.Y.C. Admin. Code § 8-112. (Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored N.Y.C. Human Rights Law*, 33 Fordham Urb. L.J., 101, 108 (2005)).

The Council, therefore, must have used the term "grievance" in § 8-109(f)(iii) to mean a type of discriminatory practice or cause of action, and not the fact situation from which it arose, which is how the term is used in N.Y. Exec. Law § 297(9).

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

As for N.Y.C. Admin. Code § 8-502, that section does not even include the word "grievance." Sections 8-109 and 8-502 were enacted at the same time by the same law—Local Law 39/1991, eff. Sept. 16, 1991. N.Y.C. Admin. Code §§ 8-

109 & 8-502, *Historical Note*. Since the word "grievance" was not included in § 8-502, the logical inference is that it did not express what the council was trying to do in § 8-109(f)(iii)—avoid the trap of differing jurisdictional reach of State DHR and City HR. The purpose of § 8-502 was to give persons a private right of court action under the City's Human Rights Law which was similar to that under N.Y. Exec. Law § 297(9)—not to create a trap of differing jurisdictions. (*See* City Council's Committee on General Welfare Report at 34-35 (1991), Addendum 2).

Even assuming the Council was unaware of the difference in jurisdictional reach of the City and State Human Rights laws in 1991, it is clear today that § 8-109(f)(iii) should <u>not</u> be interpreted to be consistent with N.Y. Exec. Law § 297(9) or N.Y.C. Admin. Code § 8-502(a). In 2005, the City Council passed and the Mayor signed into law the *Local Civil Rights Restoration Act* so as

> to ensure construction of the City's Human Rights Law in line with the purposes of the fundamental amendments to the law enacted in 1991. . . . [And] respond[] to concerns that construction of numerous provisions of the human rights law as amended in 1991 has narrowed the scope of the law's protections . . . by again underscoring that protections afforded by New York City's human rights law are not to be limited by restrictive interpretations of similarly worded state and federal statutes.

(The Council Report of the Gov. Affrs. Div. of the Committee on General Welfare at 2 (2005), Chair Bill De Blasio, Addendum 3).

The lower courts' restrictive interpretation of § 8-109(f)(iii) that relied on cases dealing with N.Y. Exec. Law § 297(9) was contrary to the very purpose of the *Local Civil Rights Restoration Act*:

> The purpose of . . . the "Local Civil Rights Restoration Act of 2005," is to clarify the scope of New York City's Human Rights Law. It is the sense of the Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law. In particular, through passage of this local law, the Council seeks to underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes. Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.

N.Y.C. Admin. Code § 8-102, Note, *Provisions of L.L. 85/2005*, Section 1.

The lower courts' interpretation of § 8-109(f)(iii) was also contrary to N.Y.C. Admin. Code § 8-130 on how the City's Human Rights law is to be construed:

> The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.

The intent of the Council's Committee on General Welfare that created the 2005 *Local Civil Rights Restoration Act* is clear, "protections afforded by New York City's human rights law are not to be limited by restrictive interpretations of

similarly worded state and federal statutes." (The Council Report of the Gov. Affrs. Div. of the Committee on General Welfare at 2 (2005), Addendum 3).

The Committee further expressed its intent as follows:

> Prop. Int. 22-A [Restoration Act Bill No.] expressly instructs decision makers assessing claims asserted under the City's human rights law to construe the human rights law independent of similarly worded provisions of state and federal law. A number of recent judicial decisions underscore the need to clarify the breadth of protections afforded by New York City's human rights law. For instance, in *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421 (2004), the Court of Appeals reasoned that broad statements regarding the intended liberal construction of the City's human rights law are insufficient to justify interpretation of the law to afford broader rights than are protected under comparably worded state or federal laws. For this reason, Prop. Int. 22-A explicitly states that the human rights law must be construed independently from both federal and New York State civil and human rights laws, including laws with comparably worded provisions. The bill further clarifies that interpretations of comparable federal and state laws may not be used to limit or restrict the provisions of this title from being construed more liberally than those laws to accomplish the purposes of the human rights law and provisions of the human rights law may not be construed less liberally than interpretations of comparably worded federal and state laws.
>
> Under the bill's provisions, a number of principles should guide decision makers when they analyze claims asserting violations of rights protected under the City's human rights law: discrimination should not play a role in decisions made by . . . providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation.
>
> [T]hose who discriminate . . . cause serious injury to . . . the social fabric of the city as a whole, which will not be tolerated.

Id. at 4-6.

The Association of the Bar of the City of New York made clear in supporting the *Local Civil Rights Restoration Act* that

> [piecemeal amendments] should no longer be necessary after [the *Restoration Act*] is enacted because [the *Restoration Act*] requires courts to construe the City's Human Rights Law independently and in light of the Council's clear intent to provide the greatest possible protection for civil rights.

(Association of the Bar letter at 4, August 1, 2005, Addendum 4).

The message from the elected representatives of the people of the City of New York is clear—

> [Courts should] search out what the broader and more remedial purposes of the City Human Rights Law actually are in order for [the courts] to assess what potential interpretation of a particular provision would serve the law's overall purposes best.

(Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored N.Y.C. Human Rights Law*, 33 Fordham Urb. L.J. at 121). And one of those purposes is "to eliminate and prevent discrimination from playing any role in actions relating to . . . public accommodations . . . ." N.Y.C. Admin. Code § 8-101.

<u>The election of remedies doctrine does not apply anyway.</u>

The City Council's legislative history on N.Y.C. Admin. Code § 8-109(f)(iii) does not specifically state the Council's definition for the term "grievance." Even assuming they used the term "grievance" to mean the fact situation, occurrence or transaction, the election of remedies doctrine would still not apply.

As Judge Cardozo held in *Schenck v. State Line Tel. Co.*, 238 N.Y. 308, 311 (1924):

> An election of remedies presupposes a right to elect, (*Henry v. Herrington*, 193 N. Y. 218, 222 (1908). . . . 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.

When State DHR inferred that the discrimination at work in this case was age discrimination over which it did not have jurisdiction (State DHR, *Determination and Order After Investigation* at p. 2, A 55), Den Hollander learned that the remedy he sought was unavailable at State DHR because the facts turn out to be different from those he supposed. In such situations, the election of remedies doctrine does not apply. *Henry v. Herrington*, 193 N.Y. 218, 222 (1908)(plaintiff "mistook, or misconceived, her remedy and was dismissed . . . . Any step, or action, taken by her, which was fruitless, because proceeding upon a misconception of the rights which the law gave her, left her unaffected as to any legal remedy which she did possess."); *Eidelberg v. Zellermayer*, 5 A.D.2d 658, 663 (2d Dept. 1957)(election does not apply "where a plaintiff pursues an erroneous remedy and his complaint is dismissed because the remedy is unavailable as the wrong one."); *Matter of Tate v. Estate of Dickens*, 276 A.D. 94, 97 (3rd Dept. 1949)(" One may erroneously pursue a remedy which is not open to him at all. If he does so, his action in pursuing it does not constitute an election.").

Since the election of remedies doctrine does not apply to the situation here, the lower courts' rulings were in error for holding that Den Hollander's complaint was properly dismissed because City HR did not have jurisdiction.

Conclusion

"The election of remedies is largely a rule of policy to prevent vexatious litigation . . . ." *Clark v. Kirby*, 243 N.Y. 295, 303 (1926). There is no vexatious litigation here, just an effort to prevent bigots from discriminating.

While "[a]ll procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish. Unless some necessary requirement has been omitted, a wrong move or a mistake in the method of seeking relief from the courts [or administrative agencies] ought not to furnish protection for a wrongful act." *Id.*

Dated: New York, N.Y.
October 21, 2014

_____
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Addendum 1

Int. 465-
LL 39/91
File Copy

THE CITY OF NEW YORK OFFICE OF THE MAYOR DAVID N. DINKINS

TEL. (212) 788-2958 S 420-91

For Immediate Release:
Tuesday, June 18, 1991, 1:30 p.m.

REMARKS BY MAYOR DAVID N. DINKINS
AT PUBLIC HEARING ON LOCAL LAWS
BLUE ROOM -- CITY HALL
TUESDAY, JUNE 18, 1991 -- 1:30 P.M.

I am pleased to have before me today Introductory 465-A, a bill that dramatically overhauls the City's Human Rights Law. Introductory 465-A was introduced in the Council at my request by Sam Horwitz, Chair of the General Welfare Committee, and co-sponsored by Council Members Horwitz, Foster, Maloney, Fields, Povman, Ward, Dryfoos, and Alter. This bill gives us a human rights law that is the most progressive in the nation, and reaffirms New York's traditional leadership role in civil rights.

I am particularly gratified to be signing Introductory 465-A today because there has been no time in the modern civil rights era when vigorous local enforcement of anti-discrimination laws has been more important. Since 1980, the federal government has been steadily marching backward on civil rights issues. Even on the state level, narrow interpretations of civil rights laws have retarded progress. For example, the State Court of Appeals has made it virtually impossible to hold taxi companies responsible for the discriminatory acts committed by their drivers. There

(more)

is, therefore, no incentive for these companies to curb bias on the part of their drivers, and persons of color still routinely face difficulty in getting a cab to take us where we want to go.

In the face of these state and national developments, we have had no choice but to move forward independently. We have not only enhanced specific sections of our law -- like the provisions relating to holding taxi companies and other owners of public accommodations liable for acts of their employees -- we have set forth a policy that enables the Commission to ensure that discrimination plays no role in the public life of the City. As the committee report that accompanies this bill makes clear, it is the intention of the Council that judges interpreting the City's Human Rights Law are not to be bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed.

I am also pleased that the City Council -- by a vote of 34 to 1 -- saw through the specious arguments regarding quotas that are hindering the passage of the Civil Rights Restoration Act in Congress. Neither the federal bill nor this bill is a quota bill, and it is time for the President to stop seeking partisan political advantage by pandering to and encouraging groundless fears.

As the first comprehensive revision to the City's Human Rights Law in 25 years, Introductory 465-A makes literally dozens of improvements to the law. To illustrate just a few of the

major gaps in the law that are being filled, consider the issues of civil penalties, injunctions, and co-worker harassment.

Under current law, a person can be compensated for the damages she has suffered as a result of having been discriminated against, but we have had no authority to levy a fine for the harm that act of bias does to the social fabric of the city. In other words, you can be fined if you litter or double-park, but not if you discriminate. With potential civil penalties ranging up to $100,000 under Introductory 465-A, it becomes clear that discriminators now face much more serious consequences for their acts. As cases begin to be prosecuted under the new law, it is my hope that the existence of these penalties will exert a strong deterrent effect against acts of bias.

Under current law, the Commission can only get an injunction in State Supreme Court in housing cases. The new law makes it possible to enjoin employment and public accommodations violations as well. This change will improve the ability of the Commission to order meaningful anti-bias remedies after a hearing and will cut down significantly on the time it takes to reach a resolution of meritorious employment and public accommodations cases.

I myself was surprised to learn that under current local law, an employee who has been the victim of sexual or racial harassment at the hands of a co-worker can sue her employer but cannot sue the co-worker himself. Without the possibility of

legal action, co-worker harassment has continued to poison many of our workplaces. The new law takes the fundamental step of making all people legally responsible for their own discriminatory conduct.

Among other changes, people for the first time will be able to go directly into State Supreme Court to assert their discrimination claims, and will be permitted to be awarded attorneys' fees and punitive damages where warranted. I hope that the creation of a private right of action will supplement the Commission's enforcement efforts and ease a portion of its caseload burden. Some forms of discrimination not previously covered under City law -- like age discrimination in public accommodations and most residential housing, and discrimination on the basis of marital status in employment -- will now be prohibited.

I want to commend, and personally thank Sam Horwitz for sponsoring this bill and shepherding it through the Council. I note, too, the enormous contributions of David Walker, Counsel to the Committee on General Welfare.

Many members of my administration worked tirelessly to shape this legislation. I thank Deputy Mayor Lynch and the members of his intergovernmental staff, including Martha Hirst and Margo Wolf. From the City Commission on Human Rights, I am grateful to the Chairperson, Dennis deLeon and to his staff members Craig Gurian, Cheryl Howard, Rolando Acosta and David Scott.

(more)

Corporation Counsel Victor Kovner was ably assisted by a number of Law Department attorneys in drafting and redrafting this landmark bill, including Andrea Cohen, Olivia Goodman and Martha Mann; also Jeffrey Friedlander, Linda Howard, Paul Rephen, David Clinton and Myles Kuwahara.

By all accounts, the discussions and negotiations on this bill between the Administration and the Council reflected tremendous diligence and spirited cooperation, and I am grateful to you all.

I also want to thank the many representatives of civil rights groups and the business community who worked with us on this legislation. Every effort was made to address the major concerns of all parties.

There is still much work to be done to help us achieve the goal of a truly open city. We have learned over the years that change will not come without resistance; that the struggle for civil rights must constantly be renewed; and that the struggle for the rights of one group is indivisible from the struggle for the rights of all other groups. The new human rights bill gives us the legal tools we need today to continue the fight. I'm counting on the Commission and the Law Department to use these tools to make sure that meritorious claims of discrimination are promptly and vigorously prosecuted.

Introductory 465-A affects all the people of New York, of course, but none so much as our children. We need to be able to

say to them: "If you work hard, you will be permitted to succeed; you will get the job you have earned; you will be able to live where you like; this is as much your city as it is anyone else's."

I will first turn to the bill's prime sponsor, Chairman Sam Horwitz;

next, to any other elected officials who wish to speak.

Now, I will turn to the general audience.

Is there anyone in the general audience to be heard in opposition?

Is there anyone in the general audience to be heard in support?

There being no one else to be heard, and for the reasons previously stated, I will now sign the bill.

The next bill before me is Introductory Number 655, sponsored by Council Member Herb Berman at my request. This local law would establish the MetroTech Area Business Improvement District in the Borough of Brooklyn. The District will be established in accordance with the District Plan filed with the City Clerk.

The proposed MetroTech Area Business Improvement District covers the equivalent of twenty square blocks in downtown Brooklyn. The proposed district will include the area bounded by Adams Street to the west, Tillary Street to the north, Flatbush Avenue Extension to the east and Fulton Mall to the south, plus

Addendum 2

Staff: David Walker

THE COUNCIL
REPORT OF THE LEGAL DIVISION
RICHARD M. WEINBERG, DIRECTOR AND GENERAL COUNSEL

COMMITTEE ON GENERAL WELFARE

PROPOSED INT. NO. 465-A: By Council Member Horwitz (by request of the Mayor) also Council Members Foster and Maloney

TITLE: In relation to the Human Rights Law.

ADMINISTRATIVE CODE: Amends various sections of Chapter 1 and adds new Chapter 4, 5, 6 and 7 to title 8.

PROPOSED INT. NO. 536-A: By Council Member Horwitz (By request of the Mayor) also Council Members Eldridge, Fields and Michels

TITLE: In relation to the Human Rights Law.

ADMINISTRATIVE CODE: Amends various sections of Chapter 1 and adds new Chapters 4, 5, 6 to title 8.

BACKGROUND AND INTENT: During the late 1980's the City of New York (hereafter "NYC" or "the City") was plagued by notorious incidents of racially motivated violence. In the first four months of 1990, the City experienced a 14% increase in bias crimes as compared with the same four month period of 1989.[1] The general

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1 Coleman, As Bias Crime Seems to Rise, Scientists Study Roots of Racism, N.Y. Times, May 29, 1990.

Chapter 5 Civil Action By Persons Aggrieved By Unlawful Discriminatory Practices §8-502 (new)

Under the City's Human Rights Law, claims of discrimination are currently adjudicated through the administrative procedure available at the Commission. An aggrieved person may resort to court only to seek review of the Commission's final decision in the matter. Where the type of discrimination alleged is also prohibited under the State Human Rights Law, an aggrieved person may bring a civil action in State court under that law. The State law, however, does not authorize a court to award costs and attorney's fees to a prevailing party.

In consideration of the policy inherent in the State Human Rights Law that a judicial forum is an appropriate alternative forum for the enforcement of discrimination laws, this chapter would permit aggrieved persons to bring a civil action in court for violation of the City law. Alternatively, aggrieved persons could file a complaint with the Commission, and having chosen one avenue of relief over another, would be deemed to have elected their remedy. §8-502(a). The bill provides generally that the filing of a complaint with the Commission or the State Division of Human Rights would preclude a person from going to court except if the complaint had been dismissed for administrative convenience. §8-502(b). Dismissal by the Commission for administrative convenience could include a dismissal requested by the complainant where 180 days have passed since the filing of a complaint which had not been actively investigated, as well as dismissal prior to the filing of an answer where no investigation or

conciliation attempts had taken place. See §8-113(a)(6) and §8-113(b).

In the civil action proposed by the bill, an aggrieved person could seek equitable relief and any appropriate damages including punitive damages. §8-502(a). In addition, the proposed bill provides for a court, in its discretion, to award costs and reasonable attorney's fees to a prevailing party. §8-502(f).

Chapter 6 Discriminatory Harassment (new)

Sometimes discrimination takes the form of threats, harassment or intimidation by persons who are not employers, owners of housing accommodations or persons who operate public accommodations and thus in circumstances not covered by the current City Human Rights Law, which although broad in its scope, prohibits discrimination by certain persons in certain defined contexts, e.g., employment, public accommodations, housing, etc. While harassment based upon discriminatory animus can theoretically be addressed by either criminal prosecution or by a civil action commenced by the victim, these methods are often ineffective.

This new chapter would add provisions derived from similar laws in Massachusetts and California. The chapter would authorize the Corporation Counsel to seek a court order enjoining a person from interfering by threats, intimidation or coercion with an individual's rights secured by any Federal, State and City laws. §8-602(a). A violation of the court order would constitute contempt and be subject to the imposition of civil penalties of up to $10,000 per day. §8-602(c). Harassment involving force or a threat of force or the

Addendum 3

Staff: Jacqueline D. Sherman, Counsel
Sean Robin, Finance Analyst
Luisa Sanchez, Finanace Analyst

THE COUNCIL
REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION
MARCEL VAN OOYEN, LEGISLATIVE DIRECTOR

COMMITTEE ON GENERAL WELFARE
BILL DE BLASIO, CHAIR

August 17, 2005

PROP. INT. NO. 22-A: By Council Members Brewer, The Speaker (Council Member Miller), Comrie, Jackson, Jennings, Koppell, Lopez, Martinez, Monserrate, Perkins, Quinn, Sanders Jr., Seabrook, Stewart, Vann, DeBlasio, Reyna, Moskowitz, Gonzalez, Rivera, James, Yassky, Gerson, Barron, Palma, Baez, Katz, Weprin, Clarke, Liu, Dilan, Reed, Sears, Boyland, Gentile, Recchia, Foster, Avella, Arroyo and The Public Advocate (Ms. Gotbaum)

TITLE: To amend the administrative code of the city of New York, in relation to the human rights law.

The Committee on General Welfare, chaired by Council Member Bill de Blasio, will meet on Wednesday, August 17, 2005, at 10:45 a.m. to consider Prop. Int. 22-A, the "Local Civil Rights Restoration Act of 2005," a proposed local law that would amend New York City's human rights law.

Prop. Int. 22-A aims to ensure construction of the City's human rights law in line with the purposes of fundamental amendments to the law enacted in 1991. Speaking at the bill signing ceremony for Int. 465-A, the 1991 amendments to the City's human rights law, Mayor Dinkins stated: "[t]his bill gives us a human rights law that is the most progressive in the nation, and reaffirms New York's traditional leadership in civil rights."[1] Mayor Dinkins went on to explain: "there is no time in the modern civil rights era when vigorous local enforcement of anti-discrimination laws has been more important. Since 1980, the federal government has been steadily marching backward on civil rights issues"[2] and "it is the intention of the Council that judges interpreting the City's Human Rights Law are not bound by restrictive state and federal rulings and are to take seriously the requirement that this law be liberally and independently construed."[3]

Prop. Int. 22-A responds to concerns that construction of numerous provisions of the human rights law as amended in 1991 has narrowed the scope of the law's protections since its enactment by clarifying a number of its provisions and by again underscoring that protections afforded by New York City's human rights law are not to be limited by restrictive interpretations of similarly worded state and federal statutes.

Specifically, the bill would add "partnership status," defined as the status of being in a domestic partnership, as set forth in § 3-240(a) of the administrative code of the city of New York, to the list of categories protected from discrimination under the administrative code. Pending judicial reconsideration of the proper scope of protection from discrimination based on marital status, this provision will ensure that life partners

[1] Remarks by Mayor David N. Dinkins at public hearing on Local Laws, June 18, 1991, 1 (on file with Committee on General Welfare).
[2] Id.
[3] Id. at 2.

who have memorialized their relationship by becoming domestic partners (or are otherwise considered domestic partners under the Administrative Code) receive protection from all forms of discrimination addressed by the human rights law, just as married partners do.

Prop. Int. 22-A also would amend § 8-107 of the administrative code of the city of New York to clarify the standard to be applied in cases alleging retaliation prohibited by the human rights law. The amendment would make clear that the standard to be applied to retaliation claims under the City's human rights law differs from the standard currently applied by the Second Circuit in retaliation claims made pursuant to Title VII of the Civil Rights Act of 1964; it is in line with the standard set out in guidelines of the Equal Employment Opportunity Commission and applied to retaliation claims by federal courts in several other circuits.[4]

Further, Prop. Int. 22-A would amend § 8-109 of the administrative code of the city of New York to require the human rights commission to conduct a thorough investigation of every complaint filed under the human rights law. A 2003 report published by the Anti-Discrimination Center of Metro New York, Inc., based on an

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[4] See EEOC Compliance Manual, Vol. 2, Section 8, Part D (issued July 31, 1998); See also, Ray v. Henderson, 217 F.3d 1234, 1241-1243 (9th Cir. 2000) (adopting EEOC interpretation of "adverse employment action" to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity" and further explaining that "[t]he EEOC test covers lateral transfers, unfavorable job references, and changes in work schedules. These changes are all reasonably likely to deter employees from engaging in protected activity. Nonetheless, it does not cover every offensive utterance by co-workers, because offensive statements by co-workers do not reasonably deter employees from engaging in protected activity." Id. at 1242-43) (internal quotations omitted); Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) (dissemination of negative job reference can be actionable employment action); Hillig v. Rumsfeld, 381 F.3d 1028 (10th Cir. 2004); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998); Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994). Cf. Galabya v. New York City Bd. of Educ., 202 F.3d 636 (2nd Cir. 2000); Gurry v. Merck & Co., 2003 U.S. Dist. Lexis 6161 (SDNY) ("An employee experiences an adverse employment action when she endures a 'materially adverse change' in the terms and conditions of employment . . . Such actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand." Id. at *15 (internal citations omitted).)

examination of approximately 100 case files from the human rights commission, provides a lengthy discussion of concerns regarding current human rights commission practices with respect to investigations of complaints filed under the human rights law.[5] In brief, the report found that the human rights commission did not adequately investigate allegations of conduct in violation of the human rights law in a significant number of cases. The proposed clarification of the human rights law to require a thorough investigation of every complaint[6] is consistent with the goal of ensuring that New York City does everything within its power to identify and root out discrimination.

Section 7 of the bill would amend § 8-130 of the administrative code concerning construction of the human rights law. Prop. Int. 22-A expressly instructs decision makers assessing claims asserted under the City's human rights law to construe the human rights law independent of similarly worded provisions of state and federal law. A number of recent judicial decisions underscore the need to clarify the breadth of protections afforded by New York City's human rights law. For instance, in McGrath v. Toys "R" Us, Inc., 3 N.Y.3d 421 (2004), the Court of Appeals reasoned that broad statements regarding the intended liberal construction of the City's human rights law are insufficient to justify interpretation of the law to afford broader rights than are protected under comparably worded state or federal laws.[7] For this reason, Prop. Int. 22-A explicitly states that the

[5] See At the Crossroads: Is There Hope for Civil Rights Law Enforcement in New York, Anti-Discrimination Law Center of Metro New York, Inc., 6-10 (2003), at http://www.antibiaslaw.com/today/crossroads.pdf.

[6] While the steps required to complete a "thorough" investigation depend upon the facts presented by a particular complaint, in general investigations should include steps such as probing the reasons for a respondent's conduct and actively seeking out facts from witnesses.

[7] Specifically, the court explained that "[t]he attorney's fee provision [of the City's human rights law] is indistinguishable from provisions in comparable federal civil rights statutes . . . Where state and local provisions overlap with federal statutes, our approach to resolution of civil rights claims has been consistent with the federal courts in recognition of the fact that, whether enacted by Congress or the state

human rights law must be construed independently from both federal and New York State civil and human rights laws, including laws with comparably worded provisions. The bill further clarifies that interpretations of comparable federal and state laws may not be used to limit or restrict the provisions of this title from being construed more liberally than those laws to accomplish the purposes of the human rights law and provisions of the human rights law may not be construed less liberally than interpretations of comparably worded federal and state laws.[8]

Under the bill's provisions, a number of principles should guide decision makers when they analyze claims asserting violations of rights protected under the City's human rights law: discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation.

In addition to the clarifications regarding overall construction of the human rights law, Prop. Int. 22-A aims to encourage rigorous enforcement of the City's human rights law by amending § 8-502 to remove any doubt that attorney's fees may be awarded under the City's human rights law in circumstances that differ from those under which they are awarded under similarly worded federal law. Specifically, it would ensure that a person who successfully effects policy change by filing a complaint under the human rights law may be eligible to receive reimbursement for costs and attorney's fees, notwithstanding

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legislature or a local body, these statutes serve the same remedial purpose – they are all designed to combat discrimination." McGrath, 3 N.Y.3d at 428-29.

[8] This bill does not require a decision maker to accept any particular argument being advanced by an advocate, but underscores the need for thoughtful, independent consideration of whether the proposed interpretation would fulfill the uniquely broad and remedial purposes of the City's human rights law.

recent changes to longstanding federal policy on a similar issue.[9] The bill would allow complainants to recover costs and attorney's fees in cases where the filing of a complaint serves as a catalyst for the change advocated in the complaint, but when the respondent makes the change before there is a final ruling on the merits of the complaint.[10] Further, the bill aims to enhance the human rights law's power to deter unlawful discriminatory acts by increasing the amount of civil penalties that may be awarded for violations of the law. Imposition of civil penalties sends a strong signal to those who discriminate that such acts cause serious injury, to both the persons directly involved and the social fabric of the City as a whole, which will not be tolerated. The bill would amend §8-126 to increase the maximum civil penalties that can be awarded to $125,000 in all cases and to $250,000 in cases involving willful, wanton or malicious acts.

The bill would take effect immediately upon enactment.

[9] See Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res., 532 U.S. 598 (2001) (despite the longstanding approach of federal appellate courts nationwide, holding that the "catalyst theory," which allows for recovery of attorney's fees and costs under federal civil rights statutes, does not provide a basis for such recovery for attorney's fees where the change sought was effected in the absence of a consent decree or final judgment).

[10] The analysis of whether a plaintiff is entitled to recover costs and fees on a catalyst theory can be based on a three part analysis, which requires: (1) that the respondent provide at least some of the benefit sought by the lawsuit; (2) that the suit stated a genuine claim; and (3) that the suit was a substantial or significant cause of the act providing the relief. See. e.g., Buckhannon, 532 U.S. at 627-28 (Ginsburg, J. dissenting).

Addendum 4

The Association of the Bar of the City of New York

Department of Public Affairs

Hon. Gifford A. Miller
Speaker
New York City Council
336 East 73rd Street, Suite C
New York, NY 10021

August 1, 2005

Re: Local Civil Rights Restoration Act (Intro 22-A)

Dear Speaker Miller,

I write on behalf of the Association of the Bar of the City of New York. The Association is a professional association of over 22,000 attorneys. Founded in 1870, the Association has long been committed to promoting, preserving and protecting human rights and dignity. The work of its standing committee on Civil Rights demonstrates the Association's interest in the use of the law to ensure that the City remains at the forefront of the nation in ensuring freedom from racial, gender, and other forms of invidious discrimination.

The Association strongly urges the City to enact the Local Civil Rights Restoration Act Intro 22-A, which would require courts to apply New York City's Human Rights Law consistent with the City Council's goals when it passed the law and in a way that would reflect New York City's long commitment to civil rights and equal opportunity.

Intro 22-A provides in part that the City Human Rights Law "shall be construed independently from both Federal and New York State civil and human rights laws, including those with provisions comparably worded to provisions" in the City Human Rights Law. Intro 22-A thus would amend the City's Human Rights Law to clarify that its protections are not to be limited by narrow interpretations of state and federal civil rights laws, even where those laws contain similar or identical wording.
As discussed further below, Intro 22-A also contains several specific amendments to correct courts' overly narrow interpretations of certain provisions of the law. Although the Human Rights Law already states that it should be liberally construed to accomplish its broad purposes, the law has on numerous occasions been narrowly interpreted to bring it in line with restrictive interpretations of federal and state laws.[1] The proposed amendment requiring independent construction is therefore necessary to ensure that the goal of achieving equality for the people of New York City, as previously expressed by the City Council, is not thwarted.

Most federal civil rights laws expressly state that they are not intended to preempt state law, which may provide greater protection for victims of discrimination.[2] Accordingly, federal civil rights laws set the

[1] See, e.g., McGrath v. Toys "R" Us, Inc., 788 N.Y.S.2d 281 (2004) (restricting availability of attorneys' fees under the New York City Human Rights Law based on restrictive interpretations of federal attorneys' fee provisions); Forrest v. Jewish Guild for the Blind, 786 N.Y.S.2d 382 (2004) (interpreting the City Human Rights Law, despite express language to the contrary, in accordance with the State Human Rights Law, pursuant to which discriminatory comments by a supervisor are not attributable to the employer unless the employer condoned such behavior); Levin v. Yeshiva Univ., 730 N.Y.S.2d 15 (2001) (following decisions interpreting the New York State Human Rights Law in determining that medical school's housing policy limiting cohabitational housing to married students did not violate New York City Human Rights Law prohibition on discrimination based on marital status); Priore v. New York Yankees, 307 A.D.2d 67, 761 N.Y.S.2d 608, 613 (1st Dep't 2003) (rejecting individual liability for employment discrimination under the New York City Human Rights Law where it is not provided for in the State Human Rights Law, even though the language of the City law differs from that of the State law).

[2] See, e.g., Civil Rights Act of 1964, Title XI, 42 U.S.C. § 2000h-4 (applicable to all titles) ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."); Title II, 42 U.S.C. §

floor, rather than the ceiling, for state and local governments seeking to protect their citizens from discrimination. Local governments are free to enact legislation that furthers the goal of equality by imposing upon employers, landlords, and others stricter requirements than does corresponding federal legislation. Municipalities are also free to provide protection from discrimination to those who are excluded from the protection of federal laws (for example, gay, lesbian, and transgender persons). Given the difficulty of getting Congress to reverse restrictive federal court interpretations of federal anti-discrimination laws, state and local laws play a key role in ensuring that all Americans receive the full protection of the law.

Federal civil rights laws anticipate that state and local lawmakers will take up the objectives of the federal legislation. In upholding a California law granting greater protections to pregnant employees than was provided under the federal Pregnancy Discrimination Act, for example, the United States Supreme Court noted "the importance Congress attached to state anti-discrimination laws in achieving Title VII's goal of equal employment opportunity."[3] If courts assume that local civil rights laws provide only the same protection as is available under federal law, the local laws serve little purpose.
Even where state or local legislation contains language that echoes federal law, principles of statutory interpretation require that courts examine whether the legislative body that enacted the local law intended that language to have the same meaning that has been ascribed to it in the federal context. For example, judges can and do interpret provisions of the New York State Constitution to provide greater protection to individual rights and freedoms than courts have found in similar provisions of the Federal Constitution.[4] In interpreting the State Constitution, judges may take into account "the history and traditions of the State in its protection of the individual right; any identification of the right . . . as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right."[5] Intro 22-A makes it clear that the same principle of independent construction must be applied to the New York City Human Rights Law.

Section 8-130 of the Human Rights Law provides that its provisions shall be construed liberally for the accomplishment of its purposes. This principle of liberal construction, enshrined in the law, has too often been abandoned in favor of narrow interpretations based on federal courts' construction of federal law. The New York City Council is under no obligation to limit civil rights protections in New York City to those protections provided by federal law. The people of New York City rely on their representatives to enact laws that reflect their commitment to equality, and that provide expansive protection to those vulnerable to discrimination. Section 8-130 of the Human Rights Law reflects the City Council's intention that the law should be interpreted broadly to provide the most robust and rigorous protection against discrimination for those who live and work in the city.

Judges interpreting federal law may not necessarily use this principle of liberal construction. Therefore, decisions interpreting federal law should not automatically determine the meaning of similar language in the New York City Human Rights Law. Intro 22-A makes it clear that judges must consider the legislative intent underlying provisions of the Human Rights Law, and ask which interpretation of the law will best fulfill the objectives of the law, rather than adopting, as a matter of course, the prevailing interpretation of similar provisions of federal or state law. Intro 22-A does not preclude judges from adopting the prevailing interpretation of federal law in interpreting the Human Rights Law, so long as they conclude that the federal interpretation best serves the broad remedial purposes of the Human Rights Law.

2000a-6(b) (public accommodations); Title VII, 42 U.S.C. 2000e-7 (equal employment opportunities); Fair Housing Act, 42 U.S.C. § 3615; Americans With Disabilities Act, 42 U.S.C. § 12201(b).

[3] Cal. Fed. Savings and Loan Ass'n v. Guerra, 479 U.S. 272, 282-83 (1987).

[4] People v. Caban, No. 04988, 2005 WL 1397044 (N.Y. June 14, 2005) (New York Constitution interpreted to impose less burdensome standard for defendant to establish ineffective assistance of counsel than the United States Constitution); Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 159 (1978) ("[O]n innumerable occasions, this court has given our State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution.").

[5] People v. P.J. Video, Inc., 68 N.Y.2d 296, 508 N.Y.S.2d 907 (1986)

The United States Supreme Court's decision in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health[6] provides an example of the problem with incorporating interpretations of federal law into local law without considering the intent of the legislature. This 2001 U.S. Supreme Court decision restricted the availability of attorneys' fees in actions under the Fair Housing Amendments Act and the Americans With Disabilities Act. Prior to Buckhannon, every federal Court of Appeals had adopted the "catalyst theory," pursuant to which courts could award attorneys' fees to the plaintiff if the lawsuit served as a "catalyst" for the change in defendant's allegedly discriminatory practice that the plaintiff sought. Under this theory, a plaintiff could be awarded counsel fees where the parties reached a settlement before trial, or where the defendant "voluntarily" changed the practice alleged to be discriminatory after being sued. The appellate courts that had so held relied on Congress' intention that the fee-shifting provisions of the 1964 Civil Rights Act and subsequent civil rights legislation encourage the public "to act as private attorneys general."[7] The Second Circuit, for example, concluded that "reimbursement of legal fees and expenses is an incentive for lawyers to accept these often time-consuming cases,"[8] and that the catalyst theory allowed victims of discrimination to present their claims without having to bear the burden of the costs if they accepted relief offered by the defendant under pressure from the lawsuit.

The Supreme Court rejected arguments based on policy and legislative history in favor of a narrow reading of the statute premised upon statutory language that attorneys' fees could be awarded to the "prevailing party." The Court took this to be a term of art referring only to "a party in whose favor a judgment is rendered"[9] and held that attorneys' fees could be awarded only if the litigation resulted in a judgment or a consent decree. Given that the legislative history is to the contrary and the catalyst theory better serves the objectives of the civil rights legislation, the Court was able to reach its holding only by using a very narrow approach to statutory construction.

Buckhannon also illustrates how different federal courts often endorse contradictory interpretations of federal statutes. Judges who decide to interpret the City Human Rights law as invariably the same as federal law therefore must frequently choose between several interpretations prevailing in the various federal courts. In such cases, Intro 22-A's directive to examine which interpretation best accomplishes the purpose of the Human Rights Law will provide welcome guidance.
Intro 22-A explicitly rejects Buckhannon and allows courts to adopt the catalyst theory. The provision of Intro 22-A that emphasizes the requirement of independent construction of the City Human Rights law, however, will avoid the need for such specific amendments in the future.

Other important provisions of Intro 22-A, like the catalyst counsel fee provision, clarify the Council's intent not to follow restrictive interpretations of federal and state law. For example, Intro 22-A provides that the degree of harm caused by an employer's retaliation against an employee who complains of discrimination shall be considered only in calculating damages, rather than in determining whether retaliation occurred in the first place. Different federal courts have very different definitions of what constitutes an actionable "adverse employment action" against an employee who complains of retaliation. The Fifth and Eighth Circuits have held that retaliation does not violate Title VII unless it takes the form of an "ultimate employment decision," such as hiring, discharge, promotion, or compensation.[10] On the other hand, a number of circuits take a much broader view. For example, the Ninth Circuit has held that an unfavorable job reference is an actionable adverse employment action even when it does not affect a prospective employer's decision not to hire the plaintiff.[11] The Seventh Circuit has found that actions such as moving someone from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services, or cutting off challenging assignments all could be actionable; the court noted

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6 532 U.S. 598 (2001).

7 Bonnes v. Long, 599 F.2d 1316, 1318 (4th Cir. 1979); see also Doe v. Busbee, 684 F.2d 1375, 1379 (11th Cir. 1982).

8 Marbley v. Bane, 57 F.3d 224, 233 (2d Cir. 1995).

9 Buckhannon, 532 U.S. at 603.

10 Mattern v. Eastman Kodak, 104 F.3d 702, 707 (5th Cir. 1997); Ledergarber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997).

11 Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997).

that "[t]he law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit."[12]

Intro 22-A makes it clear that the New York City Human Rights Law provides a remedy for employees who have opposed discrimination and, as a result, been subjected to any treatment that could deter a reasonable person from engaging in such opposition. Such retaliation could include, for example, a negative performance evaluation or an involuntary transfer to another department (both held not to be adverse employment actions in a recent Second Circuit decision).[13] The amendment also makes clear that an employee who has been subjected to a less serious violation may be entitled to lesser damages. Intro 22-A also amends the Human Rights Law to prohibit discrimination on the basis of partnership status. The New York Court of Appeals has held that the City Human Rights Law's prohibition against discrimination on the basis of marital status protects only those individuals who are discriminated against because they are single, married, divorced, or widowed. A landlord or an employer is free to discriminate against an individual because he or she is in a life partnership with someone to whom he or she is not married (and in the case of same-sex couples, cannot be married).[14] Intro 22-A will protect registered domestic partners in New York City from discrimination based on the fact that they are not married, which reflects the City's policy that unmarried domestic partners "share the same level of commitment with their partners as married persons share with their spouses."[15]

Amendments such as these should no longer be necessary after Intro 22-A is enacted because Intro 22-A requires courts to construe the City's Human Rights Law independently and in light of the Council's clear intent to provide the greatest possible protection for civil rights. At a time when restrictive interpretations of federal and state civil rights laws threaten to limit drastically the recourse available to victims of discrimination, New York City must affirm that its Human Rights Law is intended to ensure meaningful protection for the rights of those who live or work here. Without dictating to courts how any given issue must be decided, Intro 22-A establishes that in interpreting local law, judges must give due consideration to the broad remedial purposes of the law. For the foregoing reasons, on behalf of the Association of the Bar of the City of New York and its Civil Rights Committee, I urge you to enact Intro 22-A.

Very truly yours,

Bettina B. Plevan

Bettina B. Plevan
President
Association of the Bar of the City of New York

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[12] Knox v. State of Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).

[13] Fairbrother v. Morrison, No. 03 Civ. 9242, 2005 WL 1389894 (2d Cir. June 14, 2005).

[14] See Levin, 730 N.Y.S.2d at 18 ("[F]or purposes of applying the statutory proscription, a distinction must be made between the complainant's marital status as such, and the existence of the complainant's disqualifying relationship--or absence thereof--with another person.").

[15] Levin, 730 N.Y.S.2d at 26 (Kaye, C.J., concurring in part and dissenting in part).