COURT OF APPEALS,
THE STATE OF NEW YORK
----------X
In the Matter of
ROY DEN HOLLANDER

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.
----------X

NOTICE OF MOTION FOR REARGUMENT

APL-2014-00240
New York County Sup. Ct.
Index No. 100299/13

PLEASE TAKE NOTICE that, upon the attached Memorandum of Petitioner-Appellant and the Order of the Court of Appeals made on November 24, 2014, reversing its decision granting Petitioner-Appellant permission to appeal to this Court to denying permission to appeal an order of the Appellate Division, the undersigned Petitioner-Appellant will move this Court on December 15, 2014, for an order reversing that denial upon the points specified in the attached Memorandum that were overlooked or misapprehended, and for such other and further relief as may be just and proper.

Dated: New York, N.Y.
November 29, 2014

/S/
_____
By: Roy Den Hollander, Esq.
Petitioner-Appellant
545 East 14 St., 10D New York, N.Y. 10009
(917) 687-0652

rdenhollander97@gsb.columbia
.edu

TO: Ingrid R. Gustafson, Esq.
Assistant Corporation Counsel
Attorney for Respondent-Respondent
City of New York Commission
on Human Rights
100 Church Street
New York, N.Y. 10007
(212) 356-0853
igustafs@law.nyc.gov

COURT OF APPEALS,
THE STATE OF NEW YORK
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In the Matter of
ROY DEN HOLLANDER

New York County Sup. Ct.
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Petitioner- Appellant,

APL-2014-00240

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Appellant's Memorandum in Support of Reargument of the Court of Appeals decision to grant Respondent's Reargument Motion to reverse the Courts grant of leave to appeal.

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Statement of Facts

The Court of Appeals originally granted Petitioner-Appellant's motion for leave to appeal on September 16, 2014, of an Appellate Division First Department Decision and Order, dated June 3, 2014. (Petitioner-Appellant Appendix at A2 and A3). The First Department's Order held that the doctrine of election of remedies barred Petitioner-Appellant from filing an age-discrimination claim with the City of New York Commission on Human Rights ("City HR") and cited two cases for support. (Petitioner-Appellant Appendix at A3 and A4). Those cases applied the State's election of remedies doctrine under N.Y. Exec. Law § 297(9).[1]

Respondent City HR submitted papers opposing leave to appeal in which it first argued the same argument it presented in its motion for re-argument: that the City HR and lower courts' decisions rested on two independent grounds, not just the election of remedies ground and Petitioner-Appellant requested appeal on only the election of remedies ground. (City HR Affirmation in Opposition to Motion for Leave to Appeal at ¶¶ 3-4; City HR Affirmation in Support of Motion to Dismiss Appeal at ¶¶ 3-8 (Re-argument Motion)).

The ground not originally appealed on was, according to the Appellate Division, "[City HR's] alternative determination of 'no probable cause' has a

[1] One case, *Benjamin v. N.Y. City Dept. of Health*, 57 A.D.3d 403 (1st Dept. 2008) also cited N.Y.C. Admin. Code § 8-502(a) that provides a choice between a private right of court action or filing a complaint with City HR under the City Human Rights Law. There was no attempt at court action in this case other than the Article 78 review; therefore, § 8-502(a) did not apply here.

rational basis and is not arbitrary and capricious . . . [because] [p]etitioner [Appellant] was afforded a 'full and fair opportunity to present [his] case' . . . and received procedural due process . . . ." (Appellate Division, First Department Decision and Order, dated June 3, 2014, Petitioner-Appellant Appendix at A4).

On November 24, 2014, the Court of Appeals granted City HR's re-argument motion thereby changing its mind and denying Petitioner-Appellant leave to appeal. (Exhibit A). In effect, City HR was granted a "second bite at the apple" by this Court with the result of approving and writing into law that in certain situations invidiously discriminatory acts by public accommodations are legal throughout the State of New York—not unlike what the U.S. Supreme Court did in *Plessy v. Ferguson*, 163 U.S. 537 (1896) for the entire country concerning the public accommodations of railroads.

City HR's re-argument motion was submitted on September 22, 2014, and supported by an affirmation of the City's Assistant Corporation Counsel, Ingrid R. Gustafson. This Court granted City HR's motion to re-argue, stating:

> [Motion to dismiss appeal] treated as a motion for reargument of appellant's motion for leave to appeal, is granted and, upon reargument, motion for leave to appeal is denied.

(Exhibit A).

This Court's decision on November 24th was passed the deadline of November 18th set by this Court for Petitioner-Appellant to submit his brief and

appendix. Appellant invested the time to draft and the expense to print his brief and appendix in order to meet the November 18th deadline with printing costs of $1,123. (Exhibit B). Apparently in this day and age, that is not important, especially when a lawyer acting as a "private attorney general" fights for civil rights in what are effectively *pro bono* cases on important public issues.

Argument

By granting City HR's motion to re-argue—something rarely done by the Court of Appeals[2]—this Court has gone out of its way to not only approve but to institutionalize invidious discrimination by public accommodations in certain situations and to override the intent of the N.Y. City Council in enacting the City's Human Rights Law by allowing to stand the lower courts' construing part of that law, N.Y.C. Admin. Code § 8-109(f)(iii), to permit such invidious discrimination.

> In 2005, the City Council passed and the Mayor signed into law the
>
> [Local Civil Rights Restoration Act] to expressly instruct[] 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

[2] For the period from 2009 through 2013, the Court granted only six out of 244 motions for re-argument of decisions on motions. *See Annual Report of the Clerk of the Court*, Court of Appeals of the State of New York, Appendix 7.

> under comparably worded state or federal laws. For this reason, [the Act] 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.

(Exhibit C: The Council Report of the Gov. Affrs. Div. of the Committee on General Welfare at 4-5 (2005); *see also* N.Y.C. Admin. Code § 8-102, Note, *Provisions of L.L. 85/2005,* Section 1; N.Y.C. Admin. Code § 8-130). For an analysis of the City Council's intent please see Petitioner-Appellant's Brief at 5-11.

The Court of Appeals refusal to hear this case means that into the near and distant future N.Y.C. Admin. Code § 8-109(f)(iii) will be interpreted to prevent the filing of discrimination complaints with 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.

This will occur whenever a party 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 based on a type of discrimination over which it does not have jurisdiction—age, partnership status, alienage, or citizenship. City HR does have jurisdiction over age, partnership status, alienage, or citizenship under N.Y.C. Admin. Code § 8-107(4)(a), but because of the lower courts and City HR's interpretation of N.Y.C. Admin. Code § 8-109(f)(iii), the person discriminated against cannot bring a complaint with City HR.

Further, that person 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, and 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. Such occurred to Petitioner-Appellant concerning age discrimination.

More important, however, is that this 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 thereby leaving a party without any legal remedy will spring again and again—repeatedly, against others. "[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," especially the violation of civil rights. *Clark v. Kirby*, 243 N.Y. 295, 303 (1926).

Further, this Court may choose to exercise its discretion to hear an apparently moot case, which City HR argued, when there exist "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714-715 (1980).

The trap created by the lower courts rulings fits these requirements. How many judges, not to mention lay persons, are even aware of this Catch-22—few to none. How many lay persons trapped by the lower courts' rulings will try to take a similar case up the ladder to the Court of Appeals—probably none. And has this legal trap ever been challenged before—not that Petitioner-Appellant, an attorney with 30 years of practice, or City HR could find.

The granting of City HR's re-argument motion, unfortunately, means the bigots win and New York makes a mockery of decades of struggle for the protection of civil rights.

> "Discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment…." *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)(Brennan, J.)

By allowing City HR to re-argue an issue that it previously raised and lost—that the lower courts dismissed on "two independent grounds"—the Court of

Appeals has gone the extra mile to make sure the City's Human Rights Law is diluted in the above situations so as to afford victory to invidious discrimination. Such an act seems especially egregious since the "purpose of a motion to reargue is not to afford the unsuccessful party successive opportunities to reargue issues previously decided," *New York Practice Series*, § 5:5, Mark Davies (2014), and "care [must] be taken to avoid rearguing arguments previously made . . . ," *New York Appellate Practice,* § 10.02, Matthew Bender & Company, Inc. (2014), both of which are exactly what City HR has done and succeeded at.

This Court, however, does have the power to resolve such an injustice by applying the *Hearst Corp.* exception for mootness or permitting Petitioner-Appellant to add a second question for appeal. Arguments asserted for the first time before this Court are permitted if there are extraordinary or compelling reasons, 22 NYCRR § 500.24(d), and that the argument was previously advanced either in this court or in the courts below, *Simpson v. Loehmann*, 21 N.Y.2d 990 (1968).

According to the N.Y. City Council:

> [D]iscrimination should not play a role in decisions made by . . . providers of public accommodations . . . 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.

(Exhibit C: The Council Report of the Gov. Affrs. Div. of the Committee on General Welfare at 5-6 (2005)). And, the proposed second question for appeal was raised in the Supreme Court (Justice Hunter's Order and Judgment, Petitioner-Appellant Appendix at A15) and in the Appellate Division (Petitioner-Appellant Brief in the First Department at 35-38).

In addition, since the Government of the most populous city in America was granted a second chance, it seems only fair that one of its residents be granted a second shot.

> "[A]n underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual." *Regents of University of California v. Bakke*, 438 U.S. 265, 319 n. 53 (1978).

Second Question Presented

Does the determination of "no probable cause" have a rational basis and is not arbitrary and capricious when an agency (1) fails to adhere to procedural due process by violating that agency's procedures and not conducting a full investigation, and (2) fails to rely on "substantial evidence" in reaching its no probable cause decision? The First Department wrongly concluded: Yes. (Petitioner-Appellant Appendix at A4).

In finding no violation of procedural due process, the First Department relied on one case that held due process did not require a hearing because no property interest was involved, *Matter of Daxor Corp. v. State of N.Y. Dept. of*

Health, 90 N.Y.2d 89, 98 (1997), and another case holding that the availability of an Article 78 action satisfied the due process hearing requirements, *Pinder v. City of N.Y.*, 49 A.D.3d 280, 281 (1st Dept. 2008). The absence of a hearing was never challenged in this case as a violation of procedural due process.

The procedural due process issues were whether City HR's investigation followed City HR procedures and whether it conducted a full investigation. Where an agency fails to follow its rules in rendering a determination, that determination will be arbitrary and capricious. *Frick v. Bahou*, 56 N.Y.2d 777, 778 (1982). "[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. Lexis 178875 *14 (S.D.N.Y. 2012). City HR's investigation violated its own rule requiring an accurate and thorough fact-finding, 47 RCNY §1-31. Further, the Court of Appeals 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), 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)." City HR failed to conduct a full investigation.

City HR did not interview witnesses; did not issue interrogatories; did not obtain authenticated documents; did not make any telephones logs, which indicates no telephone calls; did not try to contact an eyewitness to the discriminatory

incident, attorney Robert M. Ginsberg, who was with Petitioner-Appellant on the night of the discrimination and whom City HR knew about and how to contact, which alone amounted to denying Petitioner-Appellant a "full and fair opportunity" to present his claims, *Stern v. N.Y.C. Commn. Human Rights*, 38 A.D.3d 302, 302 (1st Dept. 2007); did no more than send a letter to an eyewitness at the public accommodation addressed to the doorman "David," which was returned as undeliverable; did not try to contact anyone familiar with the public accommodation's admission policy; and did not try to contact anyone at the public accommodation who may have also witnessed the discrimination even though there were two bouncers standing in the same area when the discrimination occurred.

City HR had the "fact-finding responsibility" to conduct a full investigation that searched for substantial evidence to support its "no probable cause" determination, *Matter of T.K. Management Inc. v. Gatling*, 2005 N.Y. Misc. LEXIS 3593 *12, *see Matter of 119-121 E. 97th St. Corp. v. New York City Commn. on Human Rights*, 220 A.D.2d 79, 81-82 (1st Dept. 1996), but it failed to do so.

City HR's "no probable cause" decision had to rely on "substantial evidence." See N.Y.C. Admin. Code §8-123(e); *Okoumou v. Community Agency for Senior Citizens, Inc.*, 17 Misc.3d 827, 833 (2007). Substantial evidence

requires that its "[e]ssential attributes are relevance and a probative character," *Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938); *Matter of Ralph v. Board of Estimate of City of N. Y.*, 306 N.Y. 447, 454 (1954). Substantial 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." *300 Gramatan Ave. Associates v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978)(citations omitted). It must be "more than seeming or imaginary." *Id.* In addition, evidence for establishing facts can only come from 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). Further, hearsay evidence is treated skeptically. *Triborough Bridge and Tunnel Auth. v. Simms*, OATH Index No. 1303/97 (May 30, 1997).

The following evidence relied on by City HR hardly inspires confidence in its decision: an Internet gossip column by someone called "Jezebel" that criticizes Petitioner-Appellant over his divorce and the civil rights cases he brought (Petitioner-Appellant Appendix at A63-A64), two hearsay Internet blogs by persons identifiable only by their Internet monikers and who, according to their blogs, admitted not even being at the public accommodation on the date of the discriminatory incident (Petitioner-Appellant Appendix at A66-A67 and A68, Maria W. NY), a "Verified Answer" by an official of the public accommodation

that was useless because he did not have firsthand knowledge of the facts as required by *Kopanski v. Hawk Sales Co.*, 76 Misc. 2d 348, 349 (N.Y. Sup. Ct. Herkimer Cty. 1973), and a non-existent video tape of the line of persons outside the public accommodation.

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), such as those relied on by City HR in reaching its "no probable cause" decision.

On the other side of the coin are two sworn affidavits by Petitioner-Appellant, an obvious eyewitness, and the State DHR *Determination and Order After Investigation* (Petitioner-Appellant Appendix at A54). The State DHR *Determination and Order After Investigation* is substantial evidence because among the requirements of the State DHR's Investigative Procedure is that an investigation "[r]esolve issues of questionable jurisdiction." (*Information for Complaints*, Petitioner-Appellant Appendix at A71). The State's trained investigators made the necessary fact findings to resolve whether the State had jurisdiction—it did not because the public accommodation had engaged in age-discrimination.

City HR not only failed to follow its own procedures but relied on insubstantial evidence in reaching its finding of "no probable cause."

Conclusion

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. 101, 121 (2005). 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.

Petitioner-Appellant requests this Court grant his motion to re-argue.

Dated: New York, N.Y.
November 29, 2014

/S/

By: Roy Den Hollander, Esq.
Petitioner-Appellant
545 East 14 St., 10D
New York, N.Y. 10009
(917) 687-0652
rdenhollander97@gsb.columbia.edu

Exhibit A

State of New York
Court of Appeals

Decided and Entered on the twenty-fourth day of November, 2014

Present, HON. JONATHAN LIPPMAN, *Chief Judge, **presiding**.*

Mo. No. 2014-997
In the Matter of Roy Den Hollander,
Appellant,
v.
The City of New York Commission on Human Rights,
Respondent.

Respondent having moved to dismiss an appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion, treated as a motion for reargument of appellant's motion for leave to appeal, is granted and, upon reargument, the motion for leave to appeal is denied.

Andrew W. Klein
Clerk of the Court

Exhibit B

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Exhibit C

Staff: Jacqueline D. Sherman, Counsel
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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

[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

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[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).