PROGRAM MATERIALS
Program #3104
February 16, 2021

NYC Human Rights Law: The 'Gold Standard' of Anti-Discrimination Laws

- Mark Goldstein, Esq. – ReedSmith
- Alexandra Manfredi, Esq. – ReedSmith

Celesq® AttorneysEd Center
www.celesq.com

5255 North Federal Highway, Suite 310, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

New York City Human Rights Law: the “gold standard” of anti-discrimination laws?

Prepared for **Celesq® AttorneysEd Center**

Presented by Mark Goldstein and Alexandra Manfredi

February 16, 2021

ReedSmith

Driving progress
through partnership

Introduction

- As many businesses have come to learn in recent years, New York City is home to one of the nation's most expansive anti-discrimination laws: the New York City Human Rights Law (NYCHRL).
- The NYCHRL is unique on multiple fronts, including its broad protections and definitions, burdensome obligations for employers, and expanded remedies.
- This program will explore the history of the NYCHRL, what differentiates it from other anti-discrimination statutes, and provide practical recommendations for employers grappling with its multifaceted requirements.

Agenda

- ✓History and background on the NYCHRL
- ✓Distinct requirements of the NYCHRL
- ✓Judiciary impact on the NYCHRL
- ✓Recommendations for NYC employers

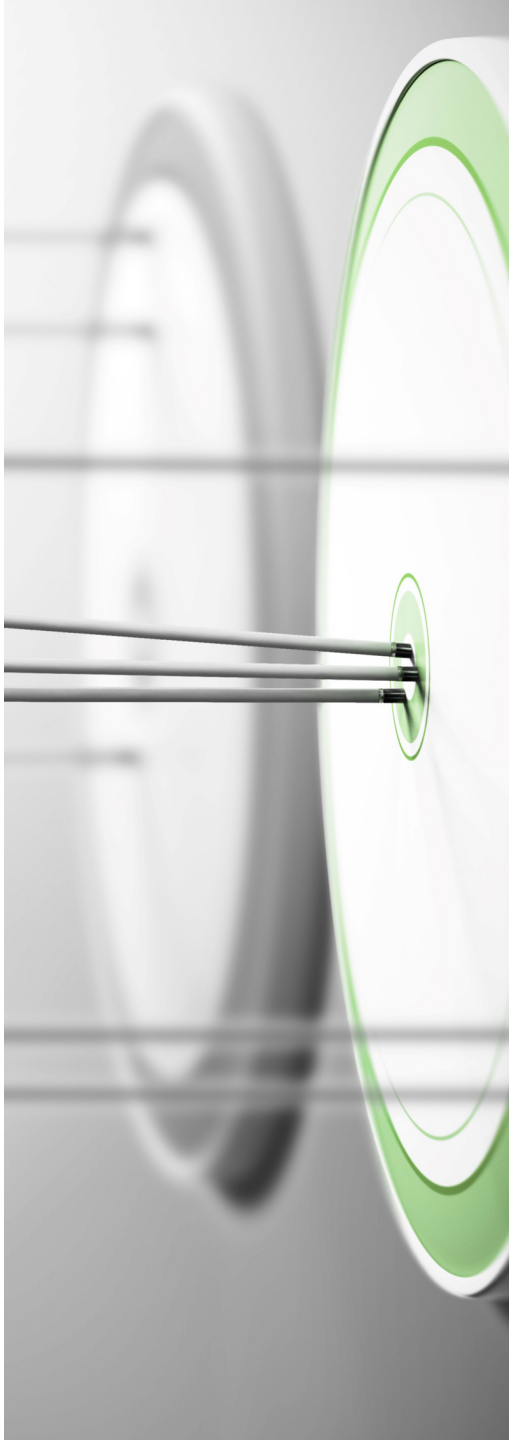
Goals

To better understand the history of the NYCHRL

- Insight into legislative intent of the law provides an important perspective on the law's changes in recent years

To understand the recent updates to the law and how to best comply

- Expanded employee rights and increased employer obligations



History and background of the NYCHRL

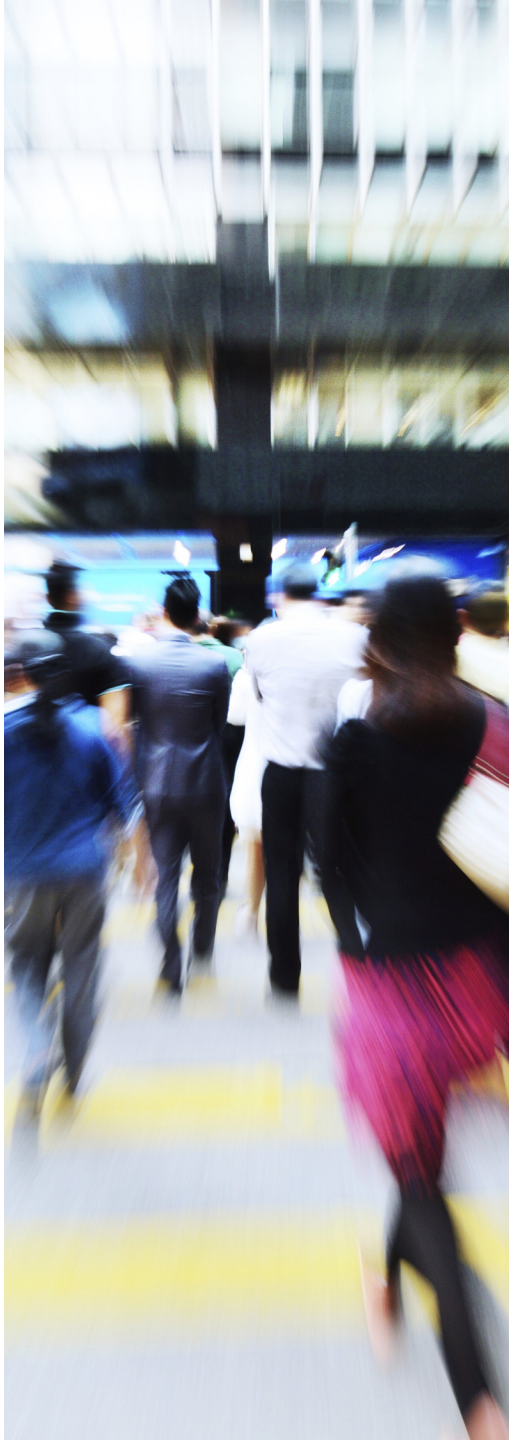
1

History and background

- The New York City Council enacted the NYCHRL in 1991 to serve as the city's own anti-discrimination law.
- In the first 14 years following its enactment, courts interpreted the NYCHRL as being largely analogous to federal and New York state anti-discrimination laws.
- As a result, the law did not garner much attention from the business or legal communities.
- By 2005, the City Council had grown displeased with judicial interpretations of the NYCHRL.
  - The legislature wanted the law to set a new standard for anti-discrimination protections.

History and background (cont.)

- In October 2005, the Council passed the Local Civil Rights Restoration Act.
  - The Act mandated that the NYCHRL be construed independently from, and interpreted more liberally than, any of its federal or state counterparts “for the accomplishment of [] uniquely broad and remedial purposes.”
- The Restoration Act made clear that federal and state anti-discrimination laws were a mere “floor below which the city’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.”



History and background (cont.)

- Through a series of reforms that started with the Restoration Act and have continued in the ensuing decade and a half, the NYCHRL has morphed from a relatively typical workplace law into one of the most employee friendly anti-discrimination laws in the nation.
- The NYCHRL charges the New York City Commission on Human Rights (NYCCHR) with enforcement, as well as educating the public and encouraging positive community relations.
- In addition to affording employees the ability to file lawsuits in court, the NYCHRL also allows them to file with the NYCCHR, which has the ability to issue a binding determination on claims reviewed by it.

History and background (cont.)

- In addition to its intake, investigation, and prosecution activities, the NYCCHR also prepares and disseminates guidance on the NYCHRL.
- Such guidance has been issued on many topics, including but not limited to:
  - Caregiver status
  - Independent contractors and freelancers
  - Muslims and those perceived as such
  - Sexual and reproductive health decisions
  - Lactation accommodations

Distinct requirements of the NYCHRL

2

Distinct requirements

To say that the NYCHRL is unique in the realm of anti-discrimination laws would be an understatement. In this portion of the presentation, we will cover some of the law's more distinct requirements.

- ✓Broad protections and definitions
- ✓Burdensome obligations for employers
- ✓Expanded remedies and individual liability

Distinct requirements: Broad protections and definitions

- NYCHRL prohibits discrimination against a broader scope of protected classes than under federal law
- In addition to traditional protected categories, the NYCHRL prohibits discrimination based upon, among other classes, the following:
  - Younger age
  - Employment status
  - Reproductive health choices
  - Status as a victim of domestic violence
  - Actual or perceived caregiver status
  - Consumer credit history
  - Criminal conviction history

Distinct requirements: Broad protections and definitions (cont.)

Expanded age-protected class

- While federal law bars age-based discrimination, it only protects employees who are 40 years of age or older.
  - The NYCHRL's age-related protections, on the other hand, extend to all workers who are at least 18 years old.

Employment status

- The NYCHRL protects most independent contractors from unfair workplace practices, while federal law does not.
- The NYCHRL protects nonemployees, such as contractors, subcontractors, vendors, consultants, temporary workers, "gig" workers, and other non-employee persons providing services pursuant to a contract.
- In practice, independent contractors may now pursue claims of workplace discrimination, harassment, and retaliation.

Distinct requirements: Broad protections and definitions (cont.)

Reproductive health

- NYCHRL protects employees against employment discrimination based on their sexual and reproductive health decisions.
- Sexual and reproductive health decisions:
  - Any decision to receive services related to the reproductive system and its functions.
  - E.g., family planning services and counseling, such as abortion and birth control; fertility-related medical procedures; and sexually transmitted disease prevention, testing, treatment, and transgender individuals seeking hormone therapy.

Distinct requirements: Broad protections and definitions (cont.)

Domestic violence victims

- New Yorkers who are victims/survivors of domestic violence, sex offenses, or stalking are protected against discrimination in housing and employment by the NYCHRL.

Caregiver status

- You cannot be treated differently at your job because you have children, or because you care for a relative who is sick or has disabilities.
  - E.g., an employee has children at home, has a sick spouse, is a foster/adoptive parent, or is a single parent.
  - E.g., based on the belief that someone with children or caring for a disabled relative with a disability will not be a reliable employee; that mothers should stay home with their children.

Distinct requirements: Broad protections and definitions (cont.)

Credit history

- The Stop Credit Discrimination in Employment Act (SCDEA) amends the NYCHRL by making it an unlawful discriminatory practice for employers to request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment.

Distinct requirements: Broad protections and definitions (cont.)

Criminal conviction history

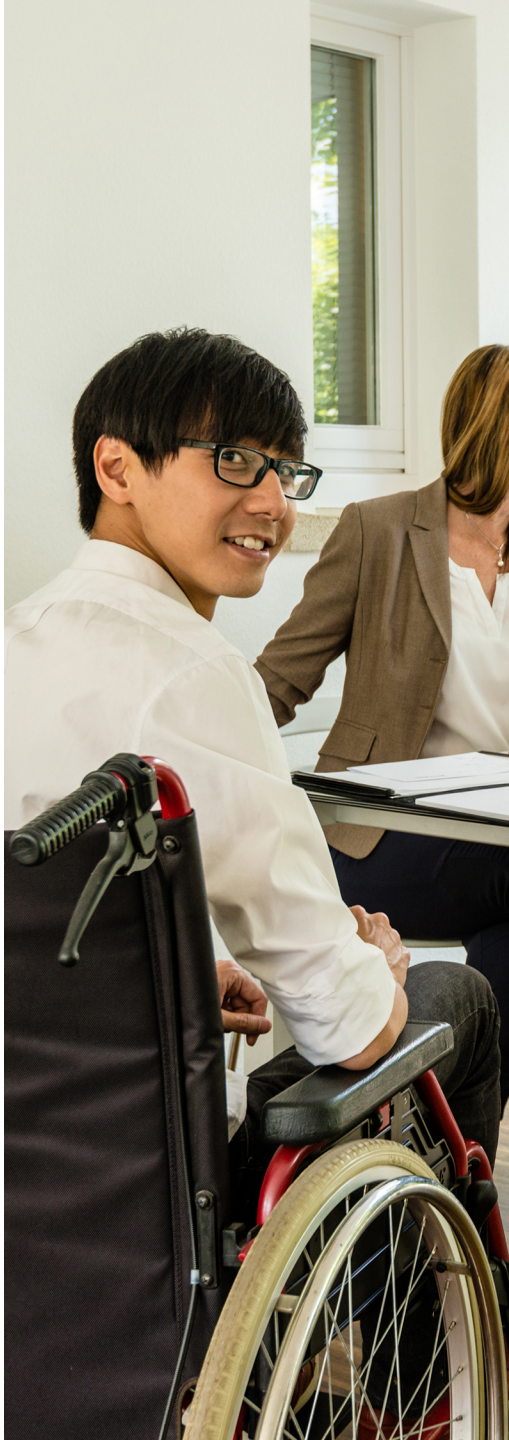
- The Fair Chance Act (FCA) amends the NYCHRL by making it an unlawful discriminatory practice for most employers to inquire about or consider the criminal history of job applicants until after extending conditional offers of employment.
- If an employer wishes to withdraw its offer, it must give the applicant a copy of its inquiry into and analysis of the applicant's conviction history, along with at least three business days to respond.

Distinct requirements: Broad protections and definitions (cont.)

The law broadly defines several key discrimination concepts.

Disability

- For example, the NYCHRL's definition of **disability** – which includes "any physical, medical, mental or psychological impairment, or a history or record of such impairment" – is far more expansive than other anti-discrimination laws.
  - Under this definition, virtually all mental and physical conditions, however temporary in duration, could potentially qualify as legally protected disabilities.



Distinct requirements: Broad protections and definitions (cont.)

Accommodations

- Federal law only requires that employers provide workplace accommodations for disabled employees and employees' sincerely held religious beliefs or practices.
- The NYCHRL, however, goes far beyond this.
- Under the NYCHRL, employers must provide the same accommodations as required by federal law, **plus** accommodations relating to an employee's pregnancy, childbirth, and/or related medical condition, and also for certain qualifying reasons for victims of domestic violence.

Distinct requirements: Burdensome obligations for employers

Limitations on job applicant inquiries

- The NYCHRL imposes strict limitations on what information can be asked of job applicants, and when that information can be requested.
  - NYC employers may not ask for, or base employment decisions on, a candidate's credit history or criminal history.
  - Criminal history may only be considered after a conditional offer is extended.
  - Absent certain limited exceptions, the law bars pre-employment marijuana testing.

Distinct requirements: Burdensome obligations for employers (cont.)

Mandatory sexual harassment training

- The NYCHRL requires that all city employers with 15 or more employees provide annual sexual harassment prevention training to employees and independent contractors.

Distinct requirements: Burdensome obligations for employers (cont.)

Written accommodation determination

- The NYCHRL requires employers to provide a final **written** determination identifying any accommodation that has been granted or denied as part of the employer's "cooperative dialogue" with an employee who has requested a workplace accommodation.
- With respect to employees who are new mothers, the NYCHRL requires the provision of a lactation room, adequate time for employees to express breast milk during the workday, and a written policy on lactation accommodations.

Distinct requirements: Expanded remedies

Damages and individual liability

- With respect to the damages that a successful plaintiff-employee can recover in a discrimination lawsuit, federal law imposes caps on punitive damages.
- The NYCHRL, however, permits successful litigants to recover uncapped punitive damages, among other forms of damages.
- Also unlike federal law, the NYCHRL permits courts to impose liability against individual employees – such as co-workers and supervisors – who engage in discriminatory conduct or aid and abet such conduct.

The judiciary's impact on the law's reach

3

Judiciary impact

- One of the reasons that the City Council enacted the Restoration Act in 2005 was its belief that, up to that point, New York federal and state courts had interpreted the NYCHRL too narrowly.
- However, since then, the judiciary has repeatedly effectuated the Council's liberal intent for the law.
- In this section we will cover:
  - ✓Lenient definition of discrimination and harassment
  - ✓Elimination of important affirmative defenses
  - ✓Heightened standard for pretrial summary disposition

Judiciary impact: Lenient definition of discrimination and harassment

- In 2010, a state appellate court rules that a NYCHRL hostile work environment claim – which, at the federal level (and at the state level until 2019) requires a showing of severe or pervasive conduct – merely requires that the plaintiffs allege that they were treated "less well" than their fellow employees.
- This same standard applies to disparate treatment discrimination claims.

Williams v. N.Y. City Housing Auth., 61 A.D.3d 62 (1st Dept. 2009)

Judiciary impact: Lenient definition of discrimination and harassment (cont.)

- Following *Williams*, the frequency and pervasiveness of the harassing conduct bears relevance only to the eventual apportionment of damages.
- As a result, NYCHRL harassment claims may proceed unless the employer can demonstrate that the purported harassing conduct amounted to nothing more than mere "petty slights and trivial inconveniences."

Judiciary impact: Elimination of important affirmative defenses

- In a landmark decision issued in 2010, the New York Court of Appeals held that the *Faragher/Ellerth* defense to a hostile work environment claim is not a viable defense to a claim asserted pursuant to the NYCHRL.
- ***Zakrzewska v. New School***, 14 N.Y.3d 469 (2010).
- The *Faragher/Ellerth* defense protects employers when a non-supervisor perpetrates the alleged harassment, but the employer exercised reasonable care to prevent and promptly correct the harassing behavior and the plaintiff-employee unreasonably failed to take advantage of preventative or corrective opportunities to avoid harm.
- The ruling in *Zakrewska* eliminated one of the most important harassment-related defenses at an employer's disposal.

Judiciary impact: Heightened standard for pretrial summary disposition

- Some courts have held that the NYCHRL's liberal intent necessitates that the judiciary analyze city law discrimination claims under a different framework than its federal and state counterparts.
- In ***Bennett v. Health Mgmt. Sys. Inc.***, 92 A.D.3d 29 (1st Dept. 2011), an intermediate appellate court found that the traditional *McDonnell Douglas* burden-shifting framework used to analyze federal and state law discrimination claims at the summary judgment phase does not apply to NYCHRL claims.

Judiciary impact: Heightened standard for pretrial summary disposition (cont.)

- In rejecting the *McDonnell Douglas* test, the *Bennett* court held that, if the plaintiff can present some evidence that the employer's proffered legitimate, non-discriminatory reasons for termination are "false, misleading or incomplete…such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment should be denied."
- Adoption of the *Bennett* standard has been inconsistent, and neither the New York state courts nor the Second Circuit Court of Appeals has given the "green light" to abandon *McDonnell Douglas.*

Recommendations for employers

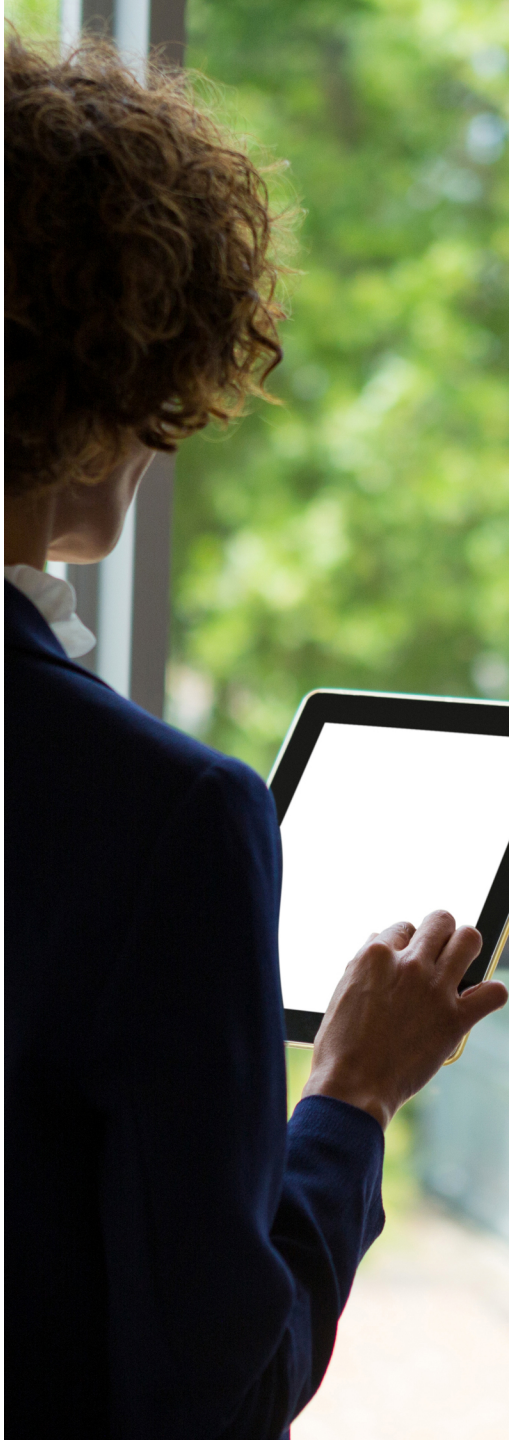
4

Recommendations for employers

- To ensure compliance with the NYCHRL and limit the potential risk of costly litigation, NYC employers who are grappling with the law's many facets should do the following, if they have not done so already…
  - ✓Training
  - ✓Review forms
  - ✓Review policies and notices
  - ✓Implement required processes
  - ✓Document

Recommendations for employers: Training

- Train supervisors and employers on the various aspects of the NYCHRL.
- Explain that they can even be held individually liable for violations of the law.
- Ensure that human resources and in-house legal departments are well versed in the NYCHRL's requirements.



Recommendations for employers: Review forms

- Review job application forms and hiring protocols to ensure that they comply with the NYCHRL's pre-hiring restrictions.
  - E.g., it is a violation of the NYCHRL for a job application to ask candidates to list their dates of prior employment.

Recommendations for employers: Review policies and notices

- Review employee handbooks and policies, as well as workplace notices and posters, on an annual basis – if not more frequently.
  - E.g., sexual harassment policy, lactation accommodations policy.

Recommendations for employers: Implement required processes

- Implement annual anti-sexual harassment training and lactation room policies and procedures, if employer has not already done so.
- Ensure that those interviewing prospective candidates are well aware of limitations on applicant inquiries (e.g., credit and criminal history, employment status, and other protected classes).

Recommendations for employers: Document

- Thoroughly document the employment relationship, from application to separation, including:
  - Performance management
  - Progressive discipline
  - Leave and accommodation requests
  - Termination
- Employers should make certain that the accommodation process and any lactation room requests, as well as the ultimate determination regarding same are memorialized in writing.

Final thoughts

While the NYCHRL remains one of, if not, the most employee-friendly anti-discrimination laws in the country, prudent and proactive employers who undertake the measures discussed – and remain on top of the law's changes – will be best positioned to both demonstrate compliance and defend against claims under the law.

Questions

Team contacts

Mark S. Goldstein
Partner
New York
+1 212 549 0328
mgoldstein@reedsmith.com

Alexandra C. Manfredi
Associate
New York
+1 212 549 4260
amanfredi@reedsmith.com

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

Reed Smith is a dynamic international law firm, dedicated to helping clients move their businesses forward.

Our belief is that by delivering smarter and more creative legal services, we will not only enrich our clients' experiences with us, but also support them in achieving their business goals.

Our long-standing relationships, international outlook, and collaborative structure make us the go-to partner for the speedy resolution of complex disputes, transactions, and regulatory matters.

For further information, please visit reedsmith.com

reedsmith.com

ReedSmith
Driving progress
through partnership

Title 8: Civil Rights

Chapter 1: Commission on Human Rights

§ 8-101 Policy.

In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, immigration or citizenship status, gender, sexual orientation, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, uniformed service, any lawful source of income, status as a victim of domestic violence or status as a victim of sex offenses or stalking, whether children are, may be or would be residing with a person or conviction or arrest record. The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. The council further finds and declares that gender-based harassment threatens the terms, conditions and privileges of employment. A city agency is hereby created with power to eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate, and to take other actions against prejudice, intolerance, bigotry, discrimination, sexual harassment and bias-related violence or harassment as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

(Am. L.L. 2016/001, 1/5/2016, eff. 5/4/2016; Am. L.L. 2017/119, 7/22/2017, eff. 11/19/2017; Am. L.L. 2018/099, 5/9/2018, eff. 5/9/2018; Am. L.L. 2019/020, 1/20/2019, eff. 5/20/2019; Am. L.L. 2020/058, 6/29/2020, eff. 8/28/2020)

§ 8-102 Definitions.

Editor's note: *this section has been amended by L.L. 2020/119, 11/17/2020, eff. 2/15/2021 and L.L. 2021/004, 1/10/2021, eff. 7/29/2021. For related unconsolidated provisions, see Appendix A at L.L. 2021/004.*

Except as otherwise expressly provided, when used in this chapter, the following terms have the following meanings:

Acts or threats of violence. The term "acts or threats of violence" includes, but is not limited to, acts, which would constitute violations of the penal law.

Caregiver. The term "caregiver" means a person who provides direct and ongoing care for a minor child or a care recipient. As used in this definition:

1. **Care recipient.** The term "care recipient" means a person with a disability who: (i) is a covered relative, or a person who resides in the caregiver's household and (ii) relies on the caregiver for medical care or to meet the needs of daily living.

2. **Covered relative.** The term "covered relative" means a caregiver's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of the caregiver's spouse or domestic partner, or any other individual in a familial relationship with the caregiver as designated by the rules of the commission.

3. **Grandchild.** The term "grandchild" means a child of a caregiver's child.

4. **Grandparent.** The term "grandparent" means a parent of a caregiver's parent.

5. **Parent.** The term "parent" means a biological, foster, step- or adoptive parent, or a legal guardian of a caregiver, or a person who stood in loco parentis when the caregiver was a minor child.

6. **Sibling.** The term "sibling" means a caregiver's brother or sister, including half-siblings, step-siblings and siblings related through adoption.

7. **Spouse.** The term "spouse" means a person to whom a caregiver is legally married under the laws of the state of New York.

8. **Child.** The term "child" means a biological, adopted or foster child, a legal ward or a child of a caregiver standing *in loco parentis*.

9. **Minor child.** The term "minor child" means a child under the age of 18.

Commercial space. The term "commercial space" means any space in a building, structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a business or professional unit or office in any building, structure or portion thereof.

Commission. The term "commission," unless a different meaning clearly appears from the text, means the city commission on human rights.

Consumer credit history. The term "consumer credit history" means an individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by: (i) a consumer credit report; (ii) credit score; or (iii) information an employer obtains directly from the individual regarding (1) details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, or (2) bankruptcies, judgments or liens. A consumer credit report shall include any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity or credit history.

Cooperative dialogue. The term “cooperative dialogue” means the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person’s accommodation needs; potential accommodations that may address the person’s accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity.

Covered entity. The term "covered entity" means a person required to comply with any provision of section 8-107.

Disability. The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment. As used in this definition:

1. Physical, medical, mental, or psychological impairment. The term "physical, medical, mental, or psychological impairment" means:

(a) An impairment of any system of the body; including, but not limited to, the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or

(b) A mental or psychological impairment.

2. In the case of alcoholism, drug addiction or other substance abuse, the term "disability" only applies to a person who (i) is recovering or has

recovered and (ii) currently is free of such abuse, and does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

Domestic partner. The term "domestic partner" means any person who has a registered domestic partnership pursuant to section 3-240, a domestic partnership registered in accordance with executive order number 123, dated August 7, 1989, or a domestic partnership registered in accordance with executive order number 48, dated January 7, 1993.

Educational institution. The term "educational institution" includes kindergartens, primary and secondary schools, academies, colleges, universities, professional schools, extension courses, and all other educational facilities.

Employer. For purposes of subdivisions 1, 2, 3, 11-a, and 22, subparagraph 1 of paragraph a of subdivision 21, paragraph e of subdivision 21 and subdivision 23 of section 8-107, the term "employer" does not include any employer that has fewer than four persons in the employ of such employer at all times during the period beginning twelve months before the start of an unlawful discriminatory practice and continuing through the end of such unlawful discriminatory practice, provided however, that in an action for unlawful discriminatory practice based on a claim of gender-based harassment pursuant to subdivision one of section 8-107, the term "employer" shall include any employer, including those with fewer than four persons in their employ. For purposes of this definition, (i) natural persons working as independent contractors in furtherance of an employer's business enterprise shall be counted as persons in the employ of such employer and (ii) the employer's parent, spouse, domestic partner or child if employed by the employer are included as in the employ of such employer.

Employment agency. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

Family. The term "family," as used in subparagraph (4) of paragraph a of subdivision 5 of section 8-107, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. As used in this definition, a "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

Gender. The term "gender" includes actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of the sex assigned to that person at birth.

Housing accommodation. The term "housing accommodation" includes any building, structure or portion thereof that is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings. Except as otherwise specifically provided, such term includes a publicly-assisted housing accommodation.

Immigration or citizenship status. The term "immigration or citizenship status" means:

1. The citizenship of any person, or

2. The immigration status of any person who is not a citizen or national of the United States.

Intelligence information. The term "intelligence information" means records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats.

Intern.

1. The term "intern" means an individual who performs work for an employer on a temporary basis whose work:

(a) Provides training or supplements training given in an educational environment such that the employability of the individual performing the work may be enhanced;

(b) Provides experience for the benefit of the individual performing the work; and

(c) Is performed under the close supervision of existing staff.

2. The term includes such individuals without regard to whether the employer pays them a salary or wage.

Labor organization. The term "labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection in connection with employment.

Lactation room. The term "lactation room" means a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water.

Lawful source of income. The term "lawful source of income" includes income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers.

Marijuana. The term “marijuana” has the same meaning as the term “marihuana” as such term is defined in subdivision 21 of section 3302 of the public health law.

National origin. The term "national origin" includes "ancestry."

National security information. The term "national security information" means any knowledge relating to the national defense or foreign relations of the United States, regardless of its physical form or characteristics, that is owned by, is produced by or for, or is under the control of the United States government and is defined as such by the United States government and its agencies and departments.

Occupation. The term "occupation" means any lawful vocation, trade, profession or field of specialization.

Partnership status. The term "partnership status" means the status of being in a domestic partnership, as defined by subdivision a of section 3-240.

Person. The term "person" includes one or more natural persons, proprietorships, partnerships, associations, group associations, organizations, governmental bodies or agencies, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

Person aggrieved.

1. The term "person aggrieved," except as used in section 8-123, includes a person whose right created, granted or protected by this chapter is violated by a covered entity directly or through conduct of the covered entity to which the person's agent or employee is subjected while the agent or employee was acting, or as a result of the agent or employee having acted, within the scope of the agency or employment relationship. For purposes of this definition, an agent or employee's protected status is imputed to that person's principal or employer when the agent or employee acts within the scope of the agency or employment relationship. It is irrelevant whether or not the covered entity knows of the agency or employment relationship.

2. A person is aggrieved even if that person's only injury is the deprivation of a right granted or protected by this chapter.

3. This definition does not limit or exclude any other basis for a cause of action.

Place or provider of public accommodation. The term "place or provider of public accommodation" includes providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term does not include any club which proves that it is in its nature distinctly private. A club is not in its nature distinctly private if it has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business. For the purposes of this definition, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law is deemed to be in its nature distinctly private. No club that sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements is a private exhibition within the meaning of this definition.

Publicly-assisted housing accommodations. The term "publicly-assisted housing accommodations" includes:

1. Publicly-owned or operated housing accommodations;

2. Housing accommodations operated by housing companies under the supervision of the state commissioner of housing and community renewal, or the department of housing preservation and development;

3. Housing accommodations constructed after July 1, 1950, and housing accommodations sold after July 1, 1991:

(a) That are exempt in whole or in part from taxes levied by the state or any of its political subdivisions;

(b) That are constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of 1949;

(c) That are constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; or

(d) For the acquisition, construction, repair or maintenance for which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance; and

4. Housing accommodations, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July 1, 1955, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

Real estate broker. The term "real estate broker" means any person who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale at auction, or otherwise, exchange, purchase or rental of an estate or interest in real estate or collects or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other incumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of the real property law, the term "real estate broker" shall also include any person employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

Real estate salesperson. The term "real estate salesperson" means a person employed by or authorized by a licensed real estate broker to list for sale, sell or offer for sale at auction or otherwise to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate or to negotiate a loan on real estate or to lease or rent or offer to lease, rent or place for rent any real estate, or who collects or offers or attempts to collect rents for the use of real estate for or on behalf of such real estate broker.

Reasonable accommodation.

1. The term "reasonable accommodation" means such accommodation that can be made that does not cause undue hardship in the conduct of the covered entity's business. The covered entity has the burden of proving undue hardship. In making a determination of undue hardship with respect to claims filed under subdivisions 1, 2, 22 or 27 of section 8-107, the factors which may be considered include but are not limited to:

(a) The nature and cost of the accommodation;

(b) The overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(c) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(d) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

2. In making a determination of undue hardship with respect to claims for reasonable accommodation to an employee's or prospective employee's religious observance filed under subdivision 3 of section 8-107, the definition of "undue hardship" set forth in paragraph b of such subdivision applies.

Sexual and reproductive health decisions. The term “sexual and reproductive health decisions” means any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions. Such services include, but are not limited to, fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.

Sexual orientation. The term "sexual orientation" means an individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender. A continuum of sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, bisexuality, asexuality and pansexuality.

Tetrahydrocannabinols. The term “tetrahydrocannabinols” has the same meaning as such term is defined in paragraph 21 of subdivision d of section 3306 of the public health law.

Trade secrets. The term "trade secrets" means information that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and (iii) can reasonably be said to be the end product of significant innovation. The term "trade secrets" does not include general proprietary company information such as handbooks and policies. The term "regular access to trade secrets" does not include access to or the use of client, customer or mailing lists.

Unemployed or unemployment. The term "unemployed" or "unemployment" means not having a job, being available for work, and seeking employment.

Uniformed service. The term "uniformed service" means:

1. Current or prior service in:

(a) The United States army, navy, air force, marine corps, coast guard, commissioned corps of the national oceanic and atmospheric administration, commissioned corps of the United States public health services, army national guard or air national guard;

(b) The organized militia of the state of New York, as described in section 2 of the military law, or the organized militia of any other state, territory or possession of the United States; or

(c) Any other service designated as part of the "uniformed services" pursuant to subsection (16) of section 4303 of title 38 of the United States code;

2. Membership in any reserve component of the United States army, navy, air force, marine corps, or coast guard; or

3. Being listed on the state reserve list or the state retired list as described in section 2 of the military law or comparable status for any other state, territory or possession of the United States.

Unlawful discriminatory practice. The term "unlawful discriminatory practice" includes only those practices specified in section 8-107.

Victim of domestic violence. The term "victim of domestic violence" means a person who has been subjected to acts or threats of violence, not including acts of self-defense, committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim, by a person who is or has been in a continuing social relationship of a romantic or intimate nature with the victim, or by a person who is or has continually or at regular intervals lived in the same household as the victim.

Victim of sex offenses or stalking. The term "victim of sex offenses or stalking" means a victim of acts that would constitute violations of article 130 of the penal law or a victim of acts that would constitute violations of sections 120.45, 120.50, 120.55, or 120.60 of the penal law.

(Am. L.L. 2015/037, 5/6/2015, eff. 9/3/2015; Am. L.L. 2015/063, 6/29/2015, eff. 10/27/2015; Am. L.L. 2016/001, 1/5/2016, eff. 5/4/2016; Am. L.L. 2016/040, 4/6/2016, eff. 8/4/2016; Am. L.L. 2017/119, 7/22/2017, eff. 11/19/2017; Am. L.L. 2018/038, 1/11/2018, eff. 5/11/2018; Am. L.L. 2018/059, 1/19/2018, eff. 10/16/2018; Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018; Am. L.L. 2018/098, 5/9/2018, eff. 5/9/2018 and 10/16/2018; Am. L.L. 2018/185, 11/17/2018, eff. 3/17/2019; Am. L.L. 2019/020, 1/20/2019, eff. 5/20/2019; Am. L.L. 2019/091, 5/10/2019, eff. 5/10/2020; Am. L.L. 2019/172, 10/13/2019, eff. 1/11/2020; Am. L.L. 2020/058, 6/29/2020, eff. 8/28/2020)

Editor's note: For related unconsolidated provisions, see Appendix A atL.L. 2015/037 and L.L. 2015/063.

§ 8-103 Commission on human rights. [Repealed]

(Repealed L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-104 Functions. [Repealed]

(Repealed L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-105 Powers and duties. [Repealed]

(Am. L.L. 2015/029, 4/20/2015, eff. 3/1/2017; Am. L.L. 2015/029, 4/20/2015, eff. 3/1/2017; Repealed L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-106 Relations with city departments and agencies. [Repealed]

(Repealed L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-107 Unlawful discriminatory practices.

Editor's note: *this section has been amended by L.L. 2020/115, 11/17/2020, eff. 5/16/2021, L.L. 2020/119, 11/17/2020, eff. 2/15/2021, and L.L. 2021/004, 1/10/2021, eff. 7/29/2021. For related unconsolidated provisions, see Appendix A atL.L. 2021/004.*

1. *Employment.* It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person:

(1) To represent that any employment or position is not available when in fact it is available;

(2) To refuse to hire or employ or to bar or to discharge from employment such person; or

(3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency or an employee or agent thereof to discriminate against any person because of such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status in receiving, classifying, disposing or otherwise acting upon applications for its services, including by representing to such person that any employment or position is not available when in fact it is available, or in referring an applicant or applicants for its services to an employer or employers.

(c) For a labor organization or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status of any person, to exclude or to expel from its membership such person, to represent that membership is not available when it is in fact available, or to discriminate in any way against any of its members or against any employer or any person employed by an employer.

(d) For any employer, labor organization or employment agency or an employee or agent thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or immigration or citizenship status, or any intent to make any such limitation, specification or discrimination.

(e) The provisions of this subdivision and subdivision 2 of this section: (i) as they apply to employee benefit plans, shall not be construed to preclude an employer from observing the provisions of any plan covered by the federal employment retirement income security act of 1974 that is in compliance with applicable federal discrimination laws where the application of the provisions of such subdivisions to such plan would be preempted by such act; (ii) shall not preclude the varying of insurance coverages according to an employee's age; (iii) shall not be construed to affect any retirement policy or system that is permitted pursuant to paragraphs (e) and (f) of subdivision 3-a of section 296 of the executive law; (iv) shall not be construed to affect the retirement policy or system of an employer where such policy or system is not a subterfuge to evade the purposes of this chapter.

(f) The provisions of this subdivision do not govern the employment by an employer of the employer's parents, spouse, domestic partner, or children; provided, however, that such family members shall be counted as persons employed by an employer for the purposes of the definition of employer set forth in section 8-102.

2. *Apprentice training programs.* It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs or an employee or agent thereof:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review.

(b) To deny to or withhold from any person because of such person's actual or perceived race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual and reproductive health decisions, sexual orientation, uniformed service, immigration or citizenship status or status as a victim of domestic violence or as a victim of sex offenses or stalking the right to be admitted to or participate in a guidance program, an apprentice training program, on-the-job training program, or other occupational training or retraining program, or to represent that such program is not available when in fact it is available.

(c) To discriminate against any person in such person's pursuit of such program or to discriminate against such a person in the terms, conditions or privileges of such program because of actual or perceived race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual and reproductive health decisions, sexual orientation, uniformed service, immigration or citizenship status or status as a victim of domestic violence or as a victim of sex offenses or stalking.

(d) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for such program or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual and reproductive health decisions, sexual orientation, uniformed service, immigration or citizenship status or status as a victim of domestic violence or as a victim of sex offenses or stalking, or any intent to make any such limitation, specification or discrimination.

3. *Employment; religious observance.*

(a) It shall be an unlawful discriminatory practice for an employer or an employee or agent thereof to impose upon a person as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, such person's creed or religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day or the observance of any religious custom or usage, and the employer shall make reasonable accommodation to the religious needs of such person. Without in any way limiting the foregoing, no person shall be required to remain at such person's place of employment during any day or days or portion thereof that, as a requirement of such person's religion, such person observes as a sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between such person's place of employment and such person's home, provided, however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time.

(b) "Reasonable accommodation", as used in this subdivision, shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employer shall have the burden of proof to show such hardship. "Undue hardship" as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) The identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) The number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) For an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship, for purposes of this subdivision, if it will result in the inability of an employee who is seeking a religious accommodation to perform the essential functions of the position in which the employee is employed.

4. *Public accommodations.*

a. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:

1. Because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status, directly or indirectly:

(a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation; or

(b) To represent to any person that any accommodation, advantage, facility or privilege of any such place or provider of public accommodation is not available when in fact it is available; or

2. Directly or indirectly to make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that:

(a) Full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, facilities and privileges of any such place or provider of public accommodation shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status; or

(b) The patronage or custom of any person is unwelcome, objectionable, not acceptable, undesired or unsolicited because of such person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status.

b. Notwithstanding the foregoing, the provisions of this subdivision shall not apply, with respect to age or gender, to places or providers of public accommodation where the commission grants an exemption based on bona fide considerations of public policy.

c. The provisions of this subdivision relating to discrimination on the basis of gender shall not prohibit any educational institution subject to this subdivision from making gender distinctions which would be permitted (i) for educational institutions which are subject to section 3201-a of the education law or any rules or regulations promulgated by the state commissioner of education relating to gender or (ii) under sections 86.32, 86.33 and 86.34 of title 45 of the code of federal regulations for educational institutions covered thereunder.

d. Nothing in this subdivision shall be construed to preclude an educational institution—other than a publicly-operated educational institution—which establishes or maintains a policy of educating persons of one gender exclusively from limiting admissions to students of that gender.

e. The provisions of this section relating to disparate impact shall not apply to the use of standardized tests as defined by section 340 of the

education law by an educational institution subject to this subdivision provided that such test is used in the manner and for the purpose prescribed by the test agency which designed the test.

f. The provisions of this subdivision as they relate to unlawful discriminatory practices by educational institutions shall not apply to matters that are strictly educational or pedagogic in nature.

5. *Housing accommodations, land, commercial space and lending practices.*

(a) *Housing accommodations.* It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof:

(1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or immigration or citizenship status of any person or group of persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons:

(a) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any such person or group of persons such a housing accommodation or an interest therein;

(b) To discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith; or

(c) To represent to such person or persons that any housing accommodation or an interest therein is not available for inspection, sale, rental or lease when in fact it is available to such person.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such a housing accommodation or an interest therein or to make any record or inquiry in conjunction with the prospective purchase, rental or lease of such a housing accommodation or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or immigration or citizenship status, or any lawful source of income, or whether children are, may be, or would be residing with a person, or any intent to make such limitation, specification or discrimination.

(3) [Deleted.]

(4) The provisions of this paragraph (a) shall not apply:

(1) to the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner members of the owner's family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or

(2) to the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner's family reside in such housing accommodation.

(b) *Land and commercial space.* It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, or lease, or approve the sale, rental or lease of land or commercial space or an interest therein, or any agency or employee thereof:

(1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or immigration or citizenship status of any person or group of persons, or because children are, may be or would be residing with any person or persons:

(A) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny or to withhold from any such person or group of persons land or commercial space or an interest therein;

(B) To discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space or an interest therein or in the furnishing of facilities or services in connection therewith; or

(C) To represent to any person or persons that any land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is available.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or immigration or citizenship status, or whether children are, may be or would be residing with such person, or any intent to make any such limitation, specification or discrimination.

(c) *Real estate brokers.* It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space or an interest therein to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space or an interest therein to any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or immigration or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons, or to represent that any housing accommodation, land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or an interest therein or any facilities of any housing accommodation, land or commercial space or an interest therein from any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or immigration or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or immigration or citizenship status, or any lawful source of income, or to whether children are, may be or would be residing with a person, or any intent to make such limitation, specification or discrimination.

(3) To induce or attempt to induce any person to sell or rent any housing accommodation, land or commercial space or an interest therein by representations, explicit or implicit, regarding the entry or prospective entry into the neighborhood or area of a person or persons of any race, creed, color,

gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, national origin, immigration or citizenship status, or a person or persons with any lawful source of income, or a person or persons with whom children are, may be or would be residing.

(d) *Lending practices.*

(1) It shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender, doing business in the city, including unincorporated entities and entities incorporated in any jurisdiction, or any officer, agent or employee thereof to whom application is made for a loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space or an interest therein:

(A) To discriminate against such applicant in the granting, withholding, extending or renewing, or in the fixing of rates, terms or conditions of any such financial assistance or in the appraisal of any housing accommodation, land or commercial space or an interest therein:

(i) Because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, age, marital status, uniformed service, partnership status, or immigration or citizenship status of such applicant, any member, stockholder, director, officer or employee of such applicant, or the occupants or tenants or prospective occupants or tenants of such housing accommodation, land or commercial space; or

(ii) Because children are, may be or would be residing with such applicant or other person.

(B) To use any form of application for a loan, mortgage, or other form of financial assistance, or to make any record or inquiry in connection with applications for such financial assistance, or in connection with the appraisal of any housing accommodation, land or commercial space or an interest therein, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or immigration or citizenship status, or whether children are, may be, or would be residing with a person.

(2) It shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender, doing business in the city, including unincorporated entities and entities incorporated in any jurisdiction, or any officer, agent or employee thereof to represent to any person that any type or term of loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of such housing accommodation, land or commercial space or an interest therein is not available when in fact it is available:

(A) Because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or immigration or citizenship status of such person, any member, stockholder, director, officer or employee of such person, or the occupants or tenants or prospective occupants or tenants of such housing accommodation, land or commercial space; or

(B) Because children are, may be or would be residing with a person.

(e) *Real estate services.* It shall be an unlawful discriminatory practice, because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or immigration or citizenship status of any person or because children are, may be or would be residing with such person:

(1) To deny such person access to, membership in or participation in a multiple listing service, real estate brokers' organization, or other service; or

(2) To represent to such person that access to or membership in such service or organization is not available, when in fact it is available.

(f) *Real estate related transactions.* It shall be an unlawful discriminatory practice for any person whose business includes the appraisal of housing accommodations, land or commercial space or interest therein or an employee or agent thereof to discriminate in making available or in the terms or conditions of such appraisal on the basis of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or immigration or citizenship status of any person or because children are, may be or would be residing with such person.

(g) *Applicability; persons under 18 years of age.* The provisions of this subdivision, as they relate to unlawful discriminatory practices in housing accommodations, land and commercial space or an interest therein and lending practices on the basis of age, shall not apply to unemancipated persons under the age of 18 years.

(h) *Applicability; discrimination against persons with children.* The provisions of this subdivision with respect to discrimination against persons with whom children are, may be or would be residing shall not apply to housing for older persons as defined in paragraphs 2 and 3 of subdivision (b) of section 3607 of title 42 of the United States code and any regulations promulgated thereunder.

(i) *Applicability; senior citizen housing.* The provisions of this subdivision with respect to discrimination on the basis of age shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space or an interest therein exclusively to persons 55 years of age or older. This paragraph shall not be construed to permit discrimination against such persons 55 years of age or older on the basis of whether children are, may be or would be residing in such housing accommodation or land or an interest therein unless such discrimination is otherwise permitted pursuant to paragraph (h) of this subdivision.

(j) *Applicability; dormitory residence operated by educational institution.* The provisions of this subdivision relating to discrimination on the basis of gender in housing accommodations shall not prohibit any educational institution from making gender distinctions in dormitory residences which would be permitted under sections 86.32 and 86.33 of title 45 of the code of federal regulations for educational institutions covered thereunder.

(k) *Applicability; dormitory-type housing accommodations.* The provisions of this subdivision which prohibit distinctions on the basis of gender and whether children are, may be or would be residing with a person shall not apply to dormitory-type housing accommodations including, but not limited to, shelters for the homeless where such distinctions are intended to recognize generally accepted values of personal modesty and privacy or to protect the health, safety or welfare of families with children.

(l) *Exemption for special needs of particular age group in publicly-assisted housing accommodations* . Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the state division of human rights grants an exemption pursuant to section 296 of the executive law based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups; provided however, that this paragraph shall not be construed to permit discrimination on the basis of whether children are, may be or would be residing in such housing accommodations unless such discrimination is otherwise permitted pursuant to paragraph (h) of this subdivision.

(m) *Applicability; use of criteria or qualifications in publicly-assisted housing accommodations.* The provisions of this subdivision shall not be construed to prohibit the use of criteria or qualifications of eligibility for the sale, rental, leasing or occupancy of publicly-assisted housing accommodations where such criteria or qualifications are required to comply with federal or state law, or are necessary to obtain the benefits of a federal or state program, or to prohibit the use of statements, advertisements, publications, applications or inquiries to the extent that they state such criteria or qualifications or request information necessary to determine or verify the eligibility of an applicant, tenant, purchaser, lessee or occupant.

(n) *Discrimination on the basis of occupation prohibited in housing accommodations.* Where a housing accommodation or an interest therein is sought or occupied exclusively for residential purposes, the provisions of this subdivision shall be construed to prohibit discrimination on account of a person's occupation in:

(1) The sale, rental, or leasing of such housing accommodation or interest therein;

(2) The terms, conditions and privileges of the sale, rental or leasing of such housing accommodation or interest therein;

(3) Furnishing facilities or services in connection therewith; and

(4) Representing whether or not such housing accommodation or interest therein is available for sale, rental, or leasing.

(o) *Applicability; lawful source of income.* The provisions of this subdivision, as they relate to unlawful discriminatory practices on the basis of lawful source of income, shall not apply to housing accommodations that contain a total of five or fewer housing units, provided, however:

(i) the provisions of this subdivision shall apply to tenants subject to rent control laws who reside in housing accommodations that contain a total of five or fewer units at the time of the enactment of this local law; and provided, however

(ii) the provisions of this subdivision shall apply to all housing accommodations, regardless of the number of units contained in each, of any person who has the right to sell, rent or lease or approve the sale, rental or lease of at least one housing accommodation within New York City that contains six or more housing units, constructed or to be constructed, or an interest therein.

6. *Aiding and abetting.* It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so.

7. *Retaliation.* It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, (v) requested a reasonable accommodation under this chapter, or (vi) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

8. *Violation of conciliation agreement.* It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section 8-115 of this chapter to violate the terms of such agreement.

9. *Licenses, registrations and permits.*

(a) It shall be an unlawful discriminatory practice:

(1) Except as otherwise provided in paragraph c of this subdivision, for an agency authorized to issue a license, registration or permit or an employee thereof to falsely deny the availability of such license, registration or permit, or otherwise discriminate against an applicant, or a putative or prospective applicant for a license, registration or permit because of the actual or perceived race, creed, color, national origin, age, gender, marital status, partnership status, disability, sexual orientation, uniformed service or immigration or citizenship status of such applicant.

(2) Except as otherwise provided in paragraph (c) of this subdivision, for an agency authorized to issue a license, registration or permit or an employee thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for a license, registration or permit or to make any inquiry in connection with any such application, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, age, gender, marital status, partnership status, disability, sexual orientation, uniformed service or immigration or citizenship status, or any intent to make any such limitation, specification or discrimination.

(3) For any person to deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit by reason of such applicant or holder having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based on such applicant or holder having been convicted of one or more criminal offenses, when such denial or adverse action is in violation of the provisions of article 23-a of the correction law.

(4) For any person to deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit by reason of such applicant or holder having been arrested or accused of committing a crime when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law.

(5) For any person to make any inquiry, in writing or otherwise, regarding any arrest or criminal accusation of an applicant for any license, registration or permit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law.

(b) (1) Except as otherwise provided in this paragraph, it shall be an unlawful discriminatory practice for an agency to request or use for licensing, registration or permitting purposes information contained in the consumer credit history of an applicant, licensee, registrant or permittee for licensing or permitting purposes.

(2) Subparagraph (1) of this paragraph shall not apply to an agency required by state or federal law or regulations to use an individual's consumer credit history for licensing, registration or permitting purposes.

(3) Subparagraph (1) of this paragraph shall not be construed to affect the ability of an agency to consider an applicant's, licensee's, registrant's or permittee's failure to pay any tax, fine, penalty, or fee for which liability has been admitted by the person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction, or any tax for which a government agency has issued a warrant, or a lien or levy on property.

(4) Nothing in this paragraph shall preclude a licensing agency from requesting, receiving, or using consumer credit history information obtained pursuant to a lawful subpoena, court order or law enforcement investigation.

(c) The prohibition of this subdivision relating to inquiries, denials or other adverse action related to a person's record of arrests or convictions shall not apply to licensing activities in relation to the regulation of explosives, pistols, handguns, rifles, shotguns, or other firearms and deadly weapons. Nothing contained in this subdivision shall be construed to bar an agency authorized to issue a license, registration or permit from using age, disability, criminal conviction or arrest record as a criterion for determining eligibility or continuing fitness for a license, registration or permit when specifically required to do so by any other provision of law.

(d) (1) Except as otherwise provided in this paragraph, it shall be an unlawful discriminatory practice for an agency to request or use for licensing or permitting purposes information contained in the consumer credit history of an applicant, licensee or permittee.

(2) Subparagraph (1) of this paragraph shall not apply to an agency required by state or federal law or regulations to use an individual's consumer credit history for licensing or permitting purposes.

(3) Subparagraph (1) of this paragraph shall not be construed to affect the ability of an agency to consider an applicant's, licensee's, registrant's or permittee's failure to pay any tax, fine, penalty, or fee for which liability has been admitted by the person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction, or any tax for which a government agency has issued a warrant, or a lien or levy on property.

(4) Nothing in this paragraph shall preclude a licensing agency from requesting, receiving, or using consumer credit history information obtained pursuant to a lawful subpoena, court order or law enforcement investigation.

(e) The provisions of this subdivision shall be enforceable against public agencies and employees thereof by a proceeding brought pursuant to article 78 of the civil practice law and rules.

10. *Criminal conviction; employment.*

(a) It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to deny employment to any person or take adverse action against any employee by reason of such person or employee having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based on such person or employee having been convicted of one or more criminal offenses, when such denial or adverse action is in violation of the provisions of article 23-a of the correction law.

(b) For purposes of this subdivision, "employment" shall not include membership in any law enforcement agency.

(c) Pursuant to section 755 of the correction law, the provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article 78 of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against private employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter 5 of this title. For purposes of this paragraph only, the terms "public agency" and "private employer" have the meaning given such terms in section 750 of the correction law.

11. *Arrest record; employment.* It shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, for any person to:

(a) Deny employment to any applicant or act adversely upon any employee by reason of an arrest or criminal accusation of such applicant or employee when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law; or

(b) Make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of an applicant or employee when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law.

11-a. *Arrest and conviction records; employer inquiries.*

(a) In addition to the restrictions in subdivision 11 of this section, it shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to:

(1) Declare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction;

(2) Because of any person's arrest or criminal conviction, represent that any employment or position is not available, when in fact it is available to such person; or

(3) Make any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant. For purposes of this subdivision, with respect to an applicant for temporary employment at a temporary help firm as such term is defined by subdivision 5 of section 916 of article 31 of the labor law, an offer to be placed in the temporary help firm's general candidate pool shall constitute a conditional offer of employment. For purposes of this subdivision, "any inquiry" means any question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purpose of obtaining an applicant's criminal background information, and "any statement" means a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check.

(b) After extending an applicant a conditional offer of employment, an employer, employment agency or agent thereof may inquire about the applicant's arrest or conviction record if before taking any adverse employment action based on such inquiry, the employer, employment agency or agent thereof:

(i) Provides a written copy of the inquiry to the applicant in a manner to be determined by the commission;

(ii) Performs an analysis of the applicant under article 23-a of the correction law and provides a written copy of such analysis to the applicant in a manner to be determined by the commission, which shall include but not be limited to supporting documents that formed the basis for an adverse action based on such analysis and the employer's or employment agency's reasons for taking any adverse action against such applicant; and

(iii) After giving the applicant the inquiry and analysis in writing pursuant to subparagraphs (i) and (ii) of this paragraph, allows the applicant a reasonable time to respond, which shall be no less than three business days and during this time, holds the position open for the applicant.

(c) Nothing in this subdivision shall prevent an employer, employment agency or agent thereof from taking adverse action against any employee or denying employment to any applicant for reasons other than such employee or applicant's arrest or criminal conviction record.

(d) An applicant shall not be required to respond to any inquiry or statement that violates paragraph (a) of this subdivision and any refusal to respond to such inquiry or statement shall not disqualify an applicant from the prospective employment.

(e) This subdivision shall not apply to any actions taken by an employer or agent thereof pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

(f) This subdivision shall not apply to any actions taken by an employer or agent thereof with regard to an applicant for employment:

(1) As a police officer or peace officer, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, respectively, or at a law enforcement agency as that term is used in article 23-a of the correction law, including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of youth and family services, the business integrity commission, and the district attorneys' offices; or

(2) listed in the determinations of personnel published as a commissioner's calendar item and listed on the website of the department of citywide administrative services upon a determination by the commissioner of citywide administrative services that the position involves law enforcement, is susceptible to bribery or other corruption, or entails the provision of services to or safeguarding of persons who, because of age, disability, infirmity or other condition, are vulnerable to abuse. If the department takes adverse action against any applicant based on the applicant's arrest or criminal conviction record, it shall provide a written copy of such analysis performed under article 23-a of the correction law to the applicant in a form and manner to be determined by the department.

(g) The provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article 78 of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against private employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter 5 of this title. For purposes of this paragraph only, the terms "public agency" and "private employer" have the meaning given such terms in section 750 of the correction law.

11-b. *Arrest record; credit application.* For purposes of issuing credit, it shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, to:

(a) Deny or act adversely upon any person seeking credit by reason of an arrest or criminal accusation of such person when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law;

(b) Make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of a person seeking credit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law; or

(c) Because of any arrest or criminal accusation of a person seeking credit, represent to such person that credit is not available, when in fact it is available to such person.

12. *Religious principles.* Nothing contained in this section shall be construed to bar any religious or denominational institution or organization or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rentals of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

13. *Employer liability for discriminatory conduct by employee, agent or independent contractor.*

a. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions 1 and 2 of this section.

b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision 1 or 2 of this section only where:

(1) The employee or agent exercised managerial or supervisory responsibility; or

(2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

c. An employer shall be liable for an unlawful discriminatory practice committed by a person employed as an independent contractor, other than an agent of such employer, to carry out work in furtherance of the employer's business enterprise only where such discriminatory conduct was committed in the course of such employment and the employer had actual knowledge of and acquiesced in such conduct.

d. Where liability of an employer has been established pursuant to this section and is based solely on the conduct of an employee, agent, or independent contractor, the employer shall be permitted to plead and prove to the discriminatory conduct for which it was found liable it had:

(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

(i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state, and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and

(2) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

e. The demonstration of any or all of the factors listed above in addition to any other relevant factors shall be considered in mitigation of the amount of civil penalties to be imposed by the commission pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to chapter 4 or 5 of this title and shall be among the factors considered in determining an employer's liability under subparagraph 3 of paragraph b of this subdivision.

f. The commission may establish by rule policies, programs and procedures which may be implemented by employers for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors. Notwithstanding any other provision of law to the contrary, an employer found to be liable for an unlawful discriminatory practice based solely on the conduct of an employee, agent or person employed as an independent contractor who pleads and proves that such policies, programs and procedures had been implemented and complied with at the time of the unlawful conduct shall not be liable for any civil penalties which may be imposed pursuant to this chapter or any civil penalties or punitive damages which may be imposed pursuant to chapter 4 or 5 of this title for such unlawful discriminatory practices.

14. *Applicability; immigration or citizenship status.* Notwithstanding any other provision of this section, it shall not be an unlawful discriminatory practice for any person to discriminate on the ground of immigration or citizenship status, or to make any inquiry as to a person's immigration or citizenship status, or to give preference to a person who is a citizen or national of the United States over an equally qualified person who is not a citizen or national of the United States, when such discrimination is required or when such preference is expressly permitted by any law or regulation of the United States, the state of New York or the city, and when such law or regulation does not provide that state or local law may be more protective of a person who is not a citizen or national of the United States; provided, however, that this provision shall not prohibit inquiries or determinations based on immigration or citizenship status when such actions are necessary to obtain the benefits of a federal program. An applicant for a license or permit issued by the city may be required to be authorized to work in the United States whenever by law or regulation there is a limit on the number of such licenses or permits which may be issued.

15. *Applicability; persons with disabilities.*

(a) Requirement to make reasonable accommodation to the needs of persons with disabilities. Except as provided in paragraph (b), it is an unlawful discriminatory practice for any person prohibited by the provisions of this section from discriminating on the basis of disability not to provide a reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.

(b) Affirmative defense in disability cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

(c) Use of drugs or alcohol. Nothing contained in this chapter shall be construed to prohibit a covered entity from (i) prohibiting the illegal use of drugs or the use of alcohol at the workplace or on duty impairment from the illegal use of drugs or the use of alcohol, or (ii) conducting drug testing which is otherwise lawful.

16. [*Repealed.*]

17. *Disparate impact.*

a. An unlawful discriminatory practice based upon disparate impact is established when:

(1) The commission or a person who may bring an action under chapter 4 or 5 of this title demonstrates that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter; and

(2) The covered entity fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact; provided, however, that if the commission or such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, the commission or such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity and the covered entity fails to prove that such alternative policy or practice would not serve the covered entity as well. "Significant business objective" shall include, but not be limited to, successful performance of the job.

b. The mere existence of a statistical imbalance between a covered entity's challenged demographic composition and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant and there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.

c. Nothing contained in this subdivision shall be construed to mandate or endorse the use of quotas; provided, however, that nothing contained in this subdivision shall be construed to limit the scope of the commission's authority pursuant to sections 8-115 and 8-120 of this chapter or to affect court-ordered remedies or settlements that are otherwise in accordance with law.

18. *Unlawful boycott or blacklist.* It shall be an unlawful discriminatory practice (i) for any person to discriminate against, boycott or blacklist or to refuse to buy from, sell to or trade with, any person, because of such person's actual or perceived race, creed, color, national origin, gender, disability, age, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

(a) Boycotts connected with labor disputes;

(b) Boycotts to protest unlawful discriminatory practices; or

(c) Any form of expression that is protected by the First Amendment.

19. *Interference with protected rights.* It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of such person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section.

20. *Relationship or association.* The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation, uniformed service or immigration or citizenship status of a person with whom such person has a known relationship or association.

21. *Employment; an individual's unemployment.*

a. *Prohibition of discrimination based on an individual's unemployment.*

(1) Except as provided in paragraphs b and c of this subdivision, an employer, employment agency, or agent thereof shall not:

(a) Because of a person's unemployment, represent that any employment or position is not available when in fact it is available; or

(b) Base an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment.

(2) Unless otherwise permitted by city, state or federal law, no employer, employment agency, or agent thereof shall publish, in print or in any other medium, an advertisement for any job vacancy in this city that contains one or more of the following:

(a) Any provision stating or indicating that being currently employed is a requirement or qualification for the job;

(b) Any provision stating or indicating that an employer, employment agency, or agent thereof will not consider individuals for employment based on their unemployment.

b. *Effect of subdivision.*

(1) Paragraph a of this subdivision shall not be construed to prohibit an employer, employment agency, or agent thereof from (a) considering an applicant's unemployment, where there is a substantially job-related reason for doing so; or (b) inquiring into the circumstances surrounding an applicant's separation from prior employment.

(2) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from considering any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(3) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof from publishing, in print or in any other medium, an advertisement for any job vacancy in this city that contains any provision setting forth any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(4) (a) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from determining that only applicants who are currently employed by the employer will be considered for employment or given priority for employment or with respect to compensation or terms, conditions or privileges of employment. In addition, nothing set forth in this subdivision shall prevent an employer from setting compensation or terms or conditions of employment for a person based on that person's actual amount of experience.

(b) For the purposes of this subparagraph, all persons whose salary or wages are paid from the city treasury, and all persons who are employed by public agencies or entities headed by officers or boards including one or more individuals appointed or recommended by officials of the city, shall be deemed to have the same employer.

c. *Applicability of subdivision.*

(1) This subdivision shall not apply to:

(a) Actions taken by the department of citywide administrative services in furtherance of its responsibility for city personnel matters pursuant to chapter 35 of the charter or as a municipal civil service commission administering the civil service law and other applicable laws, or by the mayor in furtherance of the mayor's duties relating to city personnel matters pursuant to chapter 35 of the charter, including, but not limited to, the administration of competitive examinations, the establishment and administration of eligible lists, and the establishment and implementation of minimum qualifications for appointment to positions;

(b) Actions taken by officers or employees of other public agencies or entities charged with performing functions comparable to those performed by the department of citywide administrative services or the mayor as described in paragraph 1 of this subdivision;

(c) Agency appointments to competitive positions from eligible lists pursuant to subsection 1 of section 61 of the civil service law; or

(d) The exercise of any right of an employer or employee pursuant to a collective bargaining agreement.

(2) This subdivision shall apply to individual hiring decisions made by an agency or entity with respect to positions for which appointments are not required to be made from an eligible list resulting from a competitive examination.

d. *Public education campaign.* The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

e. *Disparate impact.* An unlawful discriminatory practice based on disparate impact under this subdivision is established when: (1) the commission or a person who may bring an action under chapter 4 or 5 of this title demonstrates that a policy or practice of an employer, employment agency, or agent thereof, or a group of policies or practices of such an entity results in a disparate impact to the detriment of any group protected by the provisions of this subdivision; and (2) such entity fails to plead and prove as an affirmative defense that each such policy or practice has as its basis a substantially job-related qualification or does not contribute to the disparate impact; provided, however, that if the commission or such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, the commission or such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to such entity and such entity fails to prove that such alternative policy or practice would not serve such entity as well. A "substantially job-related qualification" shall include, but not be limited to, a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

22. *Employment; Pregnancy, childbirth, or a related medical condition.*

(a) It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation, as defined in section 8-102, to the needs of an employee for the employee's pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer. In any case pursuant to this subdivision where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job.

(b) *Employer lactation accommodation.*

(i) Except as provided in subparagraph (iii) of this paragraph, employers shall provide the following to accommodate an employee needing to express breast milk: (1) a lactation room in reasonable proximity to such employee’s work area; and (2) a refrigerator suitable for breast milk storage in reasonable proximity to such employee’s work area.

(ii) If a room designated by an employer to serve as a lactation room is also used for another purpose, the sole function of the room shall be as a lactation room while an employee is using the room to express breast milk. When an employee is using the room to express milk, the employer shall provide notice to other employees that the room is given preference for use as a lactation room.

(iii) Should the provision of a lactation room as required by this paragraph pose an undue hardship on an employer, the employer shall engage in a cooperative dialogue, as required by subdivision 28 of this section.

(iv) The presence of a lactation room pursuant to this subdivision shall not affect an individual’s right to breastfeed in public pursuant to article 7 of the civil rights law.

(c) *Employer lactation room accommodation policy.*

(i) An employer shall develop and implement a written policy regarding the provision of a lactation room, which shall be distributed to all employees upon hiring. The policy shall include a statement that employees have a right to request a lactation room, and identify a process by which employees may request a lactation room. This process shall:

(1) Specify the means by which an employee may submit a request for a lactation room;

(2) Require that the employer respond to a request for a lactation room within a reasonable amount of time not to exceed five business days;

(3) Provide a procedure to follow when two or more individuals need to use the lactation room at the same time, including contact information for any follow up required;

(4) State that the employer shall provide reasonable break time for an employee to express breast milk pursuant to section 206-c of the labor law; and

(5) State that if the request for a lactation room poses an undue hardship on the employer, the employer shall engage in a cooperative dialogue, as required by subdivision 28 of this section.

(ii) The commission shall, in collaboration with the department of health and mental hygiene, develop a model lactation room accommodation policy that conforms to the requirements of this subdivision and a model lactation room request form. The commission shall make such model policy and request form available on its website.

(iii) The existence of a lactation room accommodation policy pursuant to this subdivision shall not affect an individual’s right to breastfeed in public pursuant to article 7 of the civil rights law.

(d) *Notice of rights.*

(i) An employer shall provide written notice in a form and manner to be determined by the commission of the right to be free from discrimination in

relation to pregnancy, childbirth, and related medical conditions pursuant to this subdivision to new employees at the commencement of employment. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees.

(ii) The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employees, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

(e) This subdivision shall not be construed to affect any other provision of law relating to discrimination on the basis of gender, or in any way to diminish the coverage of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth under any other provision of this section.

23. *Additional provisions relating to employment.* The protections of this chapter relating to employees apply to interns, freelancers and independent contractors.

24. *Employment; consumer credit history.*

(a) Except as provided in this subdivision, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to request or to use for employment purposes the consumer credit history of an applicant for employment or employee, or otherwise discriminate against an applicant or employee with regard to hiring, compensation, or the terms, conditions or privileges of employment based on the consumer credit history of the applicant or employee.

(b) Paragraph (a) of this subdivision shall not apply to:

(1) An employer or agent thereof, that is required by state or federal law or regulations or by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended to use an individual's consumer credit history for employment purposes;

(2) Persons applying for positions as or employed:

(A) As police officers or peace officers, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, respectively, or in a position with a law enforcement or investigative function at the department of investigation;

(B) In a position that is subject to background investigation by the department of investigation, provided, however, that the appointing agency may not use consumer credit history information for employment purposes unless the position is an appointed position in which a high degree of public trust, as defined by the commission in rules, has been reposed;

(C) In a position in which an employee is required to be bonded under city, state or federal law;

(D) In a position in which an employee is required to possess security clearance under federal law or the law of any state;

(E) In a non-clerical position having regular access to trade secrets, intelligence information or national security information;

(F) In a position:

(i) having signatory authority over third party funds or assets valued at $10,000 or more; or

(ii) that involves a fiduciary responsibility to the employer with the authority to enter financial agreements valued at $10,000 or more on behalf of the employer; or

(G) In a position with regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases.

(c) Paragraph (a) of this subdivision shall not be construed to affect the obligations of persons required by section 12-110 or by mayoral executive order relating to disclosures by city employees to the conflicts of interest board to report information regarding their creditors or debts, or the use of such information by government agencies for the purposes for which such information is collected.

(d) Nothing in this subdivision precludes an employer from requesting or receiving consumer credit history information pursuant to a lawful subpoena, court order or law enforcement investigation.

25. *Employment; inquiries regarding salary history.*

(a) For purposes of this subdivision, “to inquire” means to communicate any question or statement to an applicant, an applicant’s current or prior employer, or a current or former employee or agent of the applicant’s current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant’s salary history, or to conduct a search of publicly available records or reports for the purpose of obtaining an applicant’s salary history, but does not include informing the applicant in writing or otherwise about the position’s proposed or anticipated salary or salary range. For purposes of this subdivision, “salary history” includes the applicant’s current or prior wage, benefits or other compensation. “Salary history” does not include any objective measure of the applicant’s productivity such as revenue, sales, or other production reports.

(b) Except as otherwise provided in this subdivision, it is an unlawful discriminatory practice for an employer, employment agency, or employee or agent thereof:

1. To inquire about the salary history of an applicant for employment; or

2. To rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract.

(c) Notwithstanding paragraph (b) of this subdivision, an employer, employment agency, or employee or agent thereof may, without inquiring about salary history, engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant’s resignation from their current employer.

(d) Notwithstanding subparagraph 2 of paragraph (b) of this subdivision, where an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, such employer, employment agency, or employee or agent thereof may consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant’s salary history.

(e) This subdivision shall not apply to:

(1) Any actions taken by an employer, employment agency, or employee or agent thereof pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee’s compensation;

(2) Applicants for internal transfer or promotion with their current employer;

(3) Any attempt by an employer, employment agency, or employee or agent thereof, to verify an applicant’s disclosure of non-salary related information or conduct a background check, provided that if such verification or background check discloses the applicant’s salary history, such disclosure shall not be relied upon for purposes of determining the salary, benefits or other compensation of such applicant during the hiring process, including the

negotiation of a contract; or

(4) Public employee positions for which salary, benefits or other compensation are determined pursuant to procedures established by collective bargaining.

26. *Applicability; uniformed service.* Notwithstanding any other provision of this section and except as otherwise provided by law, it is not an unlawful discriminatory practice for any person to afford any other person a preference or privilege based on such other person's uniformed service, or to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application or make any inquiry indicating any such lawful preference or privilege.

27. *Victims of domestic violence, sex offenses or stalking.*

a. *Employment.* It shall be an unlawful discriminatory practice for an employer, or an agent thereof, because of any individual's actual or perceived status as a victim of domestic violence, or as a victim of sex offenses or stalking:

(1) To represent that any employment or position is not available when in fact it is available;

(2) To refuse to hire or employ or to bar or to discharge from employment; or

(3) To discriminate against an individual in compensation or other terms, conditions, or privileges of employment.

b. *Requirement to make reasonable accommodation to the needs of victims of domestic violence, sex offenses or stalking.* Except as provided in paragraph d, it is an unlawful discriminatory practice for any person prohibited by paragraph a from discriminating on the basis of actual or perceived status as a victim of domestic violence or a victim of sex offenses or stalking not to provide a reasonable accommodation to enable a person who is a victim of domestic violence, or a victim of sex offenses or stalking to satisfy the essential requisites of a job provided that the status as a victim of domestic violence or a victim of sex offenses or stalking is known or should have been known by the covered entity.

c. *Documentation of status.* Any person required by paragraph b to make reasonable accommodation may require a person requesting reasonable accommodation pursuant to such paragraph to provide certification that the person is a victim of domestic violence, sex offenses or stalking. The person requesting reasonable accommodation pursuant to such paragraph shall provide a copy of such certification to the covered entity within a reasonable period after the request is made. A person may satisfy the certification requirement of this paragraph by providing documentation from an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider, from whom the individual seeking a reasonable accommodation or that individual's family or household member has sought assistance in addressing domestic violence, sex offenses or stalking and the effects of the violence or stalking; a police or court record; or other corroborating evidence. All information provided to the covered entity pursuant to this paragraph, including a statement of the person requesting a reasonable accommodation or any other documentation, record, or corroborating evidence, and the fact that the individual has requested or obtained a reasonable accommodation pursuant to this subdivision, shall be retained in the strictest confidence by the covered entity, except to the extent that disclosure is requested or consented to in writing by the person requesting the reasonable accommodation, or otherwise required by applicable federal, state or local law.

d. *Affirmative defense in domestic violence, sex offenses or stalking cases.* In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

e. *Housing accommodations.* It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof, because of any individual's actual or perceived status as a victim of domestic violence, or as a victim of sex offenses or stalking:

(1) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons such a housing accommodation or an interest therein, or to discriminate in the terms, conditions, or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith because of an actual or perceived status of said individual as a victim of domestic violence, or as a victim of sex offenses or stalking; or

(2) To represent that such housing accommodation or an interest therein is not available when in fact it is available.

f. The provisions of paragraph e shall not apply:

(1) To the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner or members of the owner's family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or

(2) To the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner's family reside in such housing accommodation.

g. For the purposes of this subdivision, practices "based on," "because of," "on account of," "as to," "on the basis of," or "motivated by" an individual's "status as a victim of domestic violence," or "status as a victim of sex offenses or stalking" include, but are not limited to, those based solely upon the actions of a person who has perpetrated acts or threats of violence against the individual.

28. *Reasonable accommodation; cooperative dialogue.*

(a) *Employment.* It shall be an unlawful discriminatory practice for an employer, labor organization or employment agency or an employee or agent thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation:

(1) For religious needs as provided in subdivision 3 of this section;

(2) Related to a disability as provided in subdivision 15 of this section;

(3) Related to pregnancy, childbirth or a related medical condition as provided in subdivision 22 of this section; or

(4) For such person's needs as a victim of domestic violence, sex offenses or stalking as provided in subdivision 27 of this section.

(b) *Public accommodations.* It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require an accommodation related to disability as provided in subdivision 15 of this section.

(c) *Housing accommodation.* It shall be an unlawful discriminatory practice for an owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agency or employee thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a

person who has requested an accommodation or who the covered entity has notice may require an accommodation related to disability as provided in subdivision 15 of this section.

(d) Upon reaching a final determination at the conclusion of a cooperative dialogue pursuant to paragraphs (a) and (c) of this subdivision, the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation granted or denied.

(e) The determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question may only be made after the parties have engaged, or the covered entity has attempted to engage, in a cooperative dialogue.

(f) Rights and obligations set forth in this subdivision are supplemental to and independent of the rights and obligations provided by subdivisions 3, 15, 22 and 27. A covered entity's compliance with this subdivision is not a defense to a claim of not providing a reasonable accommodation under provisions of title 8 other than this subdivision.

29. *Anti-sexual harassment rights and responsibilities; poster.*

(a) Every employer must conspicuously display an anti-sexual harassment rights and responsibilities poster designed by the commission, in employee breakrooms or other common areas employees gather. Every employer at a minimum shall display such poster in English and in Spanish.

(b) The commission shall create a poster that sets forth in simple and understandable terms the following minimum requirements:

(1) An explanation of sexual harassment as a form of unlawful discrimination under local law;

(2) A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;

(3) A description of sexual harassment, using examples;

(4) The complaint process available through, and directions on how to contact, the commission;

(5) The complaint process available through, and directions on how to contact, the state division of human rights;

(6) The complaint process available through, and directions on how to contact, the United States equal employment opportunity commission; and

(7) The prohibition against retaliation, pursuant to subdivision 7 of section 8-107.

(c) The size and style of the poster shall be at least 8 1/2 by 14 inches with a minimum 12 point type. Such poster shall be made available in English and Spanish and any other language deemed appropriate by the commission, however, any such poster shall only contain one language.

(d) Any poster required pursuant to this section shall be made available on the commission's website for employers to download for legible color reproduction in English, Spanish and any other language deemed appropriate by the commission.

(e) The commission shall develop an information sheet on sexual harassment that employers shall distribute to individual employees at the time of hire. Such information sheet may be included in an employee handbook. Such information sheet shall contain, at a minimum, the same elements of paragraph (b) of this subdivision. The information sheet shall be made available in English and Spanish and any other language deemed appropriate by the commission.

30. *Anti-sexual harassment training.*

(a) *Definitions.* For purposes of this subdivision, the following terms have the following meanings:

Interactive training. The term "interactive training" means participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as determined by the commission. However, such "interactive training" is not required to be live or facilitated by an in-person instructor in order to satisfy the provisions of this subdivision.

(b) *Training.* Employers with 15 or more employees shall annually conduct an anti-sexual harassment interactive training for all employees, including supervisory and managerial employees, of such employer employed within the city of New York. Such training shall be required after 90 days of initial hire for employees who work more than 80 hours in a calendar year who perform work on a full-time or part-time basis. Such training shall include, but need not be limited to, the following:

(1) An explanation of sexual harassment as a form of unlawful discrimination under local law;

(2) A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;

(3) A description of what sexual harassment is, using examples;

(4) Any internal complaint process available to employees through their employer to address sexual harassment claims;

(5) The complaint process available through the commission, the division of human rights and the United States equal employment opportunity commission, including contact information;

(6) The prohibition of retaliation, pursuant to subdivision 7 of section 8-107, and examples thereof; and

(7) Information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention.

(8) The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.

(c) *Compliance.*

(1) Employers shall keep a record of all trainings, including a signed employee acknowledgement. Such acknowledgment may be electronic.

(2) Employers shall maintain such records for at least three years and such records must be made available for commission inspection upon request.

(3) The commission shall develop an online interactive training module that may be used by an employer as an option to satisfy the requirements of paragraph (b) of this subdivision, provided that an employer shall inform all employees of any internal complaint process available to employees through their employer to address sexual harassment claims. Such training module shall be made publicly available at no cost on the commission's website. Such training module shall allow for the electronic provision of certification each time any such module is accessed and completed. The commission shall update such modules as needed.

(4) The training required by this subdivision is intended to establish a minimum threshold and shall not be construed to prohibit any private employer from providing more frequent or additional anti-sexual harassment training.

(d) For purposes of this subdivision the term “employer” shall not apply to (i) the United States government; (ii) the state of New York, including any office, department, independent agency, authority, institution, association, society or other body of the state including the legislature and the judiciary; or (iii) the city of New York or any local government, municipality or county or any entity governed by section 92 of the general municipal law or section 207 of the county law.

(e) For purposes of this subdivision the term “employee” shall apply to interns.

(f) An employee who has received anti-sexual harassment training at one employer within the required training cycle shall not be required to receive additional anti-sexual harassment training at another employer until the next cycle.

(g) An employer that is subject to training requirements in multiple jurisdictions may assert that it is compliant with this subdivision provided that each provision in subparagraph b of this subdivision is fulfilled in an anti-sexual harassment training that such employer makes available to its employees on an annual basis and shall be allowed to provide proof of compliance.

31. *Employment; pre-employment drug testing policy.*

(a) *Prohibition.* Except as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee’s system as a condition of employment.

(b) *Exceptions.*

(1) The provisions of this subdivision shall not apply to persons applying to work:

(A) As police officers or peace officers, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, respectively, or in a position with a law enforcement or investigative function at the department of investigation;

(B) In any position requiring compliance with section 3321 of the New York city building code or section 220-h of the labor law;

(C) In any position requiring a commercial driver’s license;

(D) In any position requiring the supervision or care of children, medical patients or vulnerable persons as defined in paragraph 15 of section 488 of the social services law; or

(E) In any position with the potential to significantly impact the health or safety of employees or members of the public, as determined by: (i) the commissioner of citywide administrative services for the classified service of the city of New York, and identified on the website of the department of citywide administrative services or (ii) the chairperson, and identified in regulations promulgated by the commission.

(2) The provisions of this subdivision shall not apply to drug testing required pursuant to:

(A) Any regulation promulgated by the federal department of transportation that requires testing of a prospective employee in accordance with 49 CFR 40 or any rule promulgated by the departments of transportation of this state or city adopting such regulation for purposes of enforcing the requirements of that regulation with respect to intrastate commerce;

(B) Any contract entered into between the federal government and an employer or any grant of financial assistance from the federal government to an employer that requires drug testing of prospective employees as a condition of receiving the contract or grant;

(C) Any federal or state statute, regulation, or order that requires drug testing of prospective employees for purposes of safety or security; or

(D) Any applicants whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses the pre-employment drug testing of such applicants.

(c) *Rules.* The commission shall promulgate rules for the implementation of this subdivision.

(Am. L.L. 2015/037, 5/6/2015, eff. 9/3/2015; Am. L.L. 2015/063, 6/29/2015, eff. 10/27/2015; Am. L.L. 2016/001, 1/5/2016, eff. 5/4/2016; Am. L.L. 2016/034, 3/28/2016, eff. 7/26/2016; Am. L.L. 2016/037, 3/28/2016, eff. 3/28/2016; Am. L.L. 2016/040, 4/6/2016, retro. eff. 10/25/2015 and eff. 4/6/2016; Am. L.L. 2017/067, 5/4/2017, eff. 10/31/2017; Am. L.L. 2017/119, 7/22/2017, eff. 11/19/2017; Am. L.L. 2018/059, 1/19/2018, eff. 10/16/2018; Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018; Am. L.L. 2018/095, 5/9/2018, eff. 9/6/2018; Am. L.L. 2018/096, 5/9/2018, eff. 4/1/2019; Am. L.L. 2018/185, 11/17/2018, eff. 3/17/2019; Am. L.L. 2018/186, 11/17/2018, eff. 3/17/2019; Am. L.L. 2019/020, 1/20/2019, eff. 5/20/2019; Am. L.L. 2019/091, 5/10/2019, eff. 5/10/2020; Am. L.L. 2019/129, 7/14/2019, eff. 11/11/2019; Am. L.L. 2019/172, 10/13/2019, eff. 1/11/2020; Am. L.L. 2020/058, 6/29/2020, eff. 8/28/2020)

Editor's note: For related unconsolidated provisions, see Appendix A atL.L. 2015/037 and L.L. 2015/063.

§ 8-107.1 Victims of domestic violence, sex offenses or stalking. [Repealed]

(Am. L.L. 2016/038, 3/28/2016, eff. 7/26/2016; Am. L.L. 2016/040, 4/6/2016, eff. 8/4/2016; Repealed* L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

***Editor's note:** § 8-107.1 was amended and redesignated as subdivision 27 of §8-107 by L.L. 2018/063.

§ 8-109 Complaint.

(a) Any person aggrieved by an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter 6 of this title, or such person's attorney, may make, sign and file with the commission a verified complaint in writing which shall: (i) state the name of the person alleged to have committed the unlawful discriminatory practice or act of discriminatory harassment or violence complained of, and the address of such person if known; (ii) set forth the particulars of the alleged unlawful discriminatory practice or act of discriminatory harassment or violence; and (iii) contain such other information as may be required by the commission. The commission shall acknowledge the filing of the complaint and advise the complainant of the time limits set forth in this chapter.

(b) Any employer whose employee or agent refuses or threatens to refuse to cooperate with the provisions of this chapter may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

(c) *Commission-initiated complaints.* The commission may itself make, sign and file a verified complaint alleging that a person has committed an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter 6 of this title.

(d) The commission shall serve a copy of the complaint upon the respondent and all persons it deems to be necessary parties and shall advise the respondent of the respondent's procedural rights and obligations as set forth herein.

(e) The commission shall not have jurisdiction over any complaint that has been filed more than one year after the alleged unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter 6 of this title occurred; provided, however, that the commission shall have jurisdiction over a claim of gender-based harassment if such claim is filed within three years after the alleged harassing conduct occurred.

(f) The commission shall not have jurisdiction to entertain a complaint if:

(i) The complainant has previously initiated a civil action in a court of competent jurisdiction alleging an unlawful discriminatory practice as defined by this chapter or an act of discriminatory harassment or violence as set forth in chapter 6 of this title with respect to the same grievance which is the subject of the complaint under this chapter, unless such civil action has been dismissed without prejudice or withdrawn without prejudice; or

(ii) The complainant has previously filed and has an action or proceeding before any administrative agency under any other law of the state alleging an unlawful discriminatory practice as defined by this chapter or an act of discriminatory harassment or violence as set forth in chapter 6 of this title with respect to the same grievance which is the subject of the complaint under this chapter; or

(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 6 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.

(g) In relation to complaints filed on or after September 1, 1991, the commission shall commence proceedings with respect to the complaint, complete a thorough investigation of the allegations of the complaint and make a final disposition of the complaint promptly and within the time periods to be prescribed by rule of the commission. If the commission is unable to comply with the time periods specified for completing its investigation and for final disposition of the complaint, it shall notify the complainant, respondent, and any necessary party in writing of the reasons for not doing so.

(h) Any complaint filed pursuant to this section may be amended pursuant to procedures prescribed by rule of the commission by filing such amended complaint with the commission and serving a copy thereof upon all parties to the proceeding.

(i) Whenever a complaint is filed pursuant to paragraph (d) of subdivision 5 of section 8-107, no member of the commission nor any member of the commission staff shall make public in any manner whatsoever the name of any borrower or identify by a specific description the collateral for any loan to such borrower except when ordered to do so by a court of competent jurisdiction or where express permission has been first obtained in writing from the lender and the borrower to such publication; provided, however, that the name of any borrower and a specific description of the collateral for any loan to such borrower may, if otherwise relevant, be introduced in evidence in any hearing before the commission or any review by a court of competent jurisdiction of any order or decision by the commission.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018; Am. L.L. 2018/100, 5/9/2018, eff. 5/9/2018)

§ 8-111 Answer.

a. Within 30 days after a copy of the complaint is served upon the respondent by the commission, the respondent shall file a written, verified answer thereto with the commission, and the commission shall cause a copy of such answer to be served upon the complainant and any necessary party.

b. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge or information sufficient to form a belief, in which case the respondent shall so state, and such statement shall operate as a denial.

c. Any allegation in the complaint not specifically denied or explained shall be deemed admitted and shall be so found by the commission unless good cause to the contrary is shown.

d. All affirmative defenses shall be stated separately in the answer.

e. Upon request of the respondent and for good cause shown, the period within which an answer is required to be filed may be extended in accordance with the rules of the commission.

f. Any necessary party may file with the commission a written, verified answer to the complaint, and the commission shall cause a copy of such answer to be served upon the complainant, respondent and any other necessary party.

g. Any answer filed pursuant to this section may be amended pursuant to procedures prescribed by rule of the commission by filing such amended answer with the commission and serving a copy thereof upon the complainant and any necessary party to the proceeding.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-112 Withdrawal of complaints.

a. A complaint filed pursuant to section 8-109 of this chapter may be withdrawn by the complainant in accordance with rules of the commission at any time prior to the service of a notice that the complaint has been referred to an administrative law judge. Such a withdrawal shall be in writing and signed by the complainant.

b. A complaint may be withdrawn after the service of such notice at the discretion of the commission.

c. Unless such complaint is withdrawn pursuant to a conciliation agreement, the withdrawal of a complaint shall be without prejudice:

1. To the continued prosecution of the complaint by the commission in accordance with rules of the commission;

2. To the initiation of a complaint by the commission based in whole or in part upon the same facts; or

3. To the commencement of a civil action by the corporation counsel based upon the same facts pursuant to chapter 4 of this title.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-113 Dismissal of complaint.

a. The commission may, in its discretion, dismiss a complaint for administrative convenience at any time prior to the taking of testimony at a hearing. Administrative convenience shall include, but not be limited to, the following circumstances:

1. Commission personnel have been unable to locate the complainant after diligent efforts to do so;

2. The complainant has repeatedly failed to appear at mutually agreed upon appointments with commission personnel or is unwilling to meet with commission personnel, provide requested documentation, or to attend a hearing;

3. The complainant has repeatedly engaged in conduct which is disruptive to the orderly functioning of the commission;

4. The complainant is unwilling to accept a reasonable proposed conciliation agreement;

5. Prosecution of the complaint will not serve the public interest; and

6. The complainant requests such dismissal, 180 days have elapsed since the filing of the complaint with the commission and the commission finds (a) that the complaint has not been actively investigated, and (b) that the respondent will not be unduly prejudiced thereby.

b. The commission shall dismiss a complaint for administrative convenience at any time prior to the filing of an answer by the respondent, if the complainant requests such dismnissal, unless the commission has conducted an investigation of the complaint or has engaged the parties in conciliation after the filing of the complaint.

c. In accordance with the rules of the commission, the commission shall dismiss a complaint if the complaint is not within the jurisdiction of the commission.

d. If after investigation the commission determines that probable cause does not exist to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter 6 of this title, the commission shall dismiss the complaint as to such respondent.

e. The commission shall promptly serve notice upon the complainant, respondent and any necessary party of any dismissal pursuant to this section.

f. The complainant or respondent may, within 30 days of such service, and in accordance with the rules of the commission, apply to the chairperson for review of any dismissal pursuant to this section. Upon such application, the chairperson shall review such action and issue an order affirming, reversing or modifying such determination or remanding the matter for further investigation and action. A copy of such order shall be served upon the complainant, respondent and any necessary party.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-114 Investigations and investigative record keeping.

a. The commis- sion may at any time issue subpoenas requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence relating to any matter under investigation or any question before the commission. The issuance of such subpoenas shall be governed by the civil practice law and rules.

b. Where the commission has initiated its own investigation or has conducted an investigation in connection with the filing of a complaint pursuant to this chapter, the commission may demand that any person or persons who are the subject of such investigation (i) preserve those records in the possession of such person or persons which are relevant to the determination of whether such person or persons have committed unlawful discriminatory practices or other acts made unlawful by this chapter or chapter 6 of this title with respect to activities in the city, and (ii) continue to make and keep the type of records made and kept by such person or persons in the ordinary course of business within the year preceding such demand which are relevant to the determination of whether such person or persons have committed unlawful discriminatory practices or other acts made unlawful by this chapter or chapter 6 of this title with respect to activities in the city. A demand made pursuant to this subdivision shall be effective immediately upon its service on the subject of an investigation and shall remain in effect until the termination of all proceedings relating to any complaint filed pursuant to this chapter or civil action commenced pursuant to chapter 4 of this title or if no complaint or civil action is filed or commenced shall expire two years after the date of such service. The commission's demand shall require that such records be made available for inspection by the commission, be filed with the commission, or both.

c. Any person upon whom a demand has been made pursuant to subdivision b of this section may, pursuant to procedures established by rule of the commission, assert an objection to such demand. Unless the commission orders otherwise, the assertion of an objection shall not stay compliance with the demand. The commission shall make a determination on an objection to a demand within 30 days after such an objection is filed with the commission, unless the party filing the objection consents to an extension of time.

d. Upon the expiration of the time set pursuant to such rules for making an objection to such demand, or upon a determination that an objection to the demand shall not be sustained, the commission shall order compliance with the demand.

e. Upon a determination that an objection to a demand shall be sustained, the commission shall order that the demand be vacated or modified.

f. A proceeding may be brought on behalf of the commission in any court of competent jurisdiction seeking an order to compel compliance with an order issued pursuant to subdivision d of this section.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-115 Mediation and conciliation.

a. If in the judgment of the commission circumstances so warrant, it may at any time after the filing of a complaint endeavor to resolve the complaint by any method of dispute resolution prescribed by rule of the commission including, but not limited to, mediation and conciliation.

b. The terms of any conciliation agreement may contain such provisions as may be agreed upon by the commission, the complaint and the respondent, including a provision for the entry in court of a consent decree embodying the terms of the conciliation agreement.

c. The members of the commission and its staff shall not publicly disclose what transpired in the course of mediation and conciliation efforts.

d. If a conciliation agreement is entered into, the commission shall embody such agreement in an order and serve a copy of such order upon all parties to the conciliation agreement. Violation of such an order may cause the imposition of civil penalties under section 8-124 of this chapter. Every conciliation agreement shall be made public unless the complainant and respondent agree otherwise and the commission determines that disclosure is not required to further the purposes of this chapter.

§ 8-116 Determination of probable cause.

a. Except in connection with commission-initiated complaints which shall not require a determination of probable cause, where the commission determines that probable cause exists to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter 6 of this title, the commission shall issue a written notice to complainant and respondent so stating. A determination of probable cause is not a final order of the commission and shall not be administratively or judicially reviewable.

b. If there is a determination of probable cause pursuant to subdivision a of this section in relation to a complaint alleging discrimination in housing accommodations, land or commercial space or an interest therein, or if a commission-initiated complaint relating to discrimination in housing accommodations, land or commercial space or an interest therein has been filed, and the property owner or the owner's duly authorized agent will not agree voluntarily to withhold from the market the subject housing accommodations, land or commercial space or an interest therein for a period of 10 days from the date of such request the commission may cause to be posted for a period of 10 days from the date of such request, in a conspicuous place on the land or on the door of such housing accommodations or commercial space, a notice stating that such accommodations, land or commercial space are the subject of a complaint before the commission and that prospective transferees will take such accommodations, land or commercial space at their peril. Any destruction, defacement, alteration or removal of such notice by the owner or the owner's agents or employees shall be a misdemeanor punishable on conviction thereof by a fine of not more than $1,000 or by imprisonment for not more than one year or both.

c. If a determination is made pursuant to subdivision a of this section that probable cause exists, or if a commission-initiated complaint has been filed, the commission shall refer the complaint to an administrative law judge and shall serve a notice upon the complainant, respondent and any necessary party that the complaint has been so referred.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-117 Rules of Procedure.

The commission shall adopt rules providing for hearing and pre-hearing procedure. These rules shall include rules providing that the commission, by its prosecutorial bureau, shall be a party to all complaints and that a complainant shall be a party if the complainant has intervened in the manner set forth in the rules of the commission. These rules shall also include rules governing discovery, motion practice and the issuance of subpoenas. Wherever

necessary, the commission shall issue orders compelling discovery. In accordance with the commission's discovery rules, any party from whom discovery is sought may assert an objection to such discovery based upon a claim of privilege or other defense and the commission shall rule upon such objection.

§ 8-118 Noncompliance with discovery order or order relating to records.

Whenever a party fails to comply with an order of the commission pursuant to section 8-117 of this chapter compelling discovery or an order pursuant to section 8-114 of this chapter relating to records the commission may, on its own motion or at the request of any part, and, after notice and opportunity for all parties to be heard in opposition or support, make such orders or take such action as may be just for the purpose of permitting the resolution of relevant issues or disposition of the complaint without unnecessary delay, including but not limited to:

(a) An order that the matter concerning which the order compelling discovery or relating to records was issued be established adversely to the claim of the noncomplying party;

(b) An order prohibiting the noncomplying party from introducing evidence or testimony, cross-examining witnesses or otherwise supporting or opposing designated claims or defenses;

(c) An order striking out pleadings or parts thereof;

(d) An order that the noncomplying party may not be heard to object to the introduction and use of secondary evidence to show what the withheld testimony, documents, other evidence or required records would have shown; and

(e) Infer that the material or testimony is withheld or records not preserved, made, kept, produced or made available for inspection because such material, testimony or records would prove to be unfavorable to the noncomplying party and use such inference to establish facts in support of a final determination pursuant to section 8-120 of this chapter.

§ 8-119 Hearing.

a. A hearing on the complaint shall be held before an administrative law judge designated by the commission. The place of any such hearing shall be the office of the commission or such other place as may be designated by the commission. Notice of the date, time and place of such hearing shall be served upon the complainant, respondent and any necessary party.

b. The case in support of the complaint shall be presented before the commission by the commission's prosecutorial bureau. The complainant may present additional testimony and cross-examine witnesses, in person or by counsel, if the complainant shall have intervened pursuant to rules established by the commission.

c. The administrative law judge may, in the administrative law judge's discretion, permit any person who has a substantial interest in the complaint to intervene as a party and may require the joinder of necessary parties.

d. Evidence relating to endeavors at mediation or conciliation by, between or among the commission, the complainant and the respondent shall not be admissible.

e. If the respondent has failed to answer the complaint within the time period prescribed in section 8-111 of this chapter, the administrative law judge may enter a default and the hearing shall proceed to determine the evidence in support of the complaint. Upon application, the administrative law judge may, for good cause shown, open a default in answering, upon equitable terms and conditions, including the taking of an oral answer.

f. Except as otherwise provided in section 8-118 of this chapter, the commission by its prosecutorial bureau, a respondent who has filed an answer or whose default in answering has been set aside for good cause shown, a necessary party, and a complainant or other person who has intervened pursuant to the rules of the commission, may appear at such hearing in person or otherwise, with or without counsel, cross-examine witnesses, present testimony and offer evidence.

g. The commission shall not be bound by the strict rules of evidence prevailing in courts of the state of New York. The testimony taken at the hearing shall be under oath and shall be transcribed.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-120 Decision and order.

a. If, upon all the evidence at the hearing, and upon the findings of fact, conclusions of law and relief recommended by an administrative law judge, the commission shall find that a respondent has engaged in any unlawful discriminatory practice or any act of discriminatory harassment or violence as set forth in chapter 6 of this title, the commission shall state its findings of fact and conclusions of law and shall issue and cause to be served on the complainant, respondent, any necessary party and any complainant who has not intervened an order requiring such respondent to cease and desist from such unlawful discriminatory practice or acts of discriminatory harassment or violence. Such order shall require the respondent to take such affirmative action as, in the judgment of the commission, will effectuate the purposes of this chapter or chapter 6 of this title, as applicable, including, but not limited to:

1. Hiring, reinstatement or upgrading of employees;

2. The award of back pay and front pay;

3. Admission to membership in any respondent labor organization;

4. Admission to or participation in a program, apprentice training program, on-the-job training program or other occupational training or retraining program;

5. The extension of full, equal and unsegregated accommodations, advantages, facilities and privileges;

6. Evaluating applications for membership in a club that is not distinctly private, without unlawful discrimination;

7. Selling, renting or leasing, or approving the sale, rental or lease of housing accommodations, land or commercial space or an interest therein, or the provision of credit with respect thereto, without unlawful discrimination;

8. Payment of compensatory damages to the person aggrieved by such practice or act;

9. Submission of reports with respect to the manner of compliance; and

10. Payment of the complainant's reasonable attorney's fees, expert fees and other costs. The commission may consider matter-specific factors when determining the complainant's attorney's fee award, including, but not limited to:

(i) Novelty or difficulty of the issues presented;

(ii) Skill and experience of the complainant's attorney; and

(iii) The hourly rate charged by attorneys of similar skill and experience litigating similar cases in New York county.

b. If, upon all the evidence at the hearing, and upon the findings of fact and conclusions of law recommended by the administrative law judge, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter 6 of this title, the commission shall state its findings of fact and conclusions of law and shall issue and cause to be served on the complainant, respondent, and any necessary party and on any complainant who has not intervened an order dismissing the complaint as to such respondent.

(Am. L.L. 2016/036, 3/28/2016, eff. 3/28/2016; Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-121 Reopening of proceeding by commission.

The commission may reopen any proceeding, or vacate or modify any order or determination of the commission, whenever justice so requires, in accordance with the rules of the commission.

§ 8-122 Injunction and temporary restraining order.

At any time after the filing of a complaint alleging an unlawful discriminatory practice under this chapter or an act of discriminatory harassment or violence as set forth in chapter 6 of this title, if the commission has reason to believe that the respondent or other person acting in concert with respondent is doing or procuring to be done any act or acts, tending to render ineffectual relief that could be ordered by the commission after a hearing as provided by section 8-120, a special proceeding may be commenced in accordance with article 63 of the civil practice law and rules on behalf of the commission in the supreme court for an order to show cause why the respondent and such other persons who are believed to be acting in concert with respondent should not be enjoined from doing or procuring to be done such acts. The special proceeding may be commenced in any county within the city where the alleged unlawful discriminatory practice or act of discriminatory harassment or violence was committed, or where the commission maintains its principal office for the transaction of business, or where any respondent resides or maintains an office for the transaction of business, or where any person aggrieved by the unlawful discriminatory practice or act of discriminatory harassment or violence resides, or, if the complaint alleges an unlawful discriminatory practice under paragraphs (a), (b) or (c) of subdivision 5 of section 8-107, where the housing accommodation, land or commercial space specified in the complaint is located. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording the commission, the person aggrieved and the respondent and any person alleged to be acting in concert with the respondent an opportunity to be heard, the court may grant appropriate injunctive relief upon such terms and conditions as the court deems proper.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-123 Judicial review.

a. Any complainant, respondent or other person aggrieved by a final order of the commission issued pursuant to section 8-120 or section 8-126 of this chapter or an order of the chairperson issued pursuant to subdivision f of section 8-113 of this chapter affirming the dismissal of a complaint may obtain judicial review thereof in a proceeding as provided in this section.

b. Such proceeding shall be brought in the supreme court of the state within any county within the city wherein the unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter 6 of this title which is the subject of the commission's order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or act of discriminatory harassment or violence or to take other affirmative action resides or transacts business.

c. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record upon the hearing, before the commission, and the issuance and service of a notice of motion returnable before such court. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such relief as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order annulling, confirming or modifying the order of the commission in whole or in part. No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

d. Any part may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and materials evidenced and seeking findings thereon, provided such party shows reasonable grounds for the failure to adduce such evidence before the commission.

e. The findings of the commission as to the facts shall be conclusive if supported by substantial evidence on the record considered as a whole.

f. All such proceedings shall be heard and determined by the court and by any appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the appellate division of the supreme court and the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding.

g. The commission's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of the order of the commission. The appeal shall be heard on the record without requirement of printing.

h. A proceeding under this section must be instituted within 30 days after the service of the order of the commission.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-124 Civil penalties for violating commission orders.

Any person who fails to comply with an order issued by the commission pursuant to section 8-115 or section 8-120 shall be liable for a civil penalty of not more than $50,000 and an additional civil penalty of not more than $100 per day for each day that the violation continues.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-125 Enforcement.

a. Any action or proceeding that may be appropriate or necessary for the enforcement of any order issued by the commission pursuant to this chapter, including actions to secure permanent injunctions enjoining any acts or practices which constitute a violation of any such order, mandating compliance with the provisions of any such order, imposing penalties pursuant to section 8-124 of this chapter, or for such other relief as may be appropriate, may be initiated in any court of competent jurisdiction on behalf of the commission. In any such action or proceeding, application may be made for a temporary restraining order or preliminary injunction, enforcing and restraining all persons from violating any provisions of any such order, or for such other relief as may be just and proper, until hearing and determination of such action or proceeding and the entry of final judgment or order thereon. The court to which such application is made may make any or all of the orders specified, as may be required in such application, with or without notice, and may make such other or further orders or directions as may be necessary to render the same effectual.

b. In any action or proceeding brought pursuant to subdivision a of this section, no person shall be entitled to contest the terms of the order sought to be enforced unless that person has timely commenced a proceeding for review of the order pursuant to section 8-123 of this chapter.

§ 8-126 Civil penalties imposed by commission for unlawful discriminatory practices or acts of discriminatory harassment or violence.

a. Except as otherwise provided in subdivision 13 of section 8-107, in addition to any of the remedies and penalties set forth in subdivision a of section 8-120, where the commission finds that a person has engaged in an unlawful discriminatory practice, the commission may, to vindicate the public interest, impose a civil penalty of not more than $125,000. Where the commission finds that an unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act or where the commission finds that an act of discriminatory harassment or violence as set forth in chapter 6 of this title has occurred, the commission may, to vindicate the public interest, impose a civil penalty of not more than $250,000.

b. A respondent that is found liable for an unlawful discriminatory practice or an act of discriminatory harassment or violence, as set forth in chapter 6 of this title, may, in relation to the determination of the appropriate amount of civil penalties to be imposed pursuant to subdivision a of this section, plead and prove any relevant mitigating factor.

c. In addition to any other penalties or sanctions which may be imposed pursuant to any other law, any person who knowingly makes a material false statement in any proceeding conducted, or document or record filed with the commission, or record required to be preserved or made and kept and subject to inspection by the commission pursuant to this chapter shall be liable for a civil penalty of not more than $10,000.

d. An action or proceeding may be commenced in any court of competent jurisdiction on behalf of the commission for the recovery of the civil penalties provided for in this section.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-127 Disposition of civil penalties.

a. Any civil penalties recovered pursuant to this chapter shall be paid into the general fund of the city.

b. Notwithstanding the foregoing provision, where an action or proceeding is commenced against a city agency for the enforcement of a final order issued by the commission pursuant to section 8-120 of the code after a finding that such agency has engaged in an unlawful discriminatory practice and in such action or proceeding civil penalties are sought for violation of such order, any civil penalties which are imposed by the court against such agency shall be budgeted in a separate account. Such account shall be used solely to support city agencies' anti-bias education programs, activities sponsored by city agencies that are designed to eradicate discrimination or to fund remedial programs that are necessary to address the city's liability for discriminatory acts or practices. Funds in such account shall not be used to support or benefit the commission. The disposition of such funds shall be under the direction of the mayor.

§ 8-128 Institution of actions or proceedings.

Where any of the provisions of this chapter authorize an application to be made, or an action or proceeding to be commenced on behalf of the commission in a court, such application may be made or such action or proceeding may be instituted only by the corporation counsel, such attorneys employed by the commission as are designated by the corporation counsel or other persons designated by the corporation counsel.

§ 8-129 Criminal penalties.

In addition to any other penalties or sanctions which may be imposed pursuant to this chapter or any other law, any person who shall willfully resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of any duty under this chapter, or shall willfully violate an order of the commission issued pursuant to section 8-115 or section 8-120, shall be guilty of a misdemeanor and be punishable by imprisonment for not more than one year, or by a fine of not more than $10,000, or by both; but the procedure for the review of the order shall not be deemed to be such willful conduct.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-130 Construction.

a. 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 worded comparably to provisions of this title, have been so construed.

b. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

c. Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include *Albunio v. City of New York*, 16 N.Y.3d 472 (2011), *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29 (1st Dep't 2011), and the majority opinion in *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dep't 2009).

(Am. L.L. 2016/035, 3/28/2016, eff. 3/28/2016)

Editor's note: For related unconsolidated provisions, see Appendix A atL.L. 2016/035.

§ 8-131 Applicability.

The provisions of this chapter which make acts of discriminatory harassment or violence as set forth in chapter 6 of this title subject to the jurisdiction of the commission shall not apply to acts committed by members of the police department in the course of performing their official duties as police officers whether the police officer is on or off duty.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-132 Sexual harassment information.

a. The commission shall post conspicuously on the commission’s website online resources about sexual harassment, including but not limited to:

1. Information that sets forth in simple and understandable terms:

(a) An explanation that sexual harassment is a form of unlawful discrimination under local law;

(b) Specific descriptions and examples of activities which may be sexual harassment;

(c) A description of the commission’s complaint process, and how to contact the commission;

(d) A list of alternate and additional government agencies for filing complaints about sexual harassment, and the websites for such agencies, to the extent available;

(e) An explanation that retaliation, including but not limited to retaliation for complaints concerning allegations of sexual harassment, is prohibited by subdivision 7 of section 8-107, and examples of activities which may be retaliation for such complaints; and

(f) Bystander intervention education and the importance of taking action to prevent workplace sexual harassment.

2. An interactive tool describing each step of the complaint process available through the commission, from when a complaint is filed to when a

determination is made on such complaint.

(L.L. 2018/094, 5/9/2018, eff. 8/7/2018)

§ 8-133 Education and outreach regarding single-occupant toilet room requirements.

The commission on human rights, in conjunction with the department of buildings, shall conduct outreach to the public at large regarding single-occupant toilet room requirements, which shall, at a minimum, include educational materials to inform transgender and gender non-conforming individuals of a building owner's required compliance with sections 403.2.1 and 403.4 of the New York city plumbing code and the violations and penalties that result from non-compliance with such sections. Such materials shall be available in the designated citywide languages as defined in section 23-1101 and shall include a statement that any non-compliance with such sections may be reported to 311 and shall be posted on the commission's website.

(L.L. 2018/190, 12/1/2018, eff. 5/30/2019)

Editor's note: For related unconsolidated provisions, see Appendix A atL.L. 2018/190.

§ 8-134 Anti-discrimination poster.

a. The commission shall create an anti-discrimination rights and responsibilities poster that addresses the forms of discrimination prohibited by the city human rights law, including age discrimination, and which explains how to contact the commission. The commission shall also include as part of its regular outreach and education efforts informational resources on age discrimination. Such poster and educational resources shall be made available on the commission's website.

b. Every agency shall conspicuously display the poster created by the commission pursuant to this section in employee breakrooms or other common areas where employees gather.

(L.L. 2020/120, 12/20/2020, eff. 4/19/2021)

Chapter 2: Certain Unlawful Real Estate Practices

§ 8-201 Declaration of policy.

It is hereby declared to be the policy of the city of New York and the purpose of this chapter to promote fair dealing in real estate transactions, to maintain community stability and security, and to foster racial and social harmony.

§ 8-202 Definitions.

As used in this chapter:

1. "Chairperson" means the chairperson of the New York city commission on human rights.

2. "Commission" means the New York city commission on human rights.

3. "Dwelling or real property" means one, two, three or four family residences, and any vacant land which is offered for sale or lease for the construction or location thereon of any such residence.

4. "Legal notice" means publication daily for one week in a newspaper of general circulation within the city of New York and written notice to all real estate brokers in the area.

5. "Real estate broker" means a real estate broker as defined in article twelve-A of the real property law of the state of New York.

6. "Real estate dealer" means any firm, partnership, association, corporation or person which or who has within the preceding twelve months, sold, traded or exchanged two or more dwellings other than, in the case of a person, such person's own residence.

7. "Real estate office" means an office or other place of business which is primarily engaged in the business of selling, buying, leasing, or renting real property; listing real property for sale, purchase, lease or rental; or providing brokerage services in connection with such selling, buying, leasing, renting, or listing.

8. "Solicitation" means requesting, inviting, or inducing by any means, including, but not limited to:

(a) going in or upon the property of the person to be solicited, except when invited by such person;

(b) communicating with the person to be solicited by mail, telephone, telegraph or messenger service, except when requested by such person;

(c) canvassing in streets or other public places;

(d) distributing handbills, circulars, cards or other advertising matter;

(e) using loudspeakers, soundtrucks, or other voice-amplifying equipment;

(f) displaying signs, posters, billboards, or other advertising devices other than signs placed upon a real estate office for the purpose of identifying the occupants and services provided therein, provided, however, that the term "solicitation" shall not include advertising in newspapers of general circulation, magazines, radio, television, or telephone directories.

9. "Block, neighborhood or area" means any forty square blocks within the city of New York.

§ 8-203 Unlawful real estate practices.

1. It shall be unlawful for any real estate broker or dealer or any agent or employee of a real estate broker or dealer, except in honest reply to an unprompted question by a prospective buyer or seller:

(a) to represent, for the purpose of inducing or discouraging the purchase, sale, or rental, or the listing for purchase, sale, or rental, of any real property, that a change has occurred or will or may occur in the racial or religious composition of any block, neighborhood, or area.

(b) to represent, implicitly or explicitly, for the purpose of inducing or discouraging the purchase, sale, or rental or the listing for purchase, sale, or rental of any real property, that the presence of persons of any particular race, religion or ethnic background in an area will or may result in:

(1) a lowering of property values in the area;

(2) change in the racial, religious or ethnic composition of the area;

(3) an increase in criminal or anti-social behavior in the area; or

(4) a change in the racial, religious or ethnic composition of schools or other public facilities or services in the area.

2. It shall be unlawful for any real estate broker or dealer or any agent or employee of a real estate broker or dealer:

(a) to make any misrepresentation in connection with the purchase, sale, or rental of any real property, that there will or may be physical deterioration of dwellings in any block, neighborhood or area.

(b) to refer to race, color, religion or ethnic background in any advertisement offering or seeking real property for purchase, sale or rental.

3. It shall be unlawful for any person, firm, partnership, association, or corporation, to knowingly aid, abet, or coerce the commission of any act made unlawful by subdivisions one and two of this section.

§ 8-204 Non-solicitation areas.

1. The commission may designate an area as a non-solicitation area for a period of up to one year upon making written findings based on substantial evidence introduced at a public hearing that:

(a) practices made unlawful by section 8-203 of this chapter, the inducement or encouragement by brokers or dealers of the use of fraudulent mortgage applications for the purchase of dwellings, or the direction based on race, creed, color or national origin by brokers or dealers of prospective purchasers or applicants to dwellings, or an unusually great incidence of solicitation are consistently occurring within the area, and that

(b) such practices are causing, or are likely to cause, residents within the area to believe that:

(1) property values in the area are declining, or about to decline rapidly; or

(2) the area is experiencing, or is about to experience:

(i) a declining level of maintenance of its housing stock; or

(ii) an increase in criminal behavior; or

(iii) a change in the racial, religious or ethnic composition of the schools in the area; or

(3) the area is experiencing, or is about to experience, a material change in its racial, religious or ethnic composition; and

(c) therefore, the temporary prohibition in the area of the real estate activities described in section 8-205 of this chapter is necessary to prevent a material change in the area's racial, religious or ethnic composition.

2. The commission may extend one or more times the designation of a non-solicitation area made pursuant to subdivision one of this section for a period of up to one year upon making written findings, based on substantial evidence introduced at a public hearing, that such extension is necessary to achieve the designation's purpose, as described in paragraph (c) of subdivision one of this section, provided, however, that no extension may be granted which, together with the original designation and all previous extensions, will maintain a non-solicitation area for a continuous period greater than two years. The public hearing on any extension shall be held not more than thirty days before the day on which the designation or earlier extension is scheduled to expire.

3. (a) The commission shall promptly announce by legal notice each designation made pursuant to subdivision one of this section and each extension made pursuant to subdivision two of this section, describing the area to which it applies by references to named streets and landmarks. Any designation shall take effect upon the completion of the publication required for legal notice. Any extension shall take effect at the time at which the designation or earlier extension would otherwise expire.

(b) The commission shall maintain, and make available to all interested persons, a current listing of designated non-solicitation areas.

4. The commission may, at any time, terminate the designation of a non-solicitation area made pursuant to subdivision one of this section or the extension of a designation made pursuant to subdivision two of this section upon making findings, based on substantial evidence introduced at a public hearing, that the continuation of the designation or its extension is no longer necessary to achieve the designation's purpose, as described in this section.

§ 8-205 Activities prohibited with respect to non-solicitation areas.

It shall be unlawful for any real estate broker or dealer or any agent or employee of a real estate broker or dealer to solicit, directly or indirectly, the sale, purchase, or rental of any dwelling located within a non-solicitation area.

§ 8-206 Hearings; rules; enforcement.

1. The commission may conduct investigations, studies, and hearings concerning practices and activities governed by this chapter. In conducting hearings, the commission shall have the power to subpoena witnesses, to compel their attendance, to administer oaths, to examine witnesses under oath, and to require the production of documents. A written record shall be made of every such hearing.

2. The commission shall have the authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this chapter.

3. The chairperson or his or her designated representative shall have the power to enforce the provisions of this chapter by signing criminal complaints against any person, firm, partnership, association, or corporation for violation of this chapter.

4. The chairperson shall report to the secretary of state of New York all violations of this chapter by real estate brokers and salespersons.

§ 8-207 Violations.

Any person, firm, partnership, association, or corporation convicted of violating this chapter shall be guilty of a class A misdemeanor.

§ 8-208 Civil remedies.

1. (a) Any owner of real property who is induced to sell his or her property through or to a real estate broker or real estate dealer by acts committed by such broker or dealer in violation of section 8-203 or section 8-205 of this chapter may institute a civil action against such broker or dealer.

(b) If, in an action instituted pursuant to this subdivision, judgment is rendered in favor of plaintiff, such plaintiff shall be awarded as damages

(i) the amount of any gains, whether in the form of profits, commission, or otherwise, realized by defendant as the result of the first subsequent arm's length sale, exchange, or transfer of the property, or, if defendant acted as a broker, the amount of any commissions received by defendant through the sale, exchange, or transfer of plaintiff's property, such gains in all cases to be calculated without regard to any expenses incurred by the defendant, and may in addition be awarded reasonable attorneys' fees and court costs; or

(ii) if the defendant has not realized any gains as defined in this subdivision, an amount equal to the difference between the price for which plaintiff

sold his or her property and the fair market value at the time of the sale, or the fair market value of the property at the time the action is commenced, whichever difference is greater, and may in addition be awarded reasonable attorneys' fees and court costs.

2. (a) Any buyer, through or from a real estate broker or real estate dealer, of real property the last owner of which, excluding such broker or dealer, was induced to sell, exchange or transfer his or her property by acts committed by such broker or dealer in violation of section 8-203 or section 8-205 of this chapter may institute a civil action against such broker or dealer.

(b) If, in an action instituted pursuant to paragraph (a) of this subdivision, judgment is rendered in favor of plaintiff, the plaintiff shall be awarded as damages the amount of any gains, whether in the form of profits, commission, or otherwise, realized by defendant as the result of such plaintiff's purchase of the property, such gains in all cases to be calculated without regard to any expenses incurred by the defendant, and may in addition be awarded reasonable attorneys' fees and court costs.

3. With respect to the sale, exchange or transfer of any property, the liability of a broker or dealer created by subdivision two of this section shall be independent of and additional to the liability of such broker or dealer created by subdivision one of this section.

Chapter 3: Civil Rights Demonstration Protection

§ 8-301 Legislative declaration.

It is hereby found that the letter and spirit of the constitution of the United States are being violated in some jurisdictions under color of law with the result that persons from this city and state, as well as from other states, are being subjected to discriminatory treatment in the exercise of their constitutional rights because of race or because they seek the removal of unconstitutional barriers to equal rights. Such persons, sometimes referred to as freedom riders and sit-ins, intent upon peaceful resistance to discrimination, segregation and the achievement of the constitutional rights of all persons in all jurisdictions of the United States, have suffered the stigma of criminal proceedings. It is hereby declared to be the policy of the city to remove or to neutralize by affording to such residents appropriate relief to the fullest extent possible, the effect upon residents of this city of such criminal proceedings, resulting from the attempted use of public transportation facilities and other places of public accommodation.

§ 8-302 Removal of disability or disqualification.

Notwithstanding any provision of this code to the contrary, no person shall be denied any license, right, benefit or privilege extended by this code, or suffer any other disability or disqualification thereunder, or be denied the right of employment by the city, solely because of any arrest, apprehension, detention, indictment or other accusation, arraignment, trial, conviction or any other aspect of conviction or adjudication of a crime had under the jurisdiction of the courts of any state or of the United States, which is founded on an act or acts arising out of any peaceful demonstration or other peaceful activity, the object of which is to resist discriminatory treatment in any place of public accommodation as defined by section 40 of the civil rights law, or to achieve equal rights for all persons regardless of race, creed, color or national origin.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

Chapter 4: Civil Action To Eliminate Unlawful Discriminatory Practices

§ 8-401 Legislative declaration.

The council finds that certain forms of unlawful discrimination are systemic in nature rooted in the operating conditions or policies of a business or industry. The council finds that the existence of systemic discrimination poses a substantial threat to, and inflicts significant injury upon, the city that is economic, social and moral in character, and is distinct from the injury sustained by individuals as an incident of such discrimination. The council finds that the potential for systemic discrimination exists in all areas of public life and that employment, housing and public accommodations are among the areas in which the economic effects of systemic discrimination are exemplified. The existence of systemic discrimination impedes the optimal efficiency of the labor market by, among other things, causing decisions to employ, promote or discharge persons to be based upon reasons other than qualifications and competence. Such discrimination impedes the optimal efficiency of the housing market and retards private investments in certain neighborhoods by causing decisions to lease or sell housing accommodations to be based upon discriminatory factors and not upon ability and willingness to lease or purchase property. The council finds that the reduction in the efficiency of the labor, housing and commercial markets has a detrimental effect on the city's economy, thereby reducing revenues and increasing costs to the city. The council finds that such economic injury to the city severely diminishes its capacity to meet the needs of those persons living and working in, and visiting, the city. The council finds further that the social and moral consequences of systemic discrimination are similarly injurious to the city in that systemic discrimination polarizes the city's communities, demoralizes its inhabitants and creates disrespect for the law, thereby frustrating the city's efforts to foster mutual respect and tolerance among its inhabitants and to promote a safe and secure environment. The council finds that the potential consequences to the city of this form of discrimination requires that the corporation counsel be expressly given the authority to institute a civil action to enforce the city's human rights law so as to supplement administrative means to prevent or remedy injury to the city.

§ 8-402 Civil action to eliminate unlawful discriminatory practices.

a. Whenever there is reasonable cause to believe that a person or group of persons is engaged in a pattern or practice that results in the denial to any person of the full enjoyment of any right secured by chapter 1 of this title, a civil action on behalf of the commission or the city may be commenced in a court of competent jurisdiction, by filing a complaint setting forth facts pertaining to such pattern or practice and requesting such relief as may be deemed necessary to insure the full enjoyment of the rights described in such chapter, including, but not limited to, injunctive relief, damages, including punitive damages, and such other types of relief as are specified in subdivision a of section 8-120. Nothing in this section shall be construed to prohibit (i) an aggrieved person from filing a complaint pursuant to section 8-109 or from commencing a civil action pursuant to chapter 5 of this title based upon the same facts pertaining to such a pattern or practice as are alleged in the civil action, or (ii) the commission from filing a commission-initiated complaint pursuant to section 8-109 alleging a pattern or practice of discrimination, provided that a civil action pursuant to this section shall not have previously been commenced.

b. A civil action commenced under this section must be commenced within three years after the alleged discriminatory practice occurred.

c. Such action may be instituted only by the corporation counsel, such attorneys employed by the city commission on human rights as are designated by the corporation counsel or other persons designated by the corporation counsel.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-403 Investigation.

The corporation counsel may initiate any investigation to ascertain such facts as may be necessary for the commencement of a civil action pursuant to section 8-402, and in connection therewith shall have the power to issue subpoenas to compel the attendance of witnesses and the production of

documents, to administer oaths and to examine such persons as are deemed necessary.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-404 Civil penalty.

In any civil action commenced pursuant to section 8-402, the trier of fact may, to vindicate the public interest, impose upon any person who is found to have engaged in a pattern or practice that results in the denial to any person of the full enjoyment of any right secured by chapter 1 of this title a civil penalty of not more than $250,000. In relation to determining the appropriate amount of civil penalties to be imposed pursuant to this section a liable party may plead and prove any relevant mitigating factor. Any civil penalties so recovered pursuant to this chapter shall be paid into the general fund of the city. Nothing in this section shall be construed to preclude the city from recovering damages, including punitive damages, and other relief pursuant to section 8-402 in addition to civil penalties.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

Chapter 5: Civil Action By Persons Aggrieved By Unlawful Discriminatory Practices

§ 8-502 Civil action by persons aggrieved by unlawful discriminatory practices.

a. Except as otherwise provided by law, any person claiming to be a person aggrieved by an unlawful discriminatory practice as defined in chapter 1 of this title or by an act of discriminatory harassment or violence as set forth in chapter 6 of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence. For purposes of this subdivision, the filing of a complaint with a federal agency pursuant to applicable federal law prohibiting discrimination which is subsequently referred to the city commission on human rights or to the state division of human rights pursuant to such law shall not be deemed to constitute the filing of a complaint under this subdivision.

b. Notwithstanding any inconsistent provision of subdivision a of this section, where a complaint filed with the city commission on human rights or the state division on human rights is dismissed by the city commission on human rights pursuant to subdivisions a, b or c of section 8-113, or by the state division of human rights pursuant to subdivision 9 of section 297 of the executive law either for administrative convenience or on the grounds that such person's election of an administrative remedy is annulled, an aggrieved person shall maintain all rights to commence a civil action pursuant to this chapter as if no such complaint had been filed.

c. The city commission on human rights and the corporation counsel shall each designate a representative authorized to receive copies of complaints in actions commenced in whole or in part pursuant to subdivision a of this section. Within 10 days after having commenced a civil action pursuant to subdivision a of this section, the plaintiff shall serve a copy of the complaint upon such authorized representatives.

d. A civil action commenced under this section must be commenced within three years after the alleged unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter 6 of this title occurred. Upon the filing of a complaint with the city commission on human rights or the state division of human rights and during the pendency of such complaint and any court proceeding for review of the dismissal of such complaint, such three-year limitations period shall be tolled.

e. Notwithstanding any inconsistent provision of this section, where a complaint filed with the city commission on human rights or state division of human rights is dismissed for administrative convenience and such dismissal is due to the complainant's malfeasance, misfeasance or recalcitrance, the three year limitation period on commencing a civil action pursuant to this section shall not be tolled. Unwillingness to accept a reasonable proposed conciliation agreement shall not be considered malfeasance, misfeasance or recalcitrance.

f. The provisions of this section which provide a cause of action to persons claiming to be persons aggrieved by an act of discriminatory harassment or violence as set forth in chapter 6 of this title shall not apply to acts committed by members of the police department in the course of performing their official duties as police officers whether the police officer is on or off duty. This subdivision shall in no way affect rights or causes of action created by section 14-151.

g. In any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party reasonable attorney's fees, expert fees and other costs. For the purposes of this subdivision, the term "prevailing" includes a plaintiff whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement or as a result of a judgment in such plaintiff's favor. The court shall apply the hourly rate charged by attorneys of similar skill and experience litigating similar cases in New York county when it chooses to factor the hourly rate into the attorney's fee award.

h. 1. The term "person aggrieved" includes a person whose right created, granted or protected by chapters 1 or 6 of this title is violated by a covered entity directly or through conduct of the covered entity to which the person's agent or employee is subjected while the agent or employee was acting, or as a result of the agent or employee having acted, within the scope of the agency or employment relationship. For purposes of this subdivision, an agent or employee's protected status is imputed to that person's principal or employer when the agent or employee acts within the scope of the agency or employment relationship. It is irrelevant whether or not the covered entity knows of the agency or employment relationship.

2. A person is aggrieved even if that person's only injury is the deprivation of a right granted or protected by chapters 1 or 6 of this title.

3. This subdivision does not limit or exclude any other basis for a cause of action.

(Am. L.L. 2016/036, 3/28/2016, eff. 3/28/2016; Am. L.L. 2016/040, 4/6/2016, eff. 8/4/2016; Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

Chapter 6: Discriminatory Harassment Or Violence

§ 8-602 Civil action to enjoin discriminatory harassment or violence; equitable remedies.

a. Whenever a person interferes by threats, intimidation or coercion or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any person of rights secured by the constitution or laws of the United States, the constitution or laws of this state, or local law of the city and such interference or attempted interference is motivated in whole or in part by the victim's actual or perceived race, creed, color, national origin, gender, sexual and reproductive health decisions, sexual orientation, age, whether children are, may or would be residing with such victim, marital status, partnership status, disability, or immigration or citizenship status as defined in chapter 1 of this title, the corporation counsel, at the request of the city commission on human rights or on the corporation counsel's own initiative, may bring a civil action on behalf of the city for injunctive and other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the rights secured.

b. An action pursuant to subdivision a of this section may be brought in any court of competent jurisdiction.

c. Violation of an order issued pursuant to subdivision a of this section may be punished by a proceeding for contempt brought pursuant to article 19 of the judiciary law and, in addition to any relief thereunder, a civil penalty may be imposed not exceeding $10,000 for each day that the violation continues.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018; Am. L.L. 2019/020, 1/20/2019, eff. 5/20/2019; Am. L.L. 2020/058, 6/29/2020, eff. 8/28/2020)

§ 8-603 Discriminatory harassment; civil penalties.

a. No person shall by force or threat of force, knowingly injure, intimidate or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to such other person by the constitution or laws of this state or by the constitution or laws of the United States or by local law of the city when such injury, intimidation, interference, oppression or threat is motivated in whole or in part by the victim's actual or perceived race, creed, color, national origin, gender, sexual and reproductive health decisions, sexual orientation, age, marital status, partnership status, disability or immigration or citizenship status, as defined in chapter 1 of this title.

b. No person shall knowingly deface, damage or destroy the real or personal property of any person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the constitution or laws of this state or by the constitution or laws of the United States or by local law of the city when such defacement, damage or destruction of real or personal property is motivated in whole or in part by the victim's actual or perceived race, creed, color, national origin, gender, sexual and reproductive health decisions, sexual orientation, age, marital status, partnership status, or whether children are, may be, or would be residing with such victim, disability or immigration or citizenship status, as defined in chapter 1 of this title.

c. Any person who violates subdivision a or b of this section shall be liable for a civil penalty of not more than $100,000 for each violation, which may be recovered by the corporation counsel in an action or proceeding in any court of competent jurisdiction.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018; Am. L.L. 2019/020, 1/20/2019, eff. 5/20/2019; Am. L.L. 2020/058, 6/29/2020, eff. 8/28/2020)

§ 8-604 Disposition of civil penalties.

Any civil penalties recovered by the corporation counsel pursuant to this chapter shall be paid into the general fund of the city.

Chapter 7: Discriminatory Boycotts

§ 8-701 Legislative declaration.

Boycotts or blacklists that are based on a person's race, color, creed, age, national origin, alienage or citizenship status, marital status, partnership status, gender, sexual orientation, or disability pose a menace to the city's foundation and institutions. In contrast to protests that are in reaction to an unlawful discriminatory practice, connected with a labor dispute or associated with other speech or activities that are protected by the first amendment discriminatory boycotts cause havoc, divide the citizenry and do not serve a legitimate purpose. The council declares that discriminatory boycotts are a dangerously insidious form of prejudice and hereby establishes a procedure for expeditiously investigating allegations of this type of prejudice, assuring that the council and mayor are duly alerted to the existence of such activity and combating discriminatory boycotts or blacklists.

§ 8-702 Definitions.

As used in this chapter, the following terms have the following meanings:

Commission. The term "commission" means the city commission on human rights.

Council. The term "council" means the council of the city of New York.

Discriminatory boycott or blacklist. The term "discriminatory boycott or blacklist" means any act that is an unlawful discriminatory practice under subdivision 18 of section 8-107.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

§ 8-703 Investigative reporting requirements.

The following requirements shall apply to all complaints alleging that a discriminatory boycott or blacklist is occurring:

(1) The commission shall begin an investigation within 24 hours of the filing of a complaint which alleges that a discriminatory boycott or blacklist is occurring.

(2) Within three days after initiating such an investigation, the commission shall file a written report with the mayor. The report shall state:

(a) The allegations contained in the complaint;

(b) Whether the commission has reason to believe a discriminatory boycott or blacklist is taking place; and

(c) Steps the commission has taken to resolve the dispute.

(3) If it is stated within the report described in subdivision 2 of this section that the commission has reason to believe that a discriminatory boycott or blacklist has taken place, within 30 days after filing such report, the commission shall file a second report with the mayor and the council. This second report shall contain:

(a) A brief description of the allegations contained in the complaint;

(b) A determination of whether probable cause exists to believe a discriminatory boycott or blacklist is taking place;

(c) A recitation of the facts that form the basis of the commission's determination of probable cause; and

(d) If the boycott or blacklist is continuing at the date of the report, a description of all actions the commission or other city agency has taken or will undertake to resolve the dispute.

(4) If a finding of probable cause is not contained in the report required by subdivision 3 of this section and the boycott or blacklist continues for more than 20 days subsequent to the report's release, then, upon demand of the mayor or council, the commission shall update such report. Report updates shall detail:

(a) Whether or not the commission presently has probable cause to believe a discriminatory boycott or blacklist is taking place; and

(b) All new activity the commission or other city agency has taken or will undertake to resolve the dispute.

(5) If the commission determines that the disclosure of any information in a report required by this section may interfere with or compromise a pending investigation or efforts to resolve the dispute by mediation or conciliation, it shall file the report without such information and state in the report the reasons for omitting such information.

(Am. L.L. 2018/063, 1/19/2018, eff. 10/16/2018)

Editor's note: The following former provisions of this Title 8 have been renumbered by L.L. 2018/063 as follows:

Chapter 8: Prevention of Interference With Reproductive Health Services – SeeTitle 10, Chapter 10

Chapter 9: Actions By Victims of Gender-Motivated Violence – SeeTitle 10, Chapter 11

Chapter 10: Equal Access to Human Services – See Title 21, Chapter 1, Subchapter 1

Chapter 11: Reports on Discipline and Certain Emergency Transports of Students – SeeTitle 21-A, Chapter 19

Pagination

* A.D.3d

** N.Y.S.2d

*** BL

Opinion >

Appellate Division of the Supreme Court of New York, First Department.

KENNETH BENNETT, Appellant, v. HEALTH MANAGEMENT SYSTEMS, INC., Respondent.

No. 5031.

December 20, 2011.

APPEAL from an order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered March 11, 2010. The order granted defendant's motion for summary judgment and dismissed the complaint.

Bennett v Health Mgt. Sys., Inc., 2010 NY Slip Op 33753(U), affirmed.

[*30]

Simon, Eisenberg & Baum, LLP, New York City (*Sheldon Karasik* of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York City (*Richard L. Steer* and *Tara T. Toevs* of counsel), for respondent.

Before: SAXE, J.P., CATTERSON, ABDUS-SALAAM and ROMÀN, JJ.

OPINION OF THE COURT

[114]** ACOSTA, J.

This appeal gives us the opportunity to address the evidentiary **[*31]** showing required at the summary judgment stage in a discrimination case brought pursuant to the New York City Human Rights Law. We hold that defendant has met its evidentiary burden and has shown its entitlement to the extraordinary remedy of judgment as a matter of law.

Background

Plaintiff, Kenneth Bennett, a 47-year-old Caucasian, was hired in 2004 by defendant Health Management Systems, Inc. (HMS), in the Data Processing Operations Unit (DPO). Four years later, he was asked to consider becoming part of the Technical Operations Support (TOS) team on the night shift, and he accepted. Approximately one month into his new position, plaintiff asked to be transferred back to DPO because, he alleged, Cynthia Bowen, the African-American manager of the TOS team, "unfairly and intemperately criticized his performance often and without cause, making it impossible for [him] to master the job." Plaintiff's request was denied, and he was terminated shortly thereafter. According to plaintiff, he was terminated for age and race-related reasons, in violation of state and city human rights laws.

Defendant asserted that it terminated plaintiff for poor job performance, including consuming alcohol on the job.

Plaintiff commenced this action against HMS, asserting five causes of action. The first was for breach of contract. The second and third, for age discrimination under section 296 of the Executive Law (New York State Human Rights Law [State HRL]) and section 8-107 (1) (a) of the Administrative Code of the City of New York (New York City Human Rights Law [City HRL]), respectively, alleged that defendant discriminated against him on the basis of age by denying him reassignment to his former unit, and replacing him with an individual who was significantly younger than he. Plaintiffs fourth and fifth causes of action, brought under the State HRL and the City HRL, respectively, alleged that defendant discriminated against him on the basis of race because his supervisors and coworkers in his unit were black and he was white.

Defendant moved to dismiss the complaint **[**113]** pursuant to CPLR 3211 (a) (1) and (7). The court granted the motion solely to the extent of dismissing the breach of contract claim. Defendant filed its answer, asserting various affirmative defenses, including that plaintiff was terminated because of repeated **[***2]** violations of company policies that prohibited the consumption of alcoholic beverages and being under the influence of alcohol while at work. **[*32]**

Several months later, defendant moved for summary judgment dismissing the complaint pursuant to CPLR 3212, arguing that its proffered reason for terminating plaintiff was legitimate and nondiscriminatory, and could not be shown to be pretextual.

The evidentiary materials submitted by defendant included the affidavit of Claude B. Phipps, Director of Data Processing Operations and Technical Services, who submitted documentation establishing that of the 35 people in the DPO and TOS, 77% were between the ages of 40 and 64 years old, and that 80% of the white employees in DPO and TOS were between the ages of 46 and 64 years old. Phipps also stated that in 2004 plaintiff was found with alcohol on the premises and given an oral warning.

The affidavit of Cynthia A. Bowen, the manager of TOS, explained that there were problems with plaintiffs attendance and job performance from the time he joined TOS. In fact, after approximately **[**115]** one month he was granted a week's vacation and an additional three-week leave of absence to "get his head together." Upon his return, his performance continued to suffer. Bowen believed that the poor performance was due to plaintiff sleeping on the job and leaving his shift early without explanation or permission. She received reports from his coworkers of plaintiff drinking and sleeping on the job. Plaintiff was warned at a meeting with Bowen and Phipps in early May 2008 that his poor performance was jeopardizing his job, and given two weeks to improve, or his employment would be terminated.

Michael O'Rourke, a 47-year old white male, and Senior Director of Operations, described an incident that occurred in January 2005, while plaintiff still worked in DPO, prompting O'Rourke to write plaintiff up for having alcohol on the premises. O'Rourke had become suspicious after observing plaintiff making frequent trips to his locker, and discovered, upon investigation, that plaintiff had an alcoholic beverage disguised in a

Mountain Dew bottle in an open duffel bag in his locker. Plaintiff was then given a final written warning.

Waldemar Rivera, a Technical Operations Support Analyst, stated in his affidavit that he was assigned to train plaintiff when plaintiff was transferred to TOS. He stated that it was "very difficult and frustrating" trying to work with and attempting to train plaintiff, because he often reeked of alcohol, slurred his words, and did not pay attention or take notes. Rivera also stated that plaintiffs confusion seemed to increase **[*33]** over time, and that it appeared that he had difficulty keeping his eyes open. Three other employees also smelled alcohol on plaintiffs breath, and stated that plaintiff had trouble focusing on the job.

In opposition, plaintiff averred that he believed that defendant's refusal to allow him to transfer back to his former unit was "solely for purposes of harassment motivated by hostility to his age and race." He **[***3]** denied receiving any warning that he was guilty of misconduct or poor job performance that, if left uncorrected, could lead to his termination. He asserted that he was not an alcoholic, and never appeared for work under the influence of alcohol. He admitted that he did take naps during his shift, but asserted that other employees did the same, since it was common practice to do so during the overnight shifts. Plaintiff averred that prior to his transfer, he was supervised by a white male and received a "very good" performance appraisal in November 2007. Plaintiff denied allegations that he failed to take notes during his training, and maintained that he was replaced by a much younger, inexperienced individual.

By order entered March 11, 2010, the court granted defendant's summary judgment motion, finding that there was no evidence in the record to support plaintiffs claim of age discrimination (**2010 NY Slip Op 33753 [U]** [2010]). The court found that plaintiffs affidavit in opposition to the motion did not contain any factual allegations to support his second and third causes of action for age discrimination, since it stated little more than the fact that he was 47 years old at the time of his termination. The court noted that plaintiff made no allegations that derogatory comments were made concerning his age or that younger individuals were treated more favorably, and did not refute the fact that he was replaced by a 54-year-old employee. With regard to plaintiff's fourth and fifth causes of action for racial discrimination, the court noted that plaintiffs claims that his termination raised an inference of discrimination were based on the fact that both of his supervisors and his unit coworkers were black. However, the court observed that defendant submitted **[**116]** evidence that plaintiff was fired because he performed his job poorly, was found sleeping on the job, had brought a bottle of alcohol to work in violation of company policy, and reeked of alcohol. The court noted that although plaintiffs affidavit in opposition stated that criticism of his work was "unfounded," he offered no facts or evidence to establish that the suspicions and concerns offered by defendant were pretextual. And plaintiff did **[*34]** not deny that he had been caught numerous times sleeping on the job or that he had brought alcohol to work.

This appeal followed.

Analysis

I.

Six years after the passage of the New York City Local Civil Rights Restoration Act (Local Law No. 85 [2005] of City of NY) (Restoration Act), it is beyond dispute that the City HRL now "explicitly requires an independent liberal construction analysis *in all circumstances*," an analysis that "must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's `uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws" (*Williams v New York City Hous. Auth.*, **61 AD3d 62**, **66** [2009], *lv denied* **13 NY3d 702** [2009] [emphasis added]).

Our Court of Appeals has emphasized that the Restoration Act's amendment of **section 8-130** of the City HRL was enacted to ensure the liberal construction **[***4]** of the City HRL by requiring that *all* provisions of the City HRL be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" (*Albunio v City of New York*, **16 NY3d 472**, **477-478** [2011]; *see also Nelson v HSBC Bank USA*, **87 AD3d 995** [2011] [adopting this Court's holding in *Williams* that considerations of severity or pervasiveness applicable in state and federal harassment cases are impermissible in determining liability in discriminatory harassment cases under the City HRL]; *Loeffler v Staten Is. Univ. Hosp.*, **582 F3d 268**, **278** [2009] [explaining that "claims under the City HRL must be reviewed independently from and `more liberally' than their federal and state counterparts"]).

Despite these clear directives, no court has yet undertaken an examination of whether, and to what extent, the three-step burden-shifting approach set forth in *McDonnell Douglas Corp. v Green* (**411 US 792** [1973]), must be modified for City HRL claims, particularly in the context of the adjudication of summary judgment motions. That examination is overdue, and we begin the process here.

II.

As a preliminary matter, the identification of the framework for evaluating the sufficiency of evidence in discrimination cases does not in any way constitute an exception to the **section 8-130** **[*35]** rule that all aspects of the City HRL must be interpreted so as to accomplish the uniquely broad and remedial purposes of the law (*see Williams*, **61 AD3d at 67** and n 4, 68, 74). Indeed, the Restoration Act had among its explicit purposes *the rejection and overruling* of the doctrine in *McGrath v Toys "R" Us, Inc.* (**3 NY3d 421**, **433-434** [2004]), which indicated that the City Council would need to amend the City HRL to specifically depart from a federal doctrine if it wanted to do so (*see Williams*, **61 AD3d at 73-74**).**[fn1]** **[**117]** In any event, for us to create an exemption from the sweep of the Restoration Act for the most basic provision of the City HRL — that it is unlawful "to discriminate" — would impermissibly invade the legislative province. **[fn2]** And walling off from examination the doctrines that are appropriate to shape the presentation and evaluation of evidence that "discrimination" has occurred would create just such an exemption.

III.

The *McDonnell Douglas* (**411 US 792** [1973]) burden-shifting approach initially requires only that the plaintiff make a prima facie showing of membership in a protected class and that an adverse employment action had been taken against him. The adverse action must have occurred under circumstances giving rise to an

inference of discrimination.[fn3] Once that minimal showing is made, the burden shifts to the defendant to articulate **[*36]** through competent evidence nondiscriminatory reasons that actually motivated defendant at the time of its action (**id. at 802**). If that burden is successfully shouldered then plaintiff must show those reasons to be false or pretextual (***id***.). The basic idea behind the *McDonnell Douglas* burden-shifting procedure — that is, that discrimination rarely announces itself, and that victims of discrimination need a way to prove their case circumstantially — is sound. But some aspects of the way it has been applied — especially in the summary judgment **[***5]** context — can undercut the City HRL's intent to maximize the opportunities for discrimination to be exposed.[fn4] For **[**118]** instance, the last prong of a plaintiffs prima facie showing — that adverse action has been taken against plaintiff under circumstances giving rise to an inference of discrimination — can, if its limited function is not understood correctly, transmute that prong into one that requires a plaintiff to prove his entire case. In the hypothetical situation where a plaintiff makes an initial showing that some of his younger colleagues were not subjected to the adverse action imposed on him, and where it is assumed that the basic showing is indeed true, [fn5] it can certainly also be true that those colleagues were not similarly situated to plaintiff because **[*37]** plaintiff engaged in misconduct and they did not. But the explanatory second set of facts, such as the absence of such misconduct by the plaintiffs colleagues, should not be relied on to negate the plaintiffs prima facie case in the first instance, but rather, seen as either: (a) the defendant's articulation through competent evidence of nondiscriminatory reasons for its action (stage two in the *McDonnell Douglas* framework); or (b) part of the defendant's ultimate effort to undercut the weight assigned to the plaintiffs evidence and thus disprove the plaintiffs claim that it was more likely than not that discrimination played a role in defendant's actions.

If this caution is not taken, the result will be inconsistent with the intent of *McDonnell Douglas* , and, more importantly, with that of the City HRL. As the Supreme Court said long ago, the burden of establishing a prima facie case of discrimination is "not onerous" (*Texas Dept. of Community Affairs v Burdine*, **450 US 248**, **253** [1981]).[fn6] The reasons were, and remain, obvious. First, discrimination rarely announces itself, so that generally a discrimination plaintiff must ask the factfinder to infer the defendant's intent from circumstantial evidence that can be difficult to obtain.[fn7] Second, the defendant, by definition, is in a materially better position to provide evidence as to its actual motivation than the plaintiff. Third, the *McDonnell **[**119]** Douglas* burden of production on a defendant that is triggered by a plaintiffs initial presentation of a prima facie case is itself neither onerous or unfair: all a defendant is being required to do in **[*38]** that circumstance is to come forward with competent evidence of what it knows, that is, the reason or reasons for its actions.[fn8] Finally, the existence of discrimination — a profound evil that New York City, as a matter of fundamental public policy, seeks to eliminate[fn9] — demands that the courts' treatment of such claims maximize the ability to ferret out such discrimination, not create room for discriminators to avoid having to answer for their actions before a jury of their peers.[fn10]

Unlike the intended role for a de minimis prima facie showing, the task of challenging a defendant's proffered nondiscriminatory reasons can frequently be onerous. It often involves

questions such as appropriate **[***6]** comparators and evidence of work performance (and discipline) of others. To conflate this broader obligation with the initial prima facie obligation contravenes the purpose of the *McDonnell Douglas* procedure for the order and requirement of proof, a procedure that is simply a mechanism designed to give a full opportunity for cases of possible discrimination to be heard. In fact, to conflate this obligation improperly merges the proof and role of the prima facie case with the proof and role of plaintiffs ultimate burden.

In the context of a summary judgment motion, of course, once a defendant has laid bare its proof, a plaintiff is compelled to do the same. But that is the point: once the defendant has revealed its evidence, the case has moved to a different level of specificity. At the summary judgment stage, a court should not confuse the limited assessment of all the evidence in the case (an issue identification function, not an issue resolution function) with a retroactive critique of the adequacy of the initial prima facie showing. If a court were to tarry at all at the summary judgment stage on the question of whether a prima facie **[*39]** case has been made out, it would need to necessarily ask whether the initial facts described by the plaintiff, *if not otherwise explained*, give rise to the *McDonnell Douglas* inference of discrimination.

Therefore, where a defendant on a summary judgment motion has produced evidence that justifies its adverse action against the plaintiff on nondiscriminatory grounds, the plaintiff may not stand silent. The plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination. **[**120]** The point of the *McDonnell Douglas* procedure was to recognize the imbalance between the information initially available to a plaintiff and the information possessed by a defendant. In the interests of making real the promise of anti-discrimination law, the *McDonnell Douglas* three-prong approach requires a defendant to come forward to provide nondiscriminatory reasons for its actions, in order to eliminate the presumption of discrimination that the prima facie case had theretofore established. A defendant's production of evidence supporting its position that it acted for nondiscriminatory reasons does not mean that a prima facie case had not been created in the first instance, and courts should not treat such evidence as doing so.

IV.

Does it even make sense to examine at the summary judgment stage whether an initial prima facie case has been made out? As the Supreme Court held almost 30 years ago:

"Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether `the defendant intentionally discriminated against **[***7]** the plaintiff" (*Postal Service Bd. of Governors v Aikens*, **460 US 711**, **715** [1983] [citation omitted]).

This reasoning applies in this context as well.

Where a defendant in a discrimination case has moved for summary judgment and has offered

evidence in admissible form of one or more nondiscriminatory motivations for its actions, a court should ordinarily avoid the unnecessary and sometimes **[*40]** confusing effort of going back to the question of whether a prima facie case has been made out in the first place. Instead, the court should turn to the question of whether the defendant has sufficiently met its initial burden as the moving party of showing that there is no evidentiary route that could allow a jury to believe that discrimination played a role in the challenged action. We stop short of holding that there is *never* a circumstance under the City HRL where such an inquiry would be proper, but do conclude that such circumstances will be rare and unusual.[fn11]

V.

There remain two factors to consider. First, it is essential to remember that the *McDonnell Douglas* evidentiary framework is not the only evidentiary framework applicable to discrimination cases. It is not uncommon for covered entities to have multiple or mixed motives for their action, and the City HRL proscribes such "partial" discrimination since "[u]nder Administrative Code § 8-101, discrimination shall play no role in decisions relating to employment, housing or public accommodations" (*See Williams*, 61 AD3d at 78 n 27; *see also* Rep of Comm on Gen Welfare, Local Law No. 85 [2005] of City of New York, 2005 NY City Legis Ann, at 537; *Weiss v JP Morgan Chase & Co.*, [2010 BL 6572], 2010 WL 114248, *1, 2010 US Dist LEXIS 2505, *1-2 [SD NY 2010] [the City HRL "requires only that a plaintiff prove that age was `a motivating factor' for an adverse employment action"]). **[**121]**

A plaintiffs response to a defendant's showing of nondiscriminatory reasons for its actions can take a variety of forms. In some cases, the plaintiff may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive. In other cases, the plaintiff may leave unchallenged one or more of the defendant's proffered reasons for its actions, and may instead seek only to show that discrimination was just one of the motivations for the conduct.[fn12] In addition, evidence of an unlawful motive in the mixed motive context need not be **[*41]** direct, but can be circumstantial — as with proof of any other fact (*See Desert Palace, Inc. v Costa*, 539 US 90 [2003]).

On a motion for summary judgment, defendant bears the burden of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiffs favor, no jury could find defendant liable under any of the evidentiary routes: under the *McDonnell Douglas* test, or as one of a number of mixed motives, by direct or circumstantial evidence.

VI.

The critical remaining question concerns the proper impact of a plaintiffs evidence that one or more of the nondiscriminatory reasons put forward by a defendant is false, incomplete, or misleading — generally referred to as pretext evidence. A sharply divided Supreme Court ruled that a factfinder's rejection **[***8]** of what the employer has proffered as a legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff, reasoning that a pretext is not necessarily a pretext for discrimination (*see St. Mary's Honor Center v Hicks*, 509 US 502, 511 [1993]). Several years later, the Supreme Court concluded, in *Reeves v Sanderson Plumbing Products, Inc.* (530 US 133

[2000]), that a plaintiffs claim of discrimination can indeed survive a defendant's motion for summary judgment by the quantum of evidence that made up plaintiffs prima facie case, along with evidence that the employer's proffered justification for its action was false. The *Reeves* Court rejected the proposition that additional evidence tending to show that the false explanation was a cover-up for discrimination was needed to survive summary judgment, sometimes termed the "pretext plus" view. It confirmed that a jury is entitled to infer from the evidence of falsity that the cover-up was a cover-up of discrimination, but rejected the position that proving the falsity of a defendant's proffered reason automatically entitled the plaintiff to judgment — sometimes termed the "pretext must" view.

The Supreme Court did not simply caution lower courts that juries should be issued a permissive rather than mandatory instruction as to the inference of discrimination to be drawn from evidence of a false reason for action. It effectively suggested that summary judgment could still be routinely granted in a defendant's favor even where evidence of falsity had been produced by plaintiff: **[*42]**

"Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative **[**122]** value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law" (*Reeves*, **530 US at 148-149**).

Whatever the merits of the Supreme Court's decision as a matter of federal law may or may not be, *Reeves* did not sufficiently consider factors crucial to interpreting the City HRL in a way that is "uniquely broad and remedial." These factors include: (a) the traditional power to be accorded to the inference of wrongdoing that arises from evidence of consciousness of guilt; (b) the importance of deterring a defendant's proffer of false reasons for its conduct; and (c) the impropriety of a court weighing the strength of evidence in the context of a summary judgment motion.

As to consciousness of guilt, it is hardly a new proposition that "[r]esort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct" (*Sheridan v E.I. DuPont de Nemours & Co.*, **100 F3d 1061**, **1069** [3d Cir 1996, en banc], *cert denied* **521 US 1129** [1997], quoting *Binder v Long Is. Light. Co.*, **57 F3d 193**, **200** [1995]; *see also Fisher v Vassar Coll.*, **114 F3d 1332**, **1390-1391** [1997, Winter, J., dissenting], *cert denied* **522 US 1075** [1998] [noting that *Binder* did nothing but apply the "universally recognized principle" that consciousness of guilt may be inferred from dishonest **[***9]** behavior concerning facts material to litigation to "false exculpatory statements by employers," and pointing out the equivalently universal principle that a jury that finds that a witness has lied in a material part of his or her testimony may "disbelieve other material parts of that witness's testimony"]).

This principle is especially important in the employment discrimination context. As the four dissenters noted in *Hicks*, the *McDonnell Douglas* procedure invests the employer (via its decision on how to meet its burden of production) with "the right to choose the scope of

the factual issues to be resolved by the factfinder" (*Hicks*, **509 US at 529**). Not only is it the case that the procedure "has no point unless the scope it chooses binds the employer as well as the plaintiff" (***id***.), but there is **[*43]** also an independent interest in deterring the presentation of false reasons in the discrimination context.

It is often the case that the dispute involves not a single, easily isolated incident, but rather an ongoing relationship that has context and nuance. It is difficult enough to discern a defendant's motive or motives in those circumstances without giving it a tactical advantage to throwing numerous nondiscriminatory justifications against the wall and seeing which stick. It must thus be the defendant's obligation to articulate its true reasons for acting in the way that it did. And the maximum deterrent effect sought by the City HRL can only be achieved where covered entities understand that, whatever the urge may be to cover up their actual motivations before arriving in court, there can be no benefit for doing so once in court (*cf. Hicks*, **509 US at 543** [Souter, J., dissenting] ["I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent"]).

The Supreme Court in *Reeves* was not wrong to state that the strength of a prima facie case can vary. Likewise, the strength of "consciousness of guilt" evidence is not a constant from case to case, and the totality of evidence available **[**123]** to be assessed is case specific. All of these factors are sound reasons why a jury is instructed that it may (not must) infer discrimination when it finds that an employer's explanation of its conduct is unworthy of credence. But the extraordinary remedy of summary judgment presents a different context.

Once there is some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, such as whether a false explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive coexisting with other legitimate reasons.**[fn13]** These will be jury questions except in the most extreme and unusual circumstances. Proceeding in this way reaffirms the principle that "trial courts must be especially chary in handing out summary **[***10]** judgment in discrimination cases, because in such cases the **[*44]** employer's intent is ordinarily at issue" (*Chertkova v Connecticut Gen. Life Ins. Co.*, **92 F3d 81**, **87** [1996], *cert denied* **531 US 1192** [2001]; *see also Patrick v LeFevre*, **745 F2d 153**, **159** [1984]).

We recognize that there has been a growing emphasis on using summary judgment in discrimination cases to promote "judicial efficiency."**[fn14]** But at least in the context of the City HRL, the Restoration Act provides a clear and unambiguous answer: a central purpose of the legislation was to resist efforts to ratchet down or devalue the means by which those intended to be protected by the City HRL could be most strongly protected (*cf. Williams*, **61 AD3d at 72-73**).**[fn15]** These concerns warrant the strongest possible safeguards against depriving an alleged victim of discrimination of a full and fair hearing before a jury of her peers by means of summary judgment. In short, evidence of pretext should in almost every case indicate to

the court that a motion for summary judgment must be denied.[fn16] **[*45]**

VII.

To summarize, then, for purposes of consideration of summary judgment motions **[**124]** in discrimination cases brought under the City HRL:

(1) If a court were to find it necessary to consider the question of whether a prima facie case has been made out, it would need to ask the question, "Do the initial facts described by the plaintiff, *if not otherwise explained*, give rise to the *McDonnell Douglas* inference of discrimination?"

(2) Where a defendant has put forward evidence of one or more nondiscriminatory motivations for its actions, however, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out. Instead, it should turn to the question of whether the defendant has sufficiently met its burden, as the moving party, of showing that, based on the evidence before the court and drawing all reasonable inferences in plaintiffs favor, no jury could find defendant liable under any of the evidentiary routes — *McDonnell Douglas*, mixed motive, "direct" evidence, or some combination thereof.

(3) If the plaintiff responds with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied.

Applying these principles to the case at hand, defendant is entitled to summary judgment.

Given the circumstances of this case, it makes sense to proceed directly to looking at the evidence as a whole. Defendant put forward evidence of nondiscriminatory motivations, **[*46]** specifically, credible evidence of numerous reports of plaintiffs unsatisfactory work performance, including, but not limited to, plaintiffs poor attendance and lack of job focus, and plaintiffs own admission that he was unable to "master [his] job." Even after plaintiff was given a week's vacation and an additional three-week leave to compose himself, his work performance continued to be below **[***11]** expectations. Relatedly, the Director of DPO advised plaintiff that if his work did not improve, he would be terminated. There is also undisputed evidence that plaintiff frequently slept on the job, and that he had left his shift early on several occasions without explanation. **[**125]** These allegations were corroborated by the affidavits of plaintiffs coworkers, who stated that plaintiff was found asleep under the desk of his cubicle, that he was under the influence of alcohol, and that he was unable to handle his responsibilities. Finally, plaintiff was replaced by a worker older than he. This evidence was sufficient to prove that plaintiff was indeed not the victim of age discrimination. Plaintiff put forward no evidence that defendant's explanations were pretextual, nor any evidence that a discriminatory motive coexisted with the legitimate reasons supported by defendant's evidence.

Defendant's proof is equally unrebutted when it

comes to plaintiffs claims of race discrimination. Plaintiff did not, for example, produce any evidence that there were black coworkers who were similarly situated to plaintiff in terms of poor performance or nonperformance, let alone evidence that a similarly situated black coworker was treated more leniently, and he did not produce any of the innumerable other types of evidence that can point to race playing a role in his employer's decision-making.

Because plaintiffs claims fail under the more protective City HRL, they fail under the State HRL as well. We have reviewed plaintiff's remaining claims and they have no merit.

Accordingly, the order of the Supreme Court, New York County (Marylin G. Diamond, J.), which granted defendant's motion to dismiss the complaint, should be affirmed, without costs.

with ACOSTA, J.

Order, Supreme Court, New York County, entered March 11, 2010, affirmed, without costs.

[fn1] *See also Williams*, **61 AD3d at 67** (when the Restoration Act was enacted, it was made plain that the intention was to legislatively overrule for City HRL purposes cases that had "either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore[d] the text of specific provisions of the law, or both." Among the illustrations of cases that, post-Restoration Act, would no longer "hinder the vindication of our civil rights" were *McGrath* and *Forrest v Jewish Guild for the Blind* [**3 NY3d 295** (2004)]).

[fn2] *See Matter of Meegan v Brown*, **16 NY3d 395**, **403** (2011) ("While examining the specific language of statutory provisions is part of our inquiry, we must also look to the underlying purpose and the statute's history as `[w]e are mindful that in "the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle."`") (citations omitted); *Brothers v Florence*, **95 NY2d 290**, **299** (2000) ("While interpretation must begin with an examination of the language itself, where a statute does not expressly address the issue, the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal") (internal quotation marks and citation omitted).

[fn3] In *McDonnell Douglas* itself, the Court held that the prima facie case could be made out

"by showing (i) [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" (**411 US at 802**).

[fn4] *See Williams*, **61 AD3d at 68** (in

"telling us that the City HRL is to be interpreted `in line with the purposes of the fundamental amendments to the law enacted in 1991,' the Council's committee was referring to amendments that were `consistent in tone and approach: every change either expanded coverage, limited an exemption, increased responsibility, or broadened remedies. In case

after case, the balance struck by the Amendments favored victims and the interests of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into state and federal law'" [citing Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law*, **33 Fordham Urb LJ 255**, 288 (2006)]).

[fn5] This illustration is not intended to suggest, and should not be construed as holding, that this particular showing is somehow an essential requisite of the prima facie case in all or a subset of discrimination matters. On the contrary, the prima facie case method established in *McDonnell Douglas* "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination" (*See Furnco Constr. Corp. v Waters*, **438 US 567**, **577** [1978]).

[fn6] Judicial construction of counterpart state and federal civil rights statutes can serve as an aid in interpretation to the City HRL to the extent that the construction of the counterpart statute is understood as providing a floor of rights under which the City HRL cannot fall, not a ceiling above which the City HRL cannot rise (Local Law No. 85 [2005] of City of NY *§ 1*), and is also not understood as a determination of, or replacement for, the ultimate and necessary question that a court, pursuant to Administrative Code **§ 8-130**, must determine independently: what interpretations of the questions before it best fulfill the City HRL's uniquely broad and remedial purposes.

[fn7] *See e.g. Dister v Continental Group, Inc.*, **859 F2d 1108**, **1112** (1988) ("The allocation of burdens and imposition of presumptions in Title VII and ADEA cases recognizes the reality that direct evidence of discrimination is difficult to find precisely because its practitioners deliberately try to hide it. Employers of a mind to act contrary to law seldom note such a motive in their employee's personnel dossier. Specific intent will only rarely be demonstrated by `smoking gun' proof . . . The *McDonnell Douglas* procedure attempts to compensate for this lack of evidence to ensure that the employee has his or her day in court") (citation omitted).

[fn8] That it may sometimes be unpleasant for a defendant to be candid does not change the fact that the reason or reasons for conduct are or should be easily available to a defendant.

[fn9] In the City HRL formulation, "there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences" (Administrative Code **§ 8-101**). The goal is to "eliminate and prevent discrimination" from, as added in 1991, "playing any role" in actions related to the employment, housing, and public accommodations contexts (*id.*).

[fn10] The Committee Report on the Restoration noted that acts of discrimination cause "serious injury, to both the persons directly involved and the social fabric of the City as a whole, which will not be tolerated" (Rep of Comm on Gen Welfare, Local Law No. 85 [2005] of City of New York, 2005 NY City Legis Ann, at 537).

[fn11] The granting of a motion based on the

absence of a prima facie showing of "circumstances giving rise to an inference of discrimination" would be even more rare given the clarification, *supra*, of the limited evidence required for that purpose.

[fn12] *Cf.* **42 USC § 2000e-2** (m), which provides that it is "an unlawful employment practice . . . when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Note that the City HRL does not provide for the limitations on relief in mixed-motive cases set forth in **42 USC § 2000e-5** (g) (2) (B) (*see* Gurian, *Return to Eyes on the Prize*, 33 Fordham Urb LJ at 312-313).

[fn13] If one explanation offered by a defendant is able to be construed by a jury as false and therefore evidence of consciousness of guilt, that same jury would be permitted to weigh that evidence when assessing the veracity of the other explanations the defendant has offered.

[fn14] *See e.g. Shager v Upjohn Co.*, **913 F2d 398**, **403** (1990, Posner, J.)

("The growing difficulty that district judges face in scheduling civil trials, a difficulty that is due to docket pressures in general . . ., makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter because the plaintiffs case . . . is marginal"); *Canitia v Yellow Frgt. Sys., Inc.*, **903 F2d 1064**, **1068** (1990, Nelson, J., concurring), *cert denied* **498 US 984** (1990) ("Given the demands now being made on the time of most district courts, it seems to me that a full-scale trial in a case as lopsided as this one would probably be a misallocation of judicial resources").

[fn15] Given the serious questions regarding the actual efficiency gains of summary judgment (*See generally* Rave, *Questioning the Efficiency of Summary Judgment*, 81 NYU L Rev 875 [2006]), we are not convinced that the City's emphasis on ensuring that discrimination cases are resolved before a jury is necessarily inconsistent with maximizing the scarce use of judicial resources.

[fn16] We cannot put this holding in absolute terms — there can be limited exceptions to the rule that emerge on a case-by-case basis — but we write here to underline that the exceptions are intended to be true exceptions (*compare Williams*, **61 AD2d at 73-80**, **80** n 30 [the rule is that any difference in treatment reflected by harassment is actionable gender-based discrimination, with narrowly drawn affirmative defense to "narrowly target concerns about truly insubstantial cases" designed with the goal of making certain to avoid "improperly giving license to the broad range of conduct that falls between `severe or pervasive' on the one hand and a `petty slight or trivial inconvenience' on the other," with emphasis on the need to permit borderline situations to be heard by a jury, and with finding that one could "easily imagine a single comment that objectifies women being made in circumstances where their comment would, for example, signal views about the role of women in the workplace and be actionable"] *and Wilson v N.Y.P. Holdings, Inc.*, [**2009 BL 68010**], 2009 WL 873206, *28, **2009 US Dist LEXIS 28876**, *82 [SD NY 2009] [ignoring the *Williams* holding and finding comments like

"training females is like `training dogs'" and "women need to be horsewhipped" to not be actionable]; *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, **2011 WL 3586060**, *9, **2011 US Dist LEXIS 84790**, *27 [SD NY 2011] [wrenching the *Williams* reference to a "general civility code" out of context; inaccurately portraying the case as one whose principal concern was that too many victims of harassment were having the opportunity to be heard by juries, not the opposite; and collecting and relying on some of the many cases that nominally acknowledge *Williams* but ignore its teaching, including *Wilson*]). As with *Williams*, it is our intention that a limited and narrow exception is not intended to be simply the new means by which an old status quo is continued.

Pagination

* N.Y.3d

** N.E.2d

*** BL

Opinion >

Court of Appeals of the State of New York.

DOMINIKA ZAKRZEWSKA, Respondent, v. THE NEW SCHOOL, Appellant, et al., Defendant.

No. 62.

Argued March 22, 2010.

decided May 6, 2010

PROCEEDING, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.27, to review a question certified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following question was certified by the United States Court of Appeals and accepted by the New York State Court of Appeals: "Does the affirmative defense to employer liability articulated in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) apply to sexual harassment and retaliation claims under *section 8-107* of the New York City Administrative Code?" **[*470]**

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] **[*471] [**1036]**

Ward Norris Heller & Reidy LLP, Rochester (*Thomas S. D'Antonio* and *Meghan M. DiPasquale* of counsel), for appellant. I. Existing precedent supports application of the *Faragher/ Ellerth* defense (*Faragher v Boca Raton*, 524 US 775 [1998]; *Burlington Industries, Inc. v Ellerth*, 524 US 742 [1998]) to the claims in this case. (*Kolpien v Family Dollar Stores of Wis., Inc.*, 402 F Supp 2d 971; *Matter of Winkler v New York State Div. of Human Rights*, 59 AD3d 1055, 66 AD3d 1499; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295; *Dunn v Astoria Fed. Sav. & Loan Assn.*, 51 AD3d 474, 11 NY3d 705; *Pace v Ogden Servs. Corp.*, 257 AD2d 101; *Ferraro v Kellwood Co.*, 440 F3d 96; *Randall v Tod-Nik Audiology*, 270 AD2d 38; *Barnum v New York City Tr. Auth.*, 62 AD3d 736; *Citroner v Progressive Cos. Ins. Co.*, 208 F Supp 2d 328; *Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21.) II. The imposition of strict liability on The New School for Kwang-Wen Pan's acts is inconsistent with, and unsupported by, New York law. (*New York State Club Assn. v City of New York*, 69 NY2d 211, 487 US 1; *Consolidated Edison Co. of NY. v Town of Red Hook*, 60 NY2d 99; *Matter of Levy v City Commn. on Human Rights*, 85 NY2d 740; *F T. B. Realty Corp. v Goodman*, 300 NY 140; *Matter of Kress & Co. v Department of Health*, 283 NY 55; *Wholesale Laundry Bd. of Trade v City of New York*, 17 AD2d 327, 12 NY2d 998;

RJC Realty Holding Corp. v Republic Franklin Ins. Co., 2 NY3d 158; *Baker v Allen & Arnink Auto Renting Co.*, 231 NY 8, 543; *Jones v Weigand*, 134 App Div 644; *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247.) III. Even if *Faragher/Ellerth (Faragher v Boca Raton*, 524 US 775 [1998]; *Burlington Industries, Inc. v Ellerth*, 524 US 742 [1998]) is held inapplicable, the New York City Human Rights Law must be interpreted consistent with established pre-*Faragher/Ellerth* law, and plaintiffs claims are equally untenable as a result. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295; *Feingold v State of New York*, 366 F3d 138; *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44.) IV The New York City Human Rights Law does not mandate a strict liability standard for the acts of all supervisory staff. (*Faragher v Boca Raton*, 524 US 775; *Burlington Industries, Inc. v Ellerth*, 524 US 742; *Meritor Savings Bank, FSB v Vinson, All* US 57; *Ferraro v Kellwood Co.* , 440 F3d 96**[*472]** ; *Albemarle Paper Co. v Moody*, 422 US 405; *Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44; *Sormani v Orange County Community Coll.*, 240 AD2d 724.) V The policy underlying the Human Rights Law actually is impaired by the recognition of strict employer liability on the facts of **[***2]** this case. (*Jansen v Packaging Corp. of Am.*, 123 F3d 490; *Faragher v Boca Raton*, 524 US 775; *Burlington Industries, Inc. v Ellerth*, 524 US 742.) VI. The 2005 Restoration Act has no application to this case. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295; *Faragher v Boca Raton*, 524 US 775; *Barnum v New York City Tr. Auth.*, 62 AD3d 736; *Williams v New York City Hous. Auth.*, 61 AD3d 62; *Franz v Dregalla*, 94 AD2d 963; *Matter of Saunders v New York State Div. of Human Rights*, 288 AD2d 478; *Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577; *People ex rel. Griffith, Inc. v Loughman*, 249 NY 369; *Lewellyn v Frick*, 268 US 238.) VII. The recent judicial activism from the First Department in this area is irrelevant to this case. (*Williams v New York City Hous. Auth.*, 61 AD3d 62; *Faragher v Boca Raton*, 524 US 775; *Burlington Industries, Inc. v Ellerth*, 524 US 742; *Bumpus v New York City Tr. Auth.*, 18 Misc 3d 1131[A], 2008 NY Slip Op 50254[U], 66 AD3d 26; *Farrugia v North Shore Univ. Hosp.*, 13 Misc 3d 740; *Misicki v Caradonna*, 12 NY3d 511.)

Giskan Solotaroff Anderson & Stewart LLP, New York City (*Jason L. Solotaroff, Darnley D. Stewart* and *Amanda Masters* of counsel), for respondent. I. The plain language of the vicarious liability provisions of the City Human Rights Law precludes application of the *Faragher/Ellerth* defense (*Faragher v Boca Raton*, 524 US 775 [1998]; *Burlington Industries, Inc. v Ellerth*, 524 US 742 [1998]). (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653; *Williams v New York City Hous. Auth.*, 61 AD3d 62; *Matter of SIN, Inc. v Department of Fin. of City of NY*, 71 NY2d 616.) II. The importation of *Faragher/Ellerth (Faragher v Boca Raton*, 524 US 775 [1998]; *Burlington Industries, Inc. v Ellerth*, 524 US 742 [1998]) would conflict with and undermine the specific intention of the City Council in enacting the vicarious liability provisions, as reflected in the relevant legislative history, and would impermissibly ignore the overall policy — strikingly distinct from title VII of the Civil Rights Act of 1964 — that animated the City Human Rights Law. (*Meritor Savings Bank, FSB v Vinson*, 477 US 57.) III. The New School can point to no case applying the vicarious liability provisions of the City **[*473]** Human Rights Law that holds that the *Faragher/Ellerth* defense (*Faragher v Boca Raton*, 524 US 775

[1998]; *Burlington Industries, Inc. v Ellerth*, 524 US 742 [1998]) properly applies to City Human Rights Law claims. (*Matter of Winkler v New York State Div. of Human Rights*, 59 AD3d 1055; *Pace v Ogden Servs. Corp.*, 257 AD2d 101; *Dunn v Astoria Fed. Sav. & Loan Assn.*, 51 AD3d 474: *Randall v Tod-Nik Audiology*, 270 AD2d 38; *Ferraro v Kellwood Co.*, 440 F3d 96; *Citroner v Progressive Cos. Ins. Co.*, 208 F Supp 2d 328; *McGrath v Toys "R" Us, Inc.*, 3 NY3d 421; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295; *Kolpien v Family Dollar Stores of Wis., Inc.*, 402 F Supp 2d 971.) IV The Local Civil Rights Restoration Act reaffirms the independent purpose and language of the 1991 amendments to the City Human Rights Law, and specifically and unequivocally rejects the "lockstep" approach to City Human Rights Law interpretation. (*McGrath u Toys "R" Us, Inc.*, 3 NY3d 421; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295; *Loeffler v Staten Is. Univ. Hosp.*, 582 F3d 268; *Faragher v Boca Raton*, 524 US 775; *Burlington Industries, Inc. v Ellerth*, 524 US 742; *Barnum v New York City Tr. Auth.*, 62 AD3d 736; *Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117; *Matter of Solkav Solartechnik, G.m.b.H. [Besicorp Group]*, 91 NY2d 482.) V The City Council was authorized to legislate that employers would be strictly liable for the discriminatory acts of their managers and supervisors. (*New York State Club Assn. v City of New **[***3]** York*, 69 NY2d 211; *Wholesale Laundry Bd. of Trade v City of New York*, 17 AD2d 327, 12 NY2d 998; *People v Cook*, 34 NY2d 100; *DJL Rest. Corp. v City of New York*, 96 NY2d 91; *Consolidated Edison Co. of N.Y v Town of Red Hook*, 60 NY2d 99; *F T. B. Realty Corp. v Goodman*, 300 NY 140; *Matter of Kress & Co. v Department of Health*, 283 NY 55; *Krohn v New York City Police Dept*, 2 NY3d 329.) VI. This Court should not substitute The New School's policy judgment for that of the City Council. (*Jansen v Packaging Corp. of Am.*, 123 F3d 490; *Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14; *Matter of Excellus Health Plan v Serio*, 2 NY3d 166; *Matter of Heitzenrater [Hooker Chem. Corp. — Catherwood]*, 19 NY2d 1.) VII. The Court should not rewrite the New York City Human Rights Law to add a distinction between high-level and low-level supervisors.

Eisenberg & Schnell, LLP, New York City (*Herbert Eisenberg* and *Peter Basso* of counsel), for National Employment Lawyers Association/ NY Chapter and others, amici curiae. I. Importing a doctrine judicially designed as a gap-filler for title VII of the Civil Rights Act of 1964, a statute lacking a vicarious liability **[*474]** provision, into the City Human Rights Law, a statute with a detailed and explicit set of vicarious liability provisions, would violate basic principles of statutory construction. (*Faragher v Boca Raton*, 524 US 775; *Burlington Industries, Inc. v Ellerth*, 524 US 742; *Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367; *Williams u New York City Hous. Auth.*, 61 AD3d 62; *Matter of SIN, Inc. v Department of Fin. of City of NY.*, 71 NY2d 616; *Meritor Savings Bank, FSB v Vinson*, 477 US 57; *Matter of Totem Taxi v New York State Human Rights Appeal Bd.*, 65 NY2d 300.) II. No case law supports the proposition that *Faragher I Ellerth {Faragher v Boca Raton*, 524 US 775 [1998]; *Burlington Industries, Inc. v Ellerth*, 524 US 742 [1998]) is consistent with the language of Administrative Code of the City of New York *§ 8-107 (13)*. (*Williams v New York City Hous. Auth.*, 61 AD3d 62.) III. The Restoration Act prohibits reliance on cases that assume City Human Rights Law equivalence with state and federal counterparts, fail to consider the language of the City Human Rights Law, or fail to consider the uniquely broad and

remedial purposes of the City Human Rights Law. (*Faragher u Boca Raton*, 524 US 775; *Burlington Industries, Inc. v Ellerth*, 524 US 742; *Williams v New York City Hous. Auth.*, 61 AD3d 62; *Loeffler v Staten Is. Univ. Hosp.*, 582 F3d 268; *McGrath v Toys "R" Us, Inc.*, 3 NY3d 421; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295; *Ochei v Coler/Goldwater Mem. Hosp.*, 450 F Supp 2d 275; *Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117.) IV The City Human Rights Law is a valid exercise of local legislative authority. (*Faragher v Boca Raton*, 524 US 775; *Burlington Industries, Inc. v Ellerth*, 524 US 742; *Levin v Yeshiva Univ.*, 96 NY2d 484.)

Bond, Schoeneck & King, PLLC, New York City (*Mark N Reinharz, Louis P DiLorenzo* and *Peter A. Jones* of counsel), for Memorial Sloan-Kettering Cancer Center and others, amici curiae. I. The New York City Human Rights Law does not mandate strict liability for conduct by supervisors. (*Matter of Daimler-Chrysler Corp. v Spitzer*, 7 NY3d 653; *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270; *Matter of Orens v Novello*, 99 NY2d 180; *Rangolan v County of Nassau*, 96 NY2d 42; *People v Schulz*, 67 NY2d 144; *Matter of Friss v City of Hudson Police Dept.*, 187 AD2d 94; *Kurlander v Incorporated Vil. of Hempstead*, 31 Misc 2d 121; *Matter of Yolanda D.*, 88 NY2d 790; *Matter of Rodriguez v Perales*, 86 NY2d 361; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95.) II. A standard of strict liability is inappropriate for sexual harassment claims. (**[***4]** *Burlington Industries, Inc. v Ellerth*, 524 US 742**[*475]** ; *Faragher v Boca Raton*, 524 US 775; *Shager v Upjohn Co.*, 913 F2d 398; *Meritor Savings Bank, FSB v Vinson*, 477 US 57; *Spier v Barker*, 35 NY2d 444 ; *A/S Dampskibssetskabet Torm v United States*, 64 F Supp 2d 298; *Federal Ins. Co. v Sabine Towing & Transp. Co., Inc.*, 783 F2d 347; *Ellerman Lines, Ltd. v The President Harding*, 288 F2d 288; *Jansen v Packaging Corp. of Am.*, 123 F3d 490; *Barnes v Costle*, 561 F2d 983.)

Before: Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, SMITH, PIGOTT and JONES concur.

OPINION OF THE COURT

READ, J.

[1] In her second amended complaint, dated February 12, 2008, Dominika Zakrzewska brought a diversity suit against Kwang-Wen Pan and The New School in the United States District Court for the Southern District of New York, asserting claims for sexual harassment and retaliation under the New York City Human Rights Law (NYCHRL), title 8 of the New York City Administrative Code. The United States Court of Appeals for the Second Circuit has asked us whether

"the affirmative defense to employer liability articulated in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) appl[ies] to sexual harassment and retaliation claims under *section 8-107* of the New York City Administrative Code" (*Zakrzewska v New School* , 574 F3d 24, 28 [2d Cir 2009]).

For the reasons that follow, we answer this question in the negative.

I.

Zakrzewska enrolled as a freshman at the

School in the fall of 2002, and worked part time at the Print Output Center, located within the School's Academic Computing Center, beginning in April 2003. She alleges in her second amended complaint that Pan was her "immediate supervisor" at the Output Center; and that he subjected her to sexually harassing e-mails and conduct, beginning in January 2004 and continuing through May 2005, when she complained to School officials. She further claims that from August 2005 through **[*476]** 2006, Pan covertly monitored **[**1037]** her Internet usage at work in retaliation for her accusation.[fn*]

On August 13, 2008, the School moved for summary judgment to dismiss Zakrzewska's complaint, arguing that it was not vicariously liable for Pan's alleged sexual harassment, and that Zakrzewska could not establish a prima facie case of retaliation. For purposes of ruling on the motion, the District Court assumed that Zakrzewska had shown that she was sexually harassed by Pan; and mentioned that "there [was] at least some evidence that Pan was a manager or supervisor" (*Zakrzewska*, 598 F Supp 2d at 434), or, put another way, that "there [was] evidence from which a jury could conclude that Pan was a supervisory or managerial employee" (id. at 437).

The Judge then remarked that federal and state courts usually treat title VII of the Civil Rights Act of 1964 and local antidiscrimination laws as "substantially co-extensive" and therefore examine claims of employer liability for an employee's unlawful discriminatory acts under "the same analytical lens" (id. at 431). But here, the parties disagreed as to whether title VII's *Faragher-Ellerth* defense to sexual harassment liability applied under the NYCHRL; and, if it did, whether the School had satisfied its requirements, or, alternatively, a genuine issue of material fact remained (**[***5]** id. at 432). As explained by the District Court, the *Faragher-Ellerth* defense provides that

"an employer is not liable under Title VII for sexual harassment committed by a supervisory employee if it sustains the burden of proving that (I) no tangible employment action such as discharge, demotion, or undesirable reassignment was taken as part of the alleged harassment, (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (3) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (*id.* [internal quotation marks omitted]).

Commenting that *Faragher-Ellerth's* role in NYCHRL cases was "not free from doubt," the Judge elected to consider first whether the School would be entitled to dismissal of the sexual **[*477]** harassment claim under *Faragher-Ellerth* (id. at 437). After reviewing the record, he concluded that the School was, indeed, "entitled to judgment as a matter of law on the sexual harassment claim, assuming that the *Faragher-Ellerth* defense applied] to [Zakrzewska's] NYCHRL claim" (id. at 434). Having resolved this issue in the School's favor, the Judge next examined whether the NYCHRL, in fact, makes the *Faragher-Ellerth* defense available to employers sued for sexual harassment.

Section 8-107 (1) (a) of the NYCHRL prohibits discrimination on the basis of gender, and section 8-107 (13) (b) states that

"[a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:

"(1) the employee or agent *exercised managerial or supervisory responsibility;* or

"(2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective **[**1038]** action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

"(3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct" (emphasis added).

Based on this text, the District Court concluded that

"the local law *on its face* appear[ed] to impose vicarious liability on an employer for discriminatory acts of (1) a manager or supervisor, without regard to whether the employer or another of its managers or supervisors knew or should have known of those acts, and (2) a co-worker, provided the employer, or a manager or supervisor, knew of and acquiesced in, or should have known of, the co-worker's acts, among other circumstances" (*Zakrzewska*, **598 F Supp 2d at 434** [emphasis added]).

He pointed out, however, that because *Faragher-Ellerth's**[*478]*** relevance in NYCHRL cases was "an open question in [the] Circuit," he was obliged to decide "whether the New York courts would be likely to apply *Faragher-Ellerth* or to adopt a different interpretation **[***6]** of [**section 8-107 (13)** (b)]" (**id. at 435**).

Noting that New York, like most states, emphasizes fidelity to the text when interpreting a statute, the District Court concluded that

"[h]ere, the plain language of **Section 8-107**, subd. 13 (b), is inconsistent with the defense crafted by the Supreme Court in *Faragher* and *Ellerth.* [This provision] creates vicarious liability for the acts of managerial and supervisory employees even where the employer has exercised reasonable care to prevent and correct any discriminatory actions and even where the aggrieved employee unreasonably has failed to take advantage of employer-offered corrective opportunities . . . Given the lack of any substantial reason to believe that the New York Court of Appeals would not apply **Section 8-107**, subd. 13 (b), as it is written . . ., the Court holds that *Faragher-Ellerth* does not apply in NYCHRL cases" (**id. at 435**).

As for Zakrzewska's retaliation claim, the Judge first decided that there were disputed issues of material fact. Further, since retaliation is an unlawful discriminatory practice under the NYCHRL, he noted that the School would be vicariously liable for any retaliation by Pan by virtue of **section 8-107** (13) (b), assuming that *Faragher-Ellerth* did not apply. The Judge therefore denied the School's motion for summary judgment dismissing Zakrzewska's complaint.

The District Court then certified an interlocutory appeal to the Second Circuit pursuant to **28 USC § 1292** (b) because he was of the opinion that *Faragher-Ellerth's* applicability under the NYCHRL was "a controlling question of law," as to which there was "substantial ground for difference of opinion . . . the resolution of which would materially advance the ultimate termination of this litigation" (**598 F Supp 2d at 437**). The Judge observed that employment discrimination cases figured prominently in the district courts' dockets, and that "[t]he apparent tendency to press claims under the state and city anti-discrimination laws, either in lieu of or in addition to claims under federal statutes, create[d] a genuine need for resolution of the vicarious liability standards applicable to employers under **[*479]** those statutes" (*id.*). He therefore asked the circuit whether the *Faragher-Ellerth* defense applied to sexual **[**1039]** harassment and retaliation claims under *section 8-107*. The Judge remarked that the circuit might "in turn . . . see fit to certify this state law question to the New York Court of Appeals" (*id.* n 63), which the circuit subsequently did (*see Zakrzewska v New School*, **574 F3d at 28**).

II.

We have "generally interpreted" state and local civil rights statutes "consistently with federal precedent" where the statutes "are *substantively and textually* similar to their federal counterparts" (*McGrath v Toys "R" Us, Inc.*, **3 NY3d 421**, **429** [2004] [emphasis added]). And we have always strived to "resolve federal and state employment discrimination claims consistently" (*Matter of Aurecchione v New York State Div. of Human Rights*, **98 NY2d 21**, **25** [2002]). But we also "construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, **7 NY3d 653**, **660** [2006]).

Here, as the District Court correctly concluded, the **[***7]** plain language of the NYCHRL precludes the *Faragher-Ellerth* defense. In many ways, the NYCHRL parallels state law prohibiting discrimination by employers (*compare* Administrative Code of City of NY **§ 8-107 [1] [a]**, **[b]** *and* Executive Law § **296**). Unlike state law, though, subdivision (13) of **section 8-107** of the NYCHRL creates an interrelated set of provisions to govern an employer's liability for an employee's unlawful discriminatory conduct in the workplace. This legislative scheme simply does not match up with the *Faragher-Ellerth* defense.

First, the NYCHRL imposes liability on the employer in three instances: (1) where the offending employee "exercised managerial or supervisory responsibility" (the circumstance alleged in Zakrzewska's complaint); (2) where the employer knew of the offending employee's unlawful discriminatory conduct and acquiesced in it or failed to take "immediate and appropriate corrective action"; and (3) where the employer "should have known" of the offending employee's unlawful discriminatory conduct yet "failed to exercise reasonable diligence to prevent [it]" (*see* Administrative Code of City of NY *§ 8-107 [13] [b] [l]*-[3], quoted at 477, *supra).* Regarding the first two instances, an employer's antidiscrimination policies and procedures may be considered "in mitigation of the amount of civil penalties or punitive damages" recoverable in **[*480]** a civil action (*see* Administrative Code of City of NY *§ 8-107 [13] [e]*). As a result, even in cases where mitigation applies, compensatory damages, costs and reasonable attorneys' fees are still recoverable. Further, an employer's antidiscrimination policies and procedures —

which are at the heart of the *Faragher-Ellerth* defense — shield against liability, rather than merely diminish otherwise potentially recoverable civil penalties and punitive damages, only where an employer should have known of a non-supervisory employee's unlawful discriminatory acts (*id.).*

The New York City Council adopted **section 8-107 (13)** in 1991 as part of a major overhaul of the NYCHRL. In a side-by-side comparison of then-current law with the proposed new law, the Report of the Council's Committee on General Welfare describes new **section 8-107 (13)** as providing for

"*[s]trict liability in employment context for acts of managers and supervisors;* also liability in employment context for acts of co-workers where employer knew **[**1040]** of act and failed to take prompt and effective remedial action or should have known and had not exercised reasonable diligence to prevent. *Employer can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken*" (1991 NY City Legis Ann, at 187 [emphases added]).

Thus, **section 8-107 (13)**'s legislative history is consonant with its unambiguous language.

[2] Next, NYCHRL **§ 8-107 (13)** is not inconsistent with state laws, as the School contends. Article **IX**, § **2** (c) of the New York Constitution vests local governments with the power to enact only those laws that are not inconsistent with state law; specifically, "every local government shall have power to adopt **[***8]** and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government, " as well as labor, and the health and well-being of its residents. We have held that a local law is inconsistent "where local laws prohibit what would be permissible under State law, or impose prerequisite additional restrictions on rights under State law, so as to inhibit the operation of the State's general laws" (*Consolidated Edison Co. of N.Y. v Town of Red Hook*, **60 NY2d 99**, **108** [1983] [citations and internal quotation marks omitted]). A local law may, however, provide a greater penalty than state law (*see Wholesale Laundry Bd. of Trade v City of New York*, **17 AD2d 327**, **329-330** [1962]). **[*481]** Under these definitions of inconsistency, **section 8-107 (13)** is consistent with Executive Law § **296**, the state antidiscrimination statute. Both prohibit discrimination; NYCHRL **§ 8-107** merely creates a greater penalty for unlawful discrimination.

Further, the School's argument that **section 8-107 (13)** does not apply to all managers and supervisors is not supported by the statute's text. The School also contends that strict liability for discrimination impedes deterrence of workplace discrimination and so thwarts sound public policy. As the District Court pointed out, however, although "[t]he arguments for applying the *Faragher-Ellerth* test in state and local law cases are not trivial," ultimately such "considerations relevant to policy judgments [are] properly made by legislatures" (*Zakrzewska*, **598 F Supp 2d at 435**). For the same reason, we may not apply cases under the State Human Rights Law imposing liability only where the employer encourages, condones or approves the unlawful discriminatory acts (*see Matter of Totem Taxi v New York State Human Rights Appeal Bd.* , **65 NY2d 300** [1985]; *Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, **66 NY2d**

684 [1985]). By the plain language of NYCHRL § 8-107 (13) (b), these are not factors to be considered so long as the offending employee exercised managerial or supervisory control.

Finally, we note that our decision is not inconsistent with our holding in *Forrest u Jewish Guild for the Blind* (3 NY3d 295 [2004]). There, we made the general statement in a footnote that "the human rights provisions of the New York City Administrative Code mirror the provisions of the [State Human Rights Law] and should therefore be analyzed according to the same standards" (*id. at 305* n 3). The plaintiff in *Forrest* did not argue that NYCHRL *§ 8-107 (13)* imposes strict liability for a supervisor's unlawful discriminatory acts, and so we had no occasion to consider the point. Since **[**1041]** the plaintiff did not establish the elements of a hostile work environment under either state or local law, we did not even reach the question of whether the *Faragher-Ellerth* defense applies under the State Human Rights Law (*id. at 312* n 10).

Accordingly, the certified question should be answered in the negative. **[*482]**

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to *section 500.27* of the Rules of Practice of the New York State **[***9]** Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the negative.

[fn*] The facts underlying this lawsuit are set out in detail in the opinion of the United States District Court for the Southern District of New York (*see Zakrzewska v The New School*, 598 F Supp 2d 426 [SD NY 2009]).

Pagination

* A.D.3d

** N.Y.S.2d

*** BL

Opinion > **Concurring Opinion** >

Appellate Division of the Supreme Court of New York, First Department.

GINA WILLIAMS, Appellant, v. NEW YORK CITY HOUSING AUTHORITY et al., Respondents.

No. 4490.

January 27, 2009.

APPEAL from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered August 14, 2007. The order granted defendants summary judgment dismissing the amended complaint.

Williams v New York City Hous. Auth., *2007 NY Slip Op 34401(U)*, affirmed. **[**29]**

[*63]

Gina Williams, appellant pro se.

Ricardo Elias Morales, New York City (*Steven J. Rappaport* and *Donna M. Murphy* of counsel), for respondents.

Before: SAXE, GONZALEZ and CATTERSON, JJ.

OPINION OF THE COURT

ACOSTA, J.

Introduction

This appeal presents us with the opportunity to construe for the first time the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of NY [Restoration Act]).

Defendants' summary judgment motion — addressed to an amended complaint alleging a hostile work environment, disparate treatment on the basis of sex, and retaliation in violation of applicable provisions of the Executive Law and the New York City Administrative Code — was granted in its entirety. While we agree with the motion court that the claims arising under both **[*64]** the State and City Human Rights Laws must be dismissed, we take a different approach and consider the city claims under the commands of the Restoration Act, as a distinct analysis is required to fully appreciate and understand the distinctive and unique contours of the local law in this area.

Background

Plaintiff was, at all times relevant to the action, an employee of defendant Housing Authority. From November 1995 to June 2004, she worked

as a heating plant technician assigned to the Authority's South Jamaica Houses development. As such, she was responsible for maintaining the development's heating system.

The pro se plaintiff commenced this action in August 2001. After converting defendants' dismissal motion to one for summary judgment, Justice Louise Gruner Gans dismissed the claims asserted under title VII of the federal Civil Rights Act of 1964 (as amended), and otherwise granted plaintiff's motion for leave to amend the complaint. In the 2003 amended complaint, plaintiff alleged that defendants engaged in, or permitted, a hostile work environment, disparate treatment on the basis of sex, and retaliation, all in violation of Executive Law § **296** (1) (a); **(6)** and **(7)** and **Administrative Code of the City of NY § 8-107 (1) (a)**; **(6)** and **(7).** **[**30]**

Plaintiff alleged she was sexually harassed in January 1997, when her supervisor allegedly told her, after she had requested facilities to take a shower, "You can take a shower at my house." Plaintiff alleged a second incident on October 21, 1998, where sex-based remarks were made in her presence, although not directed at her. Plaintiff interpreted some of those remarks as being complimentary to a coworker, and a disparaging reference to the supervisor's own wife.

For her disparate treatment claim, plaintiff alleged that her supervisor denied her tools that she needed for her work, preferred (**[***2]** higher paying) shifts, and some training, all during her probationary year (i.e., no later than 1996). Plaintiff acknowledges that she was ultimately permitted to work the preferred shifts when they were vacated by employees of longer standing. She also alleged that she was denied two training opportunities in 2001. The record reflects that plaintiff did participate in other substantial training throughout her tenure.

Plaintiff asserted that she was retaliated against after making complaints about discriminatory treatment. She alleges that in **[*65]** August 1999 she had to do work outside of her regular duties; specifically, she was required to strip and wax the boiler room office floor, a task that she completed in two regular workdays. Plaintiff also asserted that in August 2001, she was required to perform work in the field and to respond to tenant complaints, work she claimed was customarily given to utility staff. She alleged that a 2002 incident of retaliation consisted of her supervisor's refusal to permit her to take "excused time" to resolve a parking ticket she had received.

Plaintiff was promoted in June 2004 to become an assistant superintendent.

In August 2007, the court (Michael D. Stallman, J.) granted defendants' motion for summary judgment dismissing the amended complaint in its entirety (*2007 NY Slip Op 34401[U]*). The sexual harassment claim was dismissed on the basis that the conduct complained of was not "severe or pervasive." (*Id.* at *4.)

On the disparate treatment claim, the court found the allegations from plaintiff's probationary year were time-barred because they were not part of a continuing pattern of discriminatory conduct. It also found that plaintiff had attended at least nine one- or two-day training courses, and did not allege that she suffered any injury as a result of not attending more. Finally, it found that plaintiff accepted a promotion offered in May 2004, and

had not claimed that she would have been promoted earlier had she taken more classes. The court characterized the disparate treatment claim as missing the necessary element of an "adverse employment action." (*Id.* at *5.)

Evaluating the retaliation claim, the court found that a one-time assignment to perform a task arguably within plaintiff's duties did not constitute retaliation, and that the other claims did not involve being treated differently from workers who had not complained.

We agree with the court's analysis as it pertains to plaintiff's state claims under the Executive Law. The decision dismissing the action failed, however, to properly construe plaintiff's claims under the Restoration Act, **[fn1]** which mandates that courts be sensitive to the distinctive language, purposes, and method of analysis required by the City Human Rights Law (City HRL), requiring an analysis more stringent than that called for under either title VII or the State Human Rights Law (State **[**31]** HRL). In **[*66]** light of this explicit legislative policy choice by the City Council, we separately analyze plaintiff's City HRL claims.

I. Requirements and Purposes of the Restoration **[***3]** Act

While the Restoration Act amended the City HRL in a variety of respects, **[fn2]** the core of the measure was its revision of **Administrative Code § 8-130**, the construction provision of the City HRL:

"The provisions of this [chapter] *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.*" (Local Law 85 *§ 7* [deleted language in brackets, new language emphasized].)

As a result of this revision, the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart state or federal civil rights laws.

Section 1 of the Restoration Act amplifies this message. It states that the measure was needed because the provisions of the City HRL had been "construed too narrowly to ensure protection of the civil rights of all persons covered by the law." It goes on to mandate that provisions of the City HRL be interpreted "independently from similar or identical provisions of New York state or federal statutes." (*Id.*) Taking *sections 1* and **7** of the Restoration Act together, it is clear that interpretations of state or federal provisions worded similarly to City HRL provisions may be used as aids in interpretation only to the extent that the counterpart provisions are viewed "as a floor below which the City's Human Rights law cannot fall, rather **[*67]** than a ceiling above which the local law cannot rise" (*§ 1*), and only to the extent that those state or federal law decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law (*§ 7*).

The Committee Report accompanying the

legislation likewise states that the intent of the Restoration Act was to "ensure construction of the City's human rights law in line with the purposes of fundamental amendments to the law enacted in 1991," and to reverse the pattern of judicial decisions that had improvidently "narrowed the scope of the law's protections" (Rep of Comm on Gen Welfare, 2005 NY City Legis Ann, at 536).

The City Council's debate on the legislation made plain the Restoration Act's intent and consequences:

"Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy. There are many illustrations of cases, like *Levin* on marital status, *Priore[,] McGrath* and *Forrest* that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore [*sic* ***[**32]***] the text of specific provisions of the law, or both. With [the Restoration Act], these cases and others like them, will no longer hinder the vindication of our **[***4]** civil rights."[fn3]

In other words, the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its state and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, [fn4] **[*68]** and (c) cases that had failed to respect these differences were being legislatively overruled.

There is significant guidance in understanding the meaning of the term "uniquely broad and remedial." For example, in telling us that the City HRL is to be interpreted "in line with the purposes of the fundamental amendments to the law enacted in 1991," the Council's committee was referring to amendments[fn5] that were

"consistent in tone and approach: every change either expanded coverage, limited an exemption, increased responsibility, or broadened remedies. In case after case, the balance struck by the Amendments favored victims and the interests of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into state and federal law."[fn6]

The Council directs courts to the key principles that should guide the analysis of claims brought under the City HRL:

"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" (Committee Report, 2005 NY City Legis Ann, at 537).

In short, the text and legislative history represent a desire that the City HRL "meld the broadest vision of social justice with the strongest law enforcement deterrent."[fn7] Whether or not **[*69]** that desire is wise **[**33]** as a matter of legislative policy, our judicial function is to give force to legislative decisions.[fn8]

As New York's federal and state trial courts begin to recognize the need to take account of the Restoration Act, the application of the City HRL as amended by the Restoration Act must

become the rule and not the exception.[fn9]

II. Retaliation

In 1991, the anti-retaliation provision of the City HRL (Administrative Code § 8-107 [7]) — which had been identical to **[*70]** the State HRL provision — was amended in pertinent part to proscribe retaliation "*in any manner*" (Local Law No. 39 [1991] of City of NY *§ 1*). If courts were to construe this language to make actionable only conduct that has caused a materially adverse impact on terms and conditions of employment, it would constitute a significant narrowing of the Council's proscription on retaliation "in any manner." However, courts have consistently engaged in this construction. Therefore, the City Council was determined, via the Restoration Act of 2005, to

"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 [title VII] retaliation claims . . . [and] is in line with the standard set out in the guidelines of **[***5]** the Equal Employment Opportunity Commission" (Committee Report, 2005 NY City Legis Ann, at 536).

In section 8 (D) (3) **[**34]** of its Compliance Manual (1998), dealing with the subject of retaliation, the Equal Employment Opportunity Commission (EEOC) indicates that the

"broad view of coverage accords with the primary purpose of the anti-retaliation provisions, which is to `[m]aintain[] unfettered access to statutory remedial mechanisms.' Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions" (citations omitted).[fn10]

To accomplish the purpose of giving force to the earlier proscription on retaliation "in any manner, " the Restoration Act amended section 8-107 (7) to emphasize that

"[t]he retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse **[*71]** change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity."

In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities. [fn11] Accordingly, the language of the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable. On the contrary, no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, "reasonably likely to deter a person from engaging in protected activity."

[fn12]

[1] Turning to the retaliation claims, it is clear that even under this broader construction, plaintiff's claim that her assignment to strip and wax the boiler room office floor did not constitute retaliation. It is certainly possible for a jury to conclude that someone would be deterred from making a complaint if knowing that doing so might result in being assigned to duties outside or beneath one's normal work **[**35]** tasks. However, an examination of this record shows conclusively that plaintiff cannot link her complained-of assignment to a retaliatory motivation. The same allegedly "out of title" work was given to noncomplaining employees for whom the work was not normally part of the job. **[*72]**

Although not raised expressly on appeal by the pro se plaintiff, **[***6]** her other retaliation claims are similarly unavailing. Her assignment to do field work and respond to tenant complaints did not represent a difference in treatment attributable to retaliation, since the record shows that other workers (who did not complain of discrimination) were given similar assignments. The failure to grant plaintiff "excused time" to deal with a parking ticket also did not represent a difference in treatment from workers who did not complain of discrimination.[fn13] Accordingly, plaintiff's retaliation claim must fail.

III. Continuing Violations

In *National Railroad Passenger Corporation v Morgan* (536 US 101 [2002]), the Supreme Court established that for federal law purposes, the "continuing violation" doctrine only applied to harassment claims as opposed to claims alleging "discrete" discriminatory acts. At the time the comprehensive 1991 Amendments to the City HRL were enacted, however, federal law in the Second Circuit did not so limit continuing violation claims (*see e.g. Acha v Beame*, 570 F2d 57, 65 [2d Cir 1978] [holding that a continuing violation would exist if there had been a continuing policy that "limited opportunities for female participation" in the work force, including policies related to "hiring, assignment, transfer, promotion and discharge"]; *see also Cornwell v Robinson*, 23 F3d 694, 703-704 [2d Cir 1994] [reaffirming the vitality of the continuing violation doctrine where there had been a consistent pattern of discriminatory hiring practices]). There is no reason to believe that the Supreme Court's more restrictive rule of 2002 was anticipated when the City HRL was amended in 1991, or even three years after that ruling, when the Restoration Act was passed in 2005.[fn14] On the contrary, the Restoration Act's uniquely remedial provisions **[*73]** are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period. **[**36]** The continuing violation doctrine is discussed in the specific context of plaintiff's sexual harassment and disparate treatment claims, infra, at parts IV and V, respectively.

IV. Sexual Harassment

In 1986 the Supreme Court ruled, for federal law purposes, that sexual harassment must be "severe or pervasive" before it could be actionable (*Meritor Savings Bank, FSB v Vinson*, 477 US 57, 67 [1986]).[fn15] The "severe or pervasive" rule has resulted in courts "assigning

a significantly lower importance to the right to work in an atmosphere free from discrimination" than other terms and conditions of work.[fn16] The rule (and its misapplication) has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender.[fn17]

[2] Before the Restoration Act, independent development of the City HRL was limited by the assumption that decisions interpreting federal law could safely be imported into local human rights law because, it was said, any broad anti-discrimination **[***7]** policies embodied in state or local law are "*identical* to those underlying the federal statutes" (*McGrath*, 3 NY3d at 433 [emphasis added]). If the City Council had wanted to depart from a federal doctrine, *McGrath* stated, it should have **[*74]** amended the law to rebut that doctrine specifically (id. at 433-434). The City Council responded to the premise set forth in *McGrath*, legislatively overruling *McGrath* by amending the construction provision of Administrative Code § 8-130, and putting to an end this view of the City HRL as simply mimicking its federal and state counterparts.[fn18] By making a specific textual amendment to the construction provision (something not done in 1991), the Council formally and unequivocally rejected the assumption that the City HRL's purposes were identical to those of counterpart civil rights statutes. In its place, the Council instructed the courts — reflected in text and legislative history — that it wanted the City HRL's provisions to be construed *more broadly than federal civil rights laws and the State HRL*, and wanted the local **[**37]** law's provisions to be construed as *more remedial than federal civil rights laws and the State HRL* (Administrative Code § 8-130 [as amended by Local Law No. 85 [2005] § 7]).

The Council saw the change to section 8-130 as the means for obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law. While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, section 8-130's specific *construction* provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions" (*A Return to Eyes on the Prize*, 33 Fordham Urb LJ at 280). [fn19]

Accordingly, we first identify the provision of the City HRL we are interpreting and then ask, as required by the City **[*75]** Council: What interpretation "would fulfill the uniquely broad and remedial purposes of the City's human rights law."[fn20] Despite the popular notion that "sex discrimination" and "sexual harassment" are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination. There is no "sexual harassment provision" of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender (Administrative Code § 8-107 [1] [a]).[fn21]

As applied in the context of sexual harassment, therefore, the relevant question is what constitutes inferior terms and conditions based on gender. One approach would be to import the "severe or pervasive" test, a rule that the Supreme Court has characterized as "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury" (*Harris v Forklift Systems, Inc.*, 510 US 17, 21 [**38] 1993]). This "middle path," however, says bluntly

that a worker whose terms and conditions of employment include being on the receiving end of all unwanted gender-**[***8]** based conduct (except what is severe or pervasive) is experiencing essentially the same terms and conditions **[*76]** of employment as the worker whose employer has created a workplace free of unwanted gender-based conduct.

Twenty-two years after *Meritor* (**477 US 57** [1986]), it is apparent that the two workers described above do not have the same terms and conditions of employment. Experience has shown that there is a wide spectrum of harassment cases falling between "severe or pervasive" on the one hand and a "merely" offensive utterance on the other.**[fn22]** The City HRL is now explicitly designed to be broader and more remedial than the Supreme Court's "middle ground," a test that had sanctioned a significant spectrum of conduct demeaning to women. With this broad remedial purpose in mind, we conclude that questions of "severity" and "pervasiveness" are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability (*Farrugia*, **13 Misc 3d at 748-749**).

In doing so, we note that the "severe or pervasive" test reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status. In contrast, a rule by which liability is normally determined simply by the existence of differential treatment (i.e., unwanted gender-based conduct) maximizes the law's deterrent effect. It is the latter approach — maximizing deterrence — that incorporates "traditional methods and principles of law enforcement," one of the principles by which our analysis must be guided (Committee Report, 2005 NY City Legis Ann, at 537). Permitting a wide range of conduct to be found beneath the "severe or pervasive" bar would mean that discrimination is allowed to play *some significant role* in the workplace. Both Administrative Code **§ 8-101** and the Committee Report accompanying the Restoration Act say the analysis of the City HRL must be guided by the need to make sure that discrimination plays *no* role (2005 NY City Legis Ann, at 537), a principle again much more consistent with a rule by which liability is normally determined simply by the existence of unwanted gender-based conduct. Finally, the "severe or pervasive" doctrine, by effectively treating as actionable only a small subset of workplace actions that demean women or members of other protected classes, is contradicted by the Restoration **[*77]** Act principle that the discrimination violations are per se "serious injuries" (*id.*).**[fn23]** Here again, a focus on differential treatment better serves the purposes of the statute.

Further evidence in the legislative history precludes making the standard for sexual harassment violations a carbon copy of the federal and state standard. The City HRL's enhanced liberal construction requirement was passed partly in recognition of multiple complaints that a change to **section 8-130** was necessary to prevent women from being hurt by the unduly restrictive "severe or pervasive" standard. The Council had been told that the "severe or **[**39]** pervasive" standard "continuously hurts women" and "means that many **[***9]** victims of sexual harassment may never step forward."**[fn24]** Likewise, the Council was told that "without any consideration of what standard would best further **[*78]** the purposes of the City Law, women who have been sexually harassed are routinely thrown out of court

without getting a chance to have a jury hear their claims because a judge uses the federal standard that they have not been harassed enough"[fn25] and that "[w]e have long had the problem of judges insisting that harassment [has] to be `severe or pervasive' before it is actionable, even though such a requirement unduly narrows the reach of the law."[fn26]

For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred (Administrative Code § 8-107 [1] [a]; *see Farrugia*, 13 Misc 3d at 748-749 ["Under the City's law, liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages" (quoted in *Selmanovic*, [2007 BL 250943], 2007 WL 4563431 at *4, 2007 US Dist LEXIS 94963 at *11)]).[fn27]

[**40] *Farrugia* was recently criticized in *Gallo* for its focus on "`unequal' treatment," the latter decision insisting that the "severe or pervasive" restriction be applied to City HRL claims just as the restriction is applied to title VII and State HRL claims (585 F Supp 2d at 537). We conclude that the criticism simply does not recognize the City HRL's broader remedial purpose. The *Gallo* decision states:

"A single instance of `unequal' treatment (between, say, a man and woman or a homosexual and heterosexual) can constitute `discrimination,' but may not qualify as `harassment' of the sort needed to create **[*79]** a hostile work environment. If inequality of treatment were all that the hostile work environment law required, hostile work environment and discrimination claims would merge." (Id. at 537-538.)

In other words, the *Gallo* court begins with the premise that it is necessary to maintain the distinction that current federal law makes between non-harassment sex discrimination claims on the one hand (where a permissive standard is applied) and sex discrimination claims based on harassment (where "hostile work environment" is the term of art describing the application of a restrictive standard). Contrary to the assumption embedded in *Gallo*, [fn28] the task under the City HRL, as amended by the Restoration Act, is not to ask "Would a proposed interpretation differ from federal law?" but rather "How differently, if at all, should harassment and non-harassment sex discrimination cases be evaluated to achieve the City HRL's uniquely broad and remedial purposes?"[fn29]

As discussed above, we conclude that a focus on unequal treatment based on gender — regardless of whether the conduct is "tangible" (like hiring or firing) or not — is in fact the approach that is most faithful to the uniquely broad and remedial purposes of the **[***10]** local statute. To do otherwise is to permit far too much unwanted gender-based conduct to continue befouling the workplace.

Our task, however, is not yet completed because, while the City HRL has been structured to emphasize the vindication of civil rights over shortcuts that reduce litigation volume, we

recognize that the broader purposes of the City HRL do not con-note an intention that the law operate as a "general civility code" (*Oncale v Sundowner Offshore Services, Inc.*, 523 US 75, 81 [1998] [discussing title VII]). **[**41]** The way to avoid this result is **[*80]** not by adopting *Oncale's* overly restrictive "severe or pervasive" bar, but by recognizing an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences."

In doing so, we narrowly target concerns about truly insubstantial cases, while at the same time avoiding improperly giving license to the broad range of conduct that falls between "severe or pervasive" on the one hand and a "petty slight or trivial inconvenience" on the other. By using the device of an affirmative defense, we recognize that, in general, "a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation" (*Gallagher v Delaney*, 139 F3d 338, 342 [2d Cir 1998]). At the same time, we assure employers that summary judgment will still be available where they can prove that the alleged discriminatory conduct in question does not represent a "borderline" situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences.

[3] In the instant case, the complaint was filed in August 2001. As such, actions that occurred prior to August 1998 would normally be barred except if the continuing violation doctrine applies. During the limitations period, the only harassment allegation supported by evidence that could be credited by a jury consists of comments made in plaintiff's presence on one occasion in October 1998 that were not directed at her, and were perceived by her as being in part complimentary to a coworker. These comments were, in view of plaintiff's own experience and interpretation, nothing more than petty slights or trivial inconveniences, and thus are not actionable.[fn30]

Prior to the limitations period, the record does reflect the inappropriate comment about taking a shower, made in January 1997 (i.e., 19 months before the start of the limitations period). Since this pre-limitations period comment was not joined to actionable **[*81]** conduct within the limitations period, [fn31] the continuing violation doctrine does not render the complaint about the January 1997 comment timely. Accordingly, plaintiff's sexual harassment claims must fail.

V. Other Disparate Treatment Claims

Plaintiff's allegations regarding not initially being provided **[***11]** with necessary tools and not being assigned to more desirable work-shift assignments refer to conduct in 1995 and 1996. The absence of any problem for at least 20 months prior to the start of the limitations period does not evidence a "consistent pattern," and in any event, there is no connection to actionable conduct during the limitations period. Plaintiff does not show differences in treatment with male workers in the limitations period; like other workers, she received **[**42]** substantial training. [fn32] It is thus unnecessary to reach the issue of the "materiality" of these non-harassment claims.[fn33]

Accordingly, the order of Supreme Court, New York County (Michael D. Stallman, J.), entered August 14, 2007, which granted defendants summary judgment dismissing the amended complaint, should be affirmed, without costs.

[fn1] *See* 2005 NY City Legis Ann, at 528-535.

[fn2] These include reemphasizing the breadth of the anti-retaliation requirement, discussed infra, in part II. Other provisions include creating protection for domestic partners, increasing civil penalties for claims brought administratively, restoring attorney's fees for "catalyst" cases, and requiring thoroughness in administrative investigations conducted by the New York City Human Rights Commission.

[fn3] Statement of Annabel Palma at the meeting of the NY City Council (Sept. 15, 2005, transcript at 41). Council Member Palma was a member of the Committee on General Welfare that had brought the bill to the floor of the Council. Committee Chairman Bill deBlasio emphasized that "localities have to stand up for their own visions" of "how we protect the rights of the individual," regardless of federal and state restrictiveness (transcript at 47). Council Member Gale Brewer, the chief sponsor of the Restoration Act, reiterated the comments of Palma and deBlasio, and the importance of making sure that civil rights protections "are stronger here than [under] the State or federal law" (transcript at 48-49). (Transcript on file with NY City Clerk's Office and NY Legislative Service.)

[fn4] The City Council in amending Administrative Code § 8-130 could have mandated that "some" provisions of the law be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof or that "new" provisions of the law be so construed. The Council instead made the "shall construe" language applicable to "[t]he provisions of this title" without limitation.

[fn5] Local Law No. 39 (1991) of City of NY.

[fn6] (Professor Craig Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law*, 33 Fordham Urb LJ 255, 288 [2006].) The article — described elsewhere as "an extensive analysis of the purposes of the Local Civil Rights Restoration Act, written by one of the Act's principal authors" (*Ochei v Coler/Goldwater Mem. Hosp.*, 450 F Supp 2d 275, 283 n 1 [SD NY 2006]) — summarizes some of the dramatic changes of the 1991 Amendments (*see* Gurian at 283-288).

[fn7] (Gurian, A *Return to Eyes on the Prize*, 33 Fordham Urb LJ at 262.) This is consistent with statements and testimony of the Association of the Bar of the City of NY (letter dated Aug. 1, 2005), the Brennan Center for Justice at New York University School of Law (July 8, 2005), and the Anti-Discrimination Center of Metro New York, Inc. (Apr. 14, 2005), all on file with the Committee on General Welfare and the NY Legislative Service, each confirming that the Council sought to have courts maximize civil rights protections. For example, the Bar Association, at page 4 of its letter, referred to "the Council's clear intent to provide the greatest possible protection for civil rights." At the Council's debate prior to passage, Council Member Palma described the Bar Association and Brennan Center statements as important to the Committee, and characterized the Anti-Discrimination Center's testimony as "an

excellent guide to the intent and consequences of [the] legislation we pass today." (Transcript at 41.)

[fn8] We note in this context two cardinal rules of statutory construction: that legislative amendments are "deemed to have intended a material change in the law" (McKinney's Cons Laws of NY, Book 1, Statutes § 193 [a]), and that "courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy" (*id.* § 95). As such, we are not free to give force to one section of the law that has specifically been amended (*e.g.* Administrative Code § 8-107 [7]) and decline to give force to another (*e.g.* § 8-130). We must give force to all amendments, and not relegate any of them to window dressing.

[fn9] *See e.g. Selmanovic v NYSE Group, Inc.*, [2007 BL 250943], 2007 WL 4563431, *4-6, 2007 US Dist LEXIS 94963, *9-20 (SD NY) (recognizing the Restoration Act's enhanced liberal construction requirement, and its impact on sexual harassment and retaliation claims under the local law); *Pugliese v Long Is. R.R. Co.*, [2006 BL 4086], 2006 WL 2689600, * 12-13, 2006 US Dist LEXIS 66936, *38-40 (ED NY) (identifying Administrative Code § 8-107 [13] [b] [1] as the city law's explicit statutory basis for imposing vicarious liability on those exercising managerial or supervisory authority, and noting that "the breadth and scope of CHRL will often yield results different from Title VII" [[2006 BL 4086], 2006 WL 2689600 at *13, 2006 US Dist LEXIS 66936 at *40]); *Okayama v Kintetsu World Express (U.S.A.) Inc.*, 2008 NY Slip Op 31691(U) (Sup Ct, NY County) (holding that the explicit statutory structure of Administrative Code § 8-107 [13] [b] precludes the availability of the federal *Faragher* affirmative defense where the conduct of those exercising managerial or supervisory authority is at issue); *Farrugia v North Shore Univ. Hosp.*, 13 Misc 3d 740, 747 (2006) (noting that "The New York City Human Rights Law was intended to be more protective than the state and federal counterparts"); *Bumpus v New York City Tr. Auth.*, 18 Misc 3d 1131(A), 2008 NY Slip Op 50254(U), *3 (noting that "The legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation").

[fn10] The Committee Report cited, inter alia, *Ray v Henderson* (217 F3d 1234, 1241-1243 [9th Cir 2000]) to help illustrate the broad sweep of the reemphasized city anti-retaliation provision.

[fn11] See discussion in *A Return to Eyes on the Prize* (33 Fordham Urb LJ at 321-322).

[fn12] Subsequent to passage of the Restoration Act, the U.S. Supreme Court modified the title VII anti-retaliation standard (*Burlington N. & S. F. R. Co. v White*, 548 US 53 [2006]). In doing so, however, *Burlington* still spoke in terms of "material adversity," i.e., conduct that might have dissuaded a reasonable worker from making or supporting a charge of discrimination (id. at 68 [emphasis omitted]). While this was a standard similar to that set forth in section 8-107 (7), it cannot be assumed that cases citing *Burlington* adequately convey the full import of the City HRL standard, especially because the confusing use of the term "materially adverse" might lead some courts to screen out some types of conduct *prior* to conducting "reasonably likely to deter" analysis. In fact, to reiterate, section 8-107 (7) specifically rejects a materiality requirement.

[fn13] There is no evidence in the record to suggest that in the circumstances presented, the failure to grant such time off was an act reasonably likely to deter a person from engaging in protected activity.

[fn14] See, for example, the statement of then-Mayor Dinkins in connection with the signing of the 1991 Amendments, quoted in the 2005 Committee Report, that "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 marching backward on civil rights issues" (Committee Report, 2005 NY City Legis Ann, at 536). This desire for enhanced liberal construction was directly resisted in *McGrath v Toys "R" Us, Inc.* (3 NY3d 421 [2004]), a case in which a narrow, post-1991 interpretation of federal law was transplanted into the Administrative Code without Council action (Committee Report at 537). Indeed, one motivation expressed by the Committee for passing the Restoration Act was that construction of numerous provisions of the City HRL "narrowed the scope of the law's protections" (*id. at 536*). *McGrath* was specifically identified on the floor of the Council as a case inconsistent with the requirements of the Restoration Act (*see* Council Member Palma's statement preceding footnote 3, *supra*).

[fn15] Although the assumption has been that such a rule applies to the City HRL (*see*, for example, the recent case of *Gallo v Alitalia-Linee Aeree Italiane-Societa per Azione* [585 F Supp 2d 520, 536-537 (SD NY 2008)]), the fact is that "severe or pervasive" was not the accepted City HRL rule at the time of the 1991 Amendments (*see* discussion in *A Return to Eyes on the Prize* [33 Fordham Urb LJ at 300-301]). Moreover, there is no evidence that "severe or pervasive" has ever been subjected to liberal construction analysis, let alone the enhanced analysis required by the Restoration Act.

[fn16] Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates among "Terms and Conditions" of Employment*, 62 Md L Rev 85, 87 (2003).

[fn17] *Id.* at 111-134 (describing a variety of techniques by which claims have been turned away using "severe or pervasive" as a shield for discriminators).

[fn18] (*See* Committee Report, 2005 NY City Legis Ann, at 537.) Importantly, the way that the Council responded to *McGrath* was not by dealing with the specific topic of the case (the availability of attorney's fees in circumstances where only nominal damages are awarded), but by changing the method of analysis applicable to *all* provisions of the law. *McGrath*, of course, was also explicitly mentioned on the floor of the City Council as one of the cases that, with the passage of the Restoration Act, would — in Council Member Palma's words — "no longer hinder the vindication of our civil rights" (*see* text preceding footnote 3, *supra*). In light of the foregoing, it is puzzling that *Gallo* would make the identical Council "could have done so" argument already specifically rejected by the Restoration Act (*see* 585 F Supp 2d at 537).

[fn19] See also page 4 of the Bar Association letter (*supra* at footnote 7), reciting the expectation that the undoing of narrow construction of the law by legislative amendment "should no longer be necessary" if there is

judicial appreciation for the Restoration Act's intention that the law provide "the greatest possible protection for civil rights," and page 5 of the Brennan Center statement (same footnote), noting the suggestion that

"a better approach would be for the Council to limit itself to specifically overruling individual interpretations that it views as unduly restrictive. However, this approach has proven ineffective in the past, as the courts have tended to construe narrowly specific Council amendments. Without an explicit instruction that the City Human Rights Law should be construed independently, courts will continue to weaken New York City's Law with restrictive federal and state doctrines."

[fn20] See Committee Report (2005 NY City Legis Ann, at 538 n 8). See also page 4 of the Bar Association letter (*supra* at footnote 7) that construction must flow from "the Council's clear intent to provide the greatest possible protection for civil rights," and page 6 of the Anti-Discrimination Center testimony (same footnote) that "[i]n the end, regardless of federal interpretations, the primary task of [a] judge hearing a City Human Rights Law claim is to find the interpretation for the City law that most robustly further[s] the purposes of the City statute."

[fn21] The fact that title VII has language similar to that of the City HRL does not even begin our inquiry, let alone end it. The Restoration Act made clear, with specific statutory language, that the obligation to determine what interpretation best fulfills the city law's purposes is in no way limited by the existence of cases that have interpreted analogous federal civil rights provisions (Administrative Code § 8-130; *cf. Gallo* [where the court apparently believed there was something called "the hostile work environment law" (585 F Supp 2d at 538), but never asked what interpretation of section 8-107 (1) (a)'s "terms (and) conditions" language would best fulfill the uniquely broad and remedial purposes of the City HRL]).

[fn22] It would be difficult to find a worker who viewed a job where she knew she would have to cope with unwanted gender-based conduct (except what is severe or pervasive) as equivalent to one free of unwanted gender-based conduct.

[fn23] As already noted, the fact that conduct is actionable does not control the amount of damages to be awarded.

[fn24] (Kathryn Lake Mazierski, President, New York State Chapter of the National Organization for Women, testimony at hearing of the City Council's Committee on General Welfare, at 49-50 [Sept. 22, 2004] [NOW testimony, transcript on file with NY City Clerk's Office]). Note that *Gallo* asserts that organizations sought to have the "severe and pervasive" test "removed" from the City HRL, that the Council "ignored" that suggestion and "amended only those specific portions of the CHRL that the City thought needed to be addressed," and that Professor Gurian's article supports that account (585 F Supp 2d at 537). In so stating, *Gallo* ignores the legislative history and mischaracterizes the article. In fact, as discussed *supra*, the most important specific textual changes made by the Council were the changes to section 8-130 — changes designed to control the construction of every other provision of the HRL, and so important that they were doubly emphasized in *section 1* of the Restoration Act. Contrary to *Gallo*, neither the New York Chapter of NOW nor

any of the other organizations that spoke to this issue had argued that the City Council should revise the text of **section 8-107 (1)** (a)'s terms and conditions provision to proscribe the "no severe or pervasive" limitation, and the Council made no decision to "adopt" the "severe or pervasive" rule. Instead, the organizations all raised the issue as part of their (successful) advocacy to have the language of **section 8-130** changed. For example, Ms. Mazierski, after describing the "problem of hitching the local law to a federal standard" (NOW testimony at 47), argued for an enhanced liberal construction provision: "If judges are forced to look at a proper standard for sexual harassment claims under the City's Human Rights Law, independent [of] the federal standard, *we will be able to have an argument on the merits and not be stuck on the standard that continuously hurts women" (id.* at 50 [emphasis added]). As for Professor Gurian's article, it set forth the decision that the City Council actually made, describing the enhanced liberal construction provision as the Restoration Act's "declaration of independence," and noting that areas of law that have been settled by virtue of interpretations of federal or state law "will now be reopened for argument and analysis. . . . As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law, including the parameters of actionable sexual harassment" (A *Return to Eyes on the Prize*, 33 Fordham Urb LJ at 258).

[fn25] Brennan Center statement (*supra* at footnote 7) at page 5.

[fn26] Anti-Discrimination Center testimony (*supra* at footnote 7) at page 2.

[fn27] In the "mixed motive" context, of course, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct. Under Administrative Code **§ 8-101**, discrimination shall play no role in decisions relating to employment, housing or public accommodations.

[fn28] Throughout this decision, we have referenced *Gallo* to illustrate types of analyses that have now been rejected by the Restoration Act, but it is important to note that the Restoration Act will require many courts to approach the City HRL with new eyes. It is not that frequent that, as here, legislation is enacted "to remind, empower, and require judges to fulfill their essential role as active and zealous agents for the vindication of the purposes of the law" (A *Return to Eyes on the Prize*, 33 Fordham Urb LJ at 290). Nor are judges often urged by the legislative body to exercise judicial restraint against substituting their own more conservative social policy judgments for the policy judgments made by the Council or treating a local law as merely in parallel with its federal or state counterpart (*id.*).

[fn29] *Cf.* Committee Report, 2005 NY City Legis Ann, at 538 n 8 (the Restoration Act "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").

[fn30] One can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable. No such circumstances were present here.

[fn31] The lack of actionable gender-based discrimination in this case (to which a pre-limitations period harassing comment could otherwise be linked) is discussed infra, in part V.

[fn32] The record shows that plaintiff was, in fact, absent on two occasions, but complained about being denied training.

[fn33] In view of the Restoration Act's rejection of *Forrest v Jewish Guild for the Blind* (3 NY3d 295 [2004]) and *Galabya v New York City Bd. of Educ.* (202 F3d 636 [2d Cir 2000]), two of the cases cited by the court below, that issue would need to be decided afresh with due regard for the commands of the enactment (*see e.g.* Council Member Palma's statement preceding footnote 3, *supra* [that cases like these "will no longer hinder the vindication of our civil rights"]; *see also* Committee Report, 2005 NY City Legis Ann, at 537 [demanding that "discrimination . . . not play a role"], at 538 n 4 [contrasting *Galabya* with the Council's preferred approach to materiality]). However, given the factual circumstances of the instant case, such a determination is not necessary.

ANDRIAS, J.P. (concurring in the result only).

Because my learned colleagues insist on addressing and deciding an issue that was raised neither below nor on appeal, I would affirm for the reasons stated by the motion court which, in pertinent part, properly dismissed plaintiff's claim for retaliation upon a finding that a one-time assignment to strip and wax the boiler room floor — a task that was, at least arguably, a part of her duties — did not constitute retaliation. **[*82]**

Relying upon the Supreme Court's decision in *Burlington N. & S.F.R. Co. v White* (548 US 53, 67-68 [2006]) for its holding that "actionable retaliation" is that which "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (internal quotation marks and citations omitted), plaintiff succinctly argues on appeal that a reassignment of duties can constitute retaliatory discrimination even where both the former and present duties fall within the same job description, that a jury could reasonably conclude the reassignment would have been "materially adverse to a reasonable employee," and that the motion court inappropriately assessed the credibility of the witnesses' statements regarding that assignment.

My colleagues find no merit to plaintiff's arguments and agree with the motion court's analysis as pertinent to plaintiff's State Human Rights Law claim, but take issue with its decision because it failed to construe her claim according to the standard set forth in the Local Civil Rights Restoration Act of 2005. However, neither at nisi prius nor on appeal has plaintiff enunciated a specific claim under the New York City Human Rights Law. Moreover, even if it could be argued that, by amending her verified complaint to add in its introduction that "This is an action pursuant to the New York Executive Law §§ 296 (a) (1) [*sic*], (6), (7) and New York City Administrative Code §§ 8-107 (a) (1) [*sic*], (6), (7), of a hostile work environment and retaliation to vindicate the civil rights of plaintiff," she had actually raised the issue, she clearly has not pursued it on appeal. **[**43]**

The question of whether we should be deciding appeals on the basis of arguments not raised by the parties on appeal has recently become a

recurring issue in this Court. It is, however, a fundamental principle of appellate jurisprudence that arguments **[***12]** raised below but not pursued on appeal are generally deemed abandoned, and such arguments, which are therefore not properly before us, should not be considered (*see McHale v Anthony*, **41 AD3d 265**, **266-267** [2007]). The rationale for such principle, as expressed by this Court, is that deciding issues not even raised or addressed in the parties' briefs would be so unfair to the parties as to implicate due process concerns (**id. at 267**).

"By any standard it would be unusual behavior for an appellate court to reach and determine an issue never presented in a litigation, and to do so without providing an opportunity for the adversely affected parties to be heard on a question which they had no **[*83]** reason to believe was part of the litigation" (*Grant v Cuomo*, **130 AD2d 154**, **176** [1987], *affd* **73 NY2d 820** [1988]).

"These principles are not mere technicalities, nor are they only concerned with fairness to litigants, important as that goal is. They are at the core of the distinction between the Legislature, which may spontaneously change the law whenever it perceives a public need, and the courts which can only announce the law when necessary to resolve a particular dispute between identified parties. It is always tempting for a court to ignore this restriction and to reach out and settle or change the law to the court's satisfaction, particularly when the issue reached is important and might excite public interest. However, it is precisely in those cases that the need for judicial patience and adherence to the common-law adversarial process may be — or is often greatest" (*Lichtman v Grossbard*, **73 NY2d 792**, **794-795** [1988]).

For my colleagues to adopt a new and supposedly more liberal standard for determining liability under the City's Human Rights Law and to abandon the present, supposedly unduly restrictive, "severe or pervasive" standard in favor of one that "is most faithful to the uniquely broad and remedial purposes of the local statute, " without any input from the parties concerned, flies in the face of these well settled principles.

In *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law* (**33 Fordham Urb LJ 255 [2006]**), which my colleagues repeatedly cite with approval, the author, who is described as "the principal drafter of the Local Civil Rights Restoration Act" of 2005, complains that the failure of such reforms to achieve their potential is due in significant part to the supposed "unwillingness of judges to engage in an independent analysis of what interpretation of the City Human Rights Law would best effectuate the purposes of that law" (*id. at 255* n al, 255-256). However, in the next breath, he states: "In fairness, advocates for victims of discrimination must also take responsibility for the stunted state of City Human Rights Law. On far too many occasions, courts have not been asked to engage in this independent analysis" (*id. at 256* n 5). That is exactly the case here, and my colleagues' departure from the normal rules governing appellate courts is singularly unwarranted (*see Grant*, **130 AD2d at 176**). **[*84]**

With ACOSTA, J.; ANDRIAS, J.P., concurs in the result only in a separate opinion.

Order, Supreme Court, New York County, **[***13]** entered August 14, 2007, affirmed, without costs.

NYC Commission on Human Rights

FAQs for Caregiver Protections

1. What is a "caregiver"?

A caregiver is a person providing direct or ongoing care to a child under the age of 18, or to a person with a disability who either lives in the caregiver's home or is related to the caregiver. The individual with the disability must rely on that person to obtain medical care or to meet their needs of daily living.

2. Does this protection cover nannies, childcare workers, eldercare workers, or other domestic workers?

No. This protection only covers parents and people who care for family members or members of their household who have illnesses or disabilities.

3. Are employers required to provide employees with paid or unpaid family leave?

No. This law does not require that employers provide employees with paid or unpaid family leave. However, employers may be required to provide paid or unpaid sick leave or unpaid family leave under different laws, such as the New York City Earned Sick Leave Law or the federal Family Medical Leave Act.

4. Does this law give employees the right to flexible scheduling or other changes in order to take care of caregiving responsibilities?

No. This law does not give employees the right to flexible scheduling or other changes to the terms and conditions of their employment due to their caregiving responsibilities. Employers CANNOT, however, deny these benefits to employees with caregiving responsibilities if they provide these benefits to other employees.

Examples of Possible Violations of the New Caregiver Status Protections Under the New York City Human Rights Law

1. An employer allows all employees to take up to five sick days per year. This year, an employee took five days in a row to care for her seven year-old daughter who was hospitalized with asthma. The employee received a negative evaluation at the end of the year. The employee's manager did not have any performance-related criticism for the employee except that the manager said the employee would need to find someone else to take care of her daughter when she's ill because a week was too long to be absent from work.
2. An employee of a software company lives with an elderly friend of his family, who has diabetes and uses a wheelchair to ambulate. The employee helps her with cleaning, shopping, and other chores. The employee's supervisor and colleagues knows that he lives with and takes care of a family friend. In late 2015, the employee applied for a promotion to a managerial position with his company. Although he is well-qualified, another employee was chosen for the promotion. When the employee questioned his supervisor as to why he was not promoted, his supervisor told him that the company understood he had commitments outside of work and didn't want to burden him with evening and weekend responsibilities.
3. An employee works as a medical assistant for a small medical practice. Two months ago, the employee's husband was diagnosed with cancer. For the next six weeks, the employee's husband will be attending twice weekly chemotherapy appointments in the morning before the employee goes to work. The employee asked her office manager if she could arrive up to an hour late on the days when her husband goes to chemotherapy so that she can drive him home before coming to work. The office manager said no, explaining that the practice can't function if everybody doesn't arrive on

time. A couple of weeks later, the employee notices another medical assistant arriving late and being greeted by the office manager. When she asked the medical assistant why she was late, the medical assistant explained that the office manager is allowing her to come late a couple of times a week while she trains for an upcoming marathon.

Protections for Workers with Caregiving Responsibilities

Starting May 4, 2016, you cannot be treated differently at your job because you have children, or because you care for a relative who is sick or has disabilities. Under this new provision, you cannot be discriminated against if:

- You are a parent with a child under the age of 18, including adopted or foster children, and provide direct and ongoing care to that child,

  OR

- You provide direct and ongoing care to a parent, sibling, spouse, child (of any age), grandparent, or grandchild with a disability or someone with a disability who lives with you, and that person relies on you for medical care or to meet their needs of daily living.

You cannot be discriminated against at your job because you have these caregiving responsibilities.

What is caregiver discrimination?

Caregiver discrimination occurs when employment decisions are based on caregiver status, which includes but is not limited to deciding not to hire or promote someone because, for example:

- He or she has children at home;
- He or she has a sick spouse;
- He or she is a foster or adoptive parent;
- He or she is a single parent;
- Based on the belief that someone with children or caring for a disabled relative with a disability will not be a reliable employee;
- Based on the belief that mothers should stay home with their children.

Who is protected?

You are protected if you work for or are applying to work for an employer with four or more employees or an employment agency. You are protected if you work full-time or part-time or if you are an intern. You are also protected regardless of your immigration status. You are likely protected if you work as an independent contractor for an employer.

What is prohibited?

- An employer cannot refuse to hire, fire, or otherwise discriminate against you in the terms, conditions, or privileges of employment because of your caregiving responsibilities.
- An employer cannot provide certain benefits, like flexible scheduling, to someemployees and refuse to provide the same benefits to employees who request them because of caregiving responsibilities.
- An employer cannot publish an advertisement or job posting stating any limitation on who they will hire based on applicants' roles in taking care of their family.

What is NOT prohibited?

- Employers do NOT have to offer accommodations to employees because of their caregiving responsibilities. For example, employers are not required to change an employee's shift or allow them to leave work early just because they have caregiving responsibilities. Employers CANNOT, however, deny these benefits to employees with caregiving responsibilities if they provide these benefits to other employees.

What should I do if I believe an employer did not follow the rules described here?

Call 311 and ask for the Commission on Human Rights. You can leave an anonymous tip, or you can file a complaint about what happened to you. If the employer is found to have broken the law, you could recover lost wages or other damages and the employer may have to pay a fine.

Protections for Workers with Caregiving Responsibilities

The New York City Commission on Human Rights is a resource to help you strengthen your business, become a more inclusive employer, and conform your employment practices to comply with the New York City Human Rights Law. This document provides information regarding new protections for employees and job applicants with caregiving responsibilities, an important change in the law affecting your hiring and decision-making processes.

Starting May 4, 2016, it is a violation of the New York City Human Rights Law to treat employees or job applicants who have caregiving responsibilities differently than other employees.

Under this new provision, employees or job applicants cannot be discriminated against if:

- They are a parent with a child under the age of 18, including adopted or foster children, and provide direct and ongoing care for that child;

  OR

- They provide direct and ongoing care to a parent, sibling, spouse, child (of any age), grandparent, or grandchild with a disability or a person with a disability who lives with them, and that person relies on them for medical care or to meet their needs of daily living.

Employees and job applicants cannot be discriminated against because of their caregiving responsibilities.

Caregiver discrimination occurs when employment decisions are based on caregiver status, which includes, but is not limited to, deciding not to hire or promote someone because, for example:

- He or she has children at home;
- He or she has a sick spouse;
- He or she is a foster or adoptive parent;
- He or she is a single parent;
- Based on the belief that someone with children or caring for a relative with a disability will not be a reliable employee;
- Based on the belief that mothers should stay home with their children.

Does this new law cover my business?

All employers that have ***four or more employee***s in New York City are covered by the New York City Human Rights Law, including this new provision of the law. Owners count as one of the four employees. The four employees do not need work in the same location, and they do not need to all work in New York City, as long as one of them works in New York City.

Which employees are protected?

Employees are protected if they work full-time or part-time, if they are an intern (paid or unpaid), and whether or not they have work authorization documents. Most independent contractors are also protected.

What is prohibited?

- Employers cannot refuse to hire, fire, or otherwise discriminate against job applicants or employees in the terms, conditions, or privileges of employment because of their caregiving responsibilities.

- Employers cannot provide certain benefits, like flexible scheduling, to some employees and refuse to provide the same benefits to employees who request them because of their caregiving responsibilities.
- Employers cannot publish an advertisement or job posting stating any limitation on who they will hire based on applicants' caregiving responsibilities.

What is NOT prohibited

- Employers do NOT have to offer accommodations to employees because of their caregiving responsibilities. For example, employers are not required to change an employee's shift or allow them to leave work early just because they have caregiving responsibilities. Employers CANNOT, however, deny these benefits to employees with caregiving responsibilities if they provide these benefits to other employees.

To learn more, visit nyc.gov/humanrights. You can learn more about your responsibilities as an employer under the New York City Human Rights Law and sign up for a free workshop.

NYC Commission on Human Rights

January 2020

PROTECTIONS FOR INDEPENDENT CONTRACTORS & FREELANCERS FROM DISCRIMINATION AND HARASSMENT

Starting January 11, 2020, all independent contractors and freelancers are protected from employment discrimination and harassment under the City Human Rights Law.[1] This also means that independent contractors and freelancers have the right to receive reasonable accommodations for needs related to disabilities, pregnancy, lactation, religious observances, and status as victims of domestic violence, sexual offenses, or stalking. For more information about all of the protections under the City Human Rights Law, visit NYC.gov/HumanRights.

Is there a difference between the classification of "freelancer" and "independent contractor" for the purposes of protections under the City Human Rights Law?
No, all of these workers enjoy the same protections under the City Human Rights Law. It does not matter what word you, or the person or entity that hired you, use to refer to you.

How do I know if I'm an independent contractor or freelancer?
In most cases, if you are doing work for an employer and are not an employee, you are an independent contractor or freelancer. You enjoy the same rights under the City Human Rights Law regardless of whether you have a formal contract, regardless of how often, if ever, the work requires you to be on-site, and whether it is a short-term or long-term relationship.

Are employers required to have their independent contractors complete annual sexual harassment prevention training?
Yes. Similar to employees and interns, if an independent contractor works for an employer of 15 or more people[2] and works:

- more than 80 hours in a calendar year *and*
- for at least 90 days (does not need to be consecutive),

then the individual *must* be trained. If an independent contractor worked less than 90 days or less than 80 hours in a calendar year, they do not need to be trained.

Individuals who must be trained do not need to take the training at each workplace where they work over the course of a year. Independent contractors and freelancers may provide proof of completion of one sexual harassment prevention training to multiple workplaces and need not repeat the training at multiple workplaces.

What is an employer's liability for the acts of an independent contractor or freelancer?
Employers will be liable for discriminatory acts committed by independent contractors and freelancers if the conduct occurred in the course of the independent contractor's or freelancer's work for the employer *and* the employer had actual knowledge of the discriminatory behavior and acquiesced in such conduct, by, for example, failing to take steps to stop the conduct.

[1] Amending N.Y.C. Admin. Code § 8-107(23) ("The protections of this chapter relating to employees apply to interns, freelancers and independent contractors.").
[2] Other training requirements exist under New York State Law.

Where a person hires an independent contractor through an app or platform to provide services (e.g., cleaning or driving services), does the app or platform have legal obligations under the City Human Rights Law?

Yes. Apps and platforms may be liable if they directly engage in discrimination against an independent contractor who uses their platform. They may also be liable if a customer who uses their platform to hire an independent contractor engages in unlawful discrimination if the app or platform knew or should have known about the discrimination and fails to take any action to address it, by, for example, failing to prohibit a customer who is known to harass independent contractors from using the platform.

If you believe you have been subjected to unlawful discrimination as an independent contractor or freelancer, please contact the Commission at 311 and ask for “Human Rights.”

New York City Human Rights Law's

Protections for Muslims & Those Perceived as Such

10 Things You Should Know

Thousands of Muslims with diverse backgrounds call New York City home. They, like New Yorkers of every faith, contribute to the unique and rich cultural diversity for which New York City is universally known. They deserve to live and work free from discrimination and harassment.

1.

The New York City Commission on Human Rights is the City agency charged with enforcing the New York City Human Rights Law, which prohibits discrimination in employment, housing, and public accommodations across 22 categories, including religion/creed. The Law also covers retaliation, discriminatory harassment, and bias-based profiling by law enforcement.

2.

It is illegal to discriminate against an employee based on religion/creed. Some examples of violations of the Law are verbally harassing or bullying an employee for being Muslim, refusing to hire or promote an employee because of their faith, assigning an employee to a non-customer facing role because of religious attire, or treating an employee differently because of their beliefs.

3.

Employees have the right to request reasonable accommodations to observe a religious practice or wear religious attire in the workplace. Examples include growing a longer beard or wearing turbans, hijabs, headscarves and kufis.*

4.

Employees also have the right to request time off to observe a religious holiday or ritual (such as prayer in the middle of the day) and can work with their employer to reach an arrangement, such as paid leave, leave without pay, or the ability to make up missed time at a later date.*

5.

It is illegal for housing providers to refuse to rent to an individual because of their religious belief or the perception of their religious belief based on their appearance.

6.

Landlords and building managers cannot refuse to allow tenants of one faith to show religious decorations, iconography, or symbols on the outside of their apartment doors if they allow tenants of another faith to do the same (for example, around major holidays such as Eid and Christmas).

7.

Landlords and superintendents cannot refuse to fix or repair things in a tenant's apartment because of the tenant's actual or perceived religious beliefs or expression.

8.

It is illegal for restaurants, businesses, or any other public accommodation to refuse service to an individual because of their actual or perceived religious belief or faith. A restaurant cannot refuse to seat a Muslim woman because she refuses to take off her hijab. A taxi driver cannot refuse to pick up a customer because of a perceived religion.

9.

It is illegal to threaten, harass, or coercively intimidate a person in public spaces because of their actual or perceived religion; for example, on the train or in a movie theater.

10.

It is illegal to retaliate against an individual, including a religious observant, for filing a claim of discrimination.

* An employer must accommodate an employee's request for reasonable accommodation unless such accommodation poses an undue hardship to the employer.

The NYC Commission on Human Rights ensures that New Yorkers of every faith have a viable venue to report discrimination and enjoy the dignity and respect they deserve. If you believe you have been a victim of discrimination, call 311 and ask for Human Rights or call the Commission's info line directly at 718-722-3131. For more information, visit nyc.gov/humanrights and follow @NYCCHR on Twitter, Facebook, Instagram, and YouTube.

NYC Commission on Human Rights

Bill de Blasio, Mayor
Carmelyn P. Malalis, Commissioner/Chair

@NYCCHR NYC.gov/IAmMuslimNYC

NYC Commission on Human Rights

FACT SHEET: Protections Against Employment Discrimination Based on Sexual and Reproductive Health Decisions

As of May 20, 2019, New Yorkers are protected against employment discrimination based on their sexual and reproductive health decisions. This means that employers cannot take any kind of adverse action against an employee motivated in any way by the employee's sexual or reproductive health decisions.

Q. Who is protected?

A. Most employees and job applicants in New York City are protected. If an employer has four or more employees, they cannot discriminate against employees or job applicants. Workers and applicants are protected regardless of whether the position is full-time, part-time, or an internship. Independent contractors who do not have their own employees are also protected.

Q. What are "sexual and reproductive health decisions"?

A. Any decision to receive services related to the reproductive system and its functions. This includes, but is not limited to:

- family planning services and counseling, such as abortion, birth control, emergency contraception, sterilization, and pregnancy testing;
- fertility-related medical procedures; and
- sexually transmitted disease prevention, testing, and treatment.

Q. Does this include the decision to receive hormone therapy or transition-related care for transgender New Yorkers?

A. Yes. Transgender people are protected from discrimination based on their decision to receive hormone therapy or other transition-related care involving the reproductive system or its functions. This may also be discriminatory on the basis of gender, and in some cases, disability.

Q. What kind of actions are prohibited?

A. Employers are prohibited from treating employees less well than other employees or harassing them because of their sexual or reproductive health decisions. Examples of violations include:

- an employer repeatedly criticizes an employee for pursuing in vitro fertilization treatment (IVF), which the employer believes is not "natural;"
- an employer fires an employee after learning that the employee had an abortion;
- a supervisor avoids meetings with one of the employees on their team after learning the employee sought preventive treatment for the human immunodeficiency virus (HIV).

Q. Are employers required to provide accommodations, like time off for a medical procedure or medical appointments, for a sexual or reproductive health decision?

A. No. However, if the procedure or appointments relate to a disability, or to pregnancy, childbirth, or a related medical condition, the employer may be required to provide a reasonable accommodation. Find the Commission's guidance on discrimination based on pregnancy and discrimination based on disability at nyc.gov/site/cchr/law/legal-guidances.page for more information.

Q. What are the consequences for employers who are found to violate the law?

A. They may be required to pay damages, a fine, and/or be subject to additional affirmative relief such as mandated training and posting requirements.

If you have experienced discrimination based on sexual and reproductive health decisions, we can help. Contact the NYC Commission on Human Rights by calling 311 or the Commission's Infoline directly at (212) 416-0197. For more information, visit NYC.gov/HumanRights.

Photo credit: United States Breastfeeding Committee (USBC)

LACTATION ACCOMMODATIONS

What NYC Employers Need to Know

An employee's decision to breastfeed a baby and/or to pump or express breast milk after returning to work from parental leave is a personal health choice. In the United States, more than 81% of birthing parents begin breastfeeding their babies at birth – but many stop earlier than is recommended, according to the 2016 Breastfeeding Report Card by the Centers for Disease Control and Prevention. New York City is striving to change work culture surrounding lactation accommodations to reduce stigma, educate employers, support employees, and normalize pumping at work. Not everyone with a baby is able to or chooses to breastfeed, but for those who do, workplace accommodations can be critical to ensuring they are able to carry out that choice.

Under the New York City Human Rights Law, employers must provide reasonable accommodations for employees to pump and/or express breast milk at work. Each person's experience breastfeeding and pumping is unique, and employers must reasonably accommodate those unique needs. There is strong medical evidence that breast milk provides many health benefits. The American Academy of Pediatrics recommends that babies are fed only breast milk for the first six months of life, and that babies continue to receive breast milk along with solid food for at least one year or longer, as desired by the parent and baby. Breast milk provides vitamins and nutrients that a baby needs, which help build a baby's immune system and aid in brain development. Breastfed babies are at lower risk for asthma, obesity, diabetes, sudden

infant death syndrome (SIDS), and infections. Breastfeeding and/or pumping can help lower an employee's risk of high blood pressure, diabetes, ovarian cancer, and breast cancer.

Providing reasonable accommodations to employees who pump and/or express breast milk is not only the law; there are economic benefits to employers as well. Economic benefits to employers include: retention of experienced employees; reduction in time taken by employees for children's illnesses; and lower healthcare and insurance costs.

Employers must understand how to meet the needs of their employees who need lactation accommodations. This document provides employers with information about the basic needs of employees who need to pump and/or express breast milk. Additional resources are available at the NYC Commission on Human Rights website regarding employers' obligations, including a model lactation accommodation policy and request form; and at the NYC Department of Health website.

Employees Who Pump Have Specific Physical Needs

Employees who pump do not stop producing milk when they are away from their child. An employee who pumps and who is separated from their baby must empty the milk from their breasts on roughly the same schedule as the baby feeds in order to avoid complications and health risks. This is usually done through the use of a "breast pump," and the process of removal of breast milk with a pump, which is commonly known as "pumping." Failure to fully empty the breast can be extremely uncomfortable and can cause breast engorgement or swelling. This may lead to an inflammation of the breast tissue, infection, abscess, pain, fever, severe illness and even hospitalization. Failure to pump with enough frequency or to fully empty the breast can decrease the amount of milk that breasts produce, often resulting in an employee having to stop breastfeeding and/or pumping earlier than they planned because they cannot meet their baby's nutritional needs.

There are physical and psychological benefits to breastfeeding and/or pumping for both the parent and baby. As a result, failing to accommodate an employee who pumps after they return to work can have a significant negative physical and/or emotional impact on the employee. Stress caused by discrimination, harassment, or a failure to provide necessary accommodations permitting adequate time and facilities for pumping can result in decreasing an employee's milk supply, and can force an employee to stop breastfeeding and/or pumping earlier than one plans.

The Term "Pumping" Refers to Use of a Breast Pump to Express Breast Milk

A breast pump is a device, typically either electrical (requiring an outlet, a battery, or a USB charger) or manual, that is used for drawing milk from a person's breasts by suction. These devices can be large and/or heavy. Manual pumps take far longer to use than electric ones. Employees often use pumps when they return to work so they can continue producing breast milk. Breast milk is collected in specialized bottles.

Breast Milk Requires Refrigeration or Other Cooling

Breast milk is food. Freshly expressed breast milk should be placed in a refrigerator or a cooling device with ice packs as soon as possible to prevent it from spoiling. Refrigerated or chilled breast milk may last up to a few days, whereas breast milk at room temperature may remain unspoiled for only approximately four to six hours.

Employees Need Break Time to Pump for as Long and as Frequently as Needed

Employees need time during the workday to pump or otherwise express breast milk. Generally, during an 8-hour shift, an employee may require two to three breaks of 15-30 minutes pumping time, plus additional time it takes to travel to/from the pumping space, set up the pump, clean the pump parts, and store the milk. Frequency of pumping and of breaks to pump depends on the baby's age and other factors. Usually, the younger the child, the more frequently an employee needs to pump.

Employers must provide a reasonable amount of time for an employee to pump and must not limit the amount of time or the frequency an employee pumps unless the employer can show that such time poses an undue hardship. Further, there is no limit to how many years an employee may need to pump. For example, many will pump for a year or longer; and others will pump until their child is two years old or older. The decision to continue pumping and/or breastfeeding, and the decision when to stop doing so, varies from person to person.

Employees Have a Right to a Clean and Private Space to Pump

Employees have the right to pump at work shielded from others' view and free from intrusion by coworkers and members of the public. Breast milk is not easily expressed if the employee is not relaxed. Stress or embarrassment can cause an employee to stop breastfeeding and/or pumping. A private space helps ensure that the employee can continue to pump while at work. The space must also be clean.

Identifying a space to pump that is free from intrusion may not be an issue for employees who have a private office or workspace, or where dedicated lactation spaces already exist. However, many employers will have to identify or create a lactation space, or authorize the use of a multi-purpose space as a suitable pumping location. Such locations must have the amenities the employee needs to pump, such as nearby running water for cleaning pump parts and washing hands prior to pumping. The better and more convenient the lactation space, the easier it will be for the employee to promptly return to their duties after pumping.

Some employees will prefer not to use a private lactation space, but instead, for convenience, comfort, or efficiency, prefer to pump at their workspace. An employee who wishes to pump at their usual workspace shall be permitted to do this so long as it does not create an undue hardship for the employer. Discomfort expressed by a coworker, client, or customer generally does not rise to the level of "undue hardship" for the employer. Employers may not require an employee to use a particular type of pump or method of expression.

Other Accommodations May be Required

Some employees who pump, either because of the nature of their job or their unique physical needs, may require support beyond break time and space. For example, workers whose job duties normally expose them to chemicals, radiation, smoke, or other toxins may need to avoid exposure during the time they are breastfeeding their baby. Others with medical complications stemming from breastfeeding, like *mastitis* (inflammation of the breast that sometimes involves an infection), may require a brief time off from work or a change in work duties while they recover. And in the rare instance that a job is simply incompatible with breastfeeding or pumping, a temporary reassignment or transfer to another position may be necessary. Employers must engage in a cooperative dialogue with their employees to identify appropriate accommodations that meet their needs.

ReedSmith

Employment Law Watch

Analysis and commentary by Reed Smith attorneys on developments in employment and labor law

New York State and City expand Human Rights Law protections to freelancers and independent contractors


By Mark S. Goldstein and Alexandra Manfredi on 24 January 2020

Posted in Discrimination, Employment & Labor (U.S.), Labor Relations, New York Employment Beat, Workplace Laws and Regulations

Independent contractors have long been excluded from the protections afforded by traditional workplace anti-discrimination laws. **That is no longer the case in New York State and City**. In recent months, legislators in both Albany and Manhattan have extended substantial workplace-related protections – once only afforded to traditional employees – to freelancers, consultants, and the like (that is, independent contractors). We will discuss these measures below.

New York State

Effective October 2019, the antidiscrimination provisions of the New York State Human Rights Law (NYSHRL) now protect nonemployees, such as contractors, subcontractors, vendors, consultants, temporary workers, "gig" workers, and other non-employee persons providing services pursuant to a contract. In practice, this means that independent contractors may now pursue claims of workplace discrimination, harassment, and retaliation under the NYSHRL. This change is particularly impactful when considered in conjunction with the recently lowered standard for proving claims of harassment.

At present, these laws only apply to entities with four or more employees. However, effective February 8, 2020, the protections will cover all businesses operating within the state.

New York City

Similar to the above changes to New York State law, the New York City Council recently amended the New York City Human Rights Law (NYCHRL) to make clear that independent contractors are entitled to the same anti-discrimination protections as traditional employees. Guidance issued by the City on this sweeping amendment underscores that freelancers and independent contractors may, among other things, now

request and receive reasonable accommodations for needs related to disability, pregnancy, lactation, religious observances, and status as victims of domestic violence, sexual offenses, or stalking.

New York City's measure is especially notable because the NYCHRL is one of the most expansive workplace anti-discrimination laws in the country, affording workers unique protections not conferred by corresponding federal or New York State law. The NYCHRL, for instance, extends its protections to several protected classes that federal and New York State laws do not (for example, sexual and reproductive health decisions, caregiver status, and unemployment status). Independent contractors can therefore now avail themselves of these broad protections.

In addition, in accordance with a law that took effect on April 1, 2019, New York City businesses with 15 or more employees are required to provide employees with annual sexual harassment prevention training. Under a new measure, however, this requirement has now been extended to independent contractors. More particularly, according to guidance issued by New York City, if an independent contractor works (1) for an employer of 15 or more people, (2) more than 80 hours in a calendar year, and (3) for at least 90 days (which need not be consecutive), then the individual must receive the mandated sexual harassment prevention training.

Implications and next steps for employers

In light of these changes, New York State and City employers must ensure that independent contractors are treated lawfully and in accordance with the NYSHRL and the NYCHRL. This includes ensuring that workers are not subjected to unlawful discrimination, harassment, or retaliation, as well as providing reasonable accommodations where appropriate. Employers operating in New York State and City who use independent contractors should immediately update their policies and train human resources and supervisory personnel on these new laws. New York City employers with 15 or more workers should assess whether any of their independent contractors qualify to receive annual sexual harassment prevention training under the law and, if so, should take steps to implement the training within the year.

ReedSmith

Employment Law Watch

Analysis and commentary by Reed Smith attorneys on developments in employment and labor law

NYC Council amends the New York City Human Rights Law definition of covered employer



By Cindy Schmitt Minniti, Mark S. Goldstein and Leora Grushka on 8 October 2019

Posted in Discrimination, Employment & Labor (U.S.), New York Employment Beat, Workplace Laws and Regulations

New York City's Human Rights Law (NYCHRL) is one of the broadest anti-discrimination statutes in the country. But does it apply to all Big Apple employers, regardless of size? A recent amendment passed by the City Council clarifies precisely which entities are considered "employers" for purposes of the NYCHRL.

In its current incarnation, the NYCHRL simply states that it does not apply to any employer with fewer than four persons in its employ. This definition has been subject to debate, however, due to the statute's broad definition of employee, which currently encompasses employees that are full- or part-time, permanent or temporary, paid on or off the books, or are paid or unpaid interns. However, the amended law expands these protections to (1) independent contractors, (2) freelancers and (3) an employer's parent, spouse, domestic partner or child, if employed by the employer.

The new, amended law also specifies that "the term 'employer' does not include any employer that has fewer than four persons in the employ of such employer *at all times during the period beginning twelve months before the start of an unlawful discriminatory practice and continuing through the end of such unlawful discriminatory practice*…." This means that the NYCHRL now applies to an employer with four or more employees (including independent contractors), within the twelve months preceding the alleged discriminatory incident. This law is currently awaiting the mayor's signature, and will go into effect 90 days after becoming law.

Employers should take note of this amendment, to determine whether it affects their exposure to claims under the NYCHRL, violations of which include the risk of:

- Civil penalties of up to $250,000
- Hiring the complainant
- Reinstatement of the complainant
- Promotion of the complainant

- Back pay
- Front pay
- Compensatory damages
- Punitive damages
- Attorney's fees and costs

If you have any questions or concerns about the new amendment, or how it affects your company, Reed Smith's experienced Labor & Employment Group is ready to speak with you. For more information regarding this law, please contact your Reed Smith attorney.

ReedSmith

Employment Law Watch

Analysis and commentary by Reed Smith attorneys on developments in employment and labor law

New York City's Commission on Human Rights issues new guidance on immigration status and national origin discrimination



By Cindy Schmitt Minniti, Mark S. Goldstein and Leora Grushka on 4 October 2019

Posted in Discrimination, Employment & Labor (U.S.), New York Employment Beat, Workplace Laws and Regulations

For decades, the New York City Human Rights Law (NYCHRL) has provided protections against discrimination, harassment, and retaliation on the basis of an individual's actual or perceived immigration status or national origin. However, last week, New York City's Commission on Human Rights (NYCCHR) issued new guidance (the Guidance) that greatly expands the basis on which an employer can be penalized under the law. The Guidance provides examples to illustrate prohibited harassment and retaliation against individuals, based on their immigration status or national origin. Below is a list of the hiring practices and employee policies which can often lead employers to inadvertently violate the NYCHRL.

Hiring practices. In general, employers that discriminate against work-authorized individuals (including citizens, permanent residents, refugees, asylees, and those granted lawful temporary status) in their hiring practices, will be found to have violated the NYCHRL. The narrow exception to this rule is that federal law allows employers to hire a U.S. citizen over a non-U.S. citizen when two applicants are equally qualified.

Document abuse. The Guidance states that an employer may not demand that applicants or employees provide documents beyond those required to establish work authorization under federal law. Therefore, employers must not demand proof or additional documents (1) to establish identity and/or work authorization; (2) to confirm work authorization before accepting a job offer; or (3) to reverify that an employee is authorized to work. Additionally, employers must not refuse to hire individuals whose documents will expire in the future. Moreover, the Guidance limits an employer's right to reverify an employee's work authorization, to the purposes permitted under federal law. Circumstances that do not warrant reverification include when an employee returns from a leave of absence, or when an individual is promoted, transferred, or on strike.

Immigration worksite enforcement. Immigration worksite enforcement refers to raids by Immigration and Customs Enforcement (ICE) and I-9 audits. Unless explicitly prohibited by law, the Guidance encourages employers to give employees advance notice of a raid or audit, to allow them the opportunity to update any necessary documents and make other preparations.

Harassment and retaliation. The NYCCHR explains that the following are forms of discrimination:

- Use of the terms "illegal alien" and "illegals," with the intent to demean, humiliate, or offend a person in the workplace
- An employer's threats to call federal immigration authorities, when motivated by animus on the basis of an individual's actual or perceived immigration status or national origin
- An employer's threats to call immigration authorities or the police, to force employees to work in unsafe or unlawful conditions

The Guidance provides the following examples of unlawful discrimination: (1) an employer's demand that a job applicant who speaks English with an accent present a birth certificate in addition to a Social Security card, or (2) a company that provides its Polish workers with priority in scheduling and time off, to the disadvantage of U.S. citizens.

An employer's use of stereotypes or assumptions in its hiring and employment practices also constitutes discrimination under the NYCHRL. For instance, as outlined in the Guidance, "[a]n employer [that] interviews a highly qualified applicant for a new position, [and u]pon hearing the applicant's accent, the employer decides not to hire them, assuming that their accent indicates that the applicant is not very smart," has violated the NYCHRL. In addition, employers must be wary of applying facially neutral polices that disproportionately impact one group more than others. For example, the Guidance clarifies that an employer may not have a policy that requires applicants or employees to provide a passport in order to gain/continue employment because this would disproportionately affect non-U.S. citizens.

This law also protects employees' family members, or those with whom the applicant or employee has a relationship or association. For instance, an employer may not refuse to pay health benefits for an employee's spouse who is not a U.S. citizen if the health benefits are typically available to other employees' spouses.

Finally, employers may not retaliate against, threaten, or intimidate an employee who complains of discrimination on the basis of their immigration status or national origin.

Employers should review their hiring practices and workplace policies for compliance with this new Guidance. Violations of the NYCHRL include the risk of:

- Civil penalties of up to $250,000
- Requiring the complainant to be hired
- Requiring reinstatement of the complainant following termination

- Requiring a promotion of the complainant
- Back pay
- Front pay
- Compensatory damages
- Punitive damages
- Attorney's fees and costs

If you have any questions or concerns about the application of the NYCHRL to your business, or the validity of a potential or pending NYCHRL claim against you or your company on the basis of an individual's immigration status or national origin, our experienced Labor and Employment Group is ready to speak with you. For more information regarding this Guidance, please contact your Reed Smith attorney.