No. 22A184

In the Supreme Court of the United States

YESHIVA UNIVERSITY, VICE PROVOST CHAIM NISSEL, AND PRESIDENT ARI BERMAN,

Applicants,

v.

YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL WEINREICH, AMITAI MILLER, AND ANONYMOUS,

Respondents.

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit

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NYLS NOTE: The file includes material from the Mayor and City Council.
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Human Rights Law

See also: Task Force report by the NYC Commission on Human Rights, 138 pages.

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We accept the following:

LOCAL LAWS OF THE CITY OF NEW YORK
FOR THE YEAR 1991

No. 39

Introduced by Council Member Horwitz (by request of the Mayor); also Council Members Foster, Maloney, Fields, Povman, Ward, Friedlander, Dryfoos, Alter, Eldridge, Michels, Spigner and Rivera. (Passed under a Message of Necessity from the Mayor.)

A LOCAL LAW

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

Be it enacted by the Council as follows:

Section one. Chapter 1 of title 8 of the administrative code of the city of New York, subdivision 17 of section 8-102 and section 8-108.2 as added by local law number 59 for the year 1986, subdivisions 1, 1-a, 2, 3, 3-a, 4 and 5 of section 8-107 as amended by, and subdivision 18 of section 8-102 and subdivision 11 of section 8-107 as added by, local law number 52 for the year 1989, is amended to read as follows:

CHAPTER I
COMMISSION ON HUMAN RIGHTS

§ 8-101 Policy. In the city of New York, with its great cosmopolitan population [consisting of large numbers of people of every race, color, creed, age, national origin and ancestry, many of them with physical handicaps], 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 [of] , *including those based on* race, color, creed, age, national origin, [ancestry or physical handicap] *alienage or citizenship status, gender, sexual orientation, disability, marital status, 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 and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. A city agency is hereby created with power to eliminate and prevent discrimination [,in employment, in places of public accommodation, resort or amusement, in housing accommodations and in commercial space because of race, creed, color, age, national origin or physical handicap] *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 and* discrimination [because of race, creed, color, age or national origin,] as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

§ 8-102 Definitions. When used in this chapter:

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

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

3. The term "labor organization" includes any organization which 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.

4. The term "unlawful discriminatory practice" includes only those practices specified in section 8-107 of this chapter.

5. [The] *For purposes of subdivisions one, two, and three of section 8-107 of this chapter, the* term "employer" does not include any employer with fewer than four persons in his or her employ. *For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.*

[6. The term "employee" in this chapter does not include any individual employed by his or her parent, spouse or child, or in the domestic service of any person.]

[7] *6.* The term "commission" unless a different meaning clearly appears from the text, means the city commission on human rights created by this chapter.

[8] *7.* The term "national origin" shall, for the purposes of this chapter, include "ancestry."

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

9. The term "place *or provider* of public accommodation"[, resort or amusement" shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda foundations, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bathhouses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard or pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies, or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owners and one or more tenants] *shall include 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 shall not include [public libraries, kindergartens, primary and secondary schools, academies, colleges and universities, extension courses, and all educational institu-

tions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course, or other educational facility, supported in whole or in part by public funds or by contributions solicited from the general public; or] any [institution,] club [or place of accommodation] which proves that it is in its nature distinctly private. [An institution,] *A* club [or place or provider of accommodation] shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payments 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 section 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 shall be deemed to be in its nature distinctly private.

No [institution,] club[, organization or place or provider accommodation] which 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 shall be deemed a private exhibition within the meaning of this section.

10. The term "housing accommodation" includes any building, structure, or portion thereof which 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 shall include a publicly-assisted housing accommodation.*

11. The term "publicly-assisted housing accommodations" shall include [all housing accommodations within the city of New York in]:

(a) [Public housing.] *Publicly-owned or operated housing accommodations.*

(b) 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.

(c) Housing *accommodations* constructed after July first, nineteen hundred fifty, *and housing accommodations sold after July first, nineteen hundred ninety-one:* [within the city of New York.]

(1) which [is] *are* exempt in whole or in part from taxes levied by the state or any of its political subdivisions,

(2) which [is] *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 nineteen hundred forty-nine,

(3) which [is] *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

(4) 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.

(d) Housing [which is located in a multiple dwelling] *accommodations,* the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, 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 [, provided that

such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance].

[(e) Housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodation is, after July first, nineteen hundred fifty-five, 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, provided that such housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be 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.]

12. [The term "multiple dwelling," as herein used, means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fire-proof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families.] The term "family" as used [herein] ***in subparagraph four of paragraph a of subdivision five of section 8-107 of this chapter,*** **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. 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.**

13. 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 [separate] business or professional unit or office in any building, structure or portion thereof.

14. The term "real estate broker" means any person[, firm or corporation] 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[, partnership, association or corporation] 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.

15. 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.

16. (a) The term "[handicapped person] *disability*" [means any person who has or had a physical or mental impairment that substantially limits one or more major life activities, and has a record of such an impairment.

(b) The term "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine; or a mental or psychological disorder, such as mental retardation, developmental disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. It includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, alcoholism, substance abuse, and drug addiction.

(c) The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) The term "has a record of such an impairment" means has a history of, or has been classified as having, a mental or physical impairment that substantially limits one or more major life activities.

(e) The term "otherwise qualified person" means a handicapped person, who, with reasonable accommodation can satisfy the essential requisites of the job or benefit in question, and in the case of alcoholism, substance abuse and drug addiction, is recovering and currently free of abuse of same] *means any physical, medical, mental or psychological impairment, or a history or record of such impairment.*

(b) The term "physical, medical, mental, or psychological impairment" means:

(1) 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

(2) a mental or psychological impairment.

(c) In the case of alcoholism, drug addiction or other substance abuse, the term "disability" shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse, and shall 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.

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

18. The term "reasonable accommodation" means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship. In making a determination

of undue hardship with respect to claims filed under subdivisions one or two of section 8-107 of this chapter, the factors which may be considered include but shall not be 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.

[17] *19.* The term "occupation" means any lawful vocation, trade, profession or field of specialization.

20. The term "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

[18] *21.* The term "alienage or citizenship status" means:

(a) the citizenship of any person, or

(b) the immigration status of any person who is not a citizen or national of the United States.

22. The term "hate crime" means a crime that manifests evidence of prejudice based on race, religion, ethnicity, disability, sexual orientation, national origin, age, gender, or alienage or citizenship status.

§ 8-103 Commission of human rights. There is hereby created a commission on human rights. It shall consist of fifteen members, to be appointed by the mayor, one of whom shall be designated by the mayor as its chairperson and shall serve as such at the pleasure of the mayor. The chairperson shall devote his or her entire time to the chairperson's duties and shall not engage in any other occupation, profession or employment. Members other than the chairperson shall serve without compensation. Of the fifteen members first appointed, five shall be appointed for one year, five for two years and five for three years; thereafter all appointments to the commission shall be for a term of three years. In the event of the death or resignation of any member, his or her successor shall be appointed to serve for the term for which such members had been apointed.

§ 8-104 Functions. The functions of the commission shall be:

(1) To foster mutual understanding and respect among all [racial, religious and ethnic groups] *persons* in the city of New York;

(2) To encourage equality of treatment for, and prevent discrimination against, any [racial, religious and ethnic] group or its members;

(3) To cooperate with governmental and non-governmental agencies and organizations having like or kindred functions; and

(4) To make such investigations and studies in the field of human relations as in the judgment of the commission will aid in effectuating its general purposes.

§ 8-105 Powers and duties. The powers and duties of the commission shall be:

(1) To work together with federal, state and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York, *and engage in other anti-discrimination activities.*

(2) To enlist the cooperation of [the] various [racial, religious and ethnic] groups, [community] *and* organizations, [labor organizations, fraternal and benevolent associations and other groups in New York city], in *mediation efforts,* programs and campaigns devoted to eliminating group prejudice, intolerance, *hate crimes,* bigotry and discrimination.

(3) To study the problems of prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby in all or any fields of human relationship.

(4) *(a)* To receive, investigate and pass upon complaints and to initiate its own investigations of:

[(a) Racial, religious and ethnic group] *(i) Group* tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.

[(b)] *(ii)* Discrimination against any person [,] *or* group of persons[, organization or corporation, whether practiced by private persons, associations, corporations and, after consultation with the mayor, by city officials or city agencies]*, provided, however, that with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced after consultation with the mayor.* Upon its own motion, to make, sign and file complaints alleging violations of this chapter.

(b) In the event that any investigation undertaken pursuant to paragraph a of this subdivision discloses information that any person or group of persons may be engaged in a pattern or practice that results in the denial to any person or group of persons of the full enjoyment of any right secured by this chapter, in addition to making, signing and filing a complaint upon its own motion pursuant to paragraph a of this subdivision, to refer such information to the corporation counsel for the purpose of commencing a civil action pursuant to chapter four of this title.

(5) *(a)* To *issue subpoenas in the manner provided for in the civil practice law and rules compelling the attendance of witnesses and requiring the production of any evidence relating to any matter under investigation or any question before the commission, and to take proof with respect thereto;*

(b) To hold hearings, [compel the attendance of witnesses,] administer oaths[,] *and* take testimony of any person under oath [and in connection therewith to require the production of any evidence relating to any material under investigation or any question before the commission, provided that the commission shall not require the production of names from a general membership list of any club that is a place of public accommodation.]*; and*

(c) In accordance with applicable law, to require the production of any names of persons necessary for the investigation of any institution, club or other place or provider of accommodation.

(6) In accordance with the provisions of subdivision b of section 8-114 of this chapter, to require any person or persons who are the subject of an investigation by the commission to preserve such records as are in the possession of such person or persons and to continue to make and keep the type of records that have been made and kept by such person or persons in the ordinary course of business within the previous year, which records are relevant to the determination whether such person or persons have committed unlawful discriminatory practices with respect to activities in the city.

[(6)] *(7)* To issue publications and reports of investigations and research designed to promote good will and minimize or eliminate prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby.

[(7)] *(8)* To appoint [an executive director] *such employees and agents as it deems to be necessary to carry out its functions, powers and duties and to assign to such persons any of such functions, powers and duties; provided, however, that the commission shall not delegate its power to adopt rules, and, provided further, that the commission's power to order that records be preserved or made and kept pursuant to subdivision b of section 8-114 of this chapter and the commission's power to determine that a respondent has engaged in an unlawful discriminatory practice and to issue an order for such relief as is necessary and proper shall be delegated only to members of the commission.* The expenses for the carrying on of the commission's activities shall be paid out of the funds in the city treasury. *The commission's appointment and assignment powers as set forth in this subdivision may be exercised by the chairperson of the commission.*

[(8)] *(9)* To recommend to the mayor and to the council, legislation to aid in carrying out the purpose of this chapter.

[(9)] *(10)* To submit an annual report to the mayor and the council which shall be published in the City Record.

(11) To adopt rules to carry out the provisions of this chapter and the policies and procedures of the commission in connection therewith.

§ 8-106 Relations with city departments and agencies. So far as practicable and subject to the approval of the mayor, the services of all other city departments and agencies shall be made available by their respective heads to the commission for the carrying out of the functions herein stated. The head of any department or agency shall furnish information in the possession of such department or agency when the commission [, after consultation with the mayor,] so requests. The corporation counsel, *upon request of the chairperson of the commission,* may assign counsel to assist the commission in the conduct of its [investigations or hearings] *investigatory or prosecutorial functions.*

§ 8-107 Unlawful discriminatory practices. 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, [sex] *gender, disability, marital status, sexual orientation* or alienage or citizenship status of any [individual] *person,* to refuse to hire or employ or to bar or to discharge from employment such [individual] *person* or to discriminate against such [individual] *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 [individual] *person* because of such [individual's] *person's actual or perceived* age, race, creed, color, national origin, [sex] *gender, disability, marital status, sexual orientation* or alienage or citizenship status in receiving, classifying, disposing or otherwise acting upon applications for its services 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, [sex] *gender, disability, marital status, sexual orientation* or alienage or citizenship status of any [individual] *person,* to exclude or expel from its membership such [individual] *person* or to discriminate in any way against any of its members or against any employer or any [individual] *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, [sex] *gender, disability, marital status, sexual orientation* or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination [, unless based upon a bona fide occupational qualification].

(e) [For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any practices forbidden under this chapter or because such person has filed a complaint, testified or assisted in any proceeding under this chapter.] *The provisions of this subdivision and subdivision two 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 nineteen hundred seventy-four 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 paragraph (e) and (f) of subdivision three-a of section two hundred ninety-six 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 shall not govern the employment by an employer of his or her parents, spouse, or children; provided, however, that such family members shall be counted as persons employed by an employer for the purposes of subdivision five of section 8-102 of this chapter.

[1-a] *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 his or her *actual or perceived* race, creed, color, national origin, [sex] *gender, age, disability, marital status, sexual orientation* or alienage or citizenship status the right to be admitted to or participate in a guidance program, an [apprenticeship] *apprentice* training program, on-the-job training program, or other occupational training or retraining program.

(c) To discriminate against any person in his or her pursuit of such [programs] *program* or to discriminate against such a person in the terms, conditions or privileges of such [programs] *program* because of *actual or perceived* race, creed, color, national origin, [sex] *gender, age, disability, marital status, sexual orientation* or alienage or citizenship status.

(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 [programs] *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, [sex] *gender, age, disability, marital status, sexual orientation* or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination [, unless based on a bona fide occupational qualification].

[1-b] *3. Employment; religious observance.* (a) It shall be an unlawful discriminatory practice for an employer *or an employee or agent thereof* to impose upon [an individual] *a person* as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such [individual] *person* to violate, or forego a practice of, his or her 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 [individual] *person.* Without in any way limiting the foregoing, no [individual] *person* shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of such [individual's] *person's* religion, he or she observes as a sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her 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.

[2] *4. Public accommodations. a.* It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place *or provider* of public accommodation[, resort or amusement], because of the *actual or perceived* race, creed, color, national origin, [sex] *age, gender, disability, marital status, sexual orientation* or alienage or citizenship status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or, 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 any of the accommodations, advantages, facilities and privileges of any such place *or provider* shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, [sex] *age, gender, disability, marital status, sexual orientation* or alienage or citizenship status or that the patronage or custom [thereat] of any person belonging to [or], purporting to be, *or perceived to be,* of any particular race, creed, color, national origin, [sex] *age, gender, disability, marital status, sexual orientation* or alienage or citizenship status is unwelcome, objectionable or not acceptable, desired or solicited.

b. Notwithstanding the foregoing, the provisions of this subdivision shall not apply, with respect to [sex] *age or gender,* to places *or providers* of public accommodation [, resort or amusement] where the commission grants an exemption based on bona fide considerations of public policy. [Any place of accommodation which is required as a result of this section to construct or reconstruct locker room, shower, or other facilities shall be allowed until May twenty-third, nineteen hundred eighty-five to complete such work, and prior to such date shall not be found to be in violation of the

provisions of this subdivision which apply to such facilities with regard to discrimination on account of sex. The commission, for good cause shown, may grant an extension not to exceed an additional ninety days after the date allowed such place of accommodation to complete such work.]

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 thirty-two hundred one-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 forty-five 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 subdivision relating to disparate impact shall not apply to the use of standardized tests as defined by section three hundred forty 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.

[3. It shall be an unlawful discriminatory practice for the owner, lessee, sublessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

(a) To refuse to rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, creed, color, national origin, sex, age, marital status or alienage or citizenship status of such person or persons, or because children are, may be or would be residing with such person or persons.

(b) To discriminate against any person because of such person's race, creed, color, national origin, sex, age, marital status or alienage or citizenship status or because children are, may be or would be residing with such person, in terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

(c) To cause to be made any written or oral inquiry or record concerning the race, creed, color, national origin, sex, age, marital status or alienage or citizenship status of such a person seeking to rent or lease any publicly-assisted housing accommodation, or to make any such inquiry or record as to whether children are, may be or would be residing with such a person, provided, however, that this paragraph shall not be construed to prohibit inquiries concerning family size or whether children are, may be or would be residing with a person if such inquiries are made to assist such person in meeting the needs of a child, including but not limited to the availability of educational and recreational facilities, and are not for the purpose of limitation or discrimination.

(d) **Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the division grants an exemption 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.**

3-a It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because an individual is between the ages of eighteen and sixty-five or because of any individual's alienage or citizenship status, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment.

(b) For any employer, licensing agency or employment agency to print or circulate or cause to be 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 respecting individuals between the ages of eighteen and sixty-five or respecting any person's alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

(c) For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he or she has opposed any practices forbidden under this chapter or because such person has filed a complaint, testified or assisted in any proceeding under this chapter. But nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the termination of the employment of any person who is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivisions; nor shall anything in said subdivisions be deemed to preclude the varying of insurance coverages according to an employee's age.

4. It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to deny the use of its facilities to any person otherwise qualified, by reason of such person's race, creed, color, age, religion or alienage or citizenship status.]

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 agency or employee thereof:

(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* because of the *actual or perceived* race, creed, color, national origin, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status of such person or persons, or because children are, may be or would be residing with such person or [persons, in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith] *persons.*

(2) To discriminate against any person because of such person's *actual or perceived* race, creed, color, national origin, [sex] *gender, age, disability, sexual orientation,* marital

status or alienage or citizenship status, or because children are, may be or would be residing with such person, 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.

(3) 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, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status, or whether children are, may be, or would be residing with a person, or any intent to make such limitation, specification or discrimination.

(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 or a member 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, or

(3) to the restriction of the rental of rooms in a rooming house , dormitory or residence hotel to one sex if such housing accommodation is regularly occupied on a permanent, as opposed to transient, basis by the majority of its guests].

(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) 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 commercial space because of the age of such person or persons; or such] land or commercial space *or an interest therein* because of the *actual or perceived* race, creed, color, national origin, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status of such person or persons, or because children are, may be or would be residing with such person or persons.

(2) To discriminate against any person because of *actual or perceived* race, creed, color, national origin, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status, or because children are, may be or would be residing with such person, in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space [or because of such person's age in relation to such commercial space;] *or an interest therein* or in the furnishing of facilities or services in connection therewith.

(3) 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, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status, or whether children are, may be or would be residing with such person, [or in relation to commercial space as to age;] or any intent to make any such limitation, specification or discrimination.

(c) *Real estate brokers.* It shall be 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, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status of such person or persons, or because children are, may be or would be residing with such person or persons, or [in relation to commercial space because of the age of 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, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status of such person or persons, or because children are, may be or would be residing with such person or persons[, or in relation to commercial space because of the age of 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, [sex] *gender, age, disability, sexual orientation,* marital status or alienage or citizenship status, or to whether children are, may be or would be residing with a person, or [in relation to commercial space as to age; 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, marital status, national origin, alienage or citizenship

status or a person or persons with whom children are, may be or would be residing.

(d) *Lending practices.* 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 and if incorporated regardless of whether incorporated under the laws of the state of New York, the United States or any other 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 any officer, agent or employee thereof] *or an interest therein*:

(1) To discriminate against such applicant or applicants because of the *actual or perceived* race, creed, color, national origin, [sex] *gender, disability, sexual orientation,* age, marital status or alienage or citizenship status of such applicant or applicants or of any member, stockholder, director, officer or employee of such applicant or applicants, or of the *occupants or tenants or* prospective occupants or tenants of such housing accommodations, land or commercial space, or because children are, may be or would be residing with such applicant *or other person,* 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.*

(2) To use any form of application for [such] *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, [sex] *gender, disability, sexual orientation,* age, marital status or alienage or citizenship status, or whether children are, may be, or would be residing with a person.

(e) Real estate services. It shall be an unlawful discriminatory practice to deny a person access to, or membership in or participation in, a multiple listing service, real estate brokers' organization, or other service because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, age, marital status, or alienage or citizenship status of such person or because children are, may be or would be residing with such person.

(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, age, marital status or alienage or citizenship status of any person or because children are, may be or would be residing with such person.

[(f)] *(g) Applicability; persons under eighteen 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 eighteen years.

[(g)] ***(h) Applicability; discrimination against persons with children.*** The provisions of this [chapter] *subdivision* with respect to discrimination against persons with whom children are, may be or would be residing shall not apply to [dormitories or to the rental of housing units insured, subsidized or guaranteed by the federal government that are specifically designed to provide accommodations for senior citizens] *housing for older persons as defined in paragraphs two and three of subdivision (b) of section thirty-six hundred seven of title forty-two 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 fifty-five years of age or older. This paragraph shall not be construed to permit discrimination against such persons fifty-five 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 forty-five 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 two hundred ninety-six 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 section.*

*(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 in the sale, rental, or leasing of such housing accommodation or interest therein and in the terms, conditions and privileges of the sale, rental or leasing of such housing accommodation or interest therein and in the furnishing of facilities or services in connection therewith, on account of a person's occupation.*

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 [section] *chapter* applies to retaliate or discriminate *in any manner* against any person because such person has *(i)* opposed any practice forbidden under this chapter [or such person] , *(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, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter.*

8. ***Violation of conciliation agreement.*** It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section [8-109] *8-115* of this chapter to violate the terms of such agreement.

*9. **Licenses and permits.** It shall be an unlawful discriminatory practice:*

(a) Except as otherwise provided in paragraph (c), for an agency authorized to issue a license or permit or an employee thereof to discriminate against an applicant for a license or permit because of the actual or perceived race, creed, color, national origin, age, gender, marital status, disability, sexual orientation or alienage or citizenship status of such applicant.

(b) Except as otherwise provided in paragraph (c), for an agency authorized to issue a license 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 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, disability, sexual orientation or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

c. Nothing contained in this subdivision shall be construed to bar an agency authorized to issue a license or permit from using age or disability as a criterion for determining eligibility for a license or permit when specifically required to do so by any other provision of law.

*10. **Criminal conviction.** (a) It shall be unlawful discriminatory practice for any person to deny any license or permit or employment to any person by reason of his or her 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 his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-a of the correction law.*

(b) Pursuant to section seven hundred fifty-five of the correction law, the provisions of this subdivision shall be enforceable against public agencies by a proceeding brought

pursuant to article seventy-eight 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 five of this title. For purposes of this paragraph only, the terms "public agency" and "private employer" shall have the meaning given such terms in section seven hundred fifty of the correction law.

11. Arrest record. It shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, for any person to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the person involved, any arrest or criminal accusation of such person not then pending against that person which was followed by a termination of that criminal action or proceeding in favor of such person, as defined in subdivision two of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing of credit to such person; provided, however, that the prohibition of such inquiries or adverse action shall not apply to licensing activities in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law.

[9] *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.

[10. The provisions of this section shall not be applicable for dormitory-type residences designed for occupancy by members of the same sex.]

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 one and two 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 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 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 that prior 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 four or five of this title and shall be among the factors considered in determining an employer's liability under subparagraph three 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 four or five of this title for such unlawful discriminatory practice.

[11.] *14. Applicability; alienage 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 alienage or citizenship status, or to make any inquiry as to a person's alienage or citizenship status, or to give preference to a person who is a citizen or a national of the United States over an equally qualified person who is an alien, 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 of New York, and when such law or regulation does not provide that state or local law may be more protective of aliens; *provided, however, that this provision shall not prohibit inquiries or determinations based on alienage or citizenship status when such actions are necessary to obtain the benefits of a federal pro-*

gram. An applicant for a license or permit issued by the city of New York 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.

[**§ 8-108 Unlawful discriminatory practice—the handicapped.** The provisions heretofore set forth in section 8-107 as unlawful discriminatory practices shall be construed to include an otherwise qualified person who is physically or mentally handicapped.]

15. Applicability; persons with disabilities.

(a) Requirement to make reasonable accommodation to the needs of persons with disabilities. *Except as provided in paragraph (b), any person prohibited by the provisions of this section from discriminating on the basis of disability shall make 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. Applicability; sexual orientation. [**Section 8-108.1 Unlawful discriminatory practices; sexual orientation.** 1. The provisions heretofore set forth in section 8-107 as unlawful discriminatory practices shall be construed to include discrimination against individuals because of their actual or perceived sexual orientation.]

[2.] Nothing in this [section] *chapter* shall be construed to:

a. Restrict an employer's right to insist that an employee meet bona fide job-related qualifications of employment;

b. Authorize or require employers to establish affirmative action quotas based on sexual orientation or to make inquiries regarding the sexual orientation of current or prospective employees;

c. Limit or override the present exemptions in the human rights law, including those relating to employment concerns [having] *employing* fewer than four *persons* [employees], as provided in subdivision five of section 8-102; owner-occupied dwellings, as provided in paragraph (a) of subdivision five of section 8-107; or 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, as provided in subdivision [nine] *twelve* of section 8-107 of this chapter;

d. Make lawful any act that violates the penal law of the state of New York; or

e. Endorse any particular behavior or way of life.

[3. As used in this section, the term "sexual orientation" shall mean heterosexuality, homosexuality, or bisexuality.]

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 four or five 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, sexual orientation or alienage 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 wilfully 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 his or her 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 or alienage or citizenship status of a person with whom such person has a known relationship or association.

[§ 8-108.2 Unlawful discriminatory practices—occupation. Where a housing accommodation is sought exclusively for residential purposes, the prohibition against unlawful discriminatory practices in relation to the sale, rental, or leasing of a housing accommodation as set forth in section 8-107 shall be construed to prohibit discrimination on account of a person's occupation.

§ 8-109 Procedure. 1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or herself or such person's attorney-at-law, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission upon its own motion may, in like manner, make, sign, and file such complaint. In connection with the filing of such complaint, the commission is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten 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.

2. After the filing of any complaint, the commission shall make prompt investigation in connection therewith. If the commission shall determine after such investigation that probable cause does not exist for crediting the allegations of the complaint that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice, the commission shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent. The complainant may, within thirty days of such service, apply for review of such action of the commission. Upon such application, the chairperson shall review such action and determine whether there is probable cause to credit the allegations of the complaint and accordingly shall enter an order affirming, reversing or modifying the determination of the commission, or remanding the matter for further investigation and action, a copy of which order shall be served upon the complainant. If the commission after such investigation shall determine that there is probable cause to credit the allegations of the complaint, or if the chairperson after such review, shall determine that there is probable cause, and if in complaints of discrimination in housing, the property owner or the owner's duly authorized agent will not agree voluntarily to withhold from the market the subject housing accommodations for a period of ten days from the date of said finding of probable cause, the commission may cause to be posted for a period of ten days from the date of the said finding, on the door of said housing accommodations, a notice stating the said accommodations are the subject of a complaint before the commission and that prospective transferees will take said accommodations at their peril. Any destruction, defacement, alteration or removal of the said notice by the owner or the owner's agents, servants and employees, shall be a misdemeanor punishable on conviction thereof by a fine of not more than five hundred dollars or by imprisonment for not more than one year or both. If the commission after such investigation, shall determine that there is probable cause to credit the allegations of the complaint, or if the chairperson after such review, shall determine that there is such probable cause, the commission shall immediately endeavor to eliminate such unlawful discriminatory practice by proceeding in the following manner:

(a) If in the judgment of the commission circumstances so warrant, it may endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. The terms of such conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the commission and the respondent, including a provision for the entry in court of consent decree embodying the terms of the conciliation agreement. The members of the commission and its staff shall not disclose what transpired in the course of such endeavors. Whenever a complaint is filed pursuant to paragraph (d) of subdivision five of section 8-107 of this chapter, 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.

(b) In case of failure to eliminate such unlawful discriminatory practice complained of, or in advance thereof as determined by the commission, it shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint at a hearing before a hearing officer designated by the chairperson and sitting as the commission, at a time and place to be fixed by the chairperson and specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by the chairperson. The case in support of the complaint shall be presented before the commission by one of its attorneys. Endeavors at conciliation by the commission shall not be received in evidence. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The complainant shall be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his or her answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed.

(c) If, upon all the evidence at the hearing, the commission, or such members as may be designated, shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this chapter, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, evaluating

applications for membership in a club that is not distinctly private without discrimination based on race, creed, color, national origin or sex, payment of compensatory damages to the person aggrieved by such practice, as, in the judgment of the commission, will effectuate the purposes of this chapter, and including a requirement for report of the manner of compliance. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing said complaint as to such respondent. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereof.

3. Any complaint filed pursuant to this section must be so filed within one year after the alleged act of discrimination.

4. At any time after the filing of a complaint alleging an unlawful discriminatory practice under subdivision three or under paragraphs (a), (b) or (c) or subdivision five of section 8-107 of this chapter, if the commission determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commission may enter in such proceeding, the commission may direct the corporation counsel to apply in the name of the commission to the supreme court in any county within the city of New York where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, for an order requiring the respondents or any of them to show cause whey they should not be enjoined from selling, renting, leasing or otherwise disposing of such housing accommodation, land or commercial space to any one other than the complainant. 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 all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual a commission order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper.]

§ 8-108 Reserved.

§ 8-109 Complaint. a. Any person aggrieved by an unlawful discriminatory practice may, by himself or herself or such person's attorney, 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 complained of, and the address of such person if known; (ii) set forth the particulars of the alleged unlawful discriminatory practice; 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.

(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 his or her 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 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 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 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 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 first, nineteen hundred ninety one, the commission shall commence proceedings with respect to the complaint, complete the 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 five of section 8-107 of this chapter, 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.

§ 8-110 Reserved.

§ 8-111 Answer. a. Within thirty 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.

§ 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:

(i) to the continued prosecution of the complaint by the commission in accordance with rules of the commission;

(ii) to the initiation of a complaint by the commission based in whole or in part upon the same facts; or

(iii) to the commencement of a civil action by the corporation counsel based upon the same facts pursuant to chapter four of this title.

§ 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, one hundred eighty 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 dismissal, 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, 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 thirty 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.

§ 8-114 Investigations and investigative record keeping. a. The commission 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 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 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 four 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 and/or be filed with the commission.

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 thirty 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.

*§ 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 complainant 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 covered entity has engaged or is engaging in an unlawful discriminatory practice, 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 ten days from the date of such request the commission may cause to be posted for a period of ten 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 one thousand dollars 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.

*§ 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 party, 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 his or her 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.

§ 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, the commission shall state its findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice. 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 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 discrimination based on race, creed, color, age, national origin, disability, marital status, gender, sexual orientation or alienage or citizenship status;
(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; and
(9) submission of reports with respect to the manner of compliance;

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, 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.

§ 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, 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 of this chapter, a special proceeding may be commenced in accordance with article sixty-three 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 of New York where the alleged unlawful discriminatory practice was committed, or where the commission maintains its principal office for the transation 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 resides, or, if the complaint alleges an unlawful discriminatory practice under paragraphs (a), (b) or (c) of subdivision five of section 8-107 of this chapter, 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.*

§ [8-110] *8-123* Judicial review [and enforcement]. *a.* Any complainant, respondent or other person aggrieved by [such] *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 [, and the commission may obtain an order of court for its enforcement,] 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 of New York* wherein the unlawful discriminatory practice 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 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 [at a special term of] *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 [temporary] relief [or restraining order] as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order [enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part] *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 party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence 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 [sufficient] *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 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 [when instituted by any complainant, respondent or other person aggrieved] must be instituted within thirty days after the service of the order of the commission.

§ 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 of this chapter shall be liable for a civil penalty of not more than fifty thousand dollars and an additional civil penalty of not more than one hundred dollars per day for each day that the violation continues.

§ 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. a. Except as otherwise provided in subdivision thirteen of section 8-107 of this chapter, in addition to any of the remedies and penalties set forth in subdivision a of section 8-120 of this chapter, 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 fifty thousand dollars. Where the commission finds that an unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act,

the commission may, to vindicate the public interest, impose a civil penalty of not more than one hundred thousand dollars.

b. A covered entity that is found liable for an unlawful discriminatory practice 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 ten thousand dollars.

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.

§ 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.

[§ 8-111 Penal provision. Any] *§ 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* [, employer, labor organization or employment agency,] who [or which] shall wilfully 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 of this chapter*, 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 [five hundred] *ten thousand* dollars, or by both; but *the* procedure for the review of the order shall not be deemed to be such willful conduct.

[§ 8-112] *§ 8-130* Construction. The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. [Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin; but, as to acts declared unlawful by section 8-107 of this chapter, the procedure herein provided shall, while

pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based upon the same grievance of the person concerned. If such person institutes any action based on such grievance without resorting to the procedure provided in this chapter, he or she may not subsequently resort to the procedure herein.]

§ 2. Title 8 of the administrative code of the city of New York is amended by adding four new chapters 4, 5, 6 and 7 to read, respectively, as follows:

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 one 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 of this title. Nothing in this section shall be construed to prohibit (i) an aggrieved person from filing a complaint pursuant to section 8-109 of chapter one of this title or from commencing a civil action pursuant to chapter five 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 of chapter one of this title 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.

***§ 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 of this chapter, 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.*

***§ 8-404 Civil penalty.** In any civil action commenced pursuant to section 8-402 of this chapter, 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 one of this title a civil penalty of not more than two hundred fifty thousand dollars. 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 of this chapter in addition to civil penalties.*

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 aggrieved by an unlawful discriminatory practice as defined in chapter one 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. 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 of chapter one of this title, or by the state division of human rights pursuant to subdivision nine of section two hundred ninety-seven of the executive law for administrative convenience, 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. Prior to commencing a civil action pursuant to subdivision a of this section, the plaintiff shall serve a copy of the complaint upon the city commission on human rights and the corporation counsel.

d. A civil action commenced under this section must be commenced within three years after the alleged unlawful discriminatory practice 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. In any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees.

CHAPTER 6

DISCRIMINATORY HARASSMENT

§ 8-602 Civil action to enjoin discriminatory harassment; 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 because of the person's actual or perceived race, creed, color, national origin, gender, sexual orientation, age, whether children are, may or would be residing with such person, marital status, disability, or alienage or citizenship status as defined in chapter one of this title, the corporation counsel, at the request of the city commission on human rights or on his or her 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 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 nineteen of the judiciary law and, in addition to any relief thereunder, a civil penalty may be imposed not exceeding ten thousand dollars for each day that the violation continues.

§ 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 him or her by the constitution or laws of this state or by the constitution or laws of the United States or local law of the city because of the other person's actual or perceived race, creed, color, national origin, gender, sexual orientation, age, marital status, disability or alienage or citizenship status, as defined in chapter one 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 because of the other person's actual or perceived race, creed, color, national origin, gender, sexual orientation, age, marital status, or whether children are, may

be, or would be residing with such person, disability or alienage or citizenship status, as defined in chapter one 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 fifty thousand dollars for each violation, which may be recovered by the corporation counsel in an action or proceeding in any court of competent jurisdiction.

§ 8-604 Disposition of civil penalties. Any civil penalties recovered 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, 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. When used in this chapter

(1) The term "discriminatory boycott or blacklist" means any act that is an unlawful discriminatory practice under subdivision eighteen of section 8-107 of chapter one of this title.

(2) The term "commission" means the New York city commission on human rights.

(3) The term "council" means the council of the city of New York.

§ 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 twenty-four 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 two of this section that the commission has reason to believe that a discriminatory boycott or blacklist has taken place, within thirty 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 three of this section and the boycott or blacklist continues for more than twenty 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.

§ 3. a. Within one hundred eighty days after the date of enactment of this local law, the New York city commission on human rights shall conduct a hearing to consider whether the city's human rights law should be amended to authorize such commission to require persons or classes of persons to make and keep additional records relevant to the determination of whether unlawful discriminatory practices have been or are being committed and make such reports therefrom as the commission shall prescribe by rule as are reasonable, necessary and appropriate for the enforcement of chapter 1 of title 8 of the administrative code of the city of New York as amended by section one of this local law, and shall submit to the mayor and the council recommendations, if any, with respect thereto.

b. Within twelve months after the enactment of this local law, the corporation counsel and the chairperson of the city commission on human rights shall issue a report to the council on the operation and results of the procedures implemented by the corporation counsel and such chairperson relating to the effective legal representation of the commission and the enforcement of the city human rights law, and relating to the prevention of any potential conflicts of interest.

§ 4. This local law shall take effect on the ninetieth day after the date of its enactment into law, provided, however, that:

(1) Paragraph a of subdivision 4 of section 8-107 of the administrative code of the city of New York, as amended by section one of this local law, as it relates to discrimination on the basis of age by places and providers of public accommodation shall take effect on the effective date of rules promulgated by the New York city commission on human rights setting forth exemptions based on bona fide considerations of public policy;

(2) Sections 8-102, 8-107, 8-113 and 8-126 of such administrative code, as added or amended by section one of this local law, shall apply to violations committed on or after such effective date.

(3) Sections 8-112, 8-115, 8-116 and 8-122 of such administrative code, as added by section one of this local law, shall apply to complaints filed with the New York city commission on human rights on or after such effective date and to complaints filed with such commission prior to such effective date pursuant to the provisions of section 8-109 of such administrative code in effect prior to such effective date;

(4) Sections 8-109, 8-111, 8-119 and 8-120 of such administrative code, as added by section one of this local law, shall apply to complaints filed with the New York city commission on human rights on or after such effective date;

(5) Sections 8-118, 8-123, 8-124, 8-125 and 8-129 of such administrative code, as added or amended by section one of this local law, shall apply to orders issued by the New York city commission on human rights on or after such effective date;

(6) Sections 8-402, 8-404, 8-502, 8-602 and 8-603 of such administrative code, as added by section two of this local law, shall apply to causes of action arising on or after such effective date;

(7) No action pursuant to chapter 5 of title 8 of such administrative code, as added by section two of this local law, shall be commenced prior to the two hundred and seventieth day after such effective date;

(8) The New York city commission on human rights may take any actions necessary for the implementation of this local law prior to such effective date including, but not limited to, the adoption of any necessary rules.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, S.S.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on June 5, 1991, and approved by the Mayor on June 18, 1991.

CARLOS CUEVAS, City Clerk, Clerk of the Council

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE LAW § 27

Pursuant to the provisions of Municipal Home Rule Law § 27, I hereby certify that the enclosed local law (Local Law 39 of 1991, Council Int. No. 465-A) contains the correct text and:

Received the following vote at the meeting of the New York City Council on June 5, 1991: 34 for, 1 against.

Was approved by the Mayor on June 18, 1991.

Was returned to the City Clerk on June 19, 1991.

JEFFREY D. FRIEDLANDER, Acting Corporation Counsel

Staff: David Walker

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

COMMITTEE ON GENERAL WELFARE

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

TITLE: In relation to the Human Rights Law.

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

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

TITLE: In relation to the Human Rights Law.

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

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

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

consensus is that conditions have worsened and, according to a June 12, 1990 New York Times/WCBS-TV News Survey, over 70% of the Black and White New Yorkers polled feel that race relations in New York City are generally bad.[2] As was recently stated by Dennis de Leon, Commissioner of the New York City Commission on Human Rights (hereafter "CCHR" or "the commission");

> There is a relationship between bias-motivated violence and the deeply entrenched patterns of institutional bigotry that persist in contemporary society. Patterns of segregation in employment, housing, lending, and education all relate in important ways to the "bush fires" of hate crime. For example, many racially-motivated assaults are based upon notions of neighborhood "turf" and intrusion of "outsiders" in segregated neighborhoods.[3]

Proposed Int. No. 465-A and Proposed Int. No. 536-A address the City's race relations problem by attacking entrenched patterns of segregation, discrimination and bigotry. The city's current human rights law covers discrimination in employment, housing, education, training programs, and public accommodations. The bills under consideration install enhanced protection against discrimination in the aforementioned areas plus provide additional protection against systemic discrimination, prohibit discriminatory harassment, and bring the city into conformity with

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2 Morgan, Many in Poll See Worsening in Race Relations, N.Y. Times, June 27, 1990.

3 Testimony Given by Commissioner/Chair Dennis de Leon to the General Welfare Committee of the City Council, June 1, 1990, pg. 2.

Local Law 52 of 1989 which included discrimination based on alienage or citizenship as an unlawful activity.

I. DIFFERENCES BETWEEN THE TWO BILLS

Upon introduction, Int. No. 465 (submitted June 22, 1990 by Council Member Horwitz) differed from Int. No. 536 (submitted October 10, 1990 by Council Member Horwitz at the Mayor's request) in several ways. Few of these differences were contentious and were readily addressed in an early amended version of the bills. There, however, are two among the may initial differences that are noteworthy. They are:

(1) Int. No. 465 empowered both the city commission on human rights and the corporation counsel to appear in state court, whereas under Int. No. 536 only corporation counsel was given this power (the "commission autonomy" issue); and

(2) Under Int. No. 536, all civil penalties would be paid into the city's general fund, whereas under Int. No. 465 civil penalties levied against a city agency would be paid to the prevailing party (the "disposition of civil penalties" issue).

The current version of Proposed Int. No. 465-A resolves both the commission autonomy and disposition of civil penalties issue. With respect to commission autonomy, section 3(b) of Proposed Int. No. 465-A states:

> Within twelve months after the enactment of this local law, the corporation counsel and the chairperson of the city commission on human rights shall issue a report to the council on the operation and results of the procedures implemented by the corporation counsel and such chairperson relating to the effective legal representation of the commission and the enforcement of the city human rights law, and relating to the prevention of any potential conflicts of interest.

With respect to the disposition of civil penalties, §8-127 of Proposed Int. No. 465-A state:

> a. Any civil penalties recovered pursuant to this chapter shall be paid into the general fund of the city.
>
> b. Nothwithstanding the foregoing provision, where an action or proceeding is commenced against a city agency for the enforcement of a final order issue 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

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used to support or benefit the commission. The disposition of such funds shall be under the direction of the mayor.

By addressing the commission autonomy and disposition of civil penalties issues, Proposed Int. No. 465-A resolves all outstanding differences between early versions of Int. No. 465 and Int. No. 536. In this fashion, Proposed Int. No. 465-A stands as a consolidation of the two bills. Thus, the analysis contained on this report and the annexed section-by-section analysis will refer only to Proposed Int. No. 465-A. A brief summary of the bill's provisions follows below.

II. SUMMARY OF PROVISIONS

Proposed Int. No. 465-A embodies a complete overhaul of the city's human rights law and a strengthening of the CCHR. A section-by-section analysis which is annexed to this report addresses all of the changes in detail. There are, however, seven key areas addressed by the bill that will be examined in this report. These areas are:

(1) employment and employer liability;

(2) housing;

(3) public accommodations;

(4) private right of action;

(5) systemic discrimination;

(6) discriminatory harassment; and

(7) penalties and injunctive relief.

An examination of these seven areas, plus an overview of some of the bill's other important provisions follows below.

(1) Employment and Employer Liability

The bill's employer liability standard is designed to provide an incentive to establish a policy against discrimination, hold employers to a high level of liability for employment discrimination, and present employers with a fair opportunity to mitigate the amount of civil damages imposed for discriminatory conduct. Under §8-107(13):

(a) an employer will be liable for an employee's act if:

(i) the employee exercised managerial or supervisory responsibility; or

(ii) the employer knew of the act, acquiesced in the conduct and failed to take immediate and appropriate action; or

(iii) the employer should have known of the act but was not diligent in preventing such conduct.

(b) an employer may be held immune from civil penalties and punitive damages if she implements an anti-discrimination policy that is approved by the commission and her liability is based solely on the act of an employee or agent; and

(c) if an employer is found liable for an employee's act, she may mitigate damages by showing that no other such incidents had occurred in the past or she had a meaningful anti-discrimination policy or program in place.

This standard of liability would apply to all aspects of employment including hiring and admittance into training programs.

(2) Housing

Proposed Int. No. 465-A limits the existing exemption for owner-occupied two family houses to accommodations for which vacancies are not publicly advertised. §8-107(5)(a)(4)(1). In this manner, the bill does not infringe upon the individual's right of association, but sharply restrict landlords' ability to discriminate.

(3) Public Accommodations

Under Proposed Int. No. 465-A, the commission's power to combat discrimination is expanded through the inclusion of educational institutions within the definition of provider of public accommodations. §8-102(11). This inclusion will not affect educational institutions' pedagogical policies or practices. §8-107(4). Also:

(a) gender distinctions that are permitted under federal or state law are exempted under §8-107(4); and

(b) distinctions founded on religious beliefs are protected under §8-107(12).

(4) Private Right of Action

Currently, all claims arising under the city's human rights law may be enforced only by bringing an action before the commission. This limitation denies complainants the right to a jury trial and forecloses the possibility of recovering attorney's fees or punitive damages which could be recovered in state court.

Based on the recommendations contained in the January 1988 report of the Koch Task Force on the New York City

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Commission on Human Rights,[4] the bill being considered will empower individuals to enforce the city's human rights law by bringing an action in state court. §8-502. An individual who files such a claim would be able to recover all costs, attorney's fees and punitive damages. Anyone who files a claim with the commission or the state division on human rights will have effectively chosen not to exercise this right and not be able to bring an action in state court.

(5) Systemic Discrimination

As is asserted in Proposed Int. No. 465-A, "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." §8-401. Systemic discrimination or a discriminatory pattern or practice is often hard to combat because of the difficulties entailed in accumulating evidence. This type of discrimination is particularly injurious because it is not simply an isolated incident but a repeated act founded upon a discriminatory policy, method of operating, or institutionalized procedure.

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4 Task Force Report on the New York City Commission on Human Rights, Jeremy Travis, Chair, Edward I. Koch, Mayor, January 1988, pg. 23.

There are three aspects of the bill that enhance or clarify the commission's power to combat systemic discrimination. They are:

(a) Chapter 4 of Proposed Int. No. 465-A empowers the corporation counsel to investigate and bring a civil action in state court to eliminate unlawful discriminatory practices.

(b) §8-105(4)(b) and §8-114 detail the commission's investigatory powers. Among these powers is the ability to compel the maintenance of records relevant to determining whether a person is engaging in a discriminatory pattern or practice; and

(c) §8-107(17) establishes that in a claim alleging that a policy has a discriminatory disparate impact, a person need not specify what specific element of the policy produces the disparate impact. Also, the same subsection allows a person to counter a charge of disparate impact discrimination by showing, "that each such policy or practice bears a significant relationship to a significant business objective or does not contribute to the disparate impact." §8-108(a)(2). This provision assures that recent Supreme Court

decisions that have been viewed by some human rights advocates as imposing an undue burden upon claimants are not incorporated into local law.

(6) Discriminatory Harassment

Chapter 6 of Proposed Int. No. 465-A specifically addresses discriminatory harassment. Under the bill's provisions, the city may bring a civil action against a person who allegedly attempts to threaten or intimidate anyone seeking to exercise a right guaranteed by the human rights law. §8-602. This empowers the city to act vigorously against anyone who attempts to prevent an individual from filing a claim with the commission or in state court.

(7) Penalties and Injunctive Relief

Under current law, the commission is authorized to seek a preliminary injunction only with respect to a housing discrimination claim. Proposed Int. No. 465-A will permit the city to commence a special proceeding before the Supreme Court to seek to enjoin all types of discrimination covered by the law. §8-122.

In addition to its expanding ability to seek injunctive relief, Proposed Int. No. 465-A will empower the commission to seek in state court civil penalties of up to $250,000 in systemic discrimination cases and $50,000 cases

alleging discriminatory harassment. §8-404 and §8-604 respectively. Also, in proceedings brought before the commission, it will be able to impose up to $50,000 as a penalty for engaging in discrimination and a $100,000 penalty for willful or wanton acts of perjury.

CONCLUSION

In addition to the seven areas analyzed above, there are two other aspects of Proposed Int. No. 465-A that should be noted. They are:

(1) discrimination based on perceived characteristics will now be covered as well as acts based on actual traits; and

(2) the term "handicapped" which is stigmatizing is replaced by "disabled".

It is clear that Proposed Int. No. 465-A will put the city's law at the forefront of human rights laws. Faced with restrictive interpretations of human rights laws on the state and federal levels, it is especially significant that the city has seen fit to strengthen the local human rights law at this time. Particular attention should be given to section 8-130 of Proposed Int. No. 465-A which provides that, "the provisions of this chapter shall be construed liberally for the accomplishment of the

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purposes thereof." It is imperative that restrictive interpretations of state or federal liberal construction provisions are not imposed upon city law.

UPDATE

Proposed Int. No. 465-A passed by a 7-0 vote. Proposed Int. No. 536-A filed by a 7-0 vote.

DW/rt
DG-reports
Pro. Intros. 465, 536
DG-reports

Section-by-Section Analysis

Introduction

The City's Human Rights Law (§8-101 et seq. of the Administrative Code of the City of New York) has been in the forefront of civil rights laws, providing protection for all persons from invidious discrimination. As part of a generation of Federal and State discrimination laws which created vital substantive rights and institutions charged with enforcing those rights, the City's law has made a valuable contribution to advancing civil rights in the City. While the law has been amended on numerous occasions to expand its substantive scope, the basic enforcement mechanism of the law has remained virtually unchanged since 1965. The benefits of twenty-five years of experience in enforcing this law, as well as the collective wisdom gained from the enforcement of Federal and State laws, now make it clear that the enforcement mechanisms of the City's law must be strengthened and expanded and that many of the substantive provisions should be expanded, harmonized or clarified. In recognition of the vital role served by the City in protecting civil rights, it is time now to move the City's law into the next generation of civil rights laws. The following is a section-by-section analysis of all of the provisions of the bill.

§8-101 Policy

This section, which is in current law, expresses the policy reasons for enacting the Human Rights Law. The amendment would update this section by referring to all of the prohibited grounds for discrimination. It would make clear the broad authority conferred

upon the Commission to prevent discrimination from playing any role in actions relating to employment, public accommodations, housing and other real estate. It is intended that the Human Rights Law be liberally construed to recognize the Commission's broad authority to prevent discrimination.

§8-102 Definitions
"Person" (subd. 1)

The amendment makes clear that "person" includes natural persons, group associations, organizations and governmental bodies or agencies.

"Employer" (subd. 5)

Current law prohibits an "employer" from engaging in all forms of employment discrimination and defines "employer" to exclude employers with fewer than four employees. The amendment would clarify that the definition of "employer" applies only to the employment discrimination provisions. When employer is used in other provisions of the bill, i.e., §8-107(13) (employer's liability for the discriminatory acts of its employees), it is intended to have its ordinary meaning. The amendment would also provide that certain persons employed as independent contractors would be counted as persons employed for purposes of determining whether an employer employs four or more persons and is thus subject to the employment discrimination provisions. It should be noted that employees who are

parents, spouses, or children of the employer will also be counted as persons employed for this purpose. See §8-107(1)(f).

"Employee" (former subd. 6)

The purpose of the definition of the term "employee" in the current law is to exclude certain family members and domestic workers from the employment discrimination provisions of the law. Technically the definition did not achieve this purpose since in the current law the term "employee" is not used in these provisions. The inappropriate definition of "employee" is deleted and the employment discrimination provisions are amended to carry out the intended purpose of the deleted definition with respect to the parents, spouse or child of an employer. See §8-107(1)(f). The proposed amendment does not exclude domestic workers from the employment discrimination provisions.

"Educational Institution" (new subd. 8)

The bill would add a definition of educational institution.

"Place or Provider of Public Accommodation"(subd. 9)

The amendment to this subdivision would change the term "place of public accommodation" to "place or provider of public accommodation." This change is intended to clarify the term "place of public accommodation" to make clear that it is intended to include providers of goods, services, facilities, accommodations or advantages. The amendment would streamline the definition by eliminating the long list of specific types of public accommodations and replace that with a generic definition.

The amendment would also eliminate the current exclusion of public libraries, schools, colleges and other educational institutions. This results in the implicit inclusion of these institutions in the definition of public accommodation, and thereby subjects them to the prohibitions on discrimination by public accommodations. See §8-107(4). The term "place or provider of public accommodation" would now include both public and private educational institutions. Although a variety of other laws including the State Civil Rights Law §40 and the Education Law §§ 313, 3201 and 3201-a cover certain aspects of discrimination in schools and the Board of Education has adopted a nondiscrimination policy and an internal procedure for resolving complaints of discrimination by students, the City has an independent and overriding interest in routing out discrimination from its schools. Extension of the City Human Rights Law in this area would make available to aggrieved persons the administrative remedies provided by the Commission as well as the right to bring a private action and recover attorneys fees.

The amendments to this subdivision also narrow the exclusion for places of accommodation that are distinctly private by providing that only clubs could be considered distinctly private. This would foreclose doctors, dentists and other professionals from arguing that their practices are distinctly private and thus not subject to the prohibitions against discrimination.

"Housing Accommodation" (subd. 10)

The amendment would include publicly-assisted housing accommodations within the definition of "housing accommodation," (except where otherwise expressly provided) thereby reflecting the consolidation of provisions governing public and private housing discrimination effected in a subsequent section. <u>See</u> §8-107(5).

<u>"Publicly-assisted Housing Accommodations" (subd. 11)</u>

The only substantial difference which remains in the provisions of the Human Rights Law which cover private housing and those which cover publicly-assisted housing is that the exemptions from the prohibition of housing discrimination for the rental of owner-occupied one and two family homes and for the rental of rooms in owner-occupied apartments do not apply to publicly-assisted housing. <u>See</u> §8-107(5)(a)(4)(1) and (2). Thus, the definition of publicly-assisted housing serves to limit the applicability of these exemptions. The amendment to this subdivision would broaden the definition of publicly-assisted housing to include certain tax-exempt homes or publicly financed homes sold after July 1, 1991 and all homes with mortgages financed, guaranteed or insured at any time by a government agency whether or not the mortgage is still outstanding. By broadening the definition, the bill would thus subject the rental of certain owner-occupied one and two family homes and owner-occupied apartments, which are not covered by the current law, to the housing discrimination provisions.

<u>"Multiple Dwelling" and "family" (subd. 12)</u>

The definition of "multiple dwelling" is deleted because the only reference to it is in the definition of publicly-assisted housing

accommodation and that reference is deleted. See §8-102(11)(d). Under current law, "family" is defined for purposes of defining multiple dwellings and for purposes of certain exemptions from the housing discrimination provisions including the rental of owner-occupied one and two family housing. See §8-107(5)(a)(4). With the deletion of the term "multiple dwelling", the amendment makes clear that family is defined only for purposes of those exemptions.

"Real Estate Salesperson" (subd. 15)

The amendment makes clear that the term real estate salesperson includes persons who have been appropriately authorized by a licensed real estate broker.

"Disability" (subd. 16)

The term "handicap" is changed to "disability", a more modern and less stigmatizing term used in the State Human Rights Law. The definition is amended to clarify that any person with a physical, medical, mental or psychological impairment or a history or record of such an impairment is protected by the law. Those impairments are defined broadly so as to carry out the intent that persons with disabilities of any type be protected from discrimination. The amendments also retain the provision in the existing definition of "otherwise qualified person" (subd. 16(e)) that in the case of alcoholism, drug addiction or other substance abuse, "disability" only applies to a person who is recovering or has recovered and currently is free of the abuse (new paragraph (c)). The amendments also make clear that "disability" does not apply to persons who currently are

illegally using controlled substances when the person subject to the law acts on the basis of such use.

"Covered Entity" (new subd. 17)

This term is added to the law for ease of reference to persons who are required to comply with the provisions of §8-107.

"Reasonable Accommodation" (new subd. 18)

This definition is added for purposes of a new provision which makes explicit the requirement implicit in the existing law that employers and other persons subject to the City's law make "reasonable accommodation" to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. See §8-107(15)(a). The exception in the definition for accommodations which cause undue hardship represents existing Commission case law. See e.g. Tartaglia v. Jack LaLanne Fitness Centers, NYCCHR Complaint No. 04153182-PA (June 9, 1986) at p. 21 (public accommodations discrimination); New York City Commission on Human Rights v. United Veterans Mutual Housing, Motion Decision NYCCHR Complaint No. EM00936-08/14/87-DE (April 4, 1990) at p. 5. (housing discrimination); see also Doe v. Pleasure Chest Ltd., NYCCHR Complaint No. GA-00167020389-DN (July 19, 1990) at p. 29-30 (employment discrimination).

"Sexual Orientation" (new subd. 20)

The bill moves the definition of sexual orientation currently found in §8-108.1 to the definitional section. This amendment is technical in nature and reflects the insertion of this protected category in the lists of protected categories in §8-107.

§8-105 Powers and Duties

The amendments to this section would expand the powers of the Commission as well as clarify existing powers. Specifically, the Commission would be authorized to require persons or companies under investigation to preserve records in their possession and to continue to make the type of records made by such person or company in the ordinary course of business where the records are relevant to determining whether discrimination has taken place (subd. 6).

The amendment expressly states the Commission's existing power to investigate and file complaints of pattern or practice discrimination, and authorizes the Commission to refer to the Corporation Counsel information on which a civil action (pursuant to Chapter 4) could be based (subd. (4)(b)).

The amendment clarifies the Commission's existing authority, in the course of investigating clubs which are or may be places or providers of public accommodation, to subpoena names of persons when such subpoena would not be inconsistent with applicable statutory and case law (subd. (5)(c)). As under existing law, the Commission's power to investigate clubs would continue to encompass the power to obtain information which is relevant to the determination of whether a club qualifies as a place or provider of public accommodation.

The Commission's authority to delegate its powers, functions and duties to its employees or agents is made explicit with the proviso that certain powers, i.e., rule making, issuing orders

relating to records and making a final determination that a respondent has engaged in discrimination, could be delegated only to Commission members (subd. (8)). The amendment also makes explicit that the Commission's power to appoint employees and assign them duties may be exercised by the Chairperson.

§8-106 Relations With City Departments and Agencies

The amendments to this section would enable the Commission to require a city agency to furnish information without first consulting the Mayor.

§8-107 Unlawful Discriminatory Practices

Protected Categories

The provisions in current law describing unlawful discriminatory practices are amended to make clear that the law prohibits discrimination based on perceived, as well as actual, age, race, creed, color, national origin, disability, marital status, gender, sexual orientation and alienage or citizenship status. The term "gender" is used to replace the term "sex" (with no intent to change the meaning of the term). This section is also amended to include sexual orientation and disability, which are covered in separate sections of the current law, in the list of protected categories so that the law will now provide in one place a list of all the prohibited types of discrimination.

Employment and Apprentice Training Programs (subds. 1 and new subd. 2)

The amendments to these provisions would prohibit employment discrimination based on marital status, and thus would conform the City's law to the State Human Rights Law. Currently,

these subdivisions prohibit employers, employment agencies and labor organizations from engaging in discriminatory employment practices but are silent as to the individual liability of their employees and agents for such practices. The amendment would make explicit such individual liability.

The language which permits advertisements, statements or inquiries to express limitations and discrimination based upon a bona fide occupational qualification is deleted from paragraph (d) of subdivisions one and two. The employment discrimination provisions of the current law have been construed by the courts and the Commission to allow limitations or discrimination which are based upon a "bona fide occupational qualification", although the specific language which sets forth the defense is contained only in the provisions prohibiting discriminatory advertisements or inquiries. See §8-107(1)(d). "Bona fide occupational qualification" is not defined in those provisions and thus the courts and the Commission are left to determine on a case by case basis whether a particular limitation is a bona fide occupational qualification. While the bill deletes the specific language "unless based upon a bona fide occupational qualification" in §8-107(1)(d) and (2)(d), it is not intended to eliminate the defense. The intent is to allow the defense to continue to develop through case law made by courts or the Commission with the expectation that the defense will be upheld only in circumstances where distinctions based on the criteria covered by the law are logical and necessary for the job or occupation.

The amendment would delete language in paragraph (e) of subdivision one which duplicates the general prohibition against retaliation in §8-107(6). New language would be added to paragraph (e) to provide that the age discrimination provisions would not apply to employee benefit plans covered by the federal Employment Retirement Income Security Act of 1974 ("ERISA") where that federal law would be preemptive (subd. (1)(e)(i)). This recognizes the decisional law that has held ERISA to preempt State and local discrimination laws in certain circumstances. See Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983). Provisions allowing the varying of insurance coverage based on an employee's age and allowing certain retirement policies or systems would also be added to paragraph (e). These provisions are derived from language in the existing subdivision (3-a) of section 8-107 which is being deleted. See §8-107(3-a)(c).

A new paragraph (f) of subdivision one would continue the present exemption for the hiring, firing and terms and conditions of employment of parents, spouses and children but would require those persons to be counted as persons employed for purposes of determining whether the employer is subject to the law with regard to other persons employed.

Public Accommodations (new subd. 4)

This subdivision is amended to prohibit places or providers of public accommodation from discriminating on the basis of age (para. (a)). In recognition of the fact that certain distinctions based on age are in the public interest (e.g., senior citizen discounts,

restrictions on viewing adult films and age limits on membership in peer groups), the Commission is given authority to grant exemptions from this prohibition when it is in the public interest to do so (para. (b)). The amendment adding age would not take effect until the Commission promulgates rules setting forth such exemptions. Bill Section 4(1).

Certain exemptions are added permitting educational institutions (public and private) to make gender distinctions permitted under specified state or federal laws (i.e., separate housing, bathroom and locker room facilities, certain physical education classes and certain athletic teams) (para. (c)). Private schools would be allowed to limit admissions to persons of one gender (para. (d)). Educational institutions would not be subject to the prohibitions on discrimination as they relate to matters that are strictly educational or pedagogic in nature (para. (f)). In addition, educational institutions would not be prohibited from using standardized tests which may have a disparate impact on protected groups if the tests are used in the manner and for the purpose prescribed by the test agency which designed the test (para. (e)).

Subds. 3 and 3-a (deleted)

Subdivision 3, which currently prohibits discrimination in publicly-assisted housing accommodations, is deleted and incorporated into subdivision 5, which covers all housing accommodations. Subdivision 3-a, which currently prohibits age discrimination by employers and licensing agencies, is deleted and incorporated into subdivision 1 (Employment) and a new subdivision 8 (Licenses and

Permits). In addition, the limitation in subdivision 3-a on age discrimination, providing that individuals older than 65 are not protected thereunder, is removed from the law. This would conform the City's law to the State Human Rights Law and to the Federal Age Discrimination in Employment Act.

Tax-Exempt Non-sectarian Education Corporations (former subd. 4 deleted)

The bill would delete this provision governing private schools as unnecessary in view of the implicit coverage of educational institutions (whether public or private) in the public accommodations provisions (§ 8-102, subd. 9). In bringing private schools within those provisions, the legislation would have the effect of changing current law by adding national origin, gender and marital status to the prohibited grounds for discrimination.

Housing Accommodations, Land and Commercial Space (subd. 5)

Generally

The provisions prohibiting discrimination in publicly-assisted housing (former subd. 3) are incorporated into this subdivision except that the provision which permits inquiries relating to children in publicly-assisted housing is deleted. The amendments to this subdivision would make the City's law consistent with the State Human Rights Law by prohibiting age discrimination in the sale, rental or purchase of all housing accommodations, land and commercial space. The amendments would also clarify the applicability of this subdivision to cooperatives and condominiums by prohibiting

discrimination in the "approval of the sale" of housing accommodations "or an interest therein".

Para. (a) Subpara. (4)

Current law exempts from the housing discrimination provisions the rental of housing in one and two family owner-occupied housing. The amendment would allow the exemption only if the available housing has not been publicly advertised or listed or otherwise offered to the general public (Subpara. (4)(1)).

The bill would delete the language creating a general exemption for restricting rooms in a rooming house, dormitory or residence hotel to one sex (Subpara. (4)(3)). This amendment is intended to bring the City's law into conformity with the federal Fair Housing Act, which does not contain such a general exemption.

Para. (c)

A new subparagraph (3) would prohibit real estate brokers from blockbusting, i.e. inducing persons to sell or rent housing, land or commercial space by representations regarding the entry into the neighborhood of any members of a protected group. This provision is derived from the federal Fair Housing Act (42 U.S.C. 3604(e)) but goes further than that law in its application to commercial space and in the number of protected groups.

Para. (d) and (f)

Amendments to paragraph (d) and the new paragraph (f) make clear that the law prohibits discrimination in the appraisal of any housing accommodation, land and commercial space. This

provision is also derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(ix)(B).

Para. (e)

This new provision prohibits the discriminatory denial of access to or membership in a multiple listing service or real estate brokers organization. It is derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(x).

Para. (h)

The amendments to this paragraph are designed to bring the City's law into conformity with the federal Fair Housing Act, which allows owners and operators of housing for older persons (as defined therein) to discriminate in the rental or sale of such housing on the basis of whether children are or would be residing in such housing. See 42 USC 3607(b)(2) and (3).

Para. (i)

This provision would allow restriction of the sale or rental of housing or land exclusively to persons 55 or over. It would clarify that such persons could not be discriminated against on the basis of whether children are, may be, or would be, residing with them, unless such housing qualifies as housing for older persons as defined in the federal Fair Housing Act.

Para. (j)

Although the federal Fair Housing Act on its face prohibits educational institutions from making gender distinctions in dormitory residences, the agency administering that law (the Department for Housing and Urban Development, or "HUD") has construed the law to

permit the gender distinctions allowed under another federal law for separate housing, bathrooms and locker rooms. See 45 CFR §§86.32 and 86.33. This new provision would allow such distinctions to be made under the City's law to the same extent that they are allowed under HUD's interpretation of the federal Fair Housing Act.

Para. (k)

This provision would allow distinctions to be made with regard to gender and children in dormitory-type residences (e.g. shelters for the homeless), to protect personal privacy or the health, safety or welfare of families with children. HUD's interpretation of the federal Fair Housing Act has allowed some distinctions such as these although the Act and its regulations are silent as to these issues.

Para. (l)

This provision restates and clarifies current law.

Para. (m)

This new provision clarifies that the owners of publicly-assisted housing accommodations (such as the Housing Authority) may utilize criteria or qualifications of eligibility for the sale, rental or occupancy of public housing which are required to comply with Federal or State law or are necessary to obtain the benefits of a Federal or State program, and use statements, advertisements, applications and inquiries which state criteria or qualifications necessary to determine eligibility for such housing.

Para. (n)

The provisions relating to housing discrimination on the basis of occupation are moved from §8-102.2 to this paragraph without intent to make any substantive change.

Retaliation (subd. 7)

This subdivision prohibits retaliation against persons who file complaints of discrimination. The amendments would broaden this subdivision by also prohibiting retaliation against persons who commence civil actions, assist the Corporation Counsel or the Commission in investigations or provide information pursuant to the terms of a conciliation agreement.

Licenses and Permits (subd. 9) (new)

Under the current law, discrimination by licensing agencies is prohibited only where the discrimination is based on age (former subd. 3-a). This new subdivision would broaden current law by prohibiting licensing agencies from discriminating against applicants on the basis of any of the protected categories (paras. (a) and (b)). An exception is provided which allows age or disability to be used as a criterion for determining eligibility for a license or permit where such use is specifically required by another provision of law (para. (c)). Thus, the issuance of special parking permits to disabled persons pursuant to New York City Charter §2903(b)(15), the granting of preferences to disabled or elderly persons in the issuance of newsstand licenses pursuant to Administrative Code §20-230, and the issuance of rifle and shotgun permits only to persons 18 years of age or over pursuant to Ad. Code §10-303(a)(1) would still be allowed.

Criminal Conviction (subd. 10) (new)

Article 23-A of the Correction Law prohibits discrimination in employment and licensing on the basis of an applicant's record of criminal convictions except in certain specified circumstances. That article provides for enforcement against private employers by the State Division of Human Rights and concurrently by the Commission. This new subdivision merely incorporates the Article 23-A prohibition into the City's Human Rights Law in the same manner as it is incorporated into the State Human Rights Law. See Executive Law §296(15). The amendment is intended to encompass within the City's law all of the substantive provisions which are already within the Commission's jurisdiction and would effect no substantive change in the Commission's jurisdiction over this type of discrimination.

Arrest Record (subd. 11) (new)

The State Human Rights Law, with certain exceptions, prohibits discrimination in connection with licensing, employment and providing of credit on the basis of an applicant's arrest record. See Executive Law §296(16). This new subdivision is identical to the State law provision.

Employer Liability for Discriminatory Conduct by Employee, Agent and Independent Contractor (subd 13) (new)

The current City Human Rights Law is silent on the standard to be applied in deciding whether an employer can be held liable for the discriminatory conduct of its employees. The State Human Rights Law, upon which much of the City law is modeled, is also silent on this question. However, the State law provisions prohibiting discrimination in employment and in public accommodations

have been narrowly construed by the courts of this State to impose liability upon an employer for its employee's unlawful conduct only when the employer knew of or condoned the conduct.

The proposed bill would set forth standards which must be satisfied for an employer to be held liable for the unlawful conduct of employees, agents and certain independent contractors. The standards proposed would make the City's law unique among civil rights laws in that the standards are designed not only to deter discriminatory conduct by holding employers accountable but, of equal significance, they are designed to provide employers with an incentive to implement policies and procedures that reduce, and internally resolve, discrimination claims.

Paragraph (a) of this subdivision provides that with respect to all types of discrimination other than employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent. Paragraph (b) provides that with respect to employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent only where the employee or agent who committed the discriminatory act exercised managerial or supervisory responsibility or the employer knew of the conduct and failed to take corrective action or should have known of the conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct. Under paragraph (c), an employer would be held liable for the conduct of certain persons employed as independent contractors only where the employer had actual knowledge of and acquiesced in the conduct.

Employers could mitigate their liability for civil penalties or punitive damages or liability for the act of an employee or agent which they should have known about by proving they had instituted policies, programs, and procedures for the prevention and detection of discrimination, and by showing a record of no, or relatively few, prior incidents of discrimination (para (d) and (e)). Finally, the Commission would be authorized to promulgate rules establishing policies, programs, and procedures for the prevention and detection of discrimination, which if instituted by an employer would insulate him or her from liability for civil penalties which could be imposed by the Commission or punitive damages or civil penalties which could be imposed by a court based on the conduct of an employee, agent or person employed as an independent contractor (para (f)).

Alienage or Citizenship Status (new subd. 14, former subd. 11)

Current law allows distinctions and preferences based upon alienage or citizenship status and inquiries as to a person's alienage or citizenship status in very narrow circumstances ("when... required or when... expressly permitted by any law... and when such law... does not provide that state or local law may be more protective of aliens, §8-107(11)). These circumstances do not cover distinctions or inquiries made by banks and lending institutions who seek to sell mortgages to the Federal Home Mortgage Insurance Corporation ("FHMIC"). A FHMIC directive provides that the "[FHMIC] will purchase mortgages made to aliens who are lawful permanent residents of the United States under the same terms that are available to U.S. citizens... We will purchase mortgages made to non-permanent

resident aliens as long as the borrower occupies the property and the loan-to-value ratio does not exceed 75%." See Fannie Mae, Lending Requirements, §203.02 (emphasis in original).

The proposed amendment to this subdivision is intended to allow banks and lending institutions to make such inquiries or determinations based upon alienage or citizenship status as are necessary to enable them to obtain the benefits of selling their mortgages to FHMIC. It will also allow inquiries and distinctions to be made for other purposes related to federal programs, but only insofar as such actions are necessary to obtain the benefits of such programs.

Applicability; Persons With Disabilities (new subd.15)

Paragraph (a) of this new subdivision would make explicit the requirement implicit in existing law that persons subject to the City's Human Rights Law make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. Paragraph (b) establishes an affirmative defense to a claim of discrimination based on disability that the claimant could not, with reasonable accommodation, satisfy those requisites or enjoy those rights. Paragraph (c) makes clear that work place restrictions on the illegal use of drugs and the use of alcohol and drug testing programs are not prohibited.

Former §8-108 and §8-108.1 subd(1) (deleted)

These provisions are deleted because the protected categories, disability and sexual orientation, have been inserted in the lists of protected categories in §8-107.

Applicability; Sexual Orientation (subd. 16, formerly paragraphs a through e of subd. 2 of §8-108.1)

Former section 8-108.1, subd. 2, sets forth certain provisions relating to the applicability of the law with respect to discrimination based on sexual orientation. These provisions have been retained and are set forth in the revised law as paragraphs a through e of subdivision 16 of section 8-107.

Disparate Impact (new subd. 17)

Certain discriminatory practices or policies, though not intended to discriminate, may be actionable because they result in a disparate impact to a person who is the member of a group protected by the City's law. Like Title VII of the Civil Rights Act (which prohibits employment discrimination), the City's law has been construed by the Commission to apply to disparate impact cases although it does not explicitly provide as such. In 1989, the U.S. Supreme Court in Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115, 2125-26 (1989) made it significantly more difficult for an aggrieved person to prove a disparate impact case under Title VII. The Court held that when a plaintiff has made out a prima facie case of disparate impact, the defendant has the burden of producing evidence of business justification but the burden of persuasion always remains with the plaintiff. Commentators viewed this holding as a departure from previous decisions which were read to place the burden of proving business necessity upon the defendant. The Commission and the courts are not bound to follow Wards Cove in their interpretation of the burdens of proof in disparate impact cases under the City Human Rights Law. After the Wards Cove decision,

the Commission and the administrative law judges adjudicating disparate impact cases have continued to apply the burdens of proof (as set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971)) that most courts applied in Title VII cases decided prior to Wards Cove. See Fitzgibbons v. New York City Police Department, NYCCHR Complaint No. 12141485-EG (April 26, 1990) at p. 4.

The proposed provisions are intended to clearly set out the burdens of proof in disparate impact cases brought under the City Human Rights Law so that it will not be necessary for the courts or the Commission to seek guidance in federal case law to interpret the City law in this area. The provisions make clear that the respondent or defendant has the burden to affirmatively plead and prove that a policy or practice bears a significant relationship to a significant business objective (business necessity) or does not contribute to the disparate impact (para. (a)(2)). The legislation also provides that a policy or practice shown to have a disparate impact will be found unlawful where the Commission or a plaintiff produces substantial evidence that an alternative policy or practice with less disparate impact is available and the respondent or defendant fails to prove that it would not serve them as well (id.).

Unlawful Boycott or Blacklist (new subd. 18)

This new subdivision incorporates the provisions of the State Human Rights Law which prohibits boycotts and blacklists based on discriminatory animus. However, it goes further than State law by adding disability, age, marital status, sexual orientation and alienage or citizenship status to the protected categories. The

subdivision is also different from the State law in that it specifies that it does not apply to any form of expression that is protected by the First Amendment of the U.S. Constitution.

Interference with Protected Rights (new subd. 19)

This new subdivision prohibits threats, harassment, coercion, intimidation and interference with a person's exercise or enjoyment of any rights granted or protected under §8-107 or attempts to engage in those acts. It is derived, in part, from a similar provision of the federal Fair Housing Act.

Relationship or Association (new subd. 20)

This subdivision makes clear that the City's Human Rights Law prohibits discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom such person has a known relationship or association. It would also codify the Commission's interpretation of the existing law. This provision is similar to provisions in the Federal Fair Housing Act (42 USC §3604(f)) and the Americans with Disabilities Act (§102(b)(4) and §202(b)(1)(E)).

Former §8-109 Procedure (deleted)

This section, which prescribes the current procedures for filing and processing complaints of discrimination with the Commission, is deleted and replaced by new sections 8-109 through 8-122.

§8-109 Complaint (new)

This section describes in detail the requirements and procedure for filing a complaint of discrimination with the Commission.

It includes the content of the complaint and a requirement that the Commission acknowledge the filing of the complaint (subd. a), a requirement that the Commission serve a copy of the complaint on the respondent and advise the respondent of his or her procedural rights and obligations under the law (subd. d), the time limit for filing a complaint (subd. e), and amendment of the complaint (subd. h). This section would preclude the Commission from adjudicating a complaint if prior to filing such a complaint the complainant had initiated a civil action alleging the same act of discrimination, if a complaint involving the same grievance is pending before an administrative agency, or if the State Division of Human Rights issued a final determination on such complaint (subd. f). With regard to complaints filed on or after September 1, 1991, this section would require the Commission to commence proceedings, investigate and make a final disposition promptly and within the time periods prescribed by rule of the Commission or explain the reasons for not doing so (subd. g).

§8-111 Answer (new)

This section requires a respondent to file an answer within 30 days after the complaint is served (subd. a). Under current law, there is no requirement that a respondent answer a complaint of discrimination until he or she appears at a hearing. Respondents have no incentive to answer prior to such time. This requirement would assist the Commission in the timely processing of complaints. The failure to file an answer would result in a default and the hearing would proceed without the respondent. See §8-119(e). The

administrative law judge could open the default and allow the respondent to present an answer only upon a finding that there was good cause for the failure to file a timely answer. This section also prescribes the contents of the answer (subds. b, c and d) and provides for extension of the 30-day period for good cause (subd. e). Allegations not specifically denied or explained in the answer are deemed admitted (subd. c).

§8-112 Withdrawal of Complaints (new)

This section provides that a complaint may be withdrawn at any time prior to service of a notice that it has been referred to an administrative law judge (subd. a) or after service of such notice, at the discretion of the Commission (subd. b). Unless the complaint is withdrawn pursuant to a conciliation agreement, withdrawal is without prejudice to further prosecution of the alleged discriminatory acts by the Commission or the Corporation Counsel (subd. c).

§8-113 Dismissal of Complaint (new)

This section prescribes the circumstances under which the Commission may dismiss a complaint for administrative convenience (subds. a and b). Dismissal for administrative convenience includes a dismissal requested by the complainant where 180 days have passed since the filing of a complaint which had not been actively investigated (subd. (a)(6)), as well as dismissal prior to the filing of an answer where no investigation or conciliation had taken place (subd. b). The section also provides for dismissal upon a finding of no probable cause (subd. d) or lack of jurisdiction (subd. c), and for appeal of any dismissal to the chairperson (subd. f).

§8-114 Investigations and Investigative Recordkeeping (new)

This section provides that where the Commission has conducted an investigation it could demand that the person or entity under investigation preserve records in its possession or continue to make the type of records previously made where the records are relevant to a determination of whether discrimination has taken place (subd. b). A person or entity upon whom a demand is made may file objections with the Commission and get a determination in 30 days (subd. c). During the 30-day period, the person or entity upon whom a demand is made would be required to maintain the status quo, i.e., preserve existing records and continue to make records (subd. c). A proceeding may be brought in court to enforce an order relating to records (subd. e) or the Commission may impose administrative sanctions for non-compliance (see §8-118).

§8-115 Mediation and Conciliation (new)

This section makes explicit the Commission's authority to engage the parties in mediation or conciliation at any time after the filing of a complaint (subd. a). It also provides that a conciliation agreement may be embodied in a consent decree (subd. b). All conciliation agreements shall be embodied in orders and violation of such orders would be subject to a civil penalty (subd. d). Efforts at mediation and conciliation shall not be publicly disclosed (subd. c) but all conciliation agreements shall be made public unless the complainant, respondent and the Commission agree otherwise (subd. d).

§8-116 Determination of Probable Cause (new)

This provision sets out the procedure to be followed after a finding of probable cause, including notice (subds. a and b) and referral to an administrative law judge (subd. c). It also provides that Commission-initiated complaints shall not require a determination of probable cause.

§8-117 Rules of Procedure (new)

This section requires the Commission to adopt rules for hearing and prehearing procedure, including rules for discovery. The rules shall require that the Commission be a party to any proceeding and that the complainant shall be a party only if he or she has formally intervened.

§8-118 Noncompliance with Discovery Order or Order Relating to Records (new)

To discourage persons under investigation from resisting the Commission's discovery requests, this provision would make express the Commission's authority to impose administrative sanctions upon the resisting party. The section would also authorize the Commission to impose administrative sanctions upon parties who fail to comply with Commission orders to preserve records and/or to continue to make records. After affording the resisting party an opportunity to make objections to an order compelling discovery or relating to records and upon non-compliance with the order, the Commission could sanction that party by drawing adverse inferences, precluding the introduction of evidence or testimony and striking out pleadings.

§8-119 Hearing (new)

This section describes the essential elements of the hearing process. It is similar to the current law except that it allows an administrative law judge to enter a default if the respondent has failed to file a timely answer without good cause (subd. c). If a default is entered, only the evidence in support of the complaint may be presented at the hearing (id.).

§8-120 Decision and Order (new)

This section gives the Commission the same broad authority as the existing law to grant injunctive relief and compensatory damages if it finds that a respondent has engaged in any unlawful discriminatory practice. The section gives examples of certain types of remedies but is not designed to be all inclusive. It makes clear the Commission's authority to order front pay, as well as back pay, to compensate victims of employment discrimination. Like back pay, front pay is a "make whole" remedy. Where back pay covers the time between the injury and the date of judgment, front pay offers prospective relief, providing compensation until the victim obtains the position he or she would have earned but for the discrimination. Without the remedy of front pay, the injuries of past discrimination might continue. This can occur, for example, in a situation where rightful promotion cannot take place immediately upon a favorable judgment. Thus, federal courts have found front pay useful under Title VII where reinstatement at the proper level is inappropriate because "the hostility between the parties precludes the possibility of a satisfactory employment relationship." Shore v. Federal Express Corp., 777 F.2d 1115 (6th Cir. 1985). In such cases, front pay can

be ordered until the plaintiff obtains the appropriate level with his or her new employer. Courts have also used the front pay remedy where the position has already been filled, and promoting the plaintiff would, therefore, require "bumping" an incumbent. Here, front pay can enable the victim of discrimination to draw a rightful wage while awaiting the availability of his or her rightful place. Edwards v. Occidental Chemical Corp., 892 F.2d 1442 (9th Cir. 1990) (ordering front pay from the date of the judgment until the date of promotion).

§8-121 Reopening of Proceeding by Commission (new)

This provision authorizes the Commission to reopen its proceedings or vacate or modify its orders in the interest of justice.

§8-122 Injunction and Temporary Restraining Order

Under the City's current law, after a complaint of housing discrimination has been filed, the Commission is authorized to seek a preliminary injunction to enjoin the respondent from engaging in acts which would render ineffectual a final order of the Commission (e.g. renting the subject housing to another person). The Commission is not similarly authorized with regard to complaints involving other forms of discrimination, and thus, pending the adjudication of such complaints and during the lengthy court review process, respondents will often engage in acts which make meaningless the relief imposed in Commission final orders. This section would broaden the Commission's authority to seek preliminary injunctive relief to include all types of discrimination covered by the City Human Rights Law. It allows the Commission to seek such relief where it is necessary to restrain the respondent or persons acting in concert with the respondent from

committing acts tending to render ineffectual a remedy that the Commission might impose in a final order.

§8-123 Judicial Review
§8-124 Civil Penalties for Violating Commission Orders (new)
§8-125 Enforcement (new)

Under current law, the provisions relating to judicial review of Commission orders and enforcement of Commission orders are combined in one section. As a consequence, courts have construed these provisions to permit a respondent in an enforcement proceeding to question the evidentiary basis for the issuance of the order which the Commission is seeking to enforce even where he or she had failed to commence a timely proceeding for judicial review of that order. Also, under current law there are no civil penalties for non-compliance with Commission orders. Thus, a respondent who has been found guilty of a violation of the Human Rights Law has no incentive to seek judicial review of, or to comply with, a Commission-ordered remedy until the Commission commences an enforcement proceeding.

The proposed new sections separate the procedures for judicial review (§8-123) and the procedures for enforcement of Commission orders (§8-125), and make clear that unless the respondent commences a timely proceeding for judicial review of a Commission order, he or she may not challenge the evidentiary basis for the issuance of the order when the Commission seeks to enforce that order (§8-125 (b)). In addition, civil penalties could be imposed in amounts up to $50,000 and $100 per day for non-compliance with Commission orders (§8-124).

§8-126 Civil Penalties Imposed by Commission for Unlawful Discriminatory Practices (new)

In addition to its existing authority upon a finding of discrimination to order equitable relief and award compensatory damages to a complainant, this section would give the Commission the power to impose civil penalties to vindicate the public interest. The penalties could be in amounts up to $50,000, and for willful and wanton conduct, up to $100,000.

§8-127 Disposition of Civil Penalties (new)

Civil penalties would be paid into the general fund, except that civil penalties assessed by a court against a city agency for violation of a final order issued by the Commission pursuant to section 8-120 after a finding that the agency has engaged in an unlawful discriminatory practice would be budgeted in a separate account. Monies from the account could be used only for anti-bias education programs or programs to redress discrimination by city agencies.

§8-128 Institution of Actions and Proceedings (new)

This section specifies that actions or proceedings on behalf of the Commission may be instituted by the Corporation Counsel or Commission attorneys designated by the Corporation Counsel or other attorneys designated by the Corporation Counsel.

§8-129 Criminal Penalties

This section is amended to increase the criminal fine for willful violation of final Commission orders from $500 to $10,000.

§8-130 Construction

This section expresses the legislative intent that the Human Rights Law be liberally construed for the accomplishment of its purposes. The amendment deletes unnecessary and duplicative language.

Chapter 4 Civil Action to Eliminate Unlawful Discriminatory Practices (new)

§8-401 Legislative Declaration

This provision contains an express recognition of the economic, social and moral harm imposed upon the City and its inhabitants by the existence of systemic discrimination.

§8-402 Civil Action

This provision expressly authorizes the Corporation Counsel to bring a civil action on behalf of the Commission or the City to eliminate particular instances of systemic discrimination. The relief which may be sought in such action includes injunctive relief and damages (including punitive damages) as well as civil penalties.

§8-403 Investigation

This section authorizes the Corporation Counsel to make any investigation necessary for the commencement of the civil action provided for above, and would also allow the issuance of subpoenas to compel the attendance of witnesses or the production of documents.

§8-404 Civil Penalty

This provision would authorize a court in addition to ordering a defendant found to have engaged in systemic discrimination to pay damages and provide other relief to the City, to impose upon the defendant civil penalties (recoverable by the City) of up to $250,000.

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

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

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

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

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

Chapter 6 Discriminatory Harassment (new)

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

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

damaging of property could result in the imposition of civil penalties of up to $50,000. §8-603.

Chapter 7 Discriminatory boycotts

This new chapter would require the Commission to begin investigation of a complaint alleging a discriminatory boycott or blacklist within 24 hours after the filing of the complaint and to make reports to the mayor and the council relating to the actions taken to resolve the dispute. If disclosure of any information in such reports would compromise the investigation or mediation or conciliation efforts, such information may be excluded from the report.

Bill Section 3

This section calls for the Commission to hold a hearing within 180 days of enactment, and to submit recommendations, if any, to the Mayor and the Council, on whether the City's Human Rights Law should be amended to authorize the Commission to impose reasonable requirements involving generation of records upon persons or classes of persons subject to the law.

The section also requires the Corporation Counsel and the Chairperson of the City Commission on Human Rights to issue a report to the Council within 12 months after the bill's enactment on the operation and results of procedures for effective legal representation of the Commission and enforcement of the City Human Rights Law and prevention of potential conflicts of interest.

Bill Section 4 - Effective Date

The bill would take effect 90 days after its enactment except that the provisions which prohibit discrimination on the basis

of age in public accommodations will take effect on the effective date of rules to be promulgated by the Commission which set forth exemptions to such provisions based on considerations of public policy. In addition, no action may be commenced in court for violation of the City Human Rights Law until 270 days after the effective date. The bill also specifies which of its provisions apply to complaints filed with the Commission prior to the effective date.

CURRENT LAW	NEW LAW
Disparate Impact.	
No explicit language in statute, but covered by CCHR caselaw. CCHR caselaw rejects recent U.S. Supreme Court decision which forces plaintiffs, rather than defendants, to prove that challenged practice is not required by business necessity (even though employer in best position put forth its own business needs).	Disparate impact explicitly covered. Respondent has burden of proving business necessity. Where complainant produces substantial evidence of less discriminatory alternative, respondent must prove that alternative wouldn't meet its needs as well as challenged practice. Business necessity is defined as practice or policy that bears significant relationship to significant business objective. Scope of challenges to standardized educational tests defined; and broad use of statistical evidence permitted. While "quotas" are deemed not to be encouraged by bill, authority of CCHR and courts to order or mediate appropriate relief is not limited.
Preliminary Injunctive Relief.	
Available only in housing cases. Availability pegged to harm alleged to be suffered by individual complainant.	Expanded to cover employment and public accommodations cases. Availability pegged to whether respondent's action would interfere with any type of relief that CCHR could order after a hearing.
Civil Penalties.	
Not permitted	Up to $50,000 can be awarded in most cases; up to $100,000 with a showing of willfulness or maliciousness; and up to $200,000 in cases of systemic discrimination. Other penalties include up to $50,000 and $100/day for violation of CCHR orders. All penalties collected go to general fund of City to compensate

for societal injury except for those assessed against City agencies for violations of final CCHR orders (these penalties go to special fund dedicated to anti-bias activities).

Private Right of Action.

No explicit coverage.	Complainant can choose whether to go to CCHR or State Supreme Court. Attorneys fees available for court actions.

Authority to litigate in court

Law Department (Corp Counsel) has authority to litigate CCHR cases when court action is needed and to delegate to CCHR litigation authority in specific matters or classes of matters.	Heads of Law Department and CCHR are required to report back to the Council in 12 months to provide assessments of the efficacy of procedures that have been put in place in an effort to represent CCHR effectively in court and avoid potential conflicts of interest.

Systemic discrimination claims litigated in court.

No explicit coverage.	Law Department (Corp Counsel) can litigate systemic discrimination claims in state court or delegate authority to CCHR (see authority to litigate, above).

Liability of employees and agents for their own biased acts.

No explicit coverage in employment context, although CCHR caselaw provides for liability where employee had power to do more than carry out decisions made by others.	Employees and agents are responsible for their own discriminatory acts.

Liability of employers for acts of employees and agents.

No explicit coverage.	Strict liability in housing and public accommodations. Strict liability in employment context for acts of managers and supervisors; also liability in employ-

	ment context for acts of co-workers where employer knew 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.

Liability of employers for acts of independent contractors.

No explicit coverage.	Liability where contractor, in furtherance of employer's business, discriminates, and employer knows and condones.

Discrimination based on perceived membership in a group or based on association with someone in a protected group.

No explicit language in statute, but covered by CCHR	Discrimination based on perceived status and on association with person of a protected group explicitly proscribed.

Age bias in residential housing.

Permitted	Prohibited except for certain exemptions for senior citizen housing.

Age bias in public accommodations.

Permitted.	Prohibited once CCHR issues regulations setting forth exemptions to prohibition based on bona fide public policy considerations.

Marital status bias in public accommodations and employment.

Permitted	Prohibited.

Discrimination in two-family, owner-occupied dwellings where available apartment has been publicly advertised.

Permitted.	Prohibited.

Strength and clarity of disability coverage

No affirmative statement of requirement to make reasonable accommodation; no explicit language on burdens of proof.	CCHR caselaw is explicitly incorporated into statutory language. Affirmative statement of requirement to make reasonable accommodation where covered entity knows or should know of disability.

Note: CCHR caselaw holds that respondent must make such accommodation as would enable person to meet essential requisites of job or benefit, except for that accommodation which respondent proves would cause it undue hardship.

Requirement to answer; sanctions for non-cooperation.

None (although CCHR caselaw provides for adverse inferences to be drawn for failure to comply with discovery requirements).	Respondents required to answer or face default; range of sanctions set out for failure to comply with discovery orders.

Recordkeeping

No coverage	CCHR can order respondent to preserve existing records and continue to make existing types of records. CCHR to hold hearing to develop recommendations on whether the law should be amended to authorize CCHR to require businesses to generate new records.

Discriminatory harassment

No coverage.	Prohibits threats, intimidation, force, or coercion which interfere with person's exercise of rights protected under law because of protected class.

Discriminatory boycotts

No coverage.	Prohibits as unlawful discriminatory practice discriminatory boycotts, exempting boycotts relating to labor disputes, those protesting discriminatory practices, and those protected by the First Amendment. Reporting requirements to City Council set forth.

Human Rights Legislation-
Supplement to Memorandum in Support Dated 4/3/91

The bill would amend chapter 1 of title 8 of the Administrative Code of the City of New York, which constitutes the City's Human Rights Law. It would also add new chapters 4 and 5 to title 8 of such code relating to the enforcement of that law, as well as add a new chapter 6 to title 8 relating to discriminatory harassment. The following is a section-by-section analysis of all of the provisions of the bill.

§8-101 Policy

This section, which is in current law, expresses the policy reasons for enacting the Human Rights Law. The amendment would update this section by referring to all of the prohibited grounds for discrimination. It would make clear the broad authority conferred upon the Commission to prevent discrimination from playing any role in actions relating to employment, public accommodations, housing and other real estate. It is intended that the Human Rights Law be liberally construed to recognize the Commission's broad authority to prevent discrimination.

§8-102 Definitions
"Person" (subd. 1)

The amendment makes clear that "person" includes natural persons, group associations, organizations and governmental bodies or agencies.

"Employer" (subd. 5)

Current law prohibits an "employer" from engaging in all forms of employment discrimination and defines "employer" to exclude employers with fewer than four employees. The amendment would clarify that the definition of "employer" applies only to the employment discrimination provisions. When employer is used in other provisions of the bill, i.e., §8-107(13) (employer's liability for the discriminatory acts of its employees), it is intended to have its ordinary meaning. The amendment would also provide that certain persons employed as independent contractors would be counted as persons employed for purposes of determining whether an employer employs four or more persons and is thus subject to the employment discrimination provisions. It should be noted that employees who are parents, spouses, or children of the employer will also be counted as persons employed for this purpose. See §8-107(1)(f).

"Employee" (former subd. 6)

The purpose of the definition of the term "employee" in the current law is to exclude certain family members and domestic workers from the employment discrimination provisions of the law. Technically the definition did not achieve this purpose since in the current law the term "employee" is not used in these provisions. The inappropriate definition of "employee" is deleted and the employment discrimination provisions are amended to carry out the intended purpose of the deleted definition with respect to the parents, spouse or child of an employer. See §8-107 (1)(f). The proposed

amendment does not exclude domestic workers from the employment discrimination provisions.

"Educational Institution" (new subd. 8)

The bill would add a definition of educational institution.

"Place or Provider of Public Accommodation"(subd. 9)

The amendment to this subdivision would change the term "place of public accommodation" to "place or provider of public accommodation." This change is intended to clarify the term "place of public accommodation" to make clear that it is intended to include providers of goods, services, facilities, accommodations or advantages. The amendment would streamline the definition by eliminating the long list of specific types of public accommodations and replace that with a generic definition. The amendment would also eliminate the current exclusion of public libraries, schools, colleges and other educational institutions. This results in the implicit inclusion of these institutions in the definition of public accommodation, and thereby subjects them to the prohibitions on discrimination by public accommodations. See §8-107(4). The amendment would enable persons aggrieved by certain discriminatory practices in educational institutions to avail themselves of the remedies provided by the City's law, i.e., file a complaint with the Commission or bring a private action in court.

The amendments to this subdivision also narrow the exclusion for places of accommodation that are distinctly private by providing that only clubs could be considered distinctly private. This would foreclose doctors, dentists and other professionals from

arguing that their practices are distinctly private and thus not subject to the prohibitions against discrimination.

"Housing Accommodation" (subd. 10)

The amendment would include publicly-assisted housing accommodations within the definition of "housing accommodation," (except where otherwise expressly provided) thereby reflecting the consolidation of provisions governing public and private housing discrimination effected in a subsequent section. See §8-107(5).

"Publicly-assisted Housing Accommodations" (subd. 11)

The only substantial difference which remains in the provisions of the Human Rights Law which cover private housing and those which cover publicly-assisted housing is that the exemptions from the prohibition of housing discrimination for the rental of owner-occupied one and two family homes and for the rental of rooms in owner-occupied apartments do not apply to publicly-assisted housing. See §8-107(5)(a)(4)(1) and (2). Thus, the definition of publicly-assisted housing serves to limit the applicability of these exemptions. The amendment to this subdivision would broaden the definition of publicly-assisted housing to include certain tax-exempt homes or publicly financed homes sold after July 1, 1991 and all homes with mortgages financed, guaranteed or insured at any time by a government agency whether or not the mortgage is still outstanding. By broadening the definition, the bill would thus subject the rental of certain owner-occupied one and two family homes and owner-occupied apartments, which are not covered by the current law, to the housing discrimination provisions.

"Multiple Dwelling" (former subd. 12)

The definition of "multiple dwelling" is deleted because the only reference to it is in the definition of publicly-assisted housing accommodation and that reference is deleted. See §8-102(11)(d).

"Family" (new subd. 12)

Under current law, "family" is defined for purposes of defining multiple dwellings and for purposes of certain exemptions from the housing discrimination provisions including the rental of owner-occupied one and two family housing. See §8-107(5)(a)(4). With the deletion of the term "multiple dwelling", the amendment makes clear that family is defined only for purposes of those exemptions.

"Real Estate Salesperson" (subd. 15)

The amendment makes clear that the term real estate salesperson includes persons who have been appropriately authorized by a licensed real estate broker.

"Disability" (subd. 16)

The term "handicap" is changed to "disability", a more modern and less stigmatizing term used in the State Human Rights Law. The definition is amended to clarify that any person with a physical, medical, mental or psychological impairment or a history or record of such an impairment is protected by the law. Those impairments are defined broadly so as to carry out the intent that persons with disabilities of any type be protected from discrimination. The amendments also retain the provision in the existing definition of "otherwise qualified person" (subd. 16(e)) that in the case of

alcoholism, drug addiction or other substance abuse, "disability" only applies to a person who is recovering or has recovered and currently is free of the abuse (new paragraph (c)). The amendments also make clear that "disability" does not apply to persons who currently are illegally using controlled substances when the person subject to the law acts on the basis of such use.

"Covered Entity" (new subd. 17)

This term is added to the law for purposes of the definition of the term "reasonable accommodation" (subd 18).

"Reasonable Accommodation" (new subd. 18)

This definition is added for purposes of a new provision which makes explicit the requirement implicit in the existing law that employers and other persons subject to the City's law make "reasonable accommodation" to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. See §8-107(15)(a). The exception in the definition for accommodations which cause undue hardship represents existing Commission case law. See e.g. Tartaglia v. Jack LaLanne Fitness Centers, NYCCHR Complaint No. 04153182-PA (June 9, 1986) at p. 21 (public accommodations discrimination); New York City Commission on Human Rights v. United Veterans Mutual Housing, Motion Decision NYCCHR Complaint No. EM00936-08/14/87-DE (April 4, 1990) at p. 5. (housing discrimination); see also Doe v. Pleasure Chest Ltd., NYCCHR Complaint No. GA-00167020389-DN (July 19, 1990) at p. 29-30 (employment discrimination).

"Sexual Orientation" (new subd. 20)

The bill moves the definition of sexual orientation currently found in §8-108.1 to the definitional section. This amendment is technical in nature and reflects the insertion of this protected category in the lists of protected categories in §8-107.

§8-105 Powers and Duties

The amendments to this section would expand the powers of the Commission as well as clarify existing powers. Specifically, the Commission would be authorized to require persons or companies under investigation to preserve records in their possession and to continue to make the type of records made by such person or company in the ordinary course of business where the records are relevant to determining whether discrimination has taken place (subd. 6).

The amendment expressly states the Commission's existing power to investigate and file complaints of pattern or practice discrimination, and authorizes the Commission to refer to the Corporation Counsel information on which a civil action (pursuant to Chapter 4) could be based (subd. (4)(b)).

The amendment clarifies the Commission's existing authority, in the course of investigating clubs which are or may be places or providers of public accommodation, to subpoena names of persons when such subpoena would not be inconsistent with applicable statutory and case law (subd. (5)(c)). As under existing law, the Commission's power to investigate clubs would continue to encompass the power to obtain information which is relevant to the determination

of whether a club qualifies as a place or provider of public accommodation.

The Commission's authority to delegate its powers, functions and duties to its employees or agents is made explicit with the proviso that certain powers, i.e., rule making, issuing orders relating to records and making a final determination that a respondent has engaged in discrimination, could be delegated only to Commission members (subd. (8)). The amendment also makes explicit that the Commission's power to appoint employees and assign them duties be exercised by the Chairperson.

§8-106 Relations With City Departments and Agencies

The amendments to this section would enable the Commission to require a city agency to furnish information without first consulting the Mayor.

§8-107 Unlawful Discriminatory Practices

Protected Categories

The provisions in current law describing unlawful discriminatory practices are amended to make clear that the law prohibits discrimination based on perceived, as well as actual, age, race, creed, color, national origin, disability, marital status, gender, sexual orientation and alienage or citizenship status. The term "gender" is used to replace the term "sex" (with no intent to change the meaning of the term). This section is also amended to include sexual orientation and disability, which are covered in separate sections of the current law, in the list of protected categories so that

the law will now provide in one place a list of all the prohibited types of discrimination.

Employment and Apprentice Training Programs (subds. 1 and new subd. 2)

The amendments to these provisions would prohibit employment discrimination based on marital status, and thus would conform the City's law to the State Human Rights Law. Currently, these subdivisions prohibit employers, employment agencies and labor organizations from engaging in discriminatory employment practices but are silent as to the individual liability of their employees and agents for such practices. The amendment would make explicit such individual liability.

The language which permits advertisements, statements or inquiries to express limitation and discrimination based upon a bona fide occupational qualification is deleted from paragraph (d) of subdivisions one and two. The deletion is not intended to eliminate bona fide occupational qualification as a defense to a claim of employment discrimination, but rather to allow the defense to continue to develop through case law made by courts or the Commission.

The amendment would delete language in paragraph (e) of subdivision one which duplicates the general prohibition against retaliation in §8-107(6). New language would be added to paragraph (e) to provide that the age discrimination provisions would not apply to employee benefit plans covered by the federal Employment Retirement Income Security Act of 1974 ("ERISA") where that federal law would be preemptive (subd. (1)(e)(i)). This recognizes the decisional law that has held ERISA to preempt State and local

discrimination laws in certain circumstances. See Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983). Provisions allowing the varying of insurance coverage based on an employee's age and allowing certain retirement policies or systems would also be added to paragraph (e). These provisions are derived from language in the existing subdivision (3-a) of section 8-107 which is being deleted. See §8-107(3-a)(c).

A new paragraph (f) of subdivision one would continue the present exemption for the hiring, firing and terms and conditions of employment of parents, spouses and children but would require those persons to be counted as persons employed for purposes of determining whether the employer is subject to the law with regard to other persons employed.

Public Accommodations (new subd. 4)

This subdivision is amended to prohibit places or providers of public accommodation from discriminating on the basis of age (para. (a)). The Commission is given authority to grant exemptions from this prohibition when it is in the public interest to do so (para. (b)). The amendment adding age would not take effect until the Commission promulgates rules setting forth such exemptions. Bill Section 4(1).

Certain exemptions are added permitting educational institutions (public and private) to make gender distinctions permitted under specified state or federal laws (i.e., separate housing, bathroom and locker room facilities, certain physical education classes and certain athletic teams) (para. (c)). Private schools would be

allowed to limit admissions to persons of one gender (para. (d)). In recognition of case law that has held the Board of Education not to be subject to municipal control with respect to matters that are strictly educational or pedagogic, educational institutions under the Board's jurisdiction would not be subject to the prohibitions on discrimination as they relate to matters that are strictly educational or pedagogic in nature (para. (e)).

Subds. 3 and 3-a (deleted)

Subdivision 3, which currently prohibits discrimination in publicly-assisted housing accommodations, is deleted and incorporated into subdivision 5, which covers all housing accommodations. Subdivision 3-a, which currently prohibits age discrimination by employers and licensing agencies, is deleted and incorporated into subdivision 1 (Employment) and a new subdivision 8 (Licenses and Permits). In addition, the limitation in subdivision 3-a on age discrimination, providing that individuals older than 65 are not protected thereunder, is removed from the law. This would conform the City's law to the State Human Rights Law and to the Federal Age Discrimination in Employment Act.

Tax Exempt Non-sectarian Education Corporations (former subd. 4 deleted)

The bill would delete this provision governing private schools as unnecessary in view of the implicit coverage of educational institutions (whether public or private) in the public accommodations provisions. In bringing private schools within those provisions the legislation would have the effect of changing current law by adding

national origin, gender and marital status to the prohibited grounds for discrimination.

Housing Accommodations, Land and Commercial Space (subd. 5)

Generally

The provisions prohibiting discrimination in publicly-assisted housing (former subd. 3) are incorporated into this subdivision except that the provision which permits inquiries relating to children in publicly-assisted housing is deleted. The amendments to this subdivision would make the City's law consistent with the State Human Rights Law by prohibiting age discrimination in the sale, rental or purchase of all housing accommodations, land and commercial space. The amendments would also clarify the applicability of this subdivision to cooperatives and condominiums by prohibiting discrimination in the "approval of the sale" of housing accommodations "or an interest therein".

Para. (a) Subpara. (4)

Current law exempts from the housing discrimination provisions the rental of housing in one and two family owner-occupied housing. The amendment would allow the exemption only if the available housing has not been publicly advertised or listed or otherwise offered to the general public (Subpara. (4)(1)).

The bill would delete the language creating a general exemption for restricting rooms in a rooming house, dormitory or residence hotel to one sex (Subpara. (4)(3)). This amendment is intended to bring the City's law into conformity with the federal Fair Housing Act, which does not contain such a general exemption.

Para. (c)

A new subparagraph (3) would prohibit real estate brokers from blockbusting, i.e. inducing persons to sell or rent housing, land or commercial space by representations regarding the entry into the neighborhood of any members of a protected group. This provision is derived from the federal Fair Housing Act (42 U.S.C. 3604(e)) but goes further than that law in its application to commercial space and in the number of protected groups.

Para. (d) and (f)

Amendments to paragraph (d) and the new paragraph (f) make clear that the law prohibits discrimination in the appraisal of any housing accommodation, land and commercial space. This provision is also derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(ix)(B).

Para. (e)

This new provision prohibits the discriminatory denial of access to or membership in a multiple listing service or real estate brokers organization. It is derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(x).

Para. (g)

The provisions relating to housing discrimination on the basis of occupation are moved from §8-108.2 to this paragraph without intent to make any substantive change.

Para. (i)

The amendments to this paragraph are designed to bring the City's law into conformity with the federal Fair Housing Act,

which allows owners and operators of housing for older persons (as defined therein) to discriminate in the rental or sale of such housing on the basis of whether children are or would be residing in such housing. See 42 USC 3607(b)(2) and (3).

Para. (j)

This provision would allow restriction of the sale or rental of housing or land exclusively to persons 55 or over. It would clarify that such persons could not be discriminated against on the basis of whether children are, may be or would be residing with them, unless such housing qualifies as housing for older persons as defined in the federal Fair Housing Act.

Para. (k)

Although the federal Fair Housing Act on its face prohibits educational institutions from making gender distinctions in dormitory residences, the agency administering that law (the Department for Housing and Urban Development, or "HUD") has construed the law to permit the gender distinctions allowed under another federal law for separate housing, bathrooms and locker rooms. See 45 CFR §§86.32 and 86.33. This new provision would allow such distinctions to be made under the City's law to the same extent that they are allowed under HUD's interpretation of the federal Fair Housing Act.

Para. (l)

This provision would allow distinctions to be made with regard to gender and children in dormitory-type residences (e.g. shelters for the homeless), to protect personal privacy or the health, safety or welfare of families with children. HUD's interpretation of

the federal Fair Housing Act has allowed some distinctions such as these although the Act and its regulations are silent as to these issues.

Para. (m)

This provision restates and clarifies current law.

Para. (n)

This new provision clarifies that the owners of publicly-assisted housing accommodations (such as the Housing Authority) may utilize criteria or qualifications of eligibility for the sale, rental or occupancy of public housing which are required to comply with Federal or State law or are necessary to obtain the benefits of a Federal or State program, and use statements, advertisements, applications and inquiries which state criteria or qualifications necessary to determine eligibility for such housing.

Retaliation (subd. 7)

This subdivision prohibits retaliation against persons who file complaints of discrimination. The amendments would broaden this subdivision by also prohibiting retaliation against persons who commence civil actions, assist the Corporation Counsel or the Commission in investigations or provide information pursuant to the terms of a conciliation agreement.

Licenses and Permits (subd. 9) (new)

Under the current law, discrimination by licensing agencies is prohibited only where the discrimination is based on age (former subd. 3-a). This new subdivision would broaden current law by prohibiting licensing agencies from discriminating against applicants

on the basis of any of the protected categories (paras. (a) and (b)). An exception is provided which allows age or disability to be used as a criterion for determining eligibility for a license or permit where such use is specifically required by another provision of law (para. (c)). Thus, the issuance of special parking permits to disabled persons pursuant to New York City Charter §2903(b)(15), the granting of preferences to disabled or elderly persons in the issuance of newsstand licenses pursuant to Administrative Code §20-230, and the issuance of rifle and shotgun permits only to persons 18 years of age or over pursuant to Ad. Code §10-303(a)(1) would still be allowed.

Criminal Conviction (subd. 10) (new)

Article 23-A of the Correction Law prohibits discrimination in employment and licensing on the basis of an applicant's record of criminal convictions except in certain specified circumstances. That article provides for enforcement against private employers by the State Division of Human Rights and concurrently by the Commission. This new subdivision merely incorporates the Article 23-A prohibition into the City's Human Rights Law in the same manner as it is incorporated into the State Human Rights Law. See Executive Law §296(15). The amendment is intended to encompass within the City's law all of the substantive provisions which are already within the Commission's jurisdiction and would effect no substantive change in the Commission's jurisdiction over this type of discrimination.

Arrest Record (subd. 11) (new)

The State Human Rights Law, with certain exceptions, prohibits discrimination in connection with licensing, employment and providing of credit on the basis of an applicant's arrest record. See Executive Law §296(16). This new subdivision is identical to the State law provision.

Religious Principles (subd. 12, former subd. 9)

The new language in item (i) is intended to conform the exemption for religious organizations with regard to housing discrimination with the exemption contained in the federal Fair Housing Act. See 42 USC §3607. The proposed amendment would allow religious organizations to limit or give preference in the sale or rental of housing owned by such organization for other than a commercial purpose to persons of the same religion only where it would promote the religious principles of the organization and where membership in the religion is not restricted on account of race, color or national origin.

The language in item (ii) is designed to make clear that the other limitations and preferences allowed to be made by a religious organization favoring members of the religion are only those which promote its religious principles and which are protected by the free exercise clause of the First Amendment of the U.S. Constitution.

Employer Liability for Discriminatory Conduct by Employee, Agent and Independent Contractor (subd 13) (new)

Paragraph (a) of this subdivision provides that with respect to all types of discrimination other than employment discrimination, an

employer would be held liable for the discriminatory conduct of an employee or agent. Paragraph (b) provides that with respect to employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent only where the employee or agent who committed the discriminatory act exercised managerial or supervisory responsibility or the employer knew of the conduct and failed to take corrective action or should have known of the conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct. Under paragraph (c), an employer would be held liable for the conduct of certain persons employed as independent contractors only where the employer had actual knowledge of and acquiesced in the conduct.

Employers could mitigate their liability for civil penalties or punitive damages by proving they had instituted policies, programs and procedures for the prevention and detection of discrimination and by showing a record of no, or relatively few, prior incidents of discrimination (para (d)). In the event an employer is found not liable for the conduct of an employee or agent, paragraph (e) would authorize a court or the Commission to order the employer to provide any injunctive relief (non-monetary) necessary to effectuate a complete remedy for the aggrieved person. Finally, the Commission would be authorized to promulgate rules establishing policies, programs and procedures for the prevention and detection of discrimination, which if instituted by an employer would insulate him or her from liability for civil penalties which could be imposed by the Commission or punitive damages or civil penalties which could be

imposed by a court based on the conduct of an employee, agent or person employed as an independent contractor (para (f)).

Alienage or Citizenship Status (new subd. 14, former subd. 11)

Current law allows distinctions and preferences based upon alienage or citizenship status and inquiries as to a person's alienage or citizenship status in very narrow circumstances ("when... required or when... expressly permitted by any law... and when such law... does not provide that state or local law may be more protective of aliens, §8-107(11)). These circumstances do not cover distinctions or inquiries made by banks and lending institutions who seek to sell mortgages to the Federal Home Mortgage Insurance Corporation ("FHMIC"). A FHMIC directive provides that the "[FHMIC] will purchase mortgages made to aliens who are lawful permanent residents of the United States under the same terms that are available to U.S. citizens... We will purchase mortgages made to non-permanent resident aliens as long as the borrower occupies the property and the loan-to-value ratio does not exceed 75%." See Fannie Mae, Lending Requirements, §203.02 (emphasis in original).

The proposed amendment to this subdivision is intended to allow banks and lending institutions to make such inquiries or determinations based upon alienage or citizenship status as are necessary to enable them to obtain the benefits of selling their mortgages to FHMIC. It will also allow inquiries and distinctions to be made for other purposes related to federal programs, but only insofar as such actions are necessary to obtain the benefits of such programs.

Reasonable Accommodation; Affirmative Defense (new subd.15)

Paragraph (a) of this new subdivision would make explicit the requirement implicit in existing law that persons subject to the City's Human Rights Law make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. Paragraph (b) establishes an affirmative defense to a claim of discrimination based on disability that the claimant could not, with reasonable accommodation, satisfy those requisites or enjoy those rights.

Former §8-108 and §8-108.1 subd(1) (deleted)

These provisions are deleted because the protected categories, disability and sexual orientation, have been inserted in the lists of protected categories in §8-107.

Applicability; Sexual Orientation (subd. 16, formerly paragraphs a through e of subd. 2 of §8-108.1)

Former section 8-108.1, subd. 2, sets forth certain provisions relating to the applicability of the law with respect to discrimination based on sexual orientation. These provisions have been retained and are set forth in the revised law as paragraphs a through e of subdivision 16 of section 8-107.

Disparate Impact (new subd. 17)

This new subdivision sets forth the standards for the adjudication of an alleged unlawful discriminatory practice which is based on a claim that a policy or practice has a disparate impact which is detrimental to a group protected by the provisions of §8-107.

Unlawful Boycott or Blacklist (new subd. 18)

This new subdivision incorporates the provisions of the State Human Rights Law which prohibits boycotts and blacklists based on discriminatory animus. However, it goes further than State law by adding disability, age, marital status, sexual orientation and alienage or citizenship status to the protected categories.

Interference with Protected Rights (new subd. 19)

This new subdivision prohibits threats, harassment, coercion, intimidation and interference with a person's exercise or enjoyment of any rights granted or protected under §8-107 or attempts to engage in those acts. It is derived, in part, from a similar provision of the federal Fair Housing Act.

Relationship or Association (new subd. 20)

This subdivision makes clear that the City's Human Rights Law prohibits discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom such person has a known relationship or association. It would also codify the Commission's interpretation of the existing law. This provision is similar to provisions in the Federal Fair Housing Act and the Americans with Disabilities Act.

Former §8-109 Procedure (deleted)

This section, which prescribes the current procedures for filing and processing complaints of discrimination with the Commission, is deleted and replaced by new sections 8-109 through 8-122.

§8-109 Complaint (new)

This section describes in detail the requirements and procedure for filing a complaint of discrimination with the Commission. It includes the content of the complaint and a requirement that the Commission acknowledge the filing of the complaint (subd. a), a requirement that the Commission serve a copy of the complaint on the respondent and advise the respondent of his or her procedural rights and obligations under the law (subd. d), the time limit for filing a complaint (subd. e), and amendment of the complaint (subd. h). This section would preclude the Commission from adjudicating a complaint if prior to filing such a complaint the complainant had initiated a civil action alleging the same act of discrimination, if a complaint involving the same grievance is pending before an administrative agency, or if the State Division of Human Rights issued a final determination on such complaint (subd. f). With regard to complaints filed on or after September 1, 1991, this section would require the Commission to commence proceedings, investigate and make a final disposition promptly and within the time periods prescribed by rule of the Commission or explain the reasons for not doing so (subd. g).

§8-111 Answer (new)

This section requires a respondent to file an answer within 30 days after the complaint is served (subd. a). It also prescribes the contents of the answer (subds. b, c and d) and provides for extension of the 30-day period for good cause (subd. e). Allegations not specifically denied or explained in the answer are deemed admitted (subd. c).

§8-112 Withdrawal of Complaints (new)

This section provides that a complaint may be withdrawn at any time prior to service of a notice that it has been referred to an administrative law judge (subd. a) or after service of such notice, at the discretion of the Commission (subd. b). Unless the complaint is withdrawn pursuant to a conciliation agreement, withdrawal is without prejudice to further prosecution of the alleged discriminatory acts by the Commission or the Corporation Counsel (subd. c).

§8-113 Dismissal of Complaint (new)

This section prescribes the circumstances under which the Commission may dismiss a complaint for administrative convenience (subds. a and b). Dismissal for administrative convenience includes a dismissal requested by the complainant where 180 days have passed since the filing of a complaint which had not been actively investigated (subd. (a)(6)), as well as dismissal prior to the filing of an answer where no investigation or conciliation had taken place (subd. b). The section also provides for dismissal upon a finding of no probable cause (subd. d) or lack of jurisdiction (subd. c), and for appeal of any dismissal to the chairperson (subd. f).

§8-114 Investigations and Investigative Recordkeeping (new)

This section provides that where the Commission has conducted an investigation it could demand that the person or entity under investigation preserve records in its possession or continue to make the type of records previously made where the records are relevant to a determination of whether discrimination has taken place (subd. b). A person or entity upon whom a demand is made may file

objections with the Commission and get a determination in 30 days (subd. c). During the 30-day period, the person or entity upon whom a demand is made would be required to maintain the status quo, i.e., preserve existing records and continue to make records (subd. c). A proceeding may be brought in court to enforce an order relating to records (subd. e) or the Commission may impose administrative sanctions for non-compliance (see §8-118).

§8-115 Mediation and Conciliation (new)

This section makes explicit the Commission's authority to engage the parties in mediation or conciliation at any time after the filing of a complaint (subd. a). It also provides that a conciliation agreement may be embodied in a consent decree (subd. b). All conciliation agreements shall be embodied in orders (subd. d). Efforts at mediation and conciliation shall not be publicly disclosed (subd. c) but all conciliation agreements shall be made public unless the complainant, respondent and the Commission agree otherwise (subd. d).

§8-116 Determination of Probable Cause (new)

This provision sets out the procedure to be followed after a finding of probable cause, including notice (subds. a and b) and referral to an administrative law judge (subd. c). It also provides that Commission-initiated complaints shall not require a determination of probable cause.

§8-117 Rules of Procedure (new)

This section requires the Commission to adopt rules for hearing and prehearing procedure, including rules for discovery.

The rules shall require that the Commission be a party to any proceeding and that the complainant shall be a party only if he or she has formally intervened.

§8-118 Noncompliance with Discovery Order or Order Relating to Records (new)

This section describes the procedure for imposing administrative sanctions on persons who resist the Commission's orders compelling discovery or orders relating to records, including notice and the opportunity for a hearing. The sanctions include the drawing of adverse inferences, prohibiting introduction of evidence, striking out pleadings, and precluding any objection to the use of secondary evidence.

§8-119 Hearing (new)

This section describes the essential elements of the hearing process. It is similar to the current law except that it allows an administrative law judge to enter a default if the respondent has failed to file a timely answer without good cause (subd. c). If a default is entered, only the evidence in support of the complaint may be presented at the hearing (id.).

§8-120 Decision and Order (new)

This section gives the Commission the same broad authority as the existing law to grant injunctive relief and compensatory damages if it finds that a respondent has engaged in any unlawful discriminatory practice. The section gives examples of certain types of remedies but is not designed to be all inclusive. It makes clear the Commission's authority to order front pay, as well as back pay, to compensate victims of employment discrimination. Like back pay,

front pay is a "make whole" remedy. Where back pay covers the time between the injury and the date of judgment, front pay offers prospective relief, providing compensation until the victim obtains the position he or she would have earned but for the discrimination. Without the remedy of front pay, the injuries of past discrimination might continue. This can occur, for example, in a situation where rightful promotion cannot take place immediately upon a favorable judgment. Thus, federal courts have found front pay useful under Title VII where reinstatement at the proper level is inappropriate because "the hostility between the parties precludes the possibility of a satisfactory employment relationship." Shore v. Federal Express Corp., 777 F.2d 1115 (6th Cir. 1985). In such cases, front pay can be ordered until the plaintiff obtains the appropriate level with his or her new employer. Courts have also used the front pay remedy where the position has already been filled, and promoting the plaintiff would, therefore, require "bumping" an incumbent. Here, front pay can enable the victim of discrimination to draw a rightful wage while awaiting the availability of his or her rightful place. Edwards v. Occidental Chemical Corp., 892 F.2d 1442 (9th Cir. 1990) (ordering front pay from the date of the judgment until the date of promotion).

§8-121 Reopening of Proceeding by Commission (new)

This provision authorizes the Commission to reopen its proceedings or vacate or modify its orders in the interest of justice.

§8-122 Injunction and Temporary Restraining Order Enjoining Acts Which Would Limit or Interfere With the Effectiveness of Commission Orders

Under current law, the Commission is authorized to seek from a court temporary injunctive relief against a respondent prior to a finding of an unlawful discriminatory practice only where the complaint alleges housing discrimination. This section allows the Commission to seek such relief with regard to any complaint of discrimination where it is necessary to restrain the respondent or persons acting in concert with the respondent from committing acts which would limit or interfere with a remedy that the Commission might impose in a final order.

§8-123 Judicial Review
§8-124 Civil Penalties for Violating Commission Orders (new)
§8-125 Enforcement (new)

Under current law, the provisions relating to judicial review of Commission orders and enforcement of Commission orders are combined in one section. As a consequence, courts have construed these provisions to permit a respondent in an enforcement proceeding to question the evidentiary basis for the issuance of the order which the Commission is seeking to enforce even where he or she had failed to commence a timely proceeding for judicial review of that order. Also, under current law there are no civil penalties for non-compliance with Commission orders. Thus, a respondent who has been found guilty of a violation of the Human Rights Law has no incentive to seek judicial review of, or to comply with, a Commission ordered remedy until the Commission commences an enforcement proceeding.

The proposed new sections separate the procedures for judicial review (§8-123) and the procedures for enforcement of

Commission orders (§8-125), and make clear that unless the respondent commences a timely proceeding for judicial review of a Commission order, he or she may not challenge the evidentiary basis for the issuance of the order when the Commission seeks to enforce that order (§8-125 (b)). In addition, civil penalties could be imposed in amounts up to $50,000 and $100 per day for non-compliance with Commission orders (§8-124).

§8-126 Civil Penalties Imposed by Commission for Unlawful Discriminatory Practices (new)
§8-127 Disposition of Civil Penalties (new)

In addition to its existing authority upon a finding of discrimination to order equitable relief and award compensatory damages to a complainant, these new sections would give the Commission the power to impose civil penalties (recoverable by the City) to vindicate the public interest. The penalties could be in amounts up to $50,000, and for willful and wanton conduct, up to $100,000.

§8-128 Institution of Actions and Proceedings (new)

This section specifies that actions or proceedings on behalf of the Commission may be instituted by the Corporation Counsel or Commission attorneys designated by the Corporation Counsel or other attorneys designated by the Corporation Counsel.

§8-129 Criminal Penalties

This section is amended to increase the criminal fine for willful violation of final Commission orders from $500 to $10,000.

§8-130 Construction

This section expresses the legislative intent that the Human Rights Law be liberally construed for the accomplishment of its purposes. The amendment deletes unnecessary and duplicative language.

Chapter 4 Civil Action to Eliminate Unlawful Discriminatory Practices (new)
§8-401 Legislative Declaration

This provision contains an express recognition of the economic, social and moral harm imposed upon the City and its inhabitants by the existence of systemic discrimination.

§8-402 Civil Action

This provision expressly authorizes the Corporation Counsel to bring a civil action on behalf of the Commission or the City to eliminate particular instances of systemic discrimination. The relief which may be sought in such action includes injunctive relief and damages (including punitive damages) as well as civil penalties.

§8-403 Investigation

This section authorizes the Corporation Counsel to make any investigation necessary for the commencement of the civil action provided for above, and would also allow the issuance of subpoenas to compel the attendance of witnesses or the production of documents.

§8-404 Civil Penalty

This provision would authorize a court in addition to ordering a defendant found to have engaged in systemic discrimination to pay damages and provide other relief to the City, to impose upon the defendant civil penalties (recoverable by the City) of up to $250,000.

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

This provision would allow an aggrieved person who has a discrimination claim under the City Human Rights Law to bring a civil action in court, unless such aggrieved person had filed a complaint

with the Commission or the State Division of Human Rights (subd. a). However, if the complaint had been dismissed by either agency on the grounds of administrative convenience, then a civil action could still be commenced (subd. b). The relief which could be sought in such action is injunctive relief and damages, including punitive damages (subd. a). This section would also provide for a court, in its discretion, to award costs and reasonable attorney's fees to a prevailing party (subd. e).

Chapter 6 Discriminatory Harassment (new)
§8-602 Civil Action to Enjoin Discriminatory Harassment; Equitable Remedies

This section would authorize the Corporation Counsel to seek a court order enjoining a person from interfering by threats, intimidation or coercion with an individual's rights secured by Federal, State and City laws because of race, creed, color, national origin, gender, sexual orientation, age, marital status, disability or alienage or citizenship status or whether children are, would be or may be residing with a person (subd. a). A violation of the court order would result in contempt and the imposition of civil penalties of up to $10,000 per day (subd. c).

§8-603 Discriminatory Harassment; Civil Penalties

This section would prohibit a person from, by force or threat of force, knowingly injuring, intimidating or interfering with an individual's rights secured by Federal, State and City laws on the basis of any protected category (subd. a). This section would also prohibit intimidation by knowing defacement or damage of another's property on the basis of any protected category (subd. b). Violation

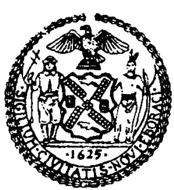
of either of these provisions would result in the imposition of a civil penalty of up to $50,000 (subd. c).

Bill Section 3 - Commission to Conduct Hearing Regarding Recordkeeping

The bill calls for the Commission to hold a hearing within 180 days of enactment, and to submit recommendations, if any, to the Mayor and the Council, on whether the City's Human Rights Law should be amended to authorize the Commission to impose reasonable requirements involving generation of records upon persons or classes of persons subject to the law.

Bill Section 4 - Effective Date

The bill would take effect 90 days after its enactment except that the provisions which prohibit discrimination on the basis of age in public accommodations will take effect on the effective date of rules to be promulgated by the Commission which set forth exemptions to such provisions based on considerations of public policy. In addition, no action may be commenced in court for violation of the City Human Rights Law until 270 days after the effective date. The bill also specifies which of its provisions apply to complaints filed with the Commission prior to the effective date.



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Revised April 3, 1991

MEMORANDUM IN SUPPORT

TITLE: A LOCAL LAW to amend the administrative code of the City of New York, in relation to the human rights law

SUMMARY OF PROVISIONS AND REASONS FOR SUPPORT:

The City's Human Rights Law (§8-101 et seq. of the Administrative Code of the City of New York) has been in the forefront of civil rights laws, providing protection for all persons from invidious discrimination. As part of a generation of Federal and State discrimination laws which created vital substantive rights and institutions charged with enforcing those rights, the City's law has made a valuable contribution to advancing civil rights in the City. While the law has been amended on numerous occasions to expand its substantive scope, the basic enforcement mechanism of the law has remained virtually unchanged since 1965. The benefits of twenty-five years of experience in enforcing this law, as well as the collective

wisdom gained from the enforcement of Federal and State laws, now make it clear that the enforcement mechanisms of the City's law must be strengthened and expanded and that many of the substantive provisions should be expanded, harmonized or clarified. In recognition of the vital role served by the City in protecting civil rights, it is time now to move the City's law into the next generation of civil rights laws. To this end, the proposed legislation would:

(1) strengthen enforcement of the law by the Commission on Human Rights ("Commission"), including enhancing its ability to investigate effectively and prosecute vigorously claims of discrimination, authorizing it to seek preliminary injunctive relief against alleged violators pending adjudication and appeal, authorizing it to impose civil penalties upon those found to have engaged in discrimination and providing for increased criminal fines for willfully violating final Commission orders;

(2) authorize the institution of civil actions on behalf of the City to eliminate patterns or practices of discriminatory acts, i.e., systemic discrimination;

(3) authorize a person aggrieved by alleged discrimination to institute a civil action to enforce the law, and allow for an award of attorney's fees to the prevailing party;

(4) authorize the Commission to administratively prosecute certain forms of discriminatory harassment and authorize the Corporation Counsel to institute a civil action to enjoin certain forms of discriminatory harassment and to impose civil penalties for engaging in such harassment;

(5) make clear that in cases of discrimination resulting in disparate impact to a protected group the burden is on the defendant to prove that the challenged practice or policy is required by business necessity; and

(6) expand, clarify or harmonize many of the substantive provisions of the law, including (i) setting forth standards for holding an employer vicariously liable for the discriminatory conduct of its employees, agents and in certain cases independent contractors; (ii) expanding the coverage of the public accommodations provisions to include public schools and colleges; (iii) prohibiting discriminatory boycotts; (iv) prohibiting age discrimination in public accommodations and in the sale or rental of housing, land and commercial space; (v) prohibiting employment discrimination based on marital status; and (vi) prohibiting licensing agencies from discriminating against license or permit applicants.

The following is a description of the most important changes proposed by the bill.

Commission's Authority to Seek Injunctive Relief Expanded

Under the City's current law, after a complaint of housing discrimination has been filed, the Commission is authorized to seek a preliminary injunction to enjoin the respondent from engaging in acts which would render ineffectual a final order of the Commission (e.g. renting the subject housing to another person). The Commission is not similarly authorized with regard to complaints involving other forms of discrimination, and thus, pending the adjudication of such complaints and during the lengthy court review process, respondents

will often engage in acts which make meaningless the relief imposed in Commission final orders. The proposed legislation would broaden the Commission's authority to seek preliminary injunctive relief to include all types of discrimination covered by the City Human Rights Law. §8-122.

Commission Empowered to Impose Civil Penalties

The proposed legislation would add to the Commission's existing authority to order equitable relief and award compensatory damages recoverable to the complainant, the power to impose civil penalties (recoverable by the City) to vindicate the public interest. §8-126 and §8-124. Under the bill, the Commission could impose a penalty of up to $50,000 for engaging in discrimination (§8-126(a)), a penalty of up to $50,000 and $100 per day for violating a Commission order remedying discrimination or a conciliation agreement (§8-124), and a penalty of up to $10,000 for making false statements or submitting false records in Commission proceedings (§8-126(b)). If the conduct is willful or wanton, the maximum penalty could be as much as $100,000. §8-126(a). These maximum amounts find precedent in Congress' recent amendments to the Federal Fair Housing Act, which prohibits housing discrimination.

Criminal Fines For Willful Violation of Commission Orders Increased

Under current law, willfully impeding a Commission investigation or willfully violating a Commission order is a misdemeanor punishable by a fine of up to $500 or up to one year in jail or both. The proposed legislation would increase the criminal fine from $500 to $10,000. §8-129.

Commission Empowered to Require Persons Under Investigation to Preserve Existing Records and to Continue to Make the Type of Records Already Made

The proposed legislation would authorize the Commission to order persons or companies under investigation to preserve records in their possession and to continue to make the type of records made by such person or company in the ordinary course of their business where the records are relevant to the existence of discrimination. §8-114(b). Under the provision, the person upon whom a demand is made to preserve and/or continue to make records would be entitled to file an objection to the demand with the Commission and get a determination within thirty days. During the thirty-day period, the person upon whom a demand is made would be required to maintain the status quo, i.e., preserve existing records and continue to make records. §8-114(c).

Imposition of Administrative Sanctions on Persons Who Resist Commission Discovery Requests and Orders Relating to Records

To discourage persons under investigation from resisting the Commission's discovery requests, the proposed bill would make express the Commission's authority to impose administrative sanctions upon the resisting party. §8-118. The bill would also authorize the Commission to impose administrative sanctions upon parties who fail to comply with Commission orders to preserve records and/or to continue to make records. After affording the resisting party an opportunity to make objections to an order compelling discovery or relating to records and upon non-compliance with the order, the Commission could sanction that party by drawing adverse inferences, precluding the introduction of evidence or testimony and striking out pleadings.

Respondents Required to Answer Complaints of Discrimination or Risk Default

Under current law, there is no requirement that a respondent answer a complaint of discrimination until he or she appears at a hearing. Respondents have no incentive to answer prior to such time. To assist the Commission in the timely processing of complaints, the bill would require a respondent to file an answer to a complaint within 30 days after the complaint had been served. §8-111. The failure to file an answer would result in a default and the hearing would proceed without the respondent. §8-119(e). The administrative law judge could open the default and allow the respondent to present an answer only upon a finding that there was good cause for the failure to file a timely answer.

Details Commission's Administrative Procedures From Complaint Through Final Decision

The bill would set forth in greater detail the administrative procedures of the Commission from the time a complaint is filed through to the final decision on whether discrimination has occurred. §8-109 to §8-120.

Corporation Counsel Empowered to Bring Civil Action to Eliminate Acts of Systemic Discrimination

The proposed legislation contains an express recognition of the economic, social and moral harm imposed upon the City and its inhabitants by the existence of systemic discrimination. §8-401. Thus, in conjunction with the enhanced ability of the Commission to investigate and prosecute claims of systemic discrimination, the proposed legislation would authorize the Corporation Counsel to bring a civil action to eliminate particular instances of systemic

discrimination. §8-402. The bill would grant investigative powers to the Corporation Counsel in relation to systemic discrimination (§8-403). The legislation envisions the Commission and the Corporation Counsel working cooperatively to investigate and prosecute these claims. §8-105(4)(b). A court deciding the case could order a defendant found to have engaged in systemic discrimination to pay the City damages (including punitive damages) and provide other relief. §8-402(a). In addition, a court could impose civil penalties upon the defendant in amounts up to $250,000. §8-404.

Authorizes Persons Aggrieved by Alleged Discrimination to Bring Civil Action Under City Law and to Recover Attorney's Fees

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

In consideration of the policy inherent in the State Human Rights Law that a judicial forum is an appropriate alternative forum for the enforcement of discrimination laws, the proposed legislation would permit aggrieved persons to bring a civil action in court for violation of the City law. Alternatively, aggrieved persons could file a complaint with the Commission, and having chosen one avenue of

relief over another, would be deemed to have elected their remedy. §8-502(a). The bill provides generally that the filing of a complaint with the Commission would preclude a person from going to court except if the complaint had been dismissed for administrative convenience. §8-502(b). Dismissal for administrative convenience could include a dismissal requested by the complainant where 180 days have passed since the filing of a complaint which had not been actively investigated, as well as dismissal prior to the filing of an answer where no investigation or conciliation attempts had taken place. §8-113(a)(6) and §8-113(b).

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

Remedies Against Discriminatory Harassment

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

First, the bill would make it an unlawful discriminatory practice to coerce, intimidate, threaten or interfere with, or to attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of any rights granted by the City Human Rights Law. This gives the Commission authority to administratively prosecute such claims and aggrieved persons the right to bring a private action. § 8-107(19). This provision is derived from a similar provision in the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(vii).

In addition, the bill would add provisions derived from similar laws in Massachusetts and California, authorizing the Corporation Counsel to seek a court order enjoining a person from interfering by threats, intimidation or coercion with an individual's rights secured by any Federal, State and City laws. §8-602(a). A violation of the court order would constitute contempt and be subject to the imposition of civil penalties of up to $10,000 per day. §8-602(c). Harassment involving force or a threat of force or the damaging of property could result in the imposition of civil penalties of up to $50,000. §8-603.

Disparate Impact

Certain discriminatory practices or policies, though not intended to discriminate, may be actionable because they result in a disparate impact to a person who is the member of a group protected by the City's law. Like Title VII of the Civil Rights Act (which prohibits employment discrimination), the City's law has been construed by the Commission to apply to disparate impact cases

although it does not explicitly provide as such. Last year, the U.S. Supreme Court in Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115, 2125-26 (1989) made it significantly more difficult for an aggrieved person to prove a disparate impact case under Title VII. The Court held that when a plaintiff has made out a prima facie case of disparate impact, the defendant has the burden of producing evidence of business justification but the burden of persuasion always remains with the plaintiff. Commentators viewed this holding as a departure from previous decisions which were read to place the burden of proving business necessity upon the defendant. The Commission and the courts are not bound to follow Wards Cove in their interpretation of the burdens of proof in disparate impact cases under the City Human Rights Law. After the Wards Cove decision, the Commission and the administrative law judges adjudicating disparate impact cases have continued to apply the burdens of proof (as set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971)) that most courts applied in Title VII cases decided prior to Wards Cove. See Fitzgibbons v. New York City Police Department, NYCCHR Complaint No. 12141485-EG (April 26, 1990) at p. 4.

The proposed provisions are intended to clearly set out the burdens of proof in disparate impact cases brought under the City Human Rights Law so that it will not be necessary for the courts or the Commission to seek guidance in federal case law to interpret the City law in this area. §8-107(17). The provisions make clear that the respondent or defendant has the burden to affirmatively plead and prove that a policy or practice bears a significant relationship to

a significant business objective (business necessity) or does not contribute to the disparate impact. The legislation also provides that a policy or practice shown to have a disparate impact will be found unlawful where the Commission or a plaintiff produces substantial evidence that an alternative policy or practice with less disparate impact is available and the respondent or defendant fails to prove that it would not serve them as well.

Substantive Provisions of the Law Expanded, Clarified or Harmonized

Employer Liability for Discriminatory Acts of Employees, Agents and Independent Contractors

The current City Human Rights Law is silent on the standard to be applied in deciding whether an employer can be held liable for the discriminatory conduct of its employees. The State Human Rights Law, upon which much of the City law is modeled, is also silent on this question. However, the State law provisions prohibiting discrimination in employment and in public accommodations have been narrowly construed by the courts of this State to impose liability upon an employer for its employee's unlawful conduct only when the employer knew of or condoned the conduct.

The proposed bill would set forth standards which must be satisfied for an employer to be held liable for the unlawful conduct of employees, agents and certain independent contractors. The standards proposed would make the City's law unique among civil rights laws in that the standards are designed not only to deter discriminatory conduct by holding employers accountable but, of equal significance, they are designed to provide employers with an incentive

to implement policies and procedures that reduce, and internally resolve, discrimination claims.

With regard to all forms of discrimination except employment discrimination, under the proposed provision employers would be held liable for the discriminatory conduct of their employees or agents. §8-107(13)(a). With regard to employment discrimination, employers would be held liable for the discriminatory conduct of their employees or agents only where the employee or agent (1) exercised managerial or supervisory responsibility, or (2) the employer knew of the conduct and acquiesced in it or failed to take corrective action, or (3) the employer should have known of the conduct and failed to act reasonably to prevent discriminatory practices. §8-107(13)(b). Employers would be held liable for the discriminatory conduct of persons employed as independent contractors only where the employer had actual knowledge of and acquiesced in the conduct. §8-107(13)(c). The employer could mitigate his or her liability for civil penalties or punitive damages by proving the establishment of policies, programs and procedures for the prevention and detection of discrimination in the work place and a record of no, or relatively few, prior incidents of discriminatory conduct. §8-107(13)(d). The provision would further provide authorization for a court or the Commission to order an employer who was found not liable for the discriminatory conduct of an employee or agent to provide such injunctive relief (non-monetary) as is necessary to effectuate a complete remedy for the aggrieved person. §8-107(13)(e). Finally, the provision allows the Commission by rule to prescribe policies,

programs and procedures for the prevention and detection of discrimination which, if implemented by employers, would insulate the employer from liability for civil penalties or punitive damages based on the discriminatory conduct of an employee, agent or independent contractor. §8-107(13)(f).

Expansion of Public Accommodations Provisions to Cover Public Schools and Colleges

The bill would give the Commission jurisdiction over certain claims of discrimination in public schools and colleges by deleting the current exclusion of these institutions from the definition of "public accommodation". §8-102(9) and §8-107(4).

The Court of Appeals has held that under the existing law, the Commission has jurisdiction over claims of employment discrimination in the schools. Maloff v. City Commission on Human Rights, 38 N.Y. 2d 329, 332 (1975). Although the public accommodations provisions in our current law do not apply to the public schools, a variety of other laws cover various aspects of discrimination in schools. The State Civil Rights Law (§40) prohibits discrimination in public accommodations based on race, creed, color or national origin. Public accommodation is defined therein to include public schools and colleges. Claims of discrimination under that law are enforced in a civil action commenced by the aggrieved person and the penalties recoverable range from $100 to $500. Civil Rights Law §41. Education Law §313 prohibits discrimination in institutions of higher education on the basis of race, religion, creed, sex, color, marital status, age and national origin. Education Law §3201 and §3201-a prohibit public schools from refusing admissions on account of

race, creed, color, national origin and sex. Title VI of the federal Civil Rights Act of 1964 prohibits discrimination in federally-assisted programs on the grounds of race, color or national origin. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in programs or activities receiving federal financial assistance. Title IX prohibits sex discrimination in educational programs or activities that receive federal financial assistance. In addition, the Board of Education has formally adopted a non-discrimination policy and an internal procedure for resolving complaints of discrimination by students on the grounds of race, color, creed, national origin, age, marital status, disability, sex and sexual orientation.

The City has an independent and overriding interest in routing out discrimination from its public schools. Extension of the Commission's jurisdiction in this area would make available to aggrieved persons the administrative remedies provided by the Commission as well as the right to bring a private action and recover attorney's fees. For this reason, the bill deletes public schools from the list of institutions which are not subject to the prohibitions on discrimination in public accommodations. However, the bill recognizes the case law which has held that the Board of Education is not subject to municipal control with respect to matters that are strictly educational or pedagogic. See e.g. Maloff v. City Commission on Human Rights, 38 N.Y.2d 329, 332 (1975); Board of Education of City of New York v. Goldin, 94 Misc.2d 574, 580-81 (Sup. Ct. Kings Co., 1978), aff'd on opinion below, 72 A.D.2d 603 (2nd Dept 1979), leave

to app. den., 49 N.Y.2d 705 (1980). The effect of this amendment will be to grant the Commission jurisdiction over the provision of services in public schools to the extent that such services are not part of the educational and pedagogic activities that are beyond the scope of the City's regulatory power.

Discriminatory Boycotts

The State Human Rights Law provides that the State Division of Human Rights may bring administrative actions to stop discriminatory boycotts. The present City law does not contain a comparable provision. The proposed provision would make it unlawful to boycott or blacklist any person because of such person's race, creed, color, national origin, gender, disability, age, marital status, sexual orientation or alienage or citizenship status. §8-107(18). The provision is modeled on Executive Law § 296(13) but it goes further in adding disability, age, marital status, sexual orientation and alienage or citizenship status to the protected categories. Like the State law, the proposed amendment would provide an exemption for boycotts connected with labor disputes and boycotts to protest unlawful discriminatory practices.

Age Discrimination in Public Accommodations and Housing

The proposed legislation would prohibit places and providers of public accommodation from discriminating on the basis of age. §8-107(4)(a). In recognition of the fact that certain distinctions based on age are in the public interest (e.g., senior citizen discounts, restrictions on viewing adult films and age limits on membership in peer groups), the provisions adding age would not

take effect until the Commission promulgates rules setting forth exemptions in the public interest. Bill section 4(1).

To make the City's law consistent with the State Human Rights Law, the proposed legislation would prohibit age discrimination in the sale, rental or purchase of all housing accommodations, land and commercial space. §8-107(5). The bill would provide an exemption for restricting the sale or rental of certain housing exclusively to persons 55 or older but makes clear that unless specifically allowed by other law such persons cannot be discriminated against on the basis of whether children are, may be or would be residing in the housing. §8-107(5)(j).

__Employment Discrimination__

The proposed legislation would prohibit employment discrimination based upon marital status, and thus would conform the City's law to the State Human Rights Law. §8-107(1).

The bill would also conform the City's law to State and Federal laws by removing the limitation in the section on age discrimination in employment, which currently provides that individuals older than 65 are not protected. It would make explicit in the employment discrimination provisions that an employee or agent of an employer who engages in employment discrimination provisions could be held individually liable for his or her conduct. §8-107(1).

The employment discrimination provisions of the current law have been construed by the courts and the Commission to allow limitations or discrimination which are based upon a "bona fide occupational qualification", although the specific language which sets

forth the defense is contained only in the provisions prohibiting discriminatory advertisements or inquiries. See §8-107(1)(d). "Bona fide occupational qualification" is not defined in those provisions and thus the courts and the Commission are left to determine on a case by case basis whether a particular limitation is a bona fide occupational qualification. The proposed bill would delete the specific language "unless based upon a bona fide occupational qualification" in those provisions (§8-107(1)(d) and (2)(d)) without intending to eliminate the defense. The intent is to allow the defense to continue to develop through case law made by courts or the Commission with the expectation that the defense will be upheld only in circumstances where distinctions based on the criteria covered by the law are logical and necessary for the job or occupation.

Finally, the legislation would provide that employees who are immediate relatives (parents, spouses and children) and certain persons employed as independent contractors would be counted as persons employed for purposes of determining whether an employer has four or more persons in its employ and is thus subject to the employment discrimination provisions. §8-102(5) and §8-107(1)(f).

Licensing Agencies

The proposed legislation would broaden provisions in the City's law that currently prohibit licensing agencies from discriminating against license and permit applicants on the basis of age to cover discrimination based upon any of the protected categories. §8-107(9).

Arrest Record

The legislation would prohibit, as does the State Human Rights Law, employers, licensing agencies and providers of credit from discriminating against an applicant based upon a prior arrest which had been terminated in favor of the applicant. §8-107(11). The provision would incorporate the exceptions found in the State law, *e.g.*, for the licensing of guns, firearms and other deadly weapons and for the hiring of police officers and peace officers.

Public Accommodations Discrimination

The City's Human Rights Law defines public accommodation for purposes of prohibiting discrimination in those places. The proposed bill would simplify the definition of public accommodation by defining the term to include places and providers of goods, services, facilities, accommodations, advantages or privileges of any kind, and by eliminating a long list of specific types of public accommodations. §8-102(9). With the removal of exclusions for schools (see discussion at pp. 12-14), the term place or provider of public accommodation would include both public and private educational institutions. The legislation adds provisions which would permit these institutions to make gender distinctions allowed under specified State or Federal laws (i.e., separate housing, bathroom and locker facilities, certain physical education classes and certain athletic teams). §8-107(4)(c). Private schools would be allowed to limit admissions to persons of one gender. §8-107(4)(d).

Disability

The proposed legislation would replace the term "handicap" with the term "disability," a more modern term which is used in the State Human Rights Law and is generally regarded as less stigmatizing. §8-102(16). The bill also clarifies the definition of disability in order to carry out the original intent of the law that all persons with disabilities of any type be protected from discrimination. It continues exisiting law which provides that in the case of alcoholism, drug addiction or other substance abuse, "disability" applies only to persons who are recovering or have recovered and currently are not engaging in the abuse. The bill also makes clear that disability does not apply to persons who currently are illegally using controlled substances when such use is the basis of adverse action. §8-102(16)(c).

The bill would require persons subject to the law (e.g. employers, owners of housing accommodations, operators of public accommodations) to make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. §8-107(15)(a). Reasonable accommodation does not include accommodations that can be demonstrated would cause undue hardship to persons subject to the law. §8-102(18).

Finally, the legislation would make clear that the law prohibits discrimination against a person who does not have a disability based upon his or her association or relationship with a person who does have a disability. This clarification is intended to bring the City's law into conformity with the 1988 amendments to the

federal Fair Housing Act and with the recently enacted Americans with Disabilities Act. The Fair Housing Act prohibits discrimination against a buyer or renter of housing who does not have a disability because of the disability of a person residing or intending to reside in the housing or of a person associated with the buyer or renter. 42 U.S.C. 3604(f). The Americans with Disabilities Act extends protection in the areas of employment and public accommodations to persons because of their association with a person who has a disability. See § 102(b)(4) and 202(b)(1)(E) of that Act.

Criminal Conviction Record

The State Correction Law prohibits employers from denying employment, and licensing agencies from denying a license, based upon an applicant's criminal conviction record except in certain specified circumstances. See Article 23-A. That law provides for enforcement against private employers by the State Division of Human Rights and concurrently by the Commission, and for enforcement against public agencies by an Article 78 proceeding in court. The State Human Rights Law contains a provision making it unlawful under that law for employers and licensing agencies to violate the above provisions of the Correction Law. The proposed legislation would add an identical provision to the City's law. §8-107(10). While there would be no substantive change in the Commission's jurisdiction over these cases, the amendment would include in the City's law all of the substantive provisions over which the Commission already has jurisdiction.

Alienage or Citizenship Status

Current law allows distinctions and preferences based upon alienage or citizenship status and inquiries as to a person's alienage or citizenship status in very narrow circumstances (" when...required or when... expressly permitted by any law... and when such law... does not provide that state or local law may be more protective of aliens", §8-107(11)). These circumstances do not cover distinctions or inquiries made by banks and lending institutions who seek to sell mortgages to the Federal Home Mortgage Insurance Corporation ("FHMIC"). A FHMIC directive provides that the "[FHMIC] will purchase mortgages made to aliens who are lawful permanent residents of the United States under the same terms that are available to U.S. citizens...We will purchase mortgages made to non-permanent resident aliens as long as the borrower occupies the property and the loan-to-value ratio does not exceed 75%." See Fannie Mae, Lending Requirements, §203.02 (emphasis in original).

The amendment proposed in the legislation is intended to allow banks and lending institutions to make such inquiries or determinations based upon alienage or citizenship status as are necessary to enable them to obtain the benefits of selling their mortgages to FHMIC. It will also allow inquiries and distinctions to be made for other purposes related to federal programs, but only insofar as such actions are necessary to obtain the benefits of such programs.

Relationship or Association

The bill would make clear that the City's law should be construed to prohibit discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom he or she has a known relationship or association. §8-107(20).

Conformity With Fair Housing Act

The proposed legislation would make substantive changes to the housing discrimination provisions which are designed to bring the City's law into conformity with the federal Fair Housing Act. The changes include prohibiting blockbusting, discrimination in the appraisal of housing, land and commercial space and the discriminatory denial of access to multiple listing services. See §8-107(5).

Protected Categories

The proposed legislation would make clear that the law prohibits discrimination based upon perceived, as well as actual, race, color, creed, national origin, disability, marital status, gender, age, sexual orientation and alienage or citizenship status. §8-107. It would also replace the term "sex" with "gender" (with no intent to change the meaning of the provisions which prohibit discrimination on that basis).

The Mayor urges upon the City Council the earliest possible favorable consideration of this worthwhile and necessary legislation.

Sincerely,

FRANK T.W. NEW
Director of City Legislative Affairs

April 3, 1991

NEW YORK REGIONAL OFFICE
serving New York City and Westchester—Rockland—Putnam Counties

Gen Welfare
Intro 465

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ARNOLD FORSTER

November 9, 1990

The Honorable Peter F. Vallone
Speaker of the Council
The City of New York
City Hall
New York, N.Y. 10007

Dear Speaker Vallone:

We are writing to you on behalf of the New York Regional Board of the Anti-Defamation League to recommend a change of wording of the definition of the term "hate crime" used in the **City Human Rights Law (Intro. #465), Section 8-102, 24, p. 13.**

In line with ADL's Model [bias crime] Legislation (see enclosure) and Governor Cuomo's Program Bill, the "Bias Related Violence or Intimidation Act" (A7464A; S4600A), we propose that the definition be amended to encompass "sexual orientation" as follows:

> 24. The term "hate crime" means a crime that manifests evidence of prejuduce based on race, religion, ethnicity, disability, gender, **sexual orientation**, or alienage or citizenship status.

We would have glady given testimony to the October 17 meeting of the Committee on General Welfare concerning the law, but the invitation only arrived at our offices October 16. When the Committee next holds hearings, we would appreciate being given more notice to prepare testimony.

Sincerely,

Steven S. Fadem
Chair
New York Regional Board

Harriet S. Bogard
Director
New York Regional Office

SSF:HSB/mr

cc: Councilman Samuel Horwitz
Commissioner Dennis deLeon

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GW
Int. No 465

THE COUNCIL
OF
THE CITY OF NEW YORK
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RICHARD M. WEINBERG
DIRECTOR AND
GENERAL COUNSEL

(212) 566-0267
566-8399

MEMORANDUM

August 29, 1990

TO: Hon. Peter F. Vallone
Joseph Strasburg
Richard Weinberg

FROM: David Walker
Jill Chaifetz

RE: Economic Boycotts/Human Rights

According to a conversation held August 29th with Martha Mann of Corporation Counsel, Mayor Dinkins intends to introduce a bill that would address the issue of racially motivated economic boycotts as part of a larger human rights bill. Except for the provision regarding economic boycotts, the Mayor's human rights bill would be similar to Intro. No. 465, which was drafted by Council staff and introduced by Council Member Horwitz on June 21, 1990. It should be noted that the Mayor has expressed a desire to include a sexual orientation aspect into the economic boycott provisions.

We have discussed the possibility of the Mayor introducing a human rights/economic boycott bill with Richard

Weinberg. He recommends splitting the two issues and considering an economic boycott bill separately from a larger human rights package. This recommendation is consistent with the sentiments expressed by members of the human rights commission during confidential conversations.

The Mayor's introduction of a economic boycott/human rights bill should be viewed in light of the events that transpired before Int. No. 465 was submitted. Int. No. 465 is based on a bill introduced by Mayor Koch in 1989. The General Welfare Committee held a hearing on the Koch bill during September of 1989. Negotiations on the bill had taken place and there were very few issues left to be resolved. One of the unresolved issues was the inclusion of the term "family composition" as a protected class. This was seen as an indirect method of providing additional protection against discrimination based on sexual orientation. Int. No. 465 resolves this issue by replacing the term "family composition" with "family size."

After Mayor Dinkins was elected, we consistently pressed the administration to introduce a human rights bill based on the Koch model. Meanwhile, we received a confidential copy of a bill that the human rights commission had drafted. Because the Mayor failed to act, Council Member Horwitz submitted Int. No. 465 at the last Stated Council Meeting before the council recessed for the summer. Based on this history, the administration's attempt to introduce a economic boycott/human rights bill package and make sexual orientation discrimination an aspect of the economic

boycott provisions of that package at this late date is an act that should be viewed quite critically.

A memorandum that outlines our human rights law's is attached.

DW/rt
8/29/90
DG-memorandums
Economic Boycotts
attachments

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NEW YORK CHAPTER
AMERICAN JEWISH COMMITTEE

Hearing
Committee on General Welfare
New York City Council
City Hall
June 3, 1991

465-A Written Testimony
New York City Human Rights Law
(Int. No. ~~485-A~~: Council Member Hurwitz; Int. No. 539-A: The Mayor)

Submitted by
Diane Steinman
Executive Director
New York Chapter, American Jewish Committee

As a member of the Ad Hoc Coalition on Civil Rights, the New York Chapter of the American Jewish Committee has already indicated our strong support for a strengthened New York City Human Rights Law. We are gratified by the progress made by the City Council and the Mayor toward a final bill, and in our comments on the new versions wish to focus on three issues about which we testified at the first Council hearing: the independence of the City Commission on Human Rights and the role of the Corporation Counsel; the disposition of civil penalties; and the exemption of religious institutions.

Independence of the Commission and the Role of the Corporation Counsel: As stated in our earlier testimony, we think it essential that the Human Rights Commission have sufficient autonomy to be an effective and credible protector of human rights, most especially when the City itself is at fault for discrimination. We therefore regret the Mayor's position, which gives the Corporation Counsel the sole right to litigate pattern and practice cases unless it elects to give the Commission that responsibility, and worse yet, the authority to act on behalf of both parties to litigation in cases brought against City agencies. Moreover, we regret that in both the Mayor's and the Council's versions whenever the Commission wishes to investigate a discrimination complaint against the City, it must first consult with the Mayor - a further undermining of the Commission's authority. Unfortunately, our concern about conflict of interest and abuse is not answered by the promised reexamination of the autonomy issue by the Corporation Counsel and the Chair of the

Human Rights Commission, which in the best case creates potential for the appearance of impropriety and, in the worst case, the opportunity for undue influence.

Disposition of Civil Penalties: We strongly endorse the Council provision (Sec. 8-127) that all civil penalties recovered against a City agency be paid into a separate fund for use solely in anti-bias programs designed to eradicate discrimination or address the City's own liability for discriminatory acts and practices. This provision increases incentives for City agencies to refrain from discrimination. At the same time, it avoids providing a benefit for victims of discrimination by the City that is not provided to persons who are instead victims of discrimination by non-City organizations or enterprises.

Exemption of Religious Institutions: We endorse the Council's provision (Sec. 8-107-12) allowing religious institutions to follow the dictates of their religious beliefs and principles in matters of employment, sales, rentals of housing accommodations and admissions. We believe this provision strikes the proper balance between protection against discrimination and the right of free exercise of religion.

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

(212) 566-0267
566-8399

MEMORANDUM

October 11, 1990

TO: Hon. Peter F. Vallone
Joseph Strasburg
Richard Weinberg

FROM: David Walker
Jill Chaifetz

RE: The Mayor's Human Rights Bill and Intro. No. 465

As anticipated, the administration has introduced a human rights bill that is comparable to Intro. No. 465 by Council Member Horwitz. Since the bills' introduction, interested parties have expressed concern regarding whether religious institutions' autonomy is protected. This memo will address that issue and also detail several differences between the Mayor's bill and Intro. No. 465. In addition, a memo outlining Intro. No. 465's key provisions is attached.

I. Religious Principles

1. "Family Composition"

Both Intro. No. 465 and the Mayor's bill are based on Intro. No. 1266-A of 1988 which was submitted under Mayor Koch. During discussions on Intro. No. 1266-A, the Council voiced opposition to the use of the term "family composition" in the

bill's policy section. The Council argued that listing family composition as a class deserving human rights protection was an implicit broadening of existing prohibitions against discrimination based on sexual orientation.

The concern surrounding "family composition" is addressed by both Intro. No. 465 and the Mayor's bill. Intro. No. 465 replaces the term "family composition" with "family size." The Mayor's bill uses the phrase "whether children are, may be or would be residing with a person."

2. Religious Principles Preserved

Both Intro. No. 465 and the Mayor's bill include educational institutions within the definition of public accommodations. It has been suggested that this may pose a threat to parochial schools' hiring practices or other policies. §8-107(12) of both bills, however, protects such institutions' practices or policies. §8-107(12) of Intro. No. 465 states:

> 12. Religious principles preserved. 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 giving preference to persons of the same religion or denomination or from making other such distinctions as would, except for this paragraph, be barred by this section; provided that membership in the religion or denomination is not restricted on the basis of race, color, or national origin; and provided further that such distinctions are calculated by such institution or organization to promote the religious principles for which it is established or maintained.

The Mayor's bill deviates from Intro. No 465's exemption by:

(1) not extending the exemption to commercial property; and

(2) limiting the exemption to the extent that "such action is protected under the free exercise clause of the first amendment of the United States Constitution."

Clearly, the Mayor's bill's distinction between commercial and non-commercial property is problematic. Intro. No. 465's provision is preferable. Both bills, however, undeniably exempt parochial schools from coverage.

II. Differences between the Two Bills

The Mayor's bill differs from Intro. No. 465 in several ways. However, there are only three differences that are truly significant. Those three differences are:

1) The Mayor's bill incudes "economic boycotts" within the definition of an unlawful discriminatory practice. Intro. No. 465 does not mention economic boycotts. However, we have drafted a separate amendment that would add a chapter to the human rights law to address economic boycotts. Our proposed amendment would be similar to the Mayor's provision and have the same legal effect. Also,

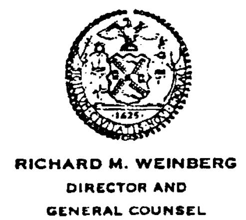
Intro. No. 465 could be amended to add an economic boycott provision.

2) Under the Mayor's bill, Corporation Counsel is the only city agency that can initiate a discrimination suit in state court. Intro. No. 465 would empower, the human rights commission to also initiate civil suits. The Mayor's bill sets the stage for an obvious conflict of interest whereby Corporation Counsel would both sue and represent city agencies.

3) Under the Mayor's bill, all civil damages including those imposed against the city would be paid into the city's general fund. According to Intro. No. 465, damages levied against a city agency would be paid to the prevailing party.

Beyond the three items listed above, there are few if any contentious differences between the Mayor's bill and Intro. No. 465. The Mayor's bill essentially changes some of Intro. No. 465's language and adds provisions that help clarify the scope of Intro. No. 465's coverage. Intro. No. 465 could readily be amended to incorporate these additions without changing the bill's substance or impact.

DW/rt/bg
10/11/90
DG-memorandums
Mayor's Human Rights Bill



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MEMORANDUM IN SUPPORT

October 17, 1990

INTRO. NO. 465 (Introduced June 22, 1990)

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

INTRODUCTION

During the late 1980's the City of New York (hereafter "NYC" or "the City") has been plagued by notorious incidents of racially motivated violence. In the first four months of 1990, the City experienced a 14% increase in bias crimes as compared with the same four month period of 1989.[1] The general consensus is that conditions have worsened and, according to a June 12, 1990 New York Times/WCBS-TV News Survey, over 70% of the Black and White New Yorkers polled feel that race relations in New York City are generally bad.[2] As was recently stated by Dennis de Leon,

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

2 Morgan, Many in Poll See Worsening in Race Relations, N.Y. Times, June 27, 1990.

Commissioner of the New York City Commission on Human Rights (hereafter "CCHR" or "the commission");

> There is a relationship between bias-motivated violence and the deeply entrenched patterns of institutional bigotry that persist in contemporary society. Patterns of segregation in employment, housing, lending, and education all relate in important ways to the "bush fires" of hate crime. For example, many racially-motivated assaults are based upon notions of neighborhood "turf" and intrusion of "outsiders" in segregated neighborhoods.[3]

Intro. No. 465 addresses the City's race relations problems by attacking entrenched patterns of segregation, discrimination and bigotry. The city's current human rights law covers discrimination in employment, housing, education, training programs, and public accommodations. Intro. No. 465 installs enhanced protection against discrimination in the aforementioned areas plus provides additional protection against systemic discrimination, prohibits discriminatory harassment, and brings the city into comformity with Local Law 52 of 1989 which included discrimination based on alienage or citizenship as an unlawful activity.

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3 Testimony Given by Commissioner/Chair Dennis de Leon to the General Welfare Committee of the City Council, June 1, 1990, pg. 2.

SUMMARY OF PROVISIONS

Intro. No. 465 embodies a complete overhaul of the city's human rights law and a strengthening of the CCHR. The changes that the bill will effect are too numerous to detail in their entirety. There are, however, seven key areas on which Intro. No. 465 focuses. These areas are:

(1) employment and employer liability;

(2) housing;

(3) public accommodations;

(4) private right of action;

(5) systemic discrimination;

(6) discriminatory harassment; and

(7) penalties and injunctive relief.

An examination of these seven areas, plus an overview of some of Intro. No. 465's other important provisions follows below.

(1) Employment and Employer Liability

Intro. No. 465's employer liability standard is designed to provide an incentive to establish a policy against discrimination, hold employers to a high level of liability for employment discrimination, and present employers with a fair opportunity to mitigate the amount of civil damages imposed for discriminatory conduct. Under §8-107(13) of the bill:

(a) an employer will be liable for an employee's act if:

(i) the employee exercised managerial or supervisory responsibility; or

(ii) the employer condoned the act or knew of the act and failed to take immediate and appropriate action; or

(iii) the employer should have known of the act but was not diligent in preventing such conduct.

(b) an employer may be held immune from civil penalties if he implements an anti-discrimination policy that is approved by the commission; and

(c) if an employer is found liable for an employee's act, she may mitigate damages by showing that no other such incidents had occurred in the past or she had a meaningful anti-discrimiantion policy or program in place.

This standard of liability would apply to all aspects of employment including hiring and admittance into training programs. By conveying immunity from civil damages and the opportunity to mitigate any damages that may be imposed while simultaneously instituting a responsible level of liability, Intro. No. 465 strongly polices employment discrimination but is fair to employers who have good intentions.

(2) Housing

There are two sections of the bill that effect significant changes in the current human rights law regarding housing. They are §8-107(12) concerning religious principles and §8-107(5)(a)(4)(1) which pertains to owner-occupied two family houses. Under current law, religious institutions are exempted from provisions regarding the sale or rental of housing accommodations. Intro. No. 465 refines this exemption so that it is only applicable to religions whose membership is not restricted on the basis of race, color, or national origin. This amendment brings the city into conformity with the Federal Fair Housing Law.

With respect to owner-occupied two family houses, the bill limits the existing exemption to accommodations for which vacancies are not publically advertised. In this manner, Intro. No. 465 does not infringe upon the individual's right of association, but sharply restricts landlords' ability to discriminate.

(3) Public Accommodations

Under Intro. No. 465, the commission's power to combat discrimination is expanded through the inclusion of educational institutions within the definition of provider of public accommodations.

§8-102(ii). This inclusion will not affect educational institutions' pedagogical policies or practices. Also:

(a) gender distinctions that are permitted under federal or state law are exempted under §8-107(4); and

(b) distinctions founded on religious beliefs are protected under §8-107(12).

(4) Private Right of Action

Currently, all claims arising under the city's human rights law may be enforced only by bringing an action before the commission. This limitation denies complainants the right to a jury trial and forecloses the possibility of recovering attorney's fees or punitive damages which could be recovered in state court.

Based on the recommendations contained in the January 1988 report of the Koch Task Force on the New York City Commission on Human Rights, Intro. No. 465 will empower individuals to enforce the city's human rights law by bringing an action in state court. §8-502.[4] An individual who files such a claim would be able to recover all costs, attorney's fees and punitive damages. Anyone who files a claim with the commission or the state division on human rights will have effectively chosen not to exercise this right and not be able to bring an action in state court.

(5) Systemic Discrimination

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4 Task Force Report on The New York City Commission on Human Rights, Jeremy Travis, Chair, Edward I. Koch, Mayor January 1988, pg. 23.

As Intro. No. 465 asserts, "[]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." §8-401. Systemic discrimination or a discriminatory pattern or practice is often hard to combat because of the difficulties entailed in accumulating evidence. This type of discrimination is particularly injurious because it is not simply an isolated incident but a repeated act founded upon a discriminatory policy, method of operating, or institutionalized procedure.

There are three aspects of Intro. No. 465 that enhance or clarify the commission's power to combat systemic discrimination. They are:

(a) Chapter 4 empowers the commission and/or the corporation counsel to investigate and bring a civil action in state court to eliminate unlawful discriminatory practices. §8-403 and §8-402 respectively;

(b) §8-105(4) and §8-114 detail the commission's investigatory powers. Among these pwoers is the ability to compel the maintenance of records relevant to determining whether a person is engaging in a discriminatory pattern or practice. The commission does not currently have this ability, and this power may be used

if the commission has reason to believe a discriminatory practice exists. §8-114; and

(c) §8-108(17) establishes that in a claim alleging that a policy has a discriminatory disparate impact, a person need not specify what specific element of the policy produces the disparate impact. Also, the same subsection allows a person to counter a charge of disparate impact discrimination by showing, "that each component of the challenged policies or practices either is essential to the performance of the covered entity's legitimate functions or does not contribute to the disparate impact." §8-108(17)(b). This provision assures that recent Supreme Court decisions that have been viewed by some human rights advocates as imposing an undue burden upon claimants are not incorporated into local law.

(6) Discriminatory Harassment

Chapter 6 of Intro. No. 465 specifically addresses discriminatory harassment. Under the bill's provisions, the commission or corporation counsel may bring a civil action against a person who allegedly attempts to threaten or intimidate anyone seeking to exercise a right guaranteed by the human right law.

§8-602. This empowers the commission to act vigorously against anyone who tries to prevent an individual from filing a claim with the commission or in state court.

(7) Penalties and Injunctive Relief.

Under current law, the commission is authorized to seek a preliminary injunction only with respect to a housing discrimination claim. Intro. No. 465 will permit the commission to commence a special proceeding before the Supreme Court to seek to enjoin all types of discrimination covered by the law. §8-122.

In addition to its expanding ability to seek injunctive relief, Intro. No. 465 will empower the commission to seek in state court civil penalties of up to $50,000 in systemic discrimination cases and cases alleging discriminatory harassment. §8-404 and §8-604 respectively. Also, in proceedings brought before the commission, it will be able to impose up to $50,000 as a penalty for engaging in discrimination, a $100 a day penalty for violating a commission order (the maximum for which is $50,000), and a $100,000 penalty for willful or wanton acts of perjury.

CONCLUSION

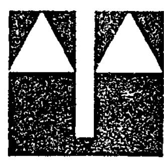
In addition to the seven areas analyzed above, there are two other aspects of Intro. No. 465 that should be noted. They are:

(1) discrimination based on perceived characteristics will now be covered as well as acts based on actual traits; and

(2) the term "handicapped" which is stigmatizing is replaced by "physical disability".

It is clear that Intro. No. 465 will put the city's law at the forefront of human rights laws. Its provisions create a strict system of human rights protection, investigation, and enforcement that establish a strong policy against discrimination and undoubtedly will become a model for other cities.

DW/rt
DG-memorandums
Int. 465 Memo of Support



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*Los Angeles Office

June 3, 1991

Ms. Yvonne Gonzales
Assistant Counsel
The City of New York
Speaker of the Council
City Hall
New York, NY 10007
Re: Testimony before the Committee on General Welfare

Dear Ms. Gonzales:

Enclosed are copies of Paula Ettelbrick's testimony on behalf of Lambda Legal Defense and Education Fund, Inc. before the Committee on General Welfare, concerning Proposed Int. 465-A and Int. 536-A.

Unfortunately, we are unable to attend today's hearing but we would like our comments added to the record. Thank you for your invitation to testify and we look forward to participating in any additional hearings on this matter.

Sincerely,
Lambda Legal Defense and Education Fund, Inc.

Enclosures

Through test-case litigation and public education, Lambda works nationally to defend and extend the rights of lesbians and [illegible] men. Lambda is a non-profit, tax-exempt organization founded in 1973.

STATEMENT OF PAULA ETTELBRICK
LEGAL DIRECTOR
LAMBDA LEGAL DEFENSE AND EDUCATION FUND INC.

BEFORE THE GENERAL WELFARE COMMITTEE OF THE CITY COUNCIL
IN CONNECTION WITH HEARINGS ON PROPOSALS
TO AMEND THE CITY'S HUMAN RIGHTS LAW
JUNE 3, 1991

Good morning, my name is Paula Ettelbrick and I am the Legal Director of Lambda Legal Defense and Education Fund. Lambda Legal Defense is a national organization founded in 1973 to advocate for and enhance the civil rights of lesbians and gay men through test case litigation and public education. It is on behalf of lesbians and gay men who live, work and are consumers in the City of New York that I comment today on the proposed changes to the New York City Human Rights Law.

We at Lambda would like to join other organizations in endorsing the efforts of the Mayor and the City Council to systemically review the city's human rights law to ensure that its purpose of remedying discrimination is fully effectuated. Some of the changes proposed by the Mayor's office in Int. 536 (hereinafter Mayor's bill) and the City Council's suggestions in Int. 465 (hereinafter Council's bill) represent necessary steps forward for the city, especially in protecting its lesbian and gay citizens. We feel that the proposed clarifications and changes will keep the New York City Commission on Human Rights in its traditional place at the forefront of civil rights legislation and enforcement.

Lambda Legal Defense supports the testimony of many of our colleagues with regard to legislating pre-1989 disparate impact theories, preserving the independence of the Human Rights

Commission, and other aspects of Int. 536 and Int. 465 that enhance the functioning of an independent Commission and the civil rights protection for classified minority groups and women. We would like to comment specifically on two provisions which particularly impact on lesbians and gay men. The provisions are the religious exemption clause in Chapter 1, S. 8-107(12) (at page 49 of Council's bill and page 29 of the Mayor's bill) and the private right of action granted in Chapter 5, S. 8-502 (at page 94 of Council's bill and page 58 of the Mayor's bill.)

Sect. 8-107(12) Unlawful Discriminatory Practice: Religious Principles.

While Lambda vigorously supports first amendment rights and religious freedoms, we are concerned that the religious exemptions in S. 8-107(12) of the Mayor's and Council's bills are unnecessarily broad and vague. As a result, the provision seems impossible to litigate and, worse yet, would undermine the justifiable reach of the human rights law in prohibiting discrimination. Because lesbians, gay men and women are the most likely to encounter discrimination masked as religious freedom, it is crucial that the religious exemption provision be more carefully and thoughtfully drafted to ensure that religious institutions, schools, hospitals, and other public facilities not be given free reign to discriminate on all fronts.

There are certain situations in which a blanket exemption for

religious institutions retreats dramatically from the intent of the proposed changes in the human rights law. In the area of employment practices, a church has a constitutional right to hire ministers and church officials free from governmental interference, including the strong public policy against discrimination. In some instances, this means that religious groups may exclude lesbians, gay men, women and other persons who hold inconsistent religious beliefs from participation in certain aspects of the institution's functioning. However, should a religious institution be allowed to use religious freedom as a justification to discriminate against a lesbian grounds-keeper, a gay organist, or woman teacher? If a religious institution operates a hospice or other medical care facility open to the public, will it be allowed to refuse service to a gay man with AIDS because of its religious views against homosexuality?

We are concerned that the language contained in the Council's version of S. 8-107(12) is too vague and may fail to strike the necessary balance between a religious organization's first amendment rights and the city's ability to protect the rights of lesbians and gay men. We join with the Association of the Bar of the City of New York and The Center for Law and Social Justice in their testimony in April 1991, in expressing our concern that the language of the Mayor's bill is far too broad and could lead to discrimination based on sexual orientation.

Lambda stands by the principal laid down in <u>Gay Rights Coalition of Georgetown University Law Center v. Georgetown</u>

University, 536 A.2d 1 (D.C. Ct. of Appeals, 1987). In this case, a gay and lesbian student group brought suit against Georgetown University, a private Catholic university, under the District of Columbia's human rights law when the school administration refused to grant official recognition or tangible benefits to the group. As a result of the refusal of university recognition, the group was denied use of mail and computer facilities, and university-wide funding. Id. at 17. The school claimed a first amendment right to discriminate against the lesbian and gay group because of its views on homosexuality. The court balanced the competing interests and held that Georgetown could not be compelled to endorse an idea contrary to its doctrine it was not free to deny tangible benefits under the same ideological measurement. Id., at 84-85.

Writing for the court, Judge Mack asserted, quoting Cantwell v. Connecticut, 310 U.S. 296,303-304, "'the [First] Amendment embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'" We therefore urge the City Council to adopt language in S. 8-107(12) that more clearly strikes the proper balance between the rights of religious organizations to believe what they may and the rights of lesbians and gay men to be free from discriminatory acts by religiously funded institutions.

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

Lambda fully endorses the Mayor's and Council's proposed amendment that makes clear the ability of a complainant to pursue a private, civil cause of action in any proper court for punitive damages and injunctive relief. This addition to the city's civil rights law will have an enormous beneficial impact on the city's lesbian and gay community, and Lambda strongly welcomes the proposal.

The amendments will enable lesbians and gay men to fully adjudicate all relevant matters in a particular case before one judicial body. For example, suppose a lesbian is discharged from a job for which she had a one year contract. She may have a multitude of claims to be raised including; sexual orientation discrimination, breach of contract, sex discrimination. Though it has always been Lambda's understanding that the discharged employee could pursue all of her actions in state court, S. 8-502 makes it absolutely clear that this is the case and ensures her ability to seek a full and complete remedy.

The lack of clarity regarding the a private right of action has led some lesbians and gay men who have suffered discrimination to litigate multiple issues in multiple forums, at great expense and possible legal detriment. By adopting S. 8-502, the City Council will open up litigation options formally not available to the city's lesbians and gay men and will provide lesbian and gay litigants a true choice in legal options and the chance to have

their claims heard in a full and coherent manner.

Finally, Lambda wishes to add its support to the proposed amendments to the city's human rights laws that will create civil remedies for bias related incidents. While the state wide bias bill once again languishes in committee in Albany, New York City continues to lead the state in efforts to protect the civil rights of all people, including lesbians and gay men. Specifically, Chapter 6, S. 8-602 provides for civil remedy for bias related acts of harassment or violence. One reservation though, as in S. 8-127, we would like to see that any award be directed to a separate fund designated to support city agencies' efforts at anti-bias education programs.

I'd like to thank you for the opportunity to allow Lambda to express our views on the matters at hand. We feel, with certain reservations, that the proposed amendments to the city's human rights laws make a significant step forward in protecting the rights of lesbians and gay men.

GW
Human Rights Law bill by Horowitz

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April 10, 1991

The Honorable Peter Vallone
Speaker
New York City Council
City Hall
New York, NY 10007

Dear Speaker Vallone:

Enclosed are the Association's comments on draft legislation to amend the City's Human Rights Law. The comments, largely the work of our Committee on Civil Rights and our Committee on Legal Issues Affecting People with Disabilities, address the draft bills prepared by the Mayor and by members of the City Council. As you will see, we firmly support the efforts of the Mayor and Council to strengthen the law, but raise comments and concerns in a number of areas.

Appended to the Association's statement are comments prepared by the Committee on Labor and Employment Law.

We would be pleased to work with you as the legislative drafting process continues.

Sincerely,

FSS:mar
Enclosure

cc: Hon. Samuel Horwitz
Joseph Strasburg, Esq.
Richard Weinberg, Esq.
David Walker, Esq.

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TESTIMONY

FOR HEARING

of the

COMMITTEE ON GENERAL WELFARE

of the

NEW YORK CITY COUNCIL

on

A HUMAN RIGHTS LAW

April 22, 1991

Delivered by

Michael A. Riff, Ph. D.

Associate Director
New York Regional Office
ANTI-DEFAMATION LEAGUE

on behalf of the

AD HOC COALITION ON CIVIL RIGHTS

My name is Michael A. Riff, and I am Associate Director of the Anti-Defamation League's New York Regional Office. I am here as ADL's representative on the Ad Hoc Coalition on Civil Rights. Formed last fall, it comprises litigators and advocates reflecting a broad cross section of diverse interests--racial minorities, the disabled, gays and lesbians, women's groups, human relations organizations-- all of whom have joined forces to promote more effectively civil rights in our city.

Let me say, first of all, that we are grateful to Councilman Horwitz, Speaker Vallone and their staffs for scheduling this hearing. We wish to thank you, Councilman Horwitz, for taking time to meet with us and taking into consideration our comments on the Council's version of the law.

It almost goes without saying that the coalition wholeheartedly supports a strengthened human rights law for New York City. All New Yorkers need this legislation. Recent decisions of the United States Supreme Court have weakened fair employment protections. Both the Mayor's and the Council's versions of the law would facilitate a better balance between workers and employers in discrimination cases brought in New York City. Legal standards requiring employment decisions to be made on the basis of actual qualifications would be restored and the use of criteria unrelated to job performance which serve to exclude women

and minorities would be eliminated in our city. Employers who intentionally discriminate will be subject to increased monetary liability.

We also support the provisions of both versions of the Human Rights Law that will tighten and make more effective the current legislation on discrimination in public accommodation, housing and the rental or sale of other real estate. We fully agree with the statement in both bills which declares that "... prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby..." threaten the fabric of our city.

The coalition believes that the key to realizing these goals is in enhancing the powers and autonomy of the city agency charged with implementation and enforcement, the Commission on Human Rights. We are, therefore, distressed by those provisions in the legislation which erode the Commission's autonomy. For example in both bills Section 8-105 (4)(b) requires the Commission to refer "pattern and practice" cases to the Corporation Council's office for commencement of civil action.

Much more disturbing are the provisions in the Mayor's bill (see Sects. 8-128 and 8-402) which allow only the Corporation Counsel litigating authority on behalf of the Commission. This would apply

to all court action, not just those in which a pattern or practice of discriminated is alleged.

We find these provisions disturbing because not only do they weaken the enforcement powers of the Commission, but they also promote a conflict of interest in the prosecutorial functions of the Law Department. It is, after all, the Law Department's duty to act as counsel for all city agencies. Where a complaint of discrimination is brought against a city agency, it is the Law Department which advocates in court on that agency's behalf. If the Commission is required to refer all in court cases to the Corporation Counsel, the Law Department will, in effect, be assuming the role of advocate for both the agency and the complainant. Obviously, the two roles are inconsistent and represent a conflict of interest, especially if we bear in mind that one-third of the total number of cases presently being brough before the Commission are against city agencies.

There is no justification for truncating the authority of the Commission at the doors of the courthouse. A complaint, originating before the Commission, and being prosecuted by Commission attorneys on the administrative level, should not automatically change hands

merely because a pattern of discrimination is revealed or the case is taken to court. The better procedure is to allow the Commission the option of referring the case to Corporation Counsel or otherwise enlisting the aid of Corporation Counsel attorneys. In this way potential conflicts of interest are avoided and the scheme of enforcement envisioned by Section 8-106 of the Human Rights Law is preserved. Allowing for this option is essential in bringing the Commission on a par with its counterparts on the state and federal levels.

Two issues which the Coalition wishes to bring to the Committee's attention invlove Sect. 8-107(13) **Employer liability for discriminatory conduct** of both bills.

Firstly, we are concerned about the independent contractor provision of the Mayor's bill. Under Section 8-107(13)(b)(e) an employer not found liable for an unlawful discriminatory practice committed by an employee or agent is nevertheless required to provide injunctive relief to the complainant "to effectuate a full and complete remedy for the person aggrieved". While the Coalition generally favors complete compensation for individuals subjected to unlawful discrimination, we strongly oppose what in effect is the imposition of liability on an employer adjudicated not to be liable. We fear that inclusion of this provision weakens the bill by subjecting it

to attack and thereby increasing the possibility that no law will be passed.

Since such a result is antagonistic to our goal, we urge this arguably unconstitutional provision be stricken.

Secondly, in the Council's version of the bill we are concerned that Sect. 8-107(13)(e) makes the mitigation of civil penalties imposed on employers for discriminatory conduct by an employee or agent too easy. The bill as it is now written provides that if an employer with no previous record of discrimination, a meaningful complaint procedure in place, a policy against discrimination and/or an education program about unlawful discrimination, could have civil penalties against it reduced. The Coalition believes that this procedure is in effect rewarding an employer for procedures he or she should have by law had in place anyway. We believe this inconsistency can be remedied by changing one word in Sect. 8-102(13)(e) as follows:

> "The demonstration of any or all of the factors listed above [shall] may be considered in mitigation of the amount of civil penalties to be imposed upon the employer pursuant to Section 8-126..."

Additionally, the coalition welcomes the provisions (Sec. 8-102 **Definitions**, 22; Sect. **Powers and Duties**, 8-104, 2) of the City

Council bill which specifically address the problem of hate crimes. Not only do hate crimes have a particularly traumatic emotional and psychological impact on individuals and communities, but they also the fabric of our communities by polarizing society into factions along racial, religious and ethnic lines.

Although prejudice and hatred cannot be legislated or prosecuted out of existence, there is a growing awareness that government can do more to address directly the far-reaching implications of crimes that are prompted by bigotry. The Coalition believes that in explicitly including hate crimes as an additional duty of the Commission and defining the term, the City Council version would send a clear signal to society as a whole that acts of bigotry will not be tolerated.

In conclusion, the Coalition again wants to thank the Committtee for having had the opportunity to present testimony. We hope that a revised Human Rights Law for New York City will be enacted quickly.

GW Human Rights Law bill by Horowitz

THE ASSOCIATION OF THE BAR
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April 10, 1991

The Honorable Peter Vallone
Speaker
New York City Council
City Hall
New York, NY 10007

Dear Speaker Vallone:

Enclosed are the Association's comments on draft legislation to amend the City's Human Rights Law. The comments, largely the work of our Committee on Civil Rights and our Committee on Legal Issues Affecting People with Disabilities, address the draft bills prepared by the Mayor and by members of the City Council. As you will see, we firmly support the efforts of the Mayor and Council to strengthen the law, but raise comments and concerns in a number of areas.

Appended to the Association's statement are comments prepared by the Committee on Labor and Employment Law.

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COMMITTEE ON CIVIL RIGHTS

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March 29, 1991

Ms. Yvonne Gonzales
Assistant Counsel
The City of New York
Speaker of the Council
City Hall
New York, New York 10007

RE: Proposed Human Rights Law

Dear Ms. Gonzales:

In response to your letter of March 21, 1991, I will be glad to testify on behalf of the Association of the Bar of the City of New York, regarding the above reference proposed legislation. I am sure I will be able to provide you with the necessary copies of the Association's report prior the hearing date. Can you please tell me how long I will be allotted for this presentation. Also, can a more definite time be set, since it is difficult for me to put aside the whole day? Your assistance in this is greatly appreciated.

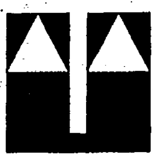
- 3 min.
give ballpark time

Sincerely,

Jan Goodman /ps
Janice Goodman

JG:ps
cc: Alan Rothstein

(dictated but not read)



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*Los Angeles Office

October 25, 1990

Yvonne Gonzalez
Assistant Counsel
The City of New York
Speaker of the Council
City Hall
New York, NY 10007

Re: Intro. 465-Human Rights Law

Dear Ms. Gonzalez:

Though we received notice of the hearing by the Committee on General Welfare regarding the new Human Rights Law, the notice did not give us sufficient time to respond. Lambda would very much like to respond in writing to the proposed new law, but I would like to know first whether we would still be able to do so in a way that could have any effect on the law.

I would very much appreciate it if you or someone from your staff could let me know as soon as possible whether more written testimony would be useful. As an organization which has litigated in the Human Rights Commission, there have been several issues that I have been waiting for the opportunity to raise.

Thanks very much for your attention to this matter.

Sincerely,

Paula L. Ettelbrick

Paula L. Ettelbrick

Through test-case litigation and public education, Lambda works nationally to defend and extend the rights of lesbians and gay men. Lambda is a non-profit, tax-exempt organization founded in 1973.

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The Association of the Bar of the City of New York Comments on the Proposed Legislation to Amend the New York City Human Rights Law

April 2, 1991

The Association of the Bar of the City of New York ("the Association") is comprised of more than 18,000 lawyers. The Association has long advocated the elimination of discrimination in American life and has actively supported legislation in that regard in the City of New York, as well as on the state and national level. We therefore heartily endorse the efforts of the Mayor and the City Council to expand the City Human Rights Law, thereby enhancing its protection of the rights of our citizens.

Historically, New York City has been in the forefront of providing protection against invidious discrimination to its inhabitants (see Commission on Intergroup Relations, New York, N.Y. Admin. Code tit. B, §§ B1-1.0-B1-6.0 (1955)). The City's Human Rights Law (§ 8-101 et seq. of the Administrative Code of the City of New York) was promulgated the year following the comprehensive federal Civil Rights Act of 1964 (42 U.S.C. § 2000 et seq.). Together with federal and state discrimination laws, the City's Human Rights Law has provided a package of legislation that furthers the protection of the civil rights of persons within New York City. However, experience over the past twenty-five years has revealed the law's deficiencies in accomplishing its mission. Inadequate procedures, and substantive gaps in the legislation have hampered the City, and particularly the City's Human Rights Commission, the agency charged with the law's enforcement. Consequently, the Association, along with others concerned with insuring that the City remain a leader in civil rights protection, agrees that the time has come to amend the 1965 law to strengthen procedures, expand certain substantive provisions, and clarify existing law.

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The City Council is currently considering two versions of proposed amendments to the New York City Human Rights Law. The first is a version that was proposed by the City Council in June 1990, and amended in January 1991, known as the "Council bill." The second was proposed by Mayor Dinkins and is known as the "Mayor's bill." The latter successfully builds on the earlier versions, and in most respects advances the goals of the Council bill while furthering the Human Rights Law's consistency with recent developments in federal and state civil rights law. However, in a few of its provisions, the Association believes that the Mayor's bill retreats from provisions in the Council bill that would advance civil rights protection for the citizens of New York City. In addition, there are some aspects of the extant legislation that neither bill addresses that are of concern to the Association. The Association's position is that the pending legislation, if adopted, would be a laudable improvement over existing law. The Association thus supports such legislation with qualifications which are explained below.

A. INDEPENDENCE OF COMMISSION

In order to perform its functions with integrity and free of political pressure, it is essential that the Commission's hearing process operate independently of the City's Chief Executive. This is especially important as approximately 20-25% of the Commission's caseload involves complaints against City agencies.

(i) Prior Consultation: § 8-105(4).

Both the Mayor's bill and the Council bill retain the requirement in the current law that the Commission consult with the Mayor before commencing investigation of a City agency. The Association believes the integrity of the Commission's process would be best served by deleting this requirement.

(ii) Authority to Litigate: §§ 8-114(f); 8-122; 8-125(a); 8-128; 8-402(c).

The Council bill empowers the Commission's own attorneys to bring appropriate court proceedings under the Human Rights Law. It would be within the Commission's discretion to ask for the assistance of the Corporation Counsel. Current law, and the Mayor's bill, continue the practice of vesting the responsibility

for court litigation with the Corporation Counsel. Under the Mayor's bill, the Corporation Counsel would have discretion to designate Commission attorneys to litigate specific cases. The Association endorses the Council version because we believe there is a conflict of interest between the Corporation Counsel's role as attorney for the other City agencies and the Commission's obligation to eradicate discrimination by City agencies.

B. COVERAGE OF PERSONS WHO ARE ALCOHOLICS OR DRUG ADDICTS: § 8-102(18)(COUNCIL BILL); § 8-102(16)(c)(MAYOR'S BILL)

Under the definition of disability in the Mayor's and Council bills, the Human Rights Law would cover only an alcoholic or drug addict who "is recovering or has recovered and ... currently is free of such abuse." This definition applies to public accommodations and housing, as well as employment.

The Association recommends that the City Human Rights Law conform to the State Human Rights Law. In Doe v. Roe, 143 Misc. 2d 156, 539 N.Y.S.2d 876 (Sup. Ct., N.Y. Cty 1989), aff'd, 553 N.Y.S.2d 364 (1st Dep't 1990), the Court accepted the State Division of Human Rights' definition of disability, stating that:

> The Division of Human Rights regards alcohol and drug abuse as disabilities within the meaning of the HRL having adopted provisions of the Mental Hygiene Law, section 1.03(3) which define alcoholism or substance dependence as a "mental disability".

539 N.Y.S.2d at 877.

We are also aware of the State Division's decision in Porcello v. General Motors Corp. (Case No. 3-E-D-85-103394, Jan. 18, 1990), in which then Commissioner Douglas H. White stated:

> although the protection of the Human Rights Law as regards disability applies to those persons who are or have been addicted to drugs, a social or casual user of drugs, whether the drug of choice is alcohol or marijuana or cocaine, is not disabled within the meaning of the Human Rights Law.

Id., slip op. at 4-5. (Emphasis in original.)

C. APPLICATION OF LAW TO CERTAIN RELIGIOUS PRACTICES: § 8-107(3)(a)

Section 8-107(3)(a) of the current law states that:

> [i]t shall be an unlawful discriminatory practice for an employer ... 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, his or her creed or religion, including but not limited to ... the observance of any other religious custom or usage ....

The Association believes that this section would provide for unconstitutionally broad protection against discrimination based on certain religious practices. For example, it might well violate the Establishment Clause of the First Amendment of the United States Constitution were a public school teacher to wear certain religious clothing, or engage in certain religious behavior, in an elementary school classroom. See United States v. Board of Education of Schools District of Philadelphia, 911 F.2d 882, 890 (3d Cir. 1990)(teacher's religious garb may leave impression of school endorsement of particular religion). Yet the wearing of such religious clothing would appear to be protected activity under the current and the proposed law. Given the present opportunity to revise the Human Rights Law, the Association recommends that the City Council should make clear in its memorandum in support of the Bill that nothing in this section is intended to conflict with the Establishment Clause of the First Amendment of the United States Constitution.

D. LANGUAGE TO ADDRESS THE SUPREME COURT'S DECISION ON DISPARATE IMPACT IN WARDS COVE PACKING CO. V. ATONIO

Section 8-107(17) of the Mayor's bill states that

> [a]n unlawful discriminatory practice based upon disparate impact is established when [inter alia] ... the covered entity fails to plead and prove as an affirmative defense that each such policy or practice ... is essential to the performance of the covered entity's legitimate functions .... (Emphasis added.)

The Association agrees with the intent of this amendment: to make explicit that disparate impact law under the City Human Rights Law is consistent with federal law prior to the Supreme Court's 1989 decision in Wards Cove Packing Co. v. Atonio, 109

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S. Ct. 2115. We believe that some alteration to the bill's language will better accomplish that purpose. We recommend that the words, "is essential to effective job performance, in the case of employment, or is otherwise essential to the entity's principal functions, in the case of housing or public accommodations," be substituted for the language underlined above from section 8-107(17). We believe this change would avoid the undesirable result of approving behavior that might otherwise be "legitimate," but for its discriminatory effect.

In 1971 Griggs v. Duke Power Co., 401 U.S. 424, held that an employer that used practices or policies that had the effect of barring minorities from jobs violated Title VII even in the absence of an intent to discriminate. Griggs, Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), and Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), seemed to have made clear that once there was a showing that an employment practice had an adverse impact on a protected group, the employer had the burden of proving that the practice was job-related, i.e., that it was required by business necessity. However, Ward's Cove held that after a showing of adverse impact, the employer only has the burden of "producing evidence of a business justification for his employment practice." 109 S. Ct. at 2126. The burden of persuasion remains at all times with the plaintiff. Moreover, the employer need not demonstrate that the challenged practice is "'essential' or 'indispensable' to the employer's business." The inquiry, rather, is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. at 2125-26.

The Civil Rights Act of 1991, H.R. 1, 102nd Cong., 2d Sess. (1991), would overrule the changes wrought by Wards Cove by restoring the burden to prove job-relatedness to the employer. Furthermore, it would require that the employer establish business necessity in order to avoid liability. We believe that our recommended changes to Section 8-107(17) of the Mayor's bill would also accomplish that result.

E. DISPOSITION OF CIVIL PENALTIES: § 8-127

Both the Mayor's and Council bills provide for the imposition of civil penalties against respondents found to have violated the Human Rights Law. The Mayor's bill provides that all civil penalties would be paid into the City's general fund. The Council bill provides that in the case of respondents who are City agencies, the civil penalties are to be paid to the prevailing complainant.

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The Association agrees with the sense of the Council bill that it is inappropriate for the City to pay money with one hand, and receive the same money with the other. However, we are nonetheless troubled by vesting similarly situated complainants with disparate remedies, solely because one complainant has been discriminated against by a City agency and the other by a private concern. The Association suggests that civil penalties imposed against City agencies be paid to a fund that provides anti-bias education programs or otherwise supports efforts at eradicating discrimination. An example of such a program would be the New York Civil Liberties Union's program in the New York City High Schools.

F. PROVISION FOR ATTORNEY'S FEES FOR CASES RESOLVED ADMINISTRATIVELY

Although the Mayor's bill provides for attorney's fees for a party who prevails in court, there is no comparable provision for attorney's fees for a party who prevails in proceedings before the Commission. In 1989, this Association supported state legislation which would have provided attorney's fees to complainants who prevailed in administrative proceedings under the New York State Human Rights Law. See Committee on Civil Rights of the Association of the Bar of the City of New York, Report approving S. 4927, An Act to amend the New York State Human Rights Law to Allow A Prevailing Plaintiff or Petitioner to Recover Attorney's Fees in Discrimination Actions Brought pursuant to the Human Rights Law (1989). Likewise, in 1990, this Association issued a report recommending that Congress amend 42 U.S.C. §§ 1988 and 2000e-5(k) to provide for attorney's fees for vindication of federal nondiscrimination rights in agency proceedings. See Committee on Civil Rights of the Association of the Bar of the City of New York, Report on The Need for Attorney's Fee Awards for Civil Rights Cases Resolved Administratively, 45 The Record 233-249 (1990). Consistent with those reports, the Association believes that attorney's fees are critical in providing incentive to members of the bar to represent complainants in proceedings before the Commission, and that private counsel should play a vital role in insuring effective vindication of violations of the City's nondiscrimination laws.

Similar federal legislation already provides that attorney's fees may be awarded at the administrative level to the attorneys for the prevailing party (see the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3612(p)). We also believe that the Commission's determination of when to award attorney's fees should be made consistently with the judicial construction of federal

civil rights attorney's fees statutes (see Hughes v. Rowe, 449 U.S. 5, 15 (1980); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); see also 42 U.S.C. §§ 1988, 2000(e)(5)(k); §706 of the Civil Rights Act of 1964, Title VII; and Individuals With Disabilities Education Act, 20 U.S.C. §1415(e)(4)(b)).

G. KNOWN DISABILITIES § 8-107(15)(a)

The Mayor's bill requires that "any person prohibited by the provisions of this section from discriminating on the basis of disability shall make 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." The Association recommends that the bill be amended to clarify that such obligation only pertains to "known" disabilities. In other words, an employer would have no obligation to make reasonable accommodation under the Act unless it knew that an employee was disabled and that an accommodation was necessary in order for the employee to satisfy the essential requisites of the job. This is consistent with the federal Americans with Disabilities Act (Public Law 101-336, 42 U.S.C. § 12101, et seq.). The reason for this distinction is explained in the following passage from the ADA's legislative history:

> [T]he duty to accommodate is generally triggered by a request from an applicant for employment or an employee. Of course, if a person with a known disability is having difficulty performing his or her job, it would be permissible for the employer to discuss the possibility of a reasonable accommodation with the employee.
>
> In the absence of a request, it would be inappropriate to provide an accommodation, especially where it could impact adversely on the individual. For example, it would be unlawful to transfer unilaterally a person with HIV infection from a job as a teacher to a job where such person has no contact with students. (Citation omitted.)
>
> * * *
>
> The Committee suggests that after a request for an accommodation has been made, employers will first consult with and involve the individual with a disability in deciding on the appropriate accommodation.

House Committee on Education and Labor Report on the Americans with Disabilities Act of 1990, 101st Cong., 2d Sess. 65 (1990).

We agree with the House Committee on Labor and Education that reasonable accommodation should be a process involving discussion of alternative accommodations between employers and other covered entities, and employees and others protected by the Human Rights Law. Thus, as a general rule, individuals should request reasonable accommodations before they take legal action. We believe that the Commission and the Mayor's Office for People with Disabilities can perform a valuable function in assisting persons with disabilities in negotiating reasonable accommodations.

H. INVESTIGATION AND DISPOSITION OF COMPLAINTS (§ 8-109); PRIVATE RIGHT OF ACTION AND ATTORNEY'S FEES FOR PENDING CASES (§ 8-401); MANDATORY LANGUAGE OF CONCILIATION AGREEMENTS § 8-115(b)

(i) Investigation and Disposition of Complaints; Private Right of Action and Attorney's Fees for Pending Cases.

Section 8-109(g) of the Mayor's bill sets specific time deadlines for the investigation of complaints filed after January 1, 1991. Under these deadlines, the Commission is to commence proceedings within 30 days after receipt of the complaint, complete the investigation in 100 days after filing the complaint and make a final disposition of the complaint within one year. These time deadlines are clearly laudable. However, the Association notes the following concerns.

We are concerned that the time deadlines may create an incentive to put a premium on closing cases quickly, possibly at the expense of a complete and adequate investigation. Considering that the vast majority of complainants are un-represented by counsel and are unfamiliar with the law, these limitations could effectively penalize naive complainants. Accordingly, we recommend that these time deadlines be considered directory, rather than mandatory, as is the case with similar time limits under the New York State Human Rights Law. See State Division of Human Rights (Johnson v. American Can Co.), 78 A.D.2d 1005, 433 N.Y.S.2d 906 (4th Dep't 1980)(time limits relating to determination of complaint by State Division of Human Rights are directory rather than mandatory); Volk v. State Division of Human Rights, 73 A.D.2d 510, 422 N.Y.S.2d 94 (1st Dep't 1979)(failure of Division to make final order and determination within 180 days of filling of complaint did not require dismissal of complaint; statutory time limits are merely directory).

Consistent with this concern, we believe that the parties should be notified promptly of the status of their cases whenever a time deadline is about to expire. We agree with the obvious intent of section 8-109(g) of the Mayor's bill which would require the Commission to notify the complainant, the respondent and any necessary party if the Commission is unable to comply with any of the timelines. However, we are also concerned that the parties may simply get a letter stating that the shortage of staff makes quicker investigations impracticable. We therefore recommend that where the Commission is unable to comply with the directory time guidelines, the Commission should notify the parties, advise the complainant of the available right to obtain a dismissal for administrative convenience and to bring a private action in federal or state court, and provide a referral to the Legal Referral Service of the Association of the Bar of the City of New York and the New York County Lawyers' Association or to a comparable legal referral service.

We are also concerned that the proposed new law does not adequately protect individuals who filed complaints before the new law is passed. Without similar directory timelines for cases already pending at the Commission, the Commission will have a great incentive to complete newer cases. Individuals with pending complaints may be substantially disadvantaged. We therefore recommend that directory time limitations be added to § 8-109(g) to require that all complaints filed prior to January 1, 1988 be finally disposed of by January 2, 1992 and that all complaints filed between January 2, 1988 and the effective date of the Law be finally disposed of by January 2, 1993.

Finally, we believe that fairness requires that the private right of action should apply to cases pending before the Commission as of the effective date of the new Law to the extent such a right of action would apply to cases filed after the effective date. We also believe that, consistent with our recommendation above, attorney's fees should be made available at the Commission level for all cases where complaints are pending at the Commission on the date that the law becomes effective.

(ii) Mandatory Language of Conciliation Agreements.

Section 8-115(b) of the Mayor's bill provides that all conciliation agreements shall require the respondent "to refrain from the commission of unlawful discriminatory practices in the future." The Association applauds what we believe to be the apparent intent of the proposed legislation here. However, we are concerned that this mandatory requirement may have the unintended effect of discouraging the use of conciliation agreements to resolve complaints.

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The Commission, the State Division of Human Rights and the United States Equal Employment Opportunity Commission all currently require respondents who enter into conciliation agreements to agree to not discriminate in the future, without any apparent adverse impact on settlement. However, Section 8-115(d) of the Mayor's bill provides that the Commission shall embody ... [any conciliation] agreement in an order," and Section 8-124 provides that "[a]ny person who fails to comply with an order issued by the Commission pursuant to Section 8-115 ... shall be liable for a civil penalty of not more than fifty thousand dollars and an additional civil penalty of not more than one hundred dollars per day for each day that the violation continues." These new provisions may dissuade respondents from entering into conciliation agreements for fear of liability for civil penalties based on an earlier conciliation agreement if they are later found to violate any provision of the Human Rights Law, even in a completely unrelated case. Such an unforeseen result may even occur where a respondent has entered into a conciliation agreement to avoid litigation costs without admitting liability. A cautious respondent, therefore, may not be inclined to enter into a conciliation agreement if such a potentially adverse result is mandatory.

Instead there should be a presumption that conciliation agreements will contain a provision that the respondent will not discriminate in the future, but that the Commission, in its sound discretion, may decide not to include this language if the circumstances so warrant. We believe the Commission will be better able to determine on a case by case basis whether the presumption should apply to a particular respondent.

I. PROBABLE CAUSE STANDARD

Section 8-116 of the Mayor's bill requires the Commission to find probable cause "where the commission determines that probable cause exists to credit the allegations of the complaint." The Association believes that simply crediting the complainant's factual allegations may be insufficient to justify a probable cause determination, unless those allegations state a claim under the Human Rights Law. Obviously, the question before the Commission is not whether the complainant's factual allegations are true, but whether the investigation shows evidence of unlawful discrimination. We therefore recommend that § 8-116 be modified to require the Commission to consider whether the allegations of the complaint and/or the results of the Commission investigation establish probable cause. By permitting the Commission to consider the results of its investigation, we recognize that additional evidence may come to light during the investigation which may establish the claim and

avoid requiring the Commission to amend the complaint prior to the hearing.

J. HOUSING DISCRIMINATION

(i) Religious Exemption: §8-107(12).

Section 8-107(12) of the Mayor's bill apparently would permit religious organizations to limit or grant preferences in non-commercial housing to promote the sponsoring organization's religious principles, provided that the religion does not exclude people from membership "on account of race, color or national origin". That section also would seem to permit such a religious organization to make other limitations, preferences or selections in support of its religious principles -- but only to the extent (a) provided above and (b) protected by the Free Exercise Clause of the United States Constitution.

Section 8-107(12) might permit, for example, a religious organization sponsoring a government-assisted AIDS hospice to discriminate against a prospective resident on the basis of mobility impairment or sexual orientation and to prohibit discussion of safe sexual practices at the hospice. Without taking a position on the merits of such a result, the Association believes that the language of section 8-107(12) should be clarified to add people with disabilities and other protected classes and, to focus public attention so that the policy choice intended is clearly understood by all concerned.

(ii) Use of Criteria or Qualifications In Publicly Assisted Housing Accommodations.

The Mayor's bill and the Council bill both include a provision that would permit entities to use criteria or qualifications of eligibility where they are required to comply with federal or state law (Mayor's bill, Sec. 8-107(5)(n); Council bill, sec. 8-107(5)(m)). We urge that the drafters of the legislation give further consideration to this provision in light of Section 296.2-1(c) of the State's Executive Law, which states that it "[i]t shall be an unlawful discriminatory practice for the owner ... or managing agent of publicly-assisted housing accommodations ...

> (c) To cause to be made any written or oral inquiry or record concerning the race, creed, color, disability, national origin, age, sex or marital status of a person seeking to rent or lease any publicly-assisted housing accommodation."

Reference to this section in the legislative memorandum should make clear that may use of criteria or qualifications or eligibility should be exercised with great restraint, in light or the above provision.

(iii) The Commission as a Local Referral Agency

The Association believes that the Commission should continue, where appropriate, to serve as a local enforcement deferral agency for complaints brought under the federal Fair Housing Amendments Act of 1988 ("FHA"), as amended by the Fair Housing Act of 1988 (42 U.S.C. § 3601 et seq.). Pursuant to the FHA, the Department of Housing and Urban Development may certify local agencies for referral of complaints where the law enforced by the local agency is at least equivalent substantively and procedurally to the FHA (see 42 U.S.C. § 3610(f); 24 C.F.R. Part 115).

The Association acknowledges that the City's Human Rights Law is at least equivalent procedurally, and in most respects substantively, to the FHA. Some of our members are concerned that the proposed Law may not be at least equivalent substantively to the FHA requirement that multifamily dwellings incorporate design features to meet the needs of citizens with disabilities, 42 U.S.C. § 3604(f)(3)(c), although the City's Administrative Code §§ 27-292.1 - 27-292.20 (known as "Local Law 58") would conform to that FHA requirement. Accordingly, we would recommend that a section "8-107(5)(O)" be added, which reads:

> (O) It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, managing agent, or any other person having the right to authorize construction or renovation of any building to fail or refuse to comply with the building accessibility requirements of the New York City Administrative Code.

CONCLUSION

The Association heartily supports and endorses the proposed changes to the City Human Rights Law subject to the qualifications we have outlined. We believe the new law will be an invaluable tool in reducing discrimination. We commend the City Council and the Mayor for their considerable efforts to improve the City's Human Rights Law and its protection of the rights of the people of the City.

THE ASSOCIATION OF THE BAR
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M E M O R A N D U M

TO: The Honorable David N. Dinkins,
Mayor of the City of New York

and

The Council of the City of New York

FROM: Committee on Labor and Employment
Law of the Association of the Bar
of the City of New York

DATE: December 5, 1990

RE: Intro. 465 and Intro. 536, Bills Pending
Before The General Welfare Committee which
Proposes Substantial Revision of the City
Human Rights Law

The Committee on Labor and Employment Law of the Association of the Bar of the City of New York would like to take this opportunity to comment upon the City Council's proposed revisions to the City's Human Rights Law contained in Intro. 465 and also upon the Mayor's proposal (Intro. 536) in this regard.

By way of background, the Committee is composed of twenty-eight members, representative of the broad spectrum of interests in the labor and employment legal field in New York City, including leading members of the union, management, plaintiff's and defendant's bars. It is our hope that the following comments will assist the drafters in further fine-tuning the legislation toward the goal of making the process of pursuing claims under the Human Rights Law expeditious and effective for complainants and the process of responding to a complaint equitable for respondents. (Although our comments

are referenced to Intro. 465, they generally are applicable to the parallel provisions of Intro. 536, the Mayor's proposal, as well.)

The proposed revisions contain some procedural changes that, in our view, may have the unwanted effect of slowing the resolution of a complaint. Other changes create standards, procedures or requirements that differ in some cases from well-established state and federal law or Supreme Court precedent which, in turn, could cause confusion and costly duplication of effort in application of these standards. We point out these differences so that they may be thoughtfully addressed to determine whether the differences improve or hinder the process.

PROCEDURAL AND REMEDIAL MATTERS

Conciliation Agreements

The proposed revisions may have the unfortunate result of discouraging the use of voluntary conciliation in complaints brought before the Commission. Both complainants and respondents value the use of a conciliation agreement to resolve complaints quickly and cost effectively and any significant decline in the number of conciliation agreements would substantially increase the Commission's case backlog.

As proposed, any conciliation agreement will require the inclusion of a provision requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future. § 8-115. (This would amount to an admission of discrimination which many respondents may refuse to agree to where the settlement is made to avoid litigation costs or merely as a convenience.) Such provision may have unforeseen consequences as a result of § 8-115(d) which allows the Commission to embody unilaterally any conciliation agreement in an order. This section, coupled with §§ 8-124 and 8-129 which impose civil and criminal penalties for the failure to comply with a Commission order, could subject the respondent to penalties for "violating" the order in the unrelated proceeding. Respondents which are aware of this tie-in among the provisions may reject conciliation under the new law. The unfortunate result is clearly the settlement of fewer cases and an increased burden on the agency and parties.

To alleviate this problem, the Committee recommends that the inclusion of the "refrain from future discriminatory acts" and the "embody in an order" provisions as stated in § 8-115(d), if they are to be included, be made optional.

Answer

The proposed revisions require a respondent to file a verified answer, stating all affirmative defenses, within 20 days of service of the Complaint. § 8-111(a). Those allegations not specifically denied or explained will be deemed admitted, § 8-111(c); and failure timely to answer may result in a default judgment being entered against the respondent. § 8-119(e).

Formal pleading requirements of this nature are not contained in either the federal or state discrimination complaint procedures. They are not normally part of the legion of procedural hazards confronted by the practioner or pro se party in an administrative discrimination proceeding. It should be noted that not all respondents are represented by counsel at this stage of a proceeding.

Record Promulgation

Section 8-114 of the proposed revisions provides that:

> the commission may demand any person who is the subject of such investigation to generate and maintain such records or other information which, in the judgment of the commission, are necessary to enable the commission to carry out the powers granted to it . . .

It is not necessary for a complaint to have been filed or for a probable cause determination to have been issued for the Commission to exercise its unbridled discretion.

There is no similar record generation requirement in Title VII or New York State law. Title VII's regulations require maintenance of records kept in the normal course of business (29 CFR 1602.14) and completion of an EEO-1 report listing minority and female representation by job category.

Probable Cause Standard

The standard for finding probable cause under the proposed revisions is linked to the complainant's allegations as opposed to a finding of a discriminatory practice. § 8-116. A hearing will be ordered "where the commission determines that probable cause exists to credit the allegations of the complaint." This differs from state law which provides

for a determination of whether respondent "has engaged or is engaging in an unlawful discriminatory practice", N.Y. Executive Law § 297(1), in that, among other reasons, it may require such a finding even where the allegations, if true, do not amount to unlawful discrimination.

Pre-Hearing Discovery

The revisions have expanded pre-hearing discovery by lowering the standard for discovery (what is "appropriate to the fair and efficient resolutions of complaints" as opposed to "material and necessary"); expanding the Commission's ability to issue and rule on discovery orders; and increasing penalties for failure to comply. § 8-118.

Extensive pre-hearing discovery such as this is not provided for under state or federal law. The opportunity for "fishing expeditions" and abuse may lead to longer proceedings and ancillary proceedings challenging discovery orders.

Affirmative Orders to Non-Respondents and Non-Discriminators

Section 8-120 contains language that permits the Commission to order "any necessary party" and "respondents have been found not to have committed an unlawful discriminatory practice to take such affirmative action, as in the judgment of the commission, is necessary to effectuate a full and complete remedy . . ." (emphasis added)

This remedial power does not exist in state or federal discrimination laws. In federal lawsuits, the civil procedure rules (Rule 19) provide for the joinder of parties for remedy purposes. The Supreme Court, in General Building Contractors Association v. Pennsylvania, 458 U.S. 375, 398-402, 102 S. Ct. 3142, 3154-56 (1982), held that a party found not to be liable for violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, could not be required to pay a proportionate share of the costs of implementing an injunction to assure non-discriminatory practice by a liability party, noting that injunctive relief against a non-liability party is limited to "minor and ancillary relief" upon "an appropriate evidentiary showing". Similarly, the National Labor Relations Board has recognized its powers are limited to ordering only the respondent union to remedy a duty of fair representation breach, where the Company is not a respondent. Mack Wayne Closures, NLRB Case No. 22-CB-4927 (slip op. May 22, 1986).

This provision may be challenged on due process grounds where a "necessary party" or a party found not respon-

sible is ordered to take affirmative action but has not been provided notice or an opportunity to appear or argue.

Reopening of Proceeding by Commission

Section 8-121 provides that the Commission may reopen a proceeding or vacate or modify any order "whenever justice so requires".

This exception to the finality of proceedings, including, presumably, conciliation proceedings, is not embodied in federal or state discrimination laws.

Standard For a Preliminary Injunction and TRO

The new Section 8-122 lowers the standard for obtaining a preliminary injunction from showing the respondent's conduct is "tending to render ineffectual" (emphasis added) a potential Commission remedy (NYC Admin. Code § 8-109(4)) to showing that the effectiveness of the potential remedy "would be limited or interfered with" (emphasis added) by the Respondent's actions. This "limit or interfere" standard is a lower standard than that embodied in CPLR § 7502(c), the State Human Rights Law, and federal law.

Statute of Limitations

Section 8-502(d) has extended the statute of limitations for filing a civil action to three (3) years and provides for tolling during the pendency of a city or state complaint. There is no comparable tolling provision in federal and state discrimination laws.

Federal and state law in this area generally contains shorter limitations periods which, in turn, serve to effectuate prompt resolution of discrimination claims.

Civil Penalties

To vindicate the public interest, Sections 8-126 and 8-127 provide for the assessment of substantial civil penalties to be paid to the general fund of the city for both willful and non-willful discriminatory practices.

The latest version of the Civil Rights Act of 1990 would limit punitive damages to the situation of intentional discrimination.

SUBSTANTIVE LAW MATTERS

§ 8-107(13) Employer liability for discriminatory conduct by employee or agent

The revised section would set forth four factors[1] to be considered "in mitigation of the amount of civil penalties to be imposed" (emphasis added) on an employer after a finding of employer liability for the acts of its employee or agent. These factors are not included in the list of factors to be considered in the initial determination of liability; instead their application is confined to the mitigation phase.

In so limiting the application of these factors, the drafters would adopt a different position than that of the Supreme Court in its Meritor Savings Bank FSB v. Vinsion, 477 U.S. 57, 72-73, 106 S. Ct. 2399, 2408 (1986), decision. In Meritor the Supreme Court concluded that factors such as a policy against discrimination and an effective grievance procedure could be considered by the courts under Title VII to determine, in the first instance, employer liability for harassment. The Equal Employment Opportunity Commission has promulgated guidelines to the same effect.

§ 8-102(18) Definition of "disability";
§ 8-102(20) Definition of "reasonable accommodation";
§ 8-107(15)(a) Requirements to make reasonable accommodation;
§ 8-107(b) Affirmative defense in disability case.

On July 26, 1990, the Americans with Disabilities Act ("ADA") became law, with most of the employment provisions of the ADA scheduled to take effect July 26, 1992. The proposed revisions to the Human Rights law differ in certain key respects with the standards set forth in the ADA, as follows:

(a) Accommodation of "known" disabilities

The ADA provides that "not making reasonable accommodation to the known physical or mental limitations of a qualified individual . . . (emphasis added)" is discriminatory

1 The factors are: 1) no other incidents of discriminatory conduct by such employee or agent; 2) employer has a meaningful and responsive procedure for handling victims' complaints of discrimination; 3) employer has adopted and effectively communicated a non-discrimination policy; and 4) employer has implemented an education program regarding unlawful discriminatory conduct.

(§ 102(b)(5)). Neither the definition of disability (§ 108(18)) nor the requirement of making reasonable accommodation (§ 8-107(15)(a)) contained in the proposed revisions explicitly state that the disabilities are "known".

(b) Necessary Accommodation

The ADA requires reasonable accommodation of a qualified individual with a disability and sets forth examples of what a reasonable accommodation "may include" (e.g. job restructuring, modified work schedule) and sets forth factors to consider as to whether an accommodation would impose an "under hardship" (e.g. overall size of operation, cost of accommodation), §§ 101(8) and (9). The ADA defines discrimination as "not making reasonable accommodations to the known physical or mental limitations of a qualified individual who is an applicant or an employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ." § 102(b)(5).

By contrast, the proposed revisions to the Human Rights Law require "all accommodation that can be made except such accommodation that a covered entity can demonstrate would cause undue hardship . . ." (§ 8-102(20)(emphasis added)), thereby setting a significantly higher standard than what otherwise may be considered "reasonable".

(c) Current Use of Illegal Drugs and Alcohol

The ADA excludes "any employee or applicant who is currently engaging in the illegal use of drugs" from the definition of a "qualified individual with a disability". §§ 104(a) & 510. Further, the ADA provides that an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." § 104(c)(4).

The proposed revisions broadly define disability (§ 8-102(18)), do not except current drug users, and do not provide the defense relating to qualification standards.

In addition, the ADA specifically excludes from the definition of "disability" various conditions, including: homosexuality, bisexuality, transvestitism, pedophilia, transsexualism, exhibitionism, voyeurism, compulsive gambling, kleptomania, pyromania, gender identity disorders, current

psychoactive substance use disorders, current psychoactive substance induced organic mental disorders and other sexual behavior disorders (§§ 508 & 511), and these are not explicitly excluded in the proposed revisions to the Human Rights law.

(d) Smoking

The proposed revisions do not expressly authorize smoking restrictions and/or prohibitions. Under the definitions of disability and accommodation, smoking restrictions could be found to violate the City Human Rights Law, despite the City's law requiring such restrictions.

(e) Bona Fide Benefit Plans

The ADA expressly carves out "bona fide benefit plans" that are "not used as a subterfuge to evade" the ADA, from coverage under the ADA. § 501(c). The City revisions do not contain such an exemption.

Disparate Impact Cases § 8-107(17)

The proposed revisions of the City Human Rights law contain provisions redefining the standard of proof in disparate impact cases which otherwise would conform to Wards Cove Packing Co. Inc. v. Antonio, 109 S. Ct. 2115 (1989).

Although the issue of the appropriate standard of proof in these cases continues to be debated both in the Congress in considering revisions to the proposed Civil Rights Act of 1990 and among legal practitioners, we note that the currently proposed revision of the City Human Rights Law would create a standard different from that set forth in the vetoed revision of the Civil Rights Act of 1990, legislation which is likely to be resubmitted for Congress' consideration in 1991.

The proposed revision provides in § 8-107(17)(a) that, in a disparate impact case challenging a group of policies or practices, a prima facie case may be established without "proof of which specific component or components of such policies or practices caused such disparate impact . . .". An employer then would have the burden of establishing that "each component of the challenged policies or practices either is essential to the performance of the covered entity's

legitimate functions or does not contribute to the disparate impact (emphasis added)",[2] § 8-107(17).

The most recent version of the Civil Rights Act of 1990, in contrast, utilizes a "business necessity" standard, defined as an employment practice which bears a "significant relationship to successful performance on the job" in the case of measures of job performances, and "significant relationship to a manifest business objective" in the case of other employment practices.

* * *

We trust that you will recognize the importance of the concerns addressed by these comments, reflecting as they do the consensus of diverse views on our Committee. We thank you for providing us with this opportunity to address the proposed revisions and would be pleased to further discuss with you any questions you may have regarding these comments.

Respectfully submitted,

Committee on Labor and Employment Law of the Association of the Bar of the City of New York

By ______________________
Jay W. Waks, Chair

Members:

Robert D. Addams
Paul Bailey
Leona L. Barsky
Richard H. Block
Irving Brand
Ronald G. Burden
John D. Canoni
Mary C. Carty

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2 The employer's burden under Griggs v. Duke Power Co., 401 U.S. 424 (1971), has previously been to show that the challenged policy or practice was significantly related either to successful job performance or to the employer's legitimate business objectives.

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HEARINGS ON REVISIONS TO CITY HUMAN RIGHTS LAW

CITY COUNCIL GENERAL WELFARE COMMITTEE

MONDAY, APRIL 22, 1991, 10:00 A.M.

THE GENERAL WELFARE COMMITTEE OF THE CITY COUNCIL CURRENTLY HAS PENDING BEFORE IT TWO BILLS, EACH OF WHICH WOULD GREATLY STRENGTHEN THE CITY'S HUMAN RIGHTS LAW BOTH PROCEDURALLY AND SUBSTANTIVELY.

THE ATTACHED CHART SUMMARIZES SOME OF THE MAJOR CHANGES THAT WOULD BE ACCOMPLISHED BY THE TWO PROPOSALS.

CURRENT LAW	MAYOR'S BILL Intro 536-A	COUNCIL BILL Intro 465-A
Disparate Impact.		
No explicit language in statute, but covered by CCHR caselaw. CCHR caselaw rejects recent U.S. Supreme Court decision which forces plaintiffs, rather than defendants, to prove that challenged practice is not required by business necessity (even though employer is in best position to put forth its own business needs).	Disparate impact explicitly covered. Respondent has burden of proving business necessity. Where complainant produces substantial evidence of less discriminatory alternative, respondent must prove that alternative wouldn't meet its needs as well as challenged practice. Business necessity is defined as practice or policy that bears significant relationship to significant business objective.	Similar to Mayor's bill, but: 1) no language on less discriminatory alternatives; 2) use of standardized educational tests by educational institutions immune from challenge; 3) specifies that mere existence of statistical imbalance in employer's workforce is not alone sufficient to establish prima facie case; 4) anti-quota language; 5) no definition of business necessity.
Preliminary Injunctive Relief.		
Available only in housing cases. Availability pegged to harm alleged to be suffered by individual complainant.	Expanded to cover employment and public accommodations cases. Availability pegged to whether respondent's action would interfere with any type of relief that CCHR could order after a hearing.	Similar to Mayor's Bill.

CURRENT LAW	MAYOR'S BILL	COUNCIL BILL
Civil Penalties.		
Not permitted	Up to $50,000 can be awarded in most cases; up to $100,000 with a showing of wilfullness or maliciousness. All penalties collected go to general fund of City to compensate for societal injury. Other penalties include up to $50,000 and $100/day for violation of CCHR orders, and up to $250,000 for systemic discrimination.	Same dollar limits as Mayor's bill, except penalty for systemic discrimination limited to $100,000. Civil penalties against city agencies paid to complainants.
Private Right of Action.		
No explicit coverage.	Complainant can choose whether to go to CCHR or State Supreme Court. Attorneys fees available for court actions.	Equivalent to Mayor's bill.
Authority to litigate in court		
Law Department (Corp Counsel) has authority to litigate CCHR cases when court action is needed and to delegate to CCHR litigation authority in specific matters or classes of matters.	Equivalent to current law.	CCHR may litigate its own cases.
Systemic discrimination claims litigated in court.		
No explicit coverage.	Law Department (Corp Counsel) can litigate systemic discrimination claims in state court or delegate authority to CCHR.	CCHR and Law Dept. can litigate in court.

CURRENT LAW	MAYOR'S BILL	COUNCIL BILL
Liability of employees and agents for their own biased acts.		
No explicit coverage in employment context, although CCHR caselaw provides for liability where employee had power to do more than carry out decisions made by others.	Employees and agents are responsible for their own discriminatory acts.	Equivalent to Mayor's bill.
Liability of employers for acts of employees and agents.		
No explicit coverage.	Liability in housing and public accommodations. Liability in employment context for acts of managers and supervisors and for acts of co-workers where employer knew of act and failed to take prompt and effective remedial action or should have known of act 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.	Similar to to Mayor's bill. No mitigation if there was any prior incident of discrimination. Mitigation factors may also be considered in determining whether employer should have known of discriminatory act. No mitigation of punitive damages.
Liability of employers for acts of independent contractors.		
No explicit coverage.	Liability where contractor, in furtherance of employer's business, discriminates, and employer knows and condones.	Similar to Mayor's bill. No mitigation of civil penalties available.

CURRENT LAW	MAYOR'S BILL	COUNCIL BILL
Ability of Commission to order complete relief to complainant where individual discriminator found liable & employer found not liable.		
Not mentioned.	Commission can order non-monetary relief against employer in order to afford make-whole relief (such as restoration of job to harassed employee) where individual respondent found liable. and employer found not liable.	No coverage.
Discrimination based on perceived membership in a group or based on association with someone in a protected group.		
No explicit language in statute, but covered by CCHR caselaw.	Discrimination based on perceived status and on association with person of a protected group explicitly proscribed.	Equivalent to Mayor's bill.
Age bias in residential housing.		
Permitted	Prohibited except for certain exemptions for senior citizen housing.	Equivalent to Mayor's bill.
Age bias in public accommodations.		
Permitted.	Prohibited once CCHR issues regulations setting forth exemptions to prohibition based on bona fide public policy considerations.	Equivalent to Mayor's bill.
Marital status bias in public accommodations and employment.		
Permitted	Prohibited.	Equivalent to Mayor's bill.
Discrimination in two-family, owner-occupied dwellings where available apartment has been publicly advertised.		
Permitted.	Prohibited.	Similar to Mayor's bill.

CURRENT LAW	MAYOR'S BILL	COUNCIL BILL
Discrimination by religious organizations.		
Permitted where preference is calculated to promote religious principles. Also, an absolute co-religionist preference is permitted regardless of whether or not such preference is calculated to promote religious principles.	Only permitted where preference is calculated to promote religious principles. In housing, adopts provision of federal fair housing act which makes exemption available only if membership in religion is not restricted on account of race, color, or national origin.	Exemption not available to religious organization which restricts membership on account of race, color or national origin. For religions without such restrictions, exemption only permitted where preference is calculated to promote religious principles.
Strength and clarity of disability coverage		
No affirmative statement of requirement to make reasonable accommodation; no explicit language on burdens of proof. Note: CCHR caselaw holds that respondent must make such accommodation as would enable person to meet essential requisites of job or benefit, except for that accommodation which respondent proves would cause it undue hardship.	CCHR caselaw is explicitly incorporated into statutory language. Affirmative statement of requirement to make reasonable accommodation.	Similar to Mayor's bill, except that definition of disability is limited to "known" disability.

CURRENT LAW	MAYOR'S BILL	COUNCIL BILL
Requirement to answer; sanctions for non-cooperation.		
None (although CCHR caselaw provides for adverse inferences to be drawn for failure to comply with discovery requirements).	Respondents required to answer or face default; range of sanctions set out for failure to comply with discovery orders.	Equivalent to Mayor's bill.
Recordkeeping		
No coverage	CCHR can order respondent to preserve existing records and continue to make existing types of records. CCHR to hold hearing to develop recommendations on whether the law should be amended to authorize CCHR to require businesses to generate new records.	CCHR can order both record generation and maintenance.
Discriminatory harassment		
No coverage.	Prohibits threats, intimidation, force, or coercion which interfere with person's exercise of rights protected under law because of protected class.	Equivalent to Mayor's bill.
Discriminatory boycotts		
No coverage.	Prohibits as unlawful discriminatory practice discriminatory boycotts, exempting boycotts relating to labor disputes or protesting discriminatory practices. Standard administrative enforcement procedure provided.	CCHR given extensive reporting obligations as to whether a boycott is discriminatory. No authority to adjudicate administratively.

Int. 465 and Mayor's Human Rights Bills: Major Points of Comparison

Employer Liability for Independent Contractors

- Int. 465 makes only the City vicariously liable for the discriminatory acts of its independent contractors to the same extent as it would be liable for the acts of its employees/agents.

- Mayor's bill makes all employers (including the City) vicariously liable for the discriminatory acts of independent contractors if employer had actual knowledge of and acquiesced in those acts.

Civil Penalties Against the City

- Int. 465 allows the Commission and courts to assess civil penalties against City agencies to be paid to the complainant. Note that civil penalties assessed against other than City agencies are not paid to the complainant but rather into the general fund.

- Mayor's bill provides for civil penalties assessed against any party to be paid into the general fund. Thus, the City will not suffer a loss of funds.

Disability - Drug/Alcohol Addiction

- Int. 465 would define person with a disability to include alcoholics and drug addicts who are current abusers.

- Mayor's bill would continue existing law and protect only recovered or recovering alcoholics and drug addicts who are currently free of abuse.

Reasonable Accommodation to Persons With Disabilities

- Int. 465 requires persons subject to the law (e.g. employers, building owners) to make "all accommodation that can be made" except if it would cause undue hardship to the person's business. This could be construed to include any accommodation requested by the person with a disability.

- Mayor's bill requires persons subject to the law to make "such accommodation as shall enable" a person with a disability to meet the job requisites or enjoy the rights in question except if it would cause undue hardship to the person's business.

Discriminatory Boycotts

- Int. 465 is silent.
- Mayor's bill would add a provision similar to that in State law to make it unlawful under the City's law to engage in a discriminatory boycott.

Adding the boycott provision to the City's law would have the following benefits:

- Gives Commission authority to file an administrative complaint.
- Adds more protected categories (disability, age, sexual orientation, alienage and citizenship status).
- Allows injured persons to bring a private action in court to recover damages, including attorney's fees.

Age Discrimination in Public Accommodations

- Int. 465 would prohibit age discrimination by places and providers of public accommodation and would take effect in 90 days.
- Mayor's bill has the same provision but would not take effect until the Commission by rule sets forth exemptions in the public interest (e.g. senior citizen discounts, restrictions on viewing adult films, peer group age limits).

Chairperson's Term

- Int. 465 would provide a four year term for the Commission Chair.
- Mayor's bill continues current law which gives all Commission members a term (including the Chair) but specifies that the Chair serves in the capacity as chair only at the pleasure of the Mayor.

Liability of Non-Guilty Respondents

- Int. 465: Where there are several respondents and one is found guilty of discrimination but the others are not, the non-guilty respondents and any necessary party can be ordered to provide injunctive relief.
- Mayor's bill: The only non-guilty respondents who can be ordered to provide injunctive relief are employers where their employee/agent has been found liable.

Discriminatory Harassment

Note that both bills give the Corporation Counsel powers to seek injunctive relief and civil penalties for discriminatory harassment, but

- Mayor's bill would also give the Commission authority to prosecute administrative complaints of discriminatory harassment and allow aggrieved persons to bring a private action for damages, including attorney fees.

Commission's Authority to Appear in Court

- Int. 465 authorizes the Commission to appear on its own in court to carry out the Commission's enforcement powers (seeking injunctive relief, enforcing Commission orders, seeking civil penalties). It also authorizes the Commission to bring civil actions to eliminate systemic discrimination.

- Mayor's bill provides for the Corporation Counsel to appear on the Commission's behalf or designate Commission attorneys regarding the above functions.

Fair Housing Act Provisions

- Int. 465 does not make any amendments to the housing discrimination provisions specifically designed to conform the City's law to the federal Fair Housing Act amendments of 1988.

- Mayor's bill makes substantial technical and substantive amendments to the housing provisions to conform the City's law to the federal law so that the Commission can qualify to receive funds to process federal housing complaints.

Commission Powers Regarding Hate Crimes

- Int. 465 specifies that the Commission has the power to enlist the cooperation of groups in mediation efforts to eliminate "hate crimes." "Hate crimes" means crimes that manifest evidence of prejudice based on race, religion, ethnicity, disability, gender or alienage or citizenship status. Protected categories omitted are sexual orientation and age.

- Mayor's bill contains no such provision. However, the Commission under existing law has the power to engage in mediation efforts with regard to all protected categories. This includes the power to mediate concerning circumstances surrounding a "hate crime".

Section-by-Section Analysis

Introduction

The City's Human Rights Law (§8-101 et seq. of the Administrative Code of the City of New York) has been in the forefront of civil rights laws, providing protection for all persons from invidious discrimination. As part of a generation of Federal and State discrimination laws which created vital substantive rights and institutions charged with enforcing those rights, the City's law has made a valuable contribution to advancing civil rights in the City. While the law has been amended on numerous occasions to expand its substantive scope, the basic enforcement mechanism of the law has remained virtually unchanged since 1965. The benefits of twenty-five years of experience in enforcing this law, as well as the collective wisdom gained from the enforcement of Federal and State laws, now make it clear that the enforcement mechanisms of the City's law must be strengthened and expanded and that many of the substantive provisions should be expanded, harmonized or clarified. In recognition of the vital role served by the City in protecting civil rights, it is time now to move the City's law into the next generation of civil rights laws. The following is a section-by-section analysis of all of the provisions of the bill.

§8-101 Policy

This section, which is in current law, expresses the policy reasons for enacting the Human Rights Law. The amendment would update this section by referring to all of the prohibited grounds for discrimination. It would make clear the broad authority conferred

upon the Commission to prevent discrimination from playing any role in actions relating to employment, public accommodations, housing and other real estate. It is intended that the Human Rights Law be liberally construed to recognize the Commission's broad authority to prevent discrimination.

§8-102 Definitions
"Person" (subd. 1)

The amendment makes clear that "person" includes natural persons, group associations, organizations and governmental bodies or agencies.

"Employer" (subd. 5)

Current law prohibits an "employer" from engaging in all forms of employment discrimination and defines "employer" to exclude employers with fewer than four employees. The amendment would clarify that the definition of "employer" applies only to the employment discrimination provisions. When employer is used in other provisions of the bill, i.e., §8-107(13) (employer's liability for the discriminatory acts of its employees), it is intended to have its ordinary meaning. The amendment would also provide that certain persons employed as independent contractors would be counted as persons employed for purposes of determining whether an employer employs four or more persons and is thus subject to the employment discrimination provisions. It should be noted that employees who are

parents, spouses, or children of the employer will also be counted as persons employed for this purpose. See §8-107(1)(f).

"Employee" (former subd. 6)

The purpose of the definition of the term "employee" in the current law is to exclude certain family members and domestic workers from the employment discrimination provisions of the law. Technically the definition did not achieve this purpose since in the current law the term "employee" is not used in these provisions. The inappropriate definition of "employee" is deleted and the employment discrimination provisions are amended to carry out the intended purpose of the deleted definition with respect to the parents, spouse or child of an employer. See §8-107(1)(f). The proposed amendment does not exclude domestic workers from the employment discrimination provisions.

"Educational Institution" (new subd. 8)

The bill would add a definition of educational institution.

"Place or Provider of Public Accommodation"(subd. 9)

The amendment to this subdivision would change the term "place of public accommodation" to "place or provider of public accommodation." This change is intended to clarify the term "place of public accommodation" to make clear that it is intended to include providers of goods, services, facilities, accommodations or advantages. The amendment would streamline the definition by eliminating the long list of specific types of public accommodations and replace that with a generic definition.

The amendment would also eliminate the current exclusion of public libraries, schools, colleges and other educational institutions. This results in the implicit inclusion of these institutions in the definition of public accommodation, and thereby subjects them to the prohibitions on discrimination by public accommodations. See §8-107(4). The term "place or provider of public accommodation" would now include both public and private educational institutions. Although a variety of other laws including the State Civil Rights Law §40 and the Education Law §§ 313, 3201 and 3201-a cover certain aspects of discrimination in schools and the Board of Education has adopted a nondiscrimination policy and an internal procedure for resolving complaints of discrimination by students, the City has an independent and overriding interest in routing out discrimination from its schools. Extension of the City Human Rights Law in this area would make available to aggrieved persons the administrative remedies provided by the Commission as well as the right to bring a private action and recover attorneys fees.

The amendments to this subdivision also narrow the exclusion for places of accommodation that are distinctly private by providing that only clubs could be considered distinctly private. This would foreclose doctors, dentists and other professionals from arguing that their practices are distinctly private and thus not subject to the prohibitions against discrimination.

"Housing Accommodation" (subd. 10)

The amendment would include publicly-assisted housing accommodations within the definition of "housing accommodation," (except where otherwise expressly provided) thereby reflecting the consolidation of provisions governing public and private housing discrimination effected in a subsequent section. See §8-107(5).

"Publicly-assisted Housing Accommodations" (subd. 11)

The only substantial difference which remains in the provisions of the Human Rights Law which cover private housing and those which cover publicly-assisted housing is that the exemptions from the prohibition of housing discrimination for the rental of owner-occupied one and two family homes and for the rental of rooms in owner-occupied apartments do not apply to publicly-assisted housing. See §8-107(5)(a)(4)(1) and (2). Thus, the definition of publicly-assisted housing serves to limit the applicability of these exemptions. The amendment to this subdivision would broaden the definition of publicly-assisted housing to include certain tax-exempt homes or publicly financed homes sold after July 1, 1991 and all homes with mortgages financed, guaranteed or insured at any time by a government agency whether or not the mortgage is still outstanding. By broadening the definition, the bill would thus subject the rental of certain owner-occupied one and two family homes and owner-occupied apartments, which are not covered by the current law, to the housing discrimination provisions.

"Multiple Dwelling" and "family" (subd. 12)

The definition of "multiple dwelling" is deleted because the only reference to it is in the definition of publicly-assisted housing

accommodation and that reference is deleted. See §8-102(11)(d). Under current law, "family" is defined for purposes of defining multiple dwellings and for purposes of certain exemptions from the housing discrimination provisions including the rental of owner-occupied one and two family housing. See §8-107(5)(a)(4). With the deletion of the term "multiple dwelling", the amendment makes clear that family is defined only for purposes of those exemptions.

"Real Estate Salesperson" (subd. 15)

The amendment makes clear that the term real estate salesperson includes persons who have been appropriately authorized by a licensed real estate broker.

"Disability" (subd. 16)

The term "handicap" is changed to "disability", a more modern and less stigmatizing term used in the State Human Rights Law. The definition is amended to clarify that any person with a physical, medical, mental or psychological impairment or a history or record of such an impairment is protected by the law. Those impairments are defined broadly so as to carry out the intent that persons with disabilities of any type be protected from discrimination. The amendments also retain the provision in the existing definition of "otherwise qualified person" (subd. 16(e)) that in the case of alcoholism, drug addiction or other substance abuse, "disability" only applies to a person who is recovering or has recovered and currently is free of the abuse (new paragraph (c)). The amendments also make clear that "disability" does not apply to persons who currently are

illegally using controlled substances when the person subject to the law acts on the basis of such use.

"Covered Entity" (new subd. 17)

This term is added to the law for ease of reference to persons who are required to comply with the provisions of §8-107.

"Reasonable Accommodation" (new subd. 18)

This definition is added for purposes of a new provision which makes explicit the requirement implicit in the existing law that employers and other persons subject to the City's law make "reasonable accommodation" to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. See §8-107(15)(a). The exception in the definition for accommodations which cause undue hardship represents existing Commission case law. See e.g. Tartaglia v. Jack LaLanne Fitness Centers, NYCCHR Complaint No. 04153182-PA (June 9, 1986) at p. 21 (public accommodations discrimination); New York City Commission on Human Rights v. United Veterans Mutual Housing, Motion Decision NYCCHR Complaint No. EM00936-08/14/87-DE (April 4, 1990) at p. 5. (housing discrimination); see also Doe v. Pleasure Chest Ltd., NYCCHR Complaint No. GA-00167020389-DN (July 19, 1990) at p. 29-30 (employment discrimination).

"Sexual Orientation" (new subd. 20)

The bill moves the definition of sexual orientation currently found in §8-108.1 to the definitional section. This amendment is technical in nature and reflects the insertion of this protected category in the lists of protected categories in §8-107.

§8-105 Powers and Duties

The amendments to this section would expand the powers of the Commission as well as clarify existing powers. Specifically, the Commission would be authorized to require persons or companies under investigation to preserve records in their possession and to continue to make the type of records made by such person or company in the ordinary course of business where the records are relevant to determining whether discrimination has taken place (subd. 6).

The amendment expressly states the Commission's existing power to investigate and file complaints of pattern or practice discrimination, and authorizes the Commission to refer to the Corporation Counsel information on which a civil action (pursuant to Chapter 4) could be based (subd. (4)(b)).

The amendment clarifies the Commission's existing authority, in the course of investigating clubs which are or may be places or providers of public accommodation, to subpoena names of persons when such subpoena would not be inconsistent with applicable statutory and case law (subd. (5)(c)). As under existing law, the Commission's power to investigate clubs would continue to encompass the power to obtain information which is relevant to the determination of whether a club qualifies as a place or provider of public accommodation.

The Commission's authority to delegate its powers, functions and duties to its employees or agents is made explicit with the proviso that certain powers, i.e., rule making, issuing orders

relating to records and making a final determination that a respondent has engaged in discrimination, could be delegated only to Commission members (subd. (8)). The amendment also makes explicit that the Commission's power to appoint employees and assign them duties may be exercised by the Chairperson.

§8-106 Relations With City Departments and Agencies

The amendments to this section would enable the Commission to require a city agency to furnish information without first consulting the Mayor.

§8-107 Unlawful Discriminatory Practices

Protected Categories

The provisions in current law describing unlawful discriminatory practices are amended to make clear that the law prohibits discrimination based on perceived, as well as actual, age, race, creed, color, national origin, disability, marital status, gender, sexual orientation and alienage or citizenship status. The term "gender" is used to replace the term "sex" (with no intent to change the meaning of the term). This section is also amended to include sexual orientation and disability, which are covered in separate sections of the current law, in the list of protected categories so that the law will now provide in one place a list of all the prohibited types of discrimination.

Employment and Apprentice Training Programs (subds. 1 and new subd. 2)

The amendments to these provisions would prohibit employment discrimination based on marital status, and thus would conform the City's law to the State Human Rights Law. Currently,

these subdivisions prohibit employers, employment agencies and labor organizations from engaging in discriminatory employment practices but are silent as to the individual liability of their employees and agents for such practices. The amendment would make explicit such individual liability.

The language which permits advertisements, statements or inquiries to express limitations and discrimination based upon a bona fide occupational qualification is deleted from paragraph (d) of subdivisions one and two. The employment discrimination provisions of the current law have been construed by the courts and the Commission to allow limitations or discrimination which are based upon a "bona fide occupational qualification", although the specific language which sets forth the defense is contained only in the provisions prohibiting discriminatory advertisements or inquiries. See §8-107(1)(d). "Bona fide occupational qualification" is not defined in those provisions and thus the courts and the Commission are left to determine on a case by case basis whether a particular limitation is a bona fide occupational qualification. While the bill deletes the specific language "unless based upon a bona fide occupational qualification" in §8-107(1)(d) and (2)(d), it is not intended to eliminate the defense. The intent is to allow the defense to continue to develop through case law made by courts or the Commission with the expectation that the defense will be upheld only in circumstances where distinctions based on the criteria covered by the law are logical and necessary for the job or occupation.

The amendment would delete language in paragraph (e) of subdivision one which duplicates the general prohibition against retaliation in §8-107(6). New language would be added to paragraph (e) to provide that the age discrimination provisions would not apply to employee benefit plans covered by the federal Employment Retirement Income Security Act of 1974 ("ERISA") where that federal law would be preemptive (subd. (1)(e)(i)). This recognizes the decisional law that has held ERISA to preempt State and local discrimination laws in certain circumstances. See Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983). Provisions allowing the varying of insurance coverage based on an employee's age and allowing certain retirement policies or systems would also be added to paragraph (e). These provisions are derived from language in the existing subdivision (3-a) of section 8-107 which is being deleted. See §8-107(3-a)(c).

A new paragraph (f) of subdivision one would continue the present exemption for the hiring, firing and terms and conditions of employment of parents, spouses and children but would require those persons to be counted as persons employed for purposes of determining whether the employer is subject to the law with regard to other persons employed.

Public Accommodations (new subd. 4)

This subdivision is amended to prohibit places or providers of public accommodation from discriminating on the basis of age (para. (a)). In recognition of the fact that certain distinctions based on age are in the public interest (e.g., senior citizen discounts,

restrictions on viewing adult films and age limits on membership in peer groups), the Commission is given authority to grant exemptions from this prohibition when it is in the public interest to do so (para. (b)). The amendment adding age would not take effect until the Commission promulgates rules setting forth such exemptions. Bill Section 4(1).

Certain exemptions are added permitting educational institutions (public and private) to make gender distinctions permitted under specified state or federal laws (i.e., separate housing, bathroom and locker room facilities, certain physical education classes and certain athletic teams) (para. (c)). Private schools would be allowed to limit admissions to persons of one gender (para. (d)). Educational institutions would not be subject to the prohibitions on discrimination as they relate to matters that are strictly educational or pedagogic in nature (para. (f)). In addition, educational institutions would not be prohibited from using standardized tests which may have a disparate impact on protected groups if the tests are used in the manner and for the purpose prescribed by the test agency which designed the test (para. (e)).

Subds. 3 and 3-a (deleted)

Subdivision 3, which currently prohibits discrimination in publicly-assisted housing accommodations, is deleted and incorporated into subdivision 5, which covers all housing accommodations. Subdivision 3-a, which currently prohibits age discrimination by employers and licensing agencies, is deleted and incorporated into subdivision 1 (Employment) and a new subdivision 8 (Licenses and

Permits). In addition, the limitation in subdivision 3-a on age discrimination, providing that individuals older than 65 are not protected thereunder, is removed from the law. This would conform the City's law to the State Human Rights Law and to the Federal Age Discrimination in Employment Act.

Tax-Exempt Non-sectarian Education Corporations
(former subd. 4 deleted)

The bill would delete this provision governing private schools as unnecessary in view of the implicit coverage of educational institutions (whether public or private) in the public accommodations provisions (§ 8-102, subd. 9). In bringing private schools within those provisions, the legislation would have the effect of changing current law by adding national origin, gender and marital status to the prohibited grounds for discrimination.

Housing Accommodations, Land and Commercial Space
(subd. 5)

Generally

The provisions prohibiting discrimination in publicly-assisted housing (former subd. 3) are incorporated into this subdivision except that the provision which permits inquiries relating to children in publicly-assisted housing is deleted. The amendments to this subdivision would make the City's law consistent with the State Human Rights Law by prohibiting age discrimination in the sale, rental or purchase of all housing accommodations, land and commercial space. The amendments would also clarify the applicability of this subdivision to cooperatives and condominiums by prohibiting

discrimination in the "approval of the sale" of housing accommodations "or an interest therein".

Para. (a) Subpara. (4)

Current law exempts from the housing discrimination provisions the rental of housing in one and two family owner-occupied housing. The amendment would allow the exemption only if the available housing has not been publicly advertised or listed or otherwise offered to the general public (Subpara. (4)(1)).

The bill would delete the language creating a general exemption for restricting rooms in a rooming house, dormitory or residence hotel to one sex (Subpara. (4)(3)). This amendment is intended to bring the City's law into conformity with the federal Fair Housing Act, which does not contain such a general exemption.

Para. (c)

A new subparagraph (3) would prohibit real estate brokers from blockbusting, i.e. inducing persons to sell or rent housing, land or commercial space by representations regarding the entry into the neighborhood of any members of a protected group. This provision is derived from the federal Fair Housing Act (42 U.S.C. 3604(e)) but goes further than that law in its application to commercial space and in the number of protected groups.

Para. (d) and (f)

Amendments to paragraph (d) and the new paragraph (f) make clear that the law prohibits discrimination in the appraisal of any housing accommodation, land and commercial space. This

provision is also derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(ix)(B).

Para. (e)

This new provision prohibits the discriminatory denial of access to or membership in a multiple listing service or real estate brokers organization. It is derived from the federal Fair Housing Act. See 24 CFR 115.3(a)(5)(x).

Para. (h)

The amendments to this paragraph are designed to bring the City's law into conformity with the federal Fair Housing Act, which allows owners and operators of housing for older persons (as defined therein) to discriminate in the rental or sale of such housing on the basis of whether children are or would be residing in such housing. See 42 USC 3607(b)(2) and (3).

Para. (i)

This provision would allow restriction of the sale or rental of housing or land exclusively to persons 55 or over. It would clarify that such persons could not be discriminated against on the basis of whether children are, may be, or would be, residing with them, unless such housing qualifies as housing for older persons as defined in the federal Fair Housing Act.

Para. (j)

Although the federal Fair Housing Act on its face prohibits educational institutions from making gender distinctions in dormitory residences, the agency administering that law (the Department for Housing and Urban Development, or "HUD") has construed the law to

permit the gender distinctions allowed under another federal law for separate housing, bathrooms and locker rooms. See 45 CFR §§86.32 and 86.33. This new provision would allow such distinctions to be made under the City's law to the same extent that they are allowed under HUD's interpretation of the federal Fair Housing Act.

Para. (k)

This provision would allow distinctions to be made with regard to gender and children in dormitory-type residences (e.g. shelters for the homeless), to protect personal privacy or the health, safety or welfare of families with children. HUD's interpretation of the federal Fair Housing Act has allowed some distinctions such as these although the Act and its regulations are silent as to these issues.

Para. (l)

This provision restates and clarifies current law.

Para. (m)

This new provision clarifies that the owners of publicly-assisted housing accommodations (such as the Housing Authority) may utilize criteria or qualifications of eligibility for the sale, rental or occupancy of public housing which are required to comply with Federal or State law or are necessary to obtain the benefits of a Federal or State program, and use statements, advertisements, applications and inquiries which state criteria or qualifications necessary to determine eligibility for such housing.

Para. (n)

The provisions relating to housing discrimination on the basis of occupation are moved from §8-102.2 to this paragraph without intent to make any substantive change.

Retaliation (subd. 7)

This subdivision prohibits retaliation against persons who file complaints of discrimination. The amendments would broaden this subdivision by also prohibiting retaliation against persons who commence civil actions, assist the Corporation Counsel or the Commission in investigations or provide information pursuant to the terms of a conciliation agreement.

Licenses and Permits (subd. 9) (new)

Under the current law, discrimination by licensing agencies is prohibited only where the discrimination is based on age (former subd. 3-a). This new subdivision would broaden current law by prohibiting licensing agencies from discriminating against applicants on the basis of any of the protected categories (paras. (a) and (b)). An exception is provided which allows age or disability to be used as a criterion for determining eligibility for a license or permit where such use is specifically required by another provision of law (para. (c)). Thus, the issuance of special parking permits to disabled persons pursuant to New York City Charter §2903(b)(15), the granting of preferences to disabled or elderly persons in the issuance of newsstand licenses pursuant to Administrative Code §20-230, and the issuance of rifle and shotgun permits only to persons 18 years of age or over pursuant to Ad. Code §10-303(a)(1) would still be allowed.

<u>Criminal Conviction (subd. 10) (new)</u>

Article 23-A of the Correction Law prohibits discrimination in employment and licensing on the basis of an applicant's record of criminal convictions except in certain specified circumstances. That article provides for enforcement against private employers by the State Division of Human Rights and concurrently by the Commission. This new subdivision merely incorporates the Article 23-A prohibition into the City's Human Rights Law in the same manner as it is incorporated into the State Human Rights Law. <u>See</u> Executive Law §296(15). The amendment is intended to encompass within the City's law all of the substantive provisions which are already within the Commission's jurisdiction and would effect no substantive change in the Commission's jurisdiction over this type of discrimination.

<u>Arrest Record (subd. 11) (new)</u>

The State Human Rights Law, with certain exceptions, prohibits discrimination in connection with licensing, employment and providing of credit on the basis of an applicant's arrest record. <u>See</u> Executive Law §296(16). This new subdivision is identical to the State law provision.

<u>Employer Liability for Discriminatory Conduct by Employee, Agent and Independent Contractor (subd 13) (new)</u>

The current City Human Rights Law is silent on the standard to be applied in deciding whether an employer can be held liable for the discriminatory conduct of its employees. The State Human Rights Law, upon which much of the City law is modeled, is also silent on this question. However, the State law provisions prohibiting discrimination in employment and in public accommodations

have been narrowly construed by the courts of this State to impose liability upon an employer for its employee's unlawful conduct only when the employer knew of or condoned the conduct.

The proposed bill would set forth standards which must be satisfied for an employer to be held liable for the unlawful conduct of employees, agents and certain independent contractors. The standards proposed would make the City's law unique among civil rights laws in that the standards are designed not only to deter discriminatory conduct by holding employers accountable but, of equal significance, they are designed to provide employers with an incentive to implement policies and procedures that reduce, and internally resolve, discrimination claims.

Paragraph (a) of this subdivision provides that with respect to all types of discrimination other than employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent. Paragraph (b) provides that with respect to employment discrimination, an employer would be held liable for the discriminatory conduct of an employee or agent only where the employee or agent who committed the discriminatory act exercised managerial or supervisory responsibility or the employer knew of the conduct and failed to take corrective action or should have known of the conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct. Under paragraph (c), an employer would be held liable for the conduct of certain persons employed as independent contractors only where the employer had actual knowledge of and acquiesced in the conduct.

Employers could mitigate their liability for civil penalties or punitive damages or liability for the act of an employee or agent which they should have known about by proving they had instituted policies, programs, and procedures for the prevention and detection of discrimination, and by showing a record of no, or relatively few, prior incidents of discrimination (para (d) and (e)). Finally, the Commission would be authorized to promulgate rules establishing policies, programs, and procedures for the prevention and detection of discrimination, which if instituted by an employer would insulate him or her from liability for civil penalties which could be imposed by the Commission or punitive damages or civil penalties which could be imposed by a court based on the conduct of an employee, agent or person employed as an independent contractor (para (f)).

Alienage or Citizenship Status (new subd. 14, former subd. 11)

Current law allows distinctions and preferences based upon alienage or citizenship status and inquiries as to a person's alienage or citizenship status in very narrow circumstances ("when... required or when... expressly permitted by any law... and when such law... does not provide that state or local law may be more protective of aliens, §8-107(11)). These circumstances do not cover distinctions or inquiries made by banks and lending institutions who seek to sell mortgages to the Federal Home Mortgage Insurance Corporation ("FHMIC"). A FHMIC directive provides that the "[FHMIC] will purchase mortgages made to aliens who are lawful permanent residents of the United States under the same terms that are available to U.S. citizens... We will purchase mortgages made to non-permanent

resident aliens as long as the borrower occupies the property and the loan-to-value ratio does not exceed 75%." See Fannie Mae, Lending Requirements, §203.02 (emphasis in original).

The proposed amendment to this subdivision is intended to allow banks and lending institutions to make such inquiries or determinations based upon alienage or citizenship status as are necessary to enable them to obtain the benefits of selling their mortgages to FHMIC. It will also allow inquiries and distinctions to be made for other purposes related to federal programs, but only insofar as such actions are necessary, to obtain the benefits of such programs.

Applicability; Persons With Disabilities (new subd.15)

Paragraph (a) of this new subdivision would make explicit the requirement implicit in existing law that persons subject to the City's Human Rights Law make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the rights in question. Paragraph (b) establishes an affirmative defense to a claim of discrimination based on disability that the claimant could not, with reasonable accommodation, satisfy those requisites or enjoy those rights. Paragraph (c) makes clear that work place restrictions on the illegal use of drugs and the use of alcohol and drug testing programs are not prohibited.

Former §8-108 and §8-108.1 subd(1) (deleted)

These provisions are deleted because the protected categories, disability and sexual orientation, have been inserted in the lists of protected categories in §8-107.

Applicability; Sexual Orientation (subd. 16, formerly paragraphs a through e of subd. 2 of §8-108.1)

Former section 8-108.1, subd. 2, sets forth certain provisions relating to the applicability of the law with respect to discrimination based on sexual orientation. These provisions have been retained and are set forth in the revised law as paragraphs a through e of subdivision 16 of section 8-107.

Disparate Impact (new subd. 17)

Certain discriminatory practices or policies, though not intended to discriminate, may be actionable because they result in a disparate impact to a person who is the member of a group protected by the City's law. Like Title VII of the Civil Rights Act (which prohibits employment discrimination), the City's law has been construed by the Commission to apply to disparate impact cases although it does not explicitly provide as such. In 1989, the U.S. Supreme Court in Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115, 2125-26 (1989) made it significantly more difficult for an aggrieved person to prove a disparate impact case under Title VII. The Court held that when a plaintiff has made out a prima facie case of disparate impact, the defendant has the burden of producing evidence of business justification but the burden of persuasion always remains with the plaintiff. Commentators viewed this holding as a departure from previous decisions which were read to place the burden of proving business necessity upon the defendant. The Commission and the courts are not bound to follow Wards Cove in their interpretation of the burdens of proof in disparate impact cases under the City Human Rights Law. After the Wards Cove decision,

the Commission and the administrative law judges adjudicating disparate impact cases have continued to apply the burdens of proof (as set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971)) that most courts applied in Title VII cases decided prior to Wards Cove. See Fitzgibbons v. New York City Police Department, NYCCHR Complaint No. 12141485-EG (April 26, 1990) at p. 4.

The proposed provisions are intended to clearly set out the burdens of proof in disparate impact cases brought under the City Human Rights Law so that it will not be necessary for the courts or the Commission to seek guidance in federal case law to interpret the City law in this area. The provisions make clear that the respondent or defendant has the burden to affirmatively plead and prove that a policy or practice bears a significant relationship to a significant business objective (business necessity) or does not contribute to the disparate impact (para. (a)(2)). The legislation also provides that a policy or practice shown to have a disparate impact will be found unlawful where the Commission or a plaintiff produces substantial evidence that an alternative policy or practice with less disparate impact is available and the respondent or defendant fails to prove that it would not serve them as well (id.).

Unlawful Boycott or Blacklist (new subd. 18)

This new subdivision incorporates the provisions of the State Human Rights Law which prohibits boycotts and blacklists based on discriminatory animus. However, it goes further than State law by adding disability, age, marital status, sexual orientation and alienage or citizenship status to the protected categories. The

subdivision is also different from the State law in that it specifies that it does not apply to any form of expression that is protected by the First Amendment of the U.S. Constitution.

Interference with Protected Rights (new subd. 19)

This new subdivision prohibits threats, harassment, coercion, intimidation and interference with a person's exercise or enjoyment of any rights granted or protected under §8-107 or attempts to engage in those acts. It is derived, in part, from a similar provision of the federal Fair Housing Act.

Relationship or Association (new subd. 20)

This subdivision makes clear that the City's Human Rights Law prohibits discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom such person has a known relationship or association. It would also codify the Commission's interpretation of the existing law. This provision is similar to provisions in the Federal Fair Housing Act (42 USC §3604(f)) and the Americans with Disabilities Act (§102(b)(4) and §202(b)(1)(E)).

Former §8-109 Procedure (deleted)

This section, which prescribes the current procedures for filing and processing complaints of discrimination with the Commission, is deleted and replaced by new sections 8-109 through 8-122.

§8-109 Complaint (new)

This section describes in detail the requirements and procedure for filing a complaint of discrimination with the Commission.

It includes the content of the complaint and a requirement that the Commission acknowledge the filing of the complaint (subd. a), a requirement that the Commission serve a copy of the complaint on the respondent and advise the respondent of his or her procedural rights and obligations under the law (subd. d), the time limit for filing a complaint (subd. e), and amendment of the complaint (subd. h). This section would preclude the Commission from adjudicating a complaint if prior to filing such a complaint the complainant had initiated a civil action alleging the same act of discrimination, if a complaint involving the same grievance is pending before an administrative agency, or if the State Division of Human Rights issued a final determination on such complaint (subd. f). With regard to complaints filed on or after September 1, 1991, this section would require the Commission to commence proceedings, investigate and make a final disposition promptly and within the time periods prescribed by rule of the Commission or explain the reasons for not doing so (subd. g).

§8-111 Answer (new)

This section requires a respondent to file an answer within 30 days after the complaint is served (subd. a). Under current law, there is no requirement that a respondent answer a complaint of discrimination until he or she appears at a hearing. Respondents have no incentive to answer prior to such time. This requirement would assist the Commission in the timely processing of complaints. The failure to file an answer would result in a default and the hearing would proceed without the respondent. See §8-119(e). The

administrative law judge could open the default and allow the respondent to present an answer only upon a finding that there was good cause for the failure to file a timely answer. This section also prescribes the contents of the answer (subds. b, c and d) and provides for extension of the 30-day period for good cause (subd. e). Allegations not specifically denied or explained in the answer are deemed admitted (subd. c).

§8-112 Withdrawal of Complaints (new)

This section provides that a complaint may be withdrawn at any time prior to service of a notice that it has been referred to an administrative law judge (subd. a) or after service of such notice, at the discretion of the Commission (subd. b). Unless the complaint is withdrawn pursuant to a conciliation agreement, withdrawal is without prejudice to further prosecution of the alleged discriminatory acts by the Commission or the Corporation Counsel (subd. c).

§8-113 Dismissal of Complaint (new)

This section prescribes the circumstances under which the Commission may dismiss a complaint for administrative convenience (subds. a and b). Dismissal for administrative convenience includes a dismissal requested by the complainant where 180 days have passed since the filing of a complaint which had not been actively investigated (subd. (a)(6)), as well as dismissal prior to the filing of an answer where no investigation or conciliation had taken place (subd. b). The section also provides for dismissal upon a finding of no probable cause (subd. d) or lack of jurisdiction (subd. c), and for appeal of any dismissal to the chairperson (subd. f).

§8-114 Investigations and Investigative Recordkeeping (new)

This section provides that where the Commission has conducted an investigation it could demand that the person or entity under investigation preserve records in its possession or continue to make the type of records previously made where the records are relevant to a determination of whether discrimination has taken place (subd. b). A person or entity upon whom a demand is made may file objections with the Commission and get a determination in 30 days (subd. c). During the 30-day period, the person or entity upon whom a demand is made would be required to maintain the status quo, i.e., preserve existing records and continue to make records (subd. c). A proceeding may be brought in court to enforce an order relating to records (subd. e) or the Commission may impose administrative sanctions for non-compliance (see §8-118).

§8-115 Mediation and Conciliation (new)

This section makes explicit the Commission's authority to engage the parties in mediation or conciliation at any time after the filing of a complaint (subd. a). It also provides that a conciliation agreement may be embodied in a consent decree (subd. b). All conciliation agreements shall be embodied in orders and violation of such orders would be subject to a civil penalty (subd. d). Efforts at mediation and conciliation shall not be publicly disclosed (subd. c) but all conciliation agreements shall be made public unless the complainant, respondent and the Commission agree otherwise (subd. d).

§8-116 Determination of Probable Cause (new)

This provision sets out the procedure to be followed after a finding of probable cause, including notice (subds. a and b) and referral to an administrative law judge (subd. c). It also provides that Commission-initiated complaints shall not require a determination of probable cause.

§8-117 Rules of Procedure (new)

This section requires the Commission to adopt rules for hearing and prehearing procedure, including rules for discovery. The rules shall require that the Commission be a party to any proceeding and that the complainant shall be a party only if he or she has formally intervened.

§8-118 Noncompliance with Discovery Order or Order Relating to Records (new)

To discourage persons under investigation from resisting the Commission's discovery requests, this provision would make express the Commission's authority to impose administrative sanctions upon the resisting party. The section would also authorize the Commission to impose administrative sanctions upon parties who fail to comply with Commission orders to preserve records and/or to continue to make records. After affording the resisting party an opportunity to make objections to an order compelling discovery or relating to records and upon non-compliance with the order, the Commission could sanction that party by drawing adverse inferences, precluding the introduction of evidence or testimony and striking out pleadings.

§8-119 Hearing (new)

This section describes the essential elements of the hearing process. It is similar to the current law except that it allows an administrative law judge to enter a default if the respondent has failed to file a timely answer without good cause (subd. c). If a default is entered, only the evidence in support of the complaint may be presented at the hearing (id.).

§8-120 Decision and Order (new)

This section gives the Commission the same broad authority as the existing law to grant injunctive relief and compensatory damages if it finds that a respondent has engaged in any unlawful discriminatory practice. The section gives examples of certain types of remedies but is not designed to be all inclusive. It makes clear the Commission's authority to order front pay, as well as back pay, to compensate victims of employment discrimination. Like back pay, front pay is a "make whole" remedy. Where back pay covers the time between the injury and the date of judgment, front pay offers prospective relief, providing compensation until the victim obtains the position he or she would have earned but for the discrimination. Without the remedy of front pay, the injuries of past discrimination might continue. This can occur, for example, in a situation where rightful promotion cannot take place immediately upon a favorable judgment. Thus, federal courts have found front pay useful under Title VII where reinstatement at the proper level is inappropriate because "the hostility between the parties precludes the possibility of a satisfactory employment relationship." Shore v. Federal Express Corp., 777 F.2d 1115 (6th Cir. 1985). In such cases, front pay can

be ordered until the plaintiff obtains the appropriate level with his or her new employer. Courts have also used the front pay remedy where the position has already been filled, and promoting the plaintiff would, therefore, require "bumping" an incumbent. Here, front pay can enable the victim of discrimination to draw a rightful wage while awaiting the availability of his or her rightful place. Edwards v. Occidental Chemical Corp., 892 F.2d 1442 (9th Cir. 1990) (ordering front pay from the date of the judgment until the date of promotion).

§8-121 Reopening of Proceeding by Commission (new)

This provision authorizes the Commission to reopen its proceedings or vacate or modify its orders in the interest of justice.

§8-122 Injunction and Temporary Restraining Order

Under the City's current law, after a complaint of housing discrimination has been filed, the Commission is authorized to seek a preliminary injunction to enjoin the respondent from engaging in acts which would render ineffectual a final order of the Commission (e.g. renting the subject housing to another person). The Commission is not similarly authorized with regard to complaints involving other forms of discrimination, and thus, pending the adjudication of such complaints and during the lengthy court review process, respondents will often engage in acts which make meaningless the relief imposed in Commission final orders. This section would broaden the Commission's authority to seek preliminary injunctive relief to include all types of discrimination covered by the City Human Rights Law. It allows the Commission to seek such relief where it is necessary to restrain the respondent or persons acting in concert with the respondent from

committing acts tending to render ineffectual a remedy that the Commission might impose in a final order.

§8-123 Judicial Review
§8-124 Civil Penalties for Violating Commission Orders (new)
§8-125 Enforcement (new)

Under current law, the provisions relating to judicial review of Commission orders and enforcement of Commission orders are combined in one section. As a consequence, courts have construed these provisions to permit a respondent in an enforcement proceeding to question the evidentiary basis for the issuance of the order which the Commission is seeking to enforce even where he or she had failed to commence a timely proceeding for judicial review of that order. Also, under current law there are no civil penalties for non-compliance with Commission orders. Thus, a respondent who has been found guilty of a violation of the Human Rights Law has no incentive to seek judicial review of, or to comply with, a Commission-ordered remedy until the Commission commences an enforcement proceeding.

The proposed new sections separate the procedures for judicial review (§8-123) and the procedures for enforcement of Commission orders (§8-125), and make clear that unless the respondent commences a timely proceeding for judicial review of a Commission order, he or she may not challenge the evidentiary basis for the issuance of the order when the Commission seeks to enforce that order (§8-125 (b)). In addition, civil penalties could be imposed in amounts up to $50,000 and $100 per day for non-compliance with Commission orders (§8-124).

§8-126 Civil Penalties Imposed by Commission for Unlawful Discriminatory Practices (new)

In addition to its existing authority upon a finding of discrimination to order equitable relief and award compensatory damages to a complainant, this section would give the Commission the power to impose civil penalties to vindicate the public interest. The penalties could be in amounts up to $50,000, and for willful and wanton conduct, up to $100,000.

§8-127 Disposition of Civil Penalties (new)

Civil penalties would be paid into the general fund, except that civil penalties assessed by a court against a city agency for violation of a final order issued by the Commission pursuant to section 8-120 after a finding that the agency has engaged in an unlawful discriminatory practice would be budgeted in a separate account. Monies from the account could be used only for anti-bias education programs or programs to redress discrimination by city agencies.

§8-128 Institution of Actions and Proceedings (new)

This section specifies that actions or proceedings on behalf of the Commission may be instituted by the Corporation Counsel or Commission attorneys designated by the Corporation Counsel or other attorneys designated by the Corporation Counsel.

§8-129 Criminal Penalties

This section is amended to increase the criminal fine for willful violation of final Commission orders from $500 to $10,000.

§8-130 Construction

This section expresses the legislative intent that the Human Rights Law be liberally construed for the accomplishment of its purposes. The amendment deletes unnecessary and duplicative language.

Chapter 4 Civil Action to Eliminate Unlawful Discriminatory Practices (new)

§8-401 Legislative Declaration

This provision contains an express recognition of the economic, social and moral harm imposed upon the City and its inhabitants by the existence of systemic discrimination.

§8-402 Civil Action

This provision expressly authorizes the Corporation Counsel to bring a civil action on behalf of the Commission or the City to eliminate particular instances of systemic discrimination. The relief which may be sought in such action includes injunctive relief and damages (including punitive damages) as well as civil penalties.

§8-403 Investigation

This section authorizes the Corporation Counsel to make any investigation necessary for the commencement of the civil action provided for above, and would also allow the issuance of subpoenas to compel the attendance of witnesses or the production of documents.

§8-404 Civil Penalty

This provision would authorize a court in addition to ordering a defendant found to have engaged in systemic discrimination to pay damages and provide other relief to the City, to impose upon the defendant civil penalties (recoverable by the City) of up to $250,000.

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

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

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

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

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

Chapter 6 Discriminatory Harassment (new)

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

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

damaging of property could result in the imposition of civil penalties of up to $50,000. §8-603.

Chapter 7 Discriminatory boycotts

This new chapter would require the Commission to begin investigation of a complaint alleging a discriminatory boycott or blacklist within 24 hours after the filing of the complaint and to make reports to the mayor and the council relating to the actions taken to resolve the dispute. If disclosure of any information in such reports would compromise the investigation or mediation or conciliation efforts, such information may be excluded from the report.

Bill Section 3

This section calls for the Commission to hold a hearing within 180 days of enactment, and to submit recommendations, if any, to the Mayor and the Council, on whether the City's Human Rights Law should be amended to authorize the Commission to impose reasonable requirements involving generation of records upon persons or classes of persons subject to the law.

The section also requires the Corporation Counsel and the Chairperson of the City Commission on Human Rights to issue a report to the Council within 12 months after the bill's enactment on the operation and results of procedures for effective legal representation of the Commission and enforcement of the City Human Rights Law and prevention of potential conflicts of interest.

Bill Section 4 - Effective Date

The bill would take effect 90 days after its enactment except that the provisions which prohibit discrimination on the basis

of age in public accommodations will take effect on the effective date of rules to be promulgated by the Commission which set forth exemptions to such provisions based on considerations of public policy. In addition, no action may be commenced in court for violation of the City Human Rights Law until 270 days after the effective date. The bill also specifies which of its provisions apply to complaints filed with the Commission prior to the effective date.

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DENNIS deLEON, Commissioner/Chair

GOOD MORNING. I AM DENNIS dELEON, COMMISSIONER/CHAIR OF THE CITY COMMISSION ON HUMAN RIGHTS. I WANT TO THANK THIS COMMITTEE FOR THE OPPORTUNITY TO PRESENT TESTIMONY ON BEHALF OF MAYOR DINKINS IN SUPPORT OF INTRO. 536, A BILL TO STRENGTHEN THE CITY'S HUMAN RIGHTS LAW. THE MAYOR HAS PERSONALLY FOLLOWED THE DEVELOPMENT OF THIS LEGISLATION SINCE HIS TENURE AS MANHATTAN BOROUGH PRESIDENT AND CONTINUES TO CONSIDER THIS AMENDMENT A TOP PRIORITY. LET ME ALSO SAY THAT IT IS HEARTENING TO SEE THE CHAIRMAN OF THIS COMMITTEE WITH US TODAY AND LOOKING SO WELL. CONSIDERATION OF THIS AND OTHER LEGISLATION PROPOSED TO AMEND EXISTING ANTI-DISCRIMINATION LAW COMES AT A CRITICAL TIME IN THE LIFE OF OUR CITY AND, INDEED, THE NATION. MORE THAN A QUARTER-CENTURY AFTER THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 DISCRIMINATION AND ITS DISASTROUS CONSEQUENCES ON INTERGROUP RELATIONS CONTINUE TO STUNT AND DIVIDE OUR COMMUNITY.

CONTEMPORARY AMERICAN SOCIETY HAS BEGUN TO LOSE A HANDLE ON DISCRIMINATION AND AS A RESULT WE ARE LOSING GROUND. TODAY THERE ARE MORE AFRICAN-AMERICAN YOUTH IN SEGREGATED SCHOOLS ALL OVER THE COUNTRY THAN IN 1954 WHEN BROWN V. BOARD OF EDUCATION WAS ARGUED. PROPORTIONATELY FEWER PEOPLE OF COLOR ARE TEACHING IN AMERICAN UNIVERSITIES TODAY THAN TWENTY YEARS AGO. ACCORDING TO

THE AMERICAN SOCIOLOGICAL REVIEW AND A RECENT UNIVERSITY OF CHICAGO STUDY, NEW YORK CITY IS THE SIXTH MOST RESIDENTIALLY SEGREGATED CITY IN THE COUNTRY. EVEN THE HISTORY OF MUNICIPAL EMPLOYMENT IN NEW YORK DEMONSTRATES PATTERNS OF BIGOTRY SO DEEPLY ENTRENCHED THAT IT MAY TAKE US MANY YEARS TO CORRECT.

DESPITE THE EXISTENCE OF A GREAT BODY OF EVIDENCE CLEARLY DEMONSTRATING THE PERSISTENCE OF RESIDENTIAL AND WORKFORCE SEGREGATION, RECENT YEARS HAVE BEEN EXTREMELY LEAN IN THE FIELD OF CIVIL RIGHTS ENFORCEMENT THROUGHOUT THE NATION. THE SUPREME COURT HAS DEALT SEVERE BLOWS TO NOBLE EGALITARIAN EFFORTS TO ACHIEVE FAIR DEMOGRAPHIC REPRESENTATION IN AMERICAN LIFE. FEDERAL CIVIL RIGHTS AUTHORITIES ARE AT BEST LACKLUSTER IN THEIR CURRENT ENFORCEMENT EFFORTS. AND IN RESPONSE TO THE DRAMATIC RISE IN HATE VIOLENCE IN THIS COUNTRY, THE DEPARTMENT OF JUSTICE PROSECUTED ONLY TEN BIAS-MOTIVATED CRIMES LAST YEAR.

THE WITHDRAWAL OF THE FEDERAL GOVERNMENT FROM MEANINGFUL CIVIL RIGHTS ENFORCEMENT HAS LEFT LOCAL JURISDICTIONS TO ANSWER THESE NEEDS FOR THEMSELVES. UNFORTUNATELY, SOME CITIES AND STATES HAVE JOINED THE FEDERAL GOVERNMENT IN ITS PASSIVE ATTITUDES ABOUT ENFORCING ANTI-DISCRIMINATION LAWS. NEW YORK CITY'S RESOLVE TO STEM THIS TIDE WILL DISTINGUISH ITS CITIZENS AND RESOUND ACROSS THE COUNTRY.

INTRO. 536 IS A CENTERPIECE IN THE ADMINISTRATIONS EFFORTS TO REVIVE CIVIL RIGHTS ENFORCEMENT AND TO REBUILD INTERGROUP

RELATIONS IN THE CITY. IT REPRESENTS BOTH PRACTICAL AND SUBSTANTIVE ADVANCES BEYOND THE CURRENT LAW AND SEEKS TO EMPOWER WHAT HAS BEEN A BELEAGUERED COMMISSION TO MORE EFFECTIVELY MEET ITS VAST ANTI-DISCRIMINATION CHARGE.

THE PROPOSED CHANGES WOULD CORRECT BASIC FLAWS IN THE CURRENT ADJUDICATIVE SYSTEM BY PROVIDING THE COMMISSION WITH SOME IMPORTANT NEW INVESTIGATIVE AND PROSECUTORIAL TOOLS. FOR INSTANCE, UNDER CURRENT LAW RESPONDENTS TO DISCRIMINATION COMPLAINTS ARE NOT REQUIRED TO PROVIDE THE COMMISSION WITH ANSWERS TO CHARGES. CONSEQUENTLY, COMMISSION INVESTIGATORS OFTEN SPEND SEVERAL MONTHS ATTEMPTING TO COMPEL EMPLOYERS AND LANDLORDS WHO HAVE BEEN NAMED IN COMPLAINTS TO RESPOND TO THE ALLEGATIONS, NOT ALWAYS SUCCESSFULLY. INTRO. 536 WILL MANDATE THAT RESPONDENTS SUBMIT WRITTEN ANSWERS WITHIN TWENTY DAYS AFTER COPIES OF THE COMPLAINT IS SERVED. FAILURE OF THE RESPONDENT TO ANSWER CHARGES WILL BE TREATED AS DEFAULT.

UNDER CURRENT LAW PARTIES FOUND GUILTY OF DISCRIMINATION ARE NOT SUBJECT TO CIVIL PENALTIES. I REGARD THIS AS A BASIC FLAW IN THE CITY'S HUMAN RIGHTS STATUTE. CIVIL FINES ARE IMPOSED UPON THOSE WHO LITTER OR WALK THEIR DOGS WITHOUT A LEASH OR FOR PARKING ON THE WRONG SIDE OF THE STREET. YET NO CIVIL PENALTY IS LEVIED FOR DENYING SOMEONE A PLACE TO LIVE BECAUSE OF HER SEXUAL ORIENTATION OR FOR DENYING SOMEONE THE MEANS TO EARN A LIVING BECAUSE HE IS LATINO. THE ABSENCE OF CIVIL PENALTIES FOR

VIOLATIONS OF ANTI-DISCRIMINATION LAWS ENCOURAGES SOME EMPLOYERS AND LANDLORDS TO IGNORE THE STATUTE AND ACT WITH IMPUNITY.

THE EXPANSION OF THE COMMISSION'S POWER TO SEEK PRELIMINARY INJUNCTIVE RELIEF REPRESENTS A FURTHER SIGNIFICANT IMPROVEMENT IN THE ADJUDICATIVE PROCESS. IT WOULD PERMIT THE COMMISSION TO SEEK EMERGENCY RELIEF FROM STATE SUPREME COURT NOT ONLY IN HOUSING CASES, BUT IN EMPLOYMENT AND PUBLIC ACCOMODATIONS CASES AS WELL. UNDER THE NEW PROVISION, INJUNCTIONS CAN BE GRANTED TO INSURE THAT ACTIONS THAT WOULD UNDERMINE A COMMISSION ORDER COULD BE PREVENTED. THIS IS NOT CURRENTLY POSSIBLE, AND OFTEN BY THE TIME A FINDING OF DISCRIMINATION IS RENDERED THE JOB HAS BEEN FILLED OR THE APARTMENT RENTED AND IT IS NO LONGER POSSIBLE TO PROVIDE MEANINGFUL RELIEF.

THE SUBSTANTIVE CHANGES IN THE LAW PROPOSED BY INTRO. 536 EXPAND PROTECTIONS IN IMPORTANT AREAS AND REPRESENT A RESPONSIBLE AND TIMELY UPDATE TO THE EXISTING CITY LAW. A NUMBER OF PROVISIONS ARE PROPOSED TO BRING THE CITY'S STATUTE INTO SUBSTANTIAL COMPLIANCE WITH FEDERAL CIVIL RIGHTS LAWS. IN THE AREA OF HOUSING, THE FEDERAL GOVERNMENT REQUIRES THAT LOCAL AGENCIES LIKE THE COMMISSION WHICH WORK UNDER CONTRACT WITH THE US DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ARE EMPOWERED BY LOCAL LAWS WHICH ARE THE "SUBSTANTIAL EQUIVALENT" OF THE FEDERAL FAIR HOUSING ACT. INTRO. 536 ACCOMPLISHES THIS EQUIVALENCY BETWEEN CITY AND FEDERAL STATUTES. SIMILARLY, PROTECTIONS PROVIDED IN THE BILL FOR PERSONS WITH DISABILITIES ARE CONSISTENT

WITH THE INCREASING PROTECTIONS UNDER FEDERAL LAW, SPECIFICALLY THE AMERICANS WITH DISABILITIES ACT, AND REFLECT THE CITY'S COMMITMENT TO THE NATIONAL EFFORT TO FIGHT DISCRIMINATION AGAINST PERSONS WITH PHYSICAL CHALLENGES.

CURRENT LAW PROVIDES NO PROTECTION AGAINST AGE DISCRIMINATION IN PRIVATE RESIDENTIAL HOUSING AND PUBLIC ACCOMMODATIONS. INTRO. 536 WOULD OUTLAW SUCH DISCRIMINATION IN HOUSING AND AUTHORIZE THE COMMISSION TO PROMULGATE REGULATIONS TO PROHIBIT INVIDIOUS DISCRIMINATION IN THE PUBLIC ACCOMMODATIONS CONTEXT WHILE AT THE SAME TIME PRESERVING APPROPRIATE BENEFITS, SUCH AS COMMERCIAL DISCOUNTS FOR SENIOR CITIZENS.

INTRO. 536 TAKES THE CLEAR AND UNMISTAKABLE VIEW THAT DISCRIMINATION CANNOT BE FOUGHT EFFECTIVELY IF LANDLORDS AND EMPLOYERS ARE NOT HELD ACCOUNTABLE FOR THE ACTS OF THEIR EMPLOYEES AND AGENTS. IT IS MY PROFESSIONAL VIEW AND CERTAINLY THE EXPERIENCE OF THE CITY COMMISSION ON HUMAN RIGHTS THAT IF EMPLOYERS ARE NOT HELD LIABLE, WITHIN REASONABLE LIMITS, FOR THE DISCRIMINATORY BEHAVIOR OF THOSE IN WHOM MANAGEMENT OR SUPERVISORY AUTHORITY HAS BEEN VESTED, EMPLOYERS WILL NOT BE EFFECTIVELY COMPELLED TO ENFORCE NON-DISCRIMINATORY CODES OF CONDUCT IN THE WORKPLACE. THE NEW LEGISLATION ALSO HOLDS INDIVIDUAL EMPLOYEES RESPONSIBLE FOR THEIR OWN ACTS OF DISCRIMINATION IN THE WORKPLACE.

FINALLY, THE BILL CREATES A PRIVATE RIGHT OF ACTION FOR INDIVIDUALS WHO BELIEVE THEY HAVE BEEN DISCRIMINATED AGAINST TO TAKE THEIR CLAIMS DIRECTLY INTO COURT, RATHER THAN AN ADMINISTRATIVE TRIBUNAL. WHILE WE EXPECT THAT THE MAJORITY OF COMPLAINTS WILL CONTINUE TO BE HANDLED ADMINISTRATIVELY, THIS PROVISION IS CRITICAL IN STIMULATING THE DEVELOPMENT OF AN AGGRESSIVE LOCAL CIVIL RIGHTS BAR AND THE USE OF THE COURTS AS AN ADJUNCT TO THE COMMISSION'S ENFORCEMENT EFFORTS. I BELIEVE PEOPLE SHOULD HAVE THE RIGHT TO CHOOSE IN WHICH FORUM THEY SEEK TO HAVE THEIR RIGHTS VINDICATED.

BEFORE CLOSING, I WOULD LIKE TO TAKE A MOMENT TO THANK THE STAFFS OF THE LAW DEPARTMENT, THE COMMISSION, AND THE COUNCIL, WHO HAVE WORKED SO DILIGENTLY FOR TWO YEARS TO DEVELOP AND REFINE THIS LEGISLATION.

WE ARE AT A DIFFICULT MOMENT. FEAR APPEARS TO BE ON THE RISE GENERALLY, BREEDING INSULARITY AND HATE AND EXACERBATING INTERGROUP TENSION AND CONFLICT. WE MUST BATTLE AGAINST FEAR ON ALL FRONTS. LET US COMMIT OURSELVES TODAY TO THE GOAL OF A TRULY OPEN CITY BY THE YEAR 2000 -- A CITY WHERE THE WORD "NEIGHBORHOOD" BECOMES AN INVITATION TO JOIN IN, NOT A WARNING TO STAY OUT; A CITY WHERE THE PROMISE OF OPPORTUNITY IS NOT UNDERMINED BY A REALITY OF DISCRIMINATORY EXCLUSION -- AND LET THE PASSAGE OF THIS LEGISLATION SIGNAL THE STRENGTH OF OUR COLLECTIVE RESOLVE. THANK YOU.

	Intro 465	Mayor's bill
§8-101	Uses the term "family size" to describe Human Rights Law policy relating to discrimination against families with children in housing accommodations	Uses the term "whether children are, may be or would be residing with a person" to describe such discrimination. Comment: No substantive difference.
§8-102 Subd 5		Includes certain independent contractors as persons who are to be counted in determining whether an employer is subject to the employment provisions (§8-107 subd 1, 2 & 3) of the law Comment: Substantive difference.
§8-102 Subd 6	New provision which defines the term "employee" to include "independent contractors contracting with the city of New York." Substantive effect: The City will be liable for the discriminatory acts of all of its contractors to the same extent that it is liable for the discriminatory acts of its employees. (See §8-107 subd 13)	No definition of employee. See explanation concerning independent contractors in comments to §8-107, subd. 13 para. (c) of the Mayor's bill.
§8-102 Subd 7	New provision which defines the term "independent contractor"	No definition of independent contractor. Comment: There is a substantial body of case law which establishes the circumstances under which an independent contractor relationship exists.
Intro 465 §8-102 Subd 11 Mayor's bill §8-102 Subd 9		Second unnumbered paragraph of Mayor's bill (paragraph c of Intro 465) deletes references to "institutions" & "organizations" to conform to changes in preceding paragraph. Comment: No substantive difference.

	Intro 465	Mayor's bill
Intro 465 §8-102 Subd 13 Mayor's bill §8-102 Subd 11		Repeals paragraph (e) Comment: Paragraph (e) is no longer necessary because paragraph (d) has been expanded to cover all governmentally financed housing accommodations including one and two family homes.
Intro 465 §8-102 Subd 14 Mayor's bill §8-102 Subd 12		Adds a specific reference to the provision of law in which the defined term "family" is used (§8-107 subd 5 para (a)). Comment: No substantive difference.
Intro 465 §8-102 Subd 20 Mayor's bill §8-102 Subd 18	Definition of reasonable accommodation: "all accommodation that can be made"	Definition of reasonable accommodation "such accommodation as shall enable a person with a disability to meet the essential requisites of a job or enjoy the rights protected by this chapter." Comment: Substantive difference.
Intro 465 §8-102 Subd 18 Mayor's bill §8-102 Subd 16	Disability includes alcoholics and drug addicts who are current abusers.	Disability covers only recovered or recovering alcoholics and drug addicts who are currently free of abuse.
Intro 465 §8-102 Subd 24	New provision which adds definition of the term "hate crime"	No definition of the term "hate crime". The term "hate crime" is not used in the Mayor's bill.
§8-103	Chairperson to be appointed for 4 year term - removable only for good cause.	Continues present law - Chairperson appointed and removed at discretion of Mayor; Chair serves a fixed term in his or her office as a member of the Commission.
§8-105 Subd 2	Use of term "hate crime" (See Intro 465 §8-102 subd 24)	Comment: This provision is not necessary because the Commission already has this power under the current law.

	Intro 465	Mayor's bill
§8-105 Subd 4	Deletes requirement that Commission consult with Mayor before commencing investigation of city agency.	Continues present law - Commission required to consult with Mayor before commencing investigation of city agency. Comment: Substantive difference.
§8-105 Subd 8	Commission power to appoint employees shall be exercised by chairperson.	Commission power to appoint employees may be exercised by Chairperson. Comment: Substantive difference.
§8-107 Subd 1 Para (f)	"Shall be treated as employees for purposes of section 8-102(5) of this chapter."	"Shall be counted as persons employed by an employer for the purposes of subdivision five of section 8-102 of this chapter." Comment: Technical difference. The term "employee" is not used in subdivision five of section 8-102.
§8-107 Subd 4 Para (c)		Exemption for gender distinctions in educational institutions covers dormitory facilities - §§86.32 and 86.33 of title 42 of CFR. Comment: Technical difference.
§8-107 Subd 4 Para (e)		New provision which limits Commission jurisdiction over educational institutions under Board of Education jurisdiction to matters that are not strictly educational or pedagogic in nature. Comment: Educational and pedagogic matters are preempted by State Education Law.

	Intro 465	[illegible]
§8-107 Subd 5 Para (a) Subpara (4) Item (1)	"And if the available housing accommodation has not been publicly advertized, listed or offered.	"And if the available housing accommodation has not been publicly advertized or listed or otherwise offered to the general public." Comment:Technical difference.
§8-107 Subd 5 Para (a) Subpara (4) Item (3)		Repeals general exemption for gender distinctions in rooming house, dormitory and residence hotel. <u>Comment</u>: Repeal necessary to comply with Federal Fair Housing Act.
Mayor's bill §8-107 Subd 5 Para (c) Subpara (3)		Adds new subpara (3) which makes "blockbusting" an unlawful discriminatory practice. <u>Comment</u>: Under current law blockbusting is prohibited but is not specifically included as an unlawful discriminatory practice under the City Human Rights Law. This provision conforms to the requirements of the Federal Fair Housing Act.
§8-107 Subd 5 Para (d)		Includes reference to discriminatory practices in the appraisal of housing accommodations land and commercial space by lending institutions. <u>Comment</u>: This provision conforms to the requirements of the Federal Fair Housing Act.
Mayor's bill §8-107 Subd 5 Para (e)		New provision which prohibits discrimination in real estate services such as real estate broker's organization and multiple listing service. <u>Comment</u>: This provision conforms to the requirements of the Federal Fair Housing Act.

	Intro 465	Mayor's bill
Mayor's bill §8-107 Subd 5 Para (f)		New provision which prohibits discrimination in appraisal services. Comment: This provision conforms to the requirements of the Federal Fair Housing Act.
Intro 465 §8-107 Subd 5 Para (e) Mayor's bill §8-107 Subd 5 Para (h)		Expands application of housing discrimination provisions to include emancipated persons who are under eighteen years of age.
Intro 465 §8-107 Subd 5 Para (l) Mayor's Bill §8-107 Subd 5 Para (i)	Permits exclusion of persons with children from dormitories and certain federally subsidized senior citizen housing.	Permits exclusion of persons with children from "housing for older persons" as defined under the Federal Fair Housing Act.
Intro 465 §8-107 Subd 5 Para (g) Mayor's Bill §8-107 Subd 5 Para (j)		Specifies that exemption in age discrimination provisions for senior citizen housing does not permit discrimination against persons with children unless such housing meets the criteria of "housing for older persons" under the Federal Fair Housing Act. Comment: No substantive difference.

	Intro 465	Mayor's Bill
Intro 465 §8-107 Subd 5 Para (h) Mayor's Bill §8-107 Subd 5 Para (k)	Occupancy of dormitory housing operated by educational institutions for students may be restricted to persons of the same gender.	Allows gender distinctions to be made in dormitory accommodations operated by educational institutions where permitted by specified regulations of the Department of Health and Human Services. Comment: Administrative actions under the Federal Fair Housing Act have recognized distinctions allowed by regulations of the Department of Health and Human Services. However, the Federal Fair Housing Act and regulations under such law are silent.
Mayor's Bill § 8-107 Subd 5 Para (l)		New provision which permits distinctions to be made based on gender and whether children are, may be or would be residing with a person in dormitory-type housing accommodations such as homeless shelters where such distinctions are intended to recognize generally accepted values of personal modesty and privacy or to protect the welfare of families with children. Comment: Administrative actions under the Federal Fair Housing Act have recognized some distinctions such as these although the Fair Housing Act and the regulations promulgated under such law are silent.
8-107 Subd 5 Para (i) Mayor's Bill §8-107 Subd 5 Para (m)		Specifies that an exemption pursuant to Executive Law §296 in age discrimination provisions for publicly assisted housing accommodations does not permit discrimination against persons with children unless the housing meets the criteria of "housing for older persons" as defined under the Federal Fair Housing Act. Comment: No substantive difference.

	Intro 465	Mayor's Bill
§8-107 Subd 12	Allows religious organizations to give preferences and make other distinctions which would otherwise be barred by §8-107 if the preferences and distinctions are calculated to promote the religious principles of the organization and if membership in the religion is not restricted on the basis of race, color, or national origin.	With respect to housing, allows religious organizations to give preference in sale, rental or occupancy of housing owned or operated by such organization for other than a commercial purpose to persons of the same religion if the preference is calculated to promote the religious principles of the organization and if membership in the religion is not restricted on the basis of race, color, or national origin. With respect to preferences and distinctions other than in housing, allows such preferences and distinction only if they are calculated to promote the religious principles of the organization and only to the extent protected by the free exercise clause of the First Amendment. Comment: This provision complies with the requirements of the Federal Fair Housing Act and with the free exercise clause of First Amendment.
Mayor's Bill §8-107 Subd 13 Para (c)		New provision which imposes liability on employers for the discriminatory acts of persons employed as independent contractors if such acts are committed in the course of such employment and the employer had actual knowledge of and acquiesced in them. Comment: Under current law employers are not liable for the discriminatory acts of independent contractors. Intro 465 would impose such liability only on the City of New York. (See Intro 465 § 8-102 subd 6)

Intro 465 [illegible]

Intro 465 § 8-107 Subd 13 Para (a, b, c and d) Mayor's Bill § 8-107 Subd 13 Para (a, b, d and (f))	Differences relate to inclusion of liability for acts of independent contractor and relief from punitive damages as well as civil penalties. (para d & f).
Mayor's Bill § 8-107 Subd 13 Para (e)	New provision which allows court or commission to grant injunctive relief (not including back pay or front pay) even where an employer is found to be not liable for the discriminatory acts of an employee or agent, if such relief is necessary to afford a complete remedy to the person aggrieved.

	Intro 465	Mayor's bill
§ 8-107 Subd 14	Changes current law by deleting provisions which allow distinctions based on alienage or citizenship where "expressly permitted" by federal, state or city law "if such law does not provide that state or local law may be more protective of aliens."	Changes current law by permitting "inquiries or determinations based on alienage or citizenship status when such actions are necessary to obtain the benefits of a federal program". Comment: The Federal Equal Credit Opportunity Act permits distinctions based on alienage or citizenship status in certain cases but does not preempt state or local laws which are more protective of creditors. The Federal Home Mortgage Insurance Corporation which purchases mortgages from banks requires certain distinctions to be made in the terms and conditions of mortgages made to non-permanent resident aliens which it purchases. Under current law, a bank which makes such distinctions in order to be able to sell its mortgages to the Federal Home Mortgage Insurance Corporation would be in violation of the City Human Rights Law. The language added to subd 14 of the Mayor's Bill is intended to allow banks and other funding institutions the flexibility to comply with federal programs such as those of the Federal Home Mortgage Insurance Corporation.
§ 8-107 Subd 17		No substantive difference.

Intro 465	Mayor's bill
Mayor's Bill § 8-107 Subd 18	New subdivision which incorporates provisions of State Human Rights law prohibiting boycotts and blacklist based on discriminatory animus.
Mayor's Bill § 8-107 Subd 19	New subdivision which expands commission jurisdiction to cover threats, harassment, coercion, intimidation and interference by any person with exercise or enjoyment of the rights granted or protected under section 8-107. Comment: Present law covers only such acts by persons defined as "covered entities". This provision conforms to the requirements of the Federal Fair Housing Act.
Mayor's Bill § 8-107 Subd 20	New subdivision which makes clear that the Human Rights Law prohibits discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation or alienage or citizenship status of a person with whom such person has a known relationship or association. Comment: Although the present law can be construed to cover this type of discrimination, the Federal Fair Housing Act requires a local or state law to cover such discrimination on its face.
§8-109 Subd a	Includes a provision which requires the Commission to acknowledge the filing of a complaint and advise complainant of the time limits of the law. Comment: This provision conforms to the requirements of the Federal Fair Housing Act.

	Intro 465	Mayor's Bill
§ 8-109 Subd d		Includes a provision which requires the Commission to advise the respondent of his or her procedural rights and obligations under the law. Comment: This provision conforms to the requirements of the Federal Fair Housing Act.
§ 8-109 Subd f		Includes the language, "which is the subject of the complaint under this chapter" after the word "grievance" in paragraph (i), (ii) and (iii). Comment: No substantive difference.
§ 8-109 Subd g	Time limits apply to complaints filed after July 1, 1990.	Time limits apply to complaints filed after January 1, 1991. Commission required to commence proceedings within 30 days after complaint filed. Comment: This provision conforms to the requirements of the Federal Fair Housing Act.
§8-114 Subd (f)	"A proceeding may be brought by or on behalf of the commission." Commission attorney or Corporation Counsel could seek enforcement of Commission order in court.	"A proceeding may be brought on behalf of the commission." Comment: Corporation Counsel could seek enforcement of a Commission order in court or designate a Commission attorney to do so.
§8-115 Subd d		Contains a provision which requires every conciliation agreement to be made public unless respondent and complainant and commission agree otherwise. Comment: This provision conforms to the requirements of the Federal Fair Housing Act.

	Intro 465	Mayor's bill
§8-117	"The rules shall include rules providing that the commission... and that a complainant shall not be a party..."	"These rules shall include rules providing ... and that the complainant shall be a party if the complainant has intervened ..." Comment: No substantive difference.
§8-120 Intro 465 Subd (c)	If one respondent is found to have committed an unlawful discriminatory practice,any other respondent, even one found to be not guilty of the charge, and any necessary party, may be ordered by Commission to take affirmative action, (excluding the payment of compensatory damages) to effectuate a full and complete remedy for the complainant.	This provision is not included in the Mayor's Bill. Comment: The Mayor's Bill provides such a remedy against an "innocent" respondent only in the case of an employer who is found not to be liable for an unlawful discriminatory practice committed by an employee or agent (See Mayor's Bill §8-107, Subd 13, Para (e)).
§8-122	"... a special proceeding may be commenced by or on behalf of the commission in the supreme court. Comment: The Corporation Counsel and Commission attorneys have power to seek injunctive relief from a court.	"... a special proceeding may be commenced on behalf of the commission. Comment: Continues the present law which gives the Corporation Counsel and Commission attorneys designated by the Corporation Counsel the power to seek injunctive relief from a court.

	Intro 465	Mayor's bill
§8-125	"Any action or proceeding ... for the enforcement of any order issued by the commission ... may be initiated in any court of competent jurisdiction "by or on behalf of the commission". Comment: The Corporation Counsel and Commission attorneys have power to seek enforcement of Commission orders in court.	"on behalf of the commission". Comment: Continues the present law which gives the Corporation Counsel or attorneys designated by the Corporation Counsel the power to seek enforcement of Commission orders in court.
§8-127	Civil penalties recovered from a respondent other than a city agency to be paid into the general fund. Civil penalties recovered from a city agency to be paid to the complainant.	All civil penalties to be paid into the general fund.
§8-128	Applications, actions or proceedings may be instituted in court either by Commission attorneys or attorneys assigned by the Corporation Counsel at the request of the Commission pursuant to §8-106.	Applications, actions or proceedings may be instituted in court only by the Corporation Counsel, Commission attorneys designated by the Corporation Counsel or other attorneys designated by the Corporation Counsel.
§8-130	Conflicts between the Human Rights Law and other provisions of the Administrative Code to be resolved in favor of the Human Rights Law unless the other provision expressly states otherwise.	No express provision regarding conflicts. Comment: Conflicts to be resolved based on inquiry into legislative intent, policy, and other rules of statutory construction.

	Intro 465	Mayor's bill
§8-402 Subd c	Action for systemic discrimination may be instituted in court by the Commission or the Corporation Counsel.	Action for systemic discrimination may be instituted in court only by the Corporation Counsel, Commission attorneys designated by Corporation Counsel or other attorneys designated by the Corporation Counsel.
§8-602 and § 8-603		Includes discrimination based on whether children are, may be or would be residing with a person in provisions relating to discriminatory harassment.
Intro 465 § 3	§3 Continues the present commission. Comment: When would 4 year term of present chairman commence?	Not applicable
Intro 465 § 4 Mayors Bill § 3		Provisions on discrimination in public accommodations as they relate to age not to become effective until the effective date of Commission rules establishing public interest exemptions.

The Council of the City of New York
Finance Division
Marc V. Shaw, Director
Fiscal Impact Statement

Intro. No: 465-A

Committee: General Welfare

Title: Amendment to the Administrative Code of the City of New York, in relation to the Human Rights Law

Sponsor: Horowitz

Summary of Legislation:

This legislation amends the City's current human rights law to provide enhanced protection against discrimination in employment, housing, education, training programs and public accomodations. Intro 465-A provides additional protection against systemic discrimination, prohibits discriminatory harassment and empowers individuals to bring an action in state court. Intro 465-A allows for civil penalties of up to $100,000 for persons engaged in discriminatory practices payable to the General Fund of the City. Intro 465-A only allows the Corporation Counsel to appear in Civil court.

Effective Date: Immediately upon adoption by the Council

FY in Which Full Fiscal Impact Anticipated: Fiscal 1993

Fiscal Impact Statement:

	Effective FY92	FY Succeeding Effective FY93	Full Fiscal Impact FY96
Revenues (+)	$200,000	$218,700	$255,092
Expenditures (-)	$164,800	$431,984	$486,561
Net	$37,700	($213,284)	($231,469)

Impact on Revenues:

According to the City Commission on Human Rights, in in Fiscal Year 1992 the projected number of cases that will be noticed for administrative hearings is 135. Out of 135 cases, 25 percent or 34 cases will actually go to administrative hearing. 75 percent or 25 of these cases will result in a judgment against respondents at an average civil penalty of $10,000. Out of the 25 cases that will result in a judgment five cases will be against the City. Therefore, approximately 20 cases would result in $200,000 in revenue to the City. For Fiscal Year 1993, the Council Finance Division projected that the number of cases noticed for trial would be 145.8, based on a precedent of eight percent annual caseload growth. It is estimated that 36 cases out of 145.8 will go to trial. 27 or 75 percent of these cases will result in a judgment, with five cases out of 27 against the City which would result in

estimated revenues of $218,700. Subsequent fiscal year projections are based on the assumptions outlined above.

Impact on Expenditures:

The Council Finance Division's projected impact on expenditures is based on the assumption that the City's budget will allow the Commission on Human Rights and the Corporation Counsel to function at maximum staffing levels. In Fiscal Year 1992, expenditures would total $164,800. This amount includes the cost of $160,000 for an estimated new need of four additional staff attorneys for the Commission on Human Rights (CCHR) at an average salary of $40,000. Also included in this amount is administrative cost of $4,800 which is three percent of staff cost that is reflective of the agency's number of staff/administrative cost ratio in previous years. Expenditures for Fiscal 1993 are projected to be $431,984. This amount includes the cost of the City losing or settling 30 percent (losing three and settling five private right of action cases), at an average cost of $20,000 which will result in a total cost of $150,000. An additional cost of $104,000 reflects the administrative cost (two Corporation Counsel attorneys at an average salary of $47,000, and an additional $10,000 in case processing expenses) to try the agency's estimated three systemic discrimination cases that will be referred to the Corporation Counsel from CCHR. This $104,000 cost of trying private right of action cases, the CCHR administrative cost of $177,984 and a cost of $50,000 to the City in attorney's fees for losing and settling private right of action cases, results in total expenditures of $431,984. Subsequent fiscal year projections are based on the assumptions outlined above.

Source of Funds to Cover Estimated Costs: General Fund

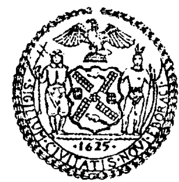
Source of Information: City Commission on Human Rights
Office of Management and Budget
Corporation Counsel
Mayor's Management Reports

Estimate Prepared By: Council Finance Division

Date Submitted to Council: June 3, 1991

FIS History: Considered by Council on November 5, 1990.
Re-considered by the committee on April 22, 1991.
To be considered on June 3, 1991

GW
Int. No. 465



THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

MARTHA K. HIRST
CHIEF LEGISLATIVE REPRESENTATIVE
CITY LEGISLATIVE AFFAIRS

52 CHAMBERS STREET
ROOM 309
(212) 566-4926

May 8, 1991

Hon. Samuel Horwitz
Chairman
Council Committee on General Welfare
City Hall
New York, NY 10007

Dear Sam:

We very much appreciate the time you and David took last week to discuss the Human Rights legislation with us. I hope you agree that it was an informative and productive meeting.

Enclosed is our proposed amendment of the "religious principles" provision. I look forward to hearing from you or David when you have had the chance to review it.

Best regards.

Sincerely,

Martha

Martha K. Hirst

MKH/sp
Enclosure
cc: Frank T.W. New
Victor Kovner
Dennis deLeon
Jeffrey Friedlander
Joseph Strasburg
David Walker

DRAFT

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 rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from making [such] any selection [as]; provided that such limitation, preference or selection is calculated by such organization to promote the religious principles for which it is established or maintained; and provided further that with respect to the sale, rental or occupancy of housing accommodations such limitation, preference or selection is not prohibited by the Federal Fair Housing Act.

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TESTIMONY

before the

COMMITTEE ON GENERAL WELFARE

of the

NEW YORK CITY COUNCIL

on

BILLS AMENDING THE N.Y.C. HUMAN RIGHTS LAW

June 3, 1991

Delivered by

Dianne E. Dixon, Esq.
Associate Counsel
The Center for Law and Social Justice
Medgar Evers College/CUNY
1473 Fulton Street
Brooklyn, NY 11216-2597

Good afternoon. My name is Dianne Dixon and I am Associate Counsel for the Center for Law and Social Justice at Medgar Evers College, the City University of New York. CLSJ is a legal research and advocacy, public interest oriented institution which engages in litigation and conducts public policy projects on matters involving civil and human rights issues. The Center testified earlier on the pending human rights bills and we are pleased to see that some of our concerns were addressed in the revised version of the Council's bill. Nevertheless, we believe that major problems remain and new ones have been created by some of the revisions which were made.

For example, the autonomy of the Commission on Human Rights is still a very troublesome issue. As was stated by almost every speaker who testified at the April 22nd hearing, the Commission must be allowed to prosecute its own cases in court with the option to enlist the aid of Corporation Counsel attorneys where appropriate. Such autonomy was present in the former draft of the Council's bill. Unfortunately, that language has been changed. What we now have is total deference to the Corporation Counsel's office and a promise that the matter will be studied further one year after the enactment of this bill. We are, to say the least, very disappointed that this body still does not recognize the legal necessity for Commission autonomy. Simply stated, Corporation Counsel cannot represent the interests of the Commission in cases where city agencies are defendants. Such circumstances create conflicts of interest which will not be overcome by the assignment of these cases to a special unit within the Corporation Counsel's office. That unit, known as the Affirmative Litigation Unit is merely another

department within the Counsel's office and in no way functions independently of the Corporation Counsel. Thus, it is unclear why further study on this issue is necessary, particularly when the study proposed is itself a conflict of interest.

According to both bills, it is the Corporation Counsel together with the Chairperson of the Commission on Human Rights who will conduct the study and issue a report to the City Council. Needless to say, this scenario does not foster any trust in the integrity of the ultimate findings from that study. It is, at best, poor judgment to allow those involved with executing the procedures under scrutiny to rule on the effectiveness and propriety of those procedures. If a study must be conducted on the issue of Commission autonomy, then those entrusted with this task must be independent of both the Corporation Counsel's office and the Commission on Human Rights. As public office holders who are constantly subject to public scrutiny, I am sure you are concerned with preventing even the appearance of impropriety. For this reason, I strongly urge you to appoint an independent committee or some other independent consultant to conduct the study. I also recommend that whenever the final report from that study is issued, it be made public with an opportunity for comment. It is time for the territorial warfare to end over who is going to protect the human rights of New Yorkers, and the actual protection of those crucial rights to become the common focal point.

The other problematic provisions of the bills which I would like to address in detail concern the issue of civil penalties. Section 8-107

(13)(d) has not been revised in either bill. Thus, whichever bill is passed, employers will be able to mitigate civil penalties and punitive damages whenever they demonstrate that they have adopted one or more of a list of various anti-discrimination policies and programs prior to the discriminatory conduct alleged in the complaint. As we testified earlier, all of the listed polices and programs are practices which an employer is required to have under existing law. Employers should not be allowed to use mere compliance with pre-existing legal obligations under employment discrimination statutes to relieve them from the imposition of civil penalties or punitive damages, and, as is the case under the Council's bill, most certainly, should not be allowed to use these factors to avoid a finding of liability.

Additionally, the revision of §8-127b creates an intolerable double standard for the imposition of civil penalties. As it is currently drafted, civil penalties against city agencies found liable for discrimination in an administrative proceeding, may be imposed only after a determination that the agency is in contempt of a Commission order. However, where the defendant is a private entity, civil penalties may be imposed as part of the relief awarded at the time of the determination of liability. Thus, city defendants are given two bites at the apple. It is not enough, for the imposition of civil penalties, that the conduct of the agency has been found to be egregious. Now, we must wait to see if the agency will comply with the Commission's order before civil penalties even can be requested. There is no plausible rationale for this distinction between public and private entities. Egregious conduct on the part of a city agency is

just as harmful to the public and deserving of punishment as when it is committed by a private party. Indeed, the argument can be made that discrimination committed by public agencies is even more harmful to society since it is the government from whom we expect fair treatment. Thus, we strongly recommend that this distinction be eradicated.

The appropriate time for treating private parties differently from public agencies is in the disposition of civil penalties. Normally, when civil penalties are imposed the funds collected are paid into the general fund of the city. For obvious reasons this is inappropriate for public defendants. However, in effect, this is exactly what is being proposed by both bills. Although the Council's bill provides for a separate account for these funds, it requires that the money be used solely to support city agency anti-bias education programs. At first glance this scheme appears to be quite innocuous, and perhaps, even noble. However, a closer look reveals that this money is simply being transferred from one city bank account to another. This undermines the purpose behind civil penalties. It is understandable that the city does not wish to lose valuable funds. However, where a finding of discrimination has been made against a city defendant, the city should pay. The better procedure is to have the Commission on Human Rights develop a list of not-for-profit organizations with experience in anti-bias education with whom the city defendant can contract to conduct the program. In this way the goals of punishment and deterrence are better served.

Finally, although other troublesome provisions remain despite the testimony given by various human rights advocates, including the Center, at the April 22nd hearing, we are very pleased that this body has undertaken the immense task of strengthening New York City's human rights law. On behalf of the Center for Law and Social Justice, I thank you again for this opportunity to comment on one of the most important pieces of legislation that the City Council will address on the future welfare of New York City. We hope that this process will be swift and yield the enactment of what promises to be a mighty weapon in the arsenal of civil and human rights advocacy.

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TESTIMONY

FOR HEARING

of the

COMMITTEE ON GENERAL WELFARE

of the

NEW YORK CITY COUNCIL

on

A HUMAN RIGHTS LAW

April 22, 1991

Delivered by

Bruce Egert, Esq.

Chair

Civil Rights Committee
New York Regional Board

ANTI-DEFAMATION LEAGUE

My Name is Bruce Egert, and I am an attorney practicing law in New York County. I am here in my capacity as Chair of the Civil Rights Committee of the Anti-Defamation League's New York Regional Board. Over the past 77 years, the Anti-Defamation League has become one of the most respected human relations organizations in the country.

Since its founding in 1913, the ADL has opposed discrimination based on race, religion, and national origin. As discrimination against other recognized segments of our society has been identified, our policy has evolved to include opposition on the basis of gender, age, and sexual orientation.

On behalf of the New York Regional Board of the Anti-Defamation League I am calling on the New York City Council to enact a new Human Rights Law for the City of New York. We are pleased that this hearing has been scheduled and of having an opportunity to comment on the two bills being considered (Int. #465-A: Human Rights Law and Int. #536: Human Rights Law; submitted by the City Council and the Mayor respectively).

The Anti-Defamation League wholeheartedly supports the policy statements in both bills "... that predjudice, intolerance, bigotry and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state." Discrimination in employment, in places of public accommodation, resort, or amusement, in housing and in commercial space on the basis of race, religion, sexual orientation, ethnicity or national origin is still a major problem in our city. We believe that both the Mayor's and the City Coucil's bills will go a long way to remedy this situation.

As part of the Ad Hoc Coalition on Civil Rights, we agree with the testimony it has given expressing concern about the autonomy of the

of the New York City Commission on Human Rights. We are particularly distressed about those provisions in both bills (Section 8-105 (4) (b) of the City Council's and Mayor's versions and Sections 8-128 and 8-402 of the Mayor's bill) which would weaken the enforcement powers of the Commission and raise conflicts of interest in the prosecutorial functions of the Law Department. Most egregiously, in cases brought aganist city agencies (which now account for about one-third of all cases brought before the Commission), under this proposal the Law Department would be acting on behalf of both parties to litigation. This is unacceptable.

Additionally, the Anti-Defamation welcomes the provisions (Sec. 8-102 **Definitions**, 22; Sect. **Powers and Duties**, 8-104, 2) of the City Council bill which specifically address the problem of hate crimes. Not only do they have a special emotional and psychological impact on individuals and communities, but carry the potential for polarizing communities. Over the last five years, according to the Bias Incident Investigation Unit of the Police Department, New York City has experienced a dramatic increase in crimes against persons and property on the basis of religion, race, ethnicity and sexual orientation. The recent murders of Yusuf Hawkins, James Zappalorti, Julio Rivera and Max Kowalsky are the most painful reminders of the prevalence of hate crimes. All four men met their deaths because of bigotry.

Although prejudice and hatred cannot be legislated or prosecuted out of existence, there is a growing awareness that government can do more to address directly the far-reaching implications of crimes that are prompted by bigotry. The coalition believes that in explicitly including hate crimes as an additional duty of the Commission and defining the term, the City Council version would

send a clear signal that acts of bigotry will not be tolerated.

The Anti-Defamation League welcomes, as well, those provisions (Sect. 8-107 **Unlawful Discriminory Practices, [1-b] 3.Employment:religious observance**) of both the Mayor's and City Council's bills which deal with the protection of religious observance in employment. Not only are the protections that this section offers strong, but it also places the burden on the employer to prove undue hardship if he or she charges that accommodation cannot reasonably be made for a particular employee's religious needs.

By the same token, in the same section we welcome 12. **Religious principles preserved** which protects the rights of religious groups to choose from within their own religious ranks in employment and housing "provided that membership in the religion is not restricted on the basis of race, color, or national origin..." .

Similar to the Civil Rights Act of 1990 and similar legislation before Congress this session, both versions of the new Human Rights Law have resulted in concerns that enactment will promote quotas and unfairly burden businesses. While the Anti-Defamation League has always fought for strong civil rights protection and effective statutory enforcement of individual rights, we have fought equally vigorously against the use of quotas and goals and timetables. Individuals should be evaluated on the basis of their skills -- not their skin color or their numerical value or their numerical value to an employer. Race, gender and ethnic preferences are not legitimate means of affirmative action and do not promote equal opportunity in any meaningful way.

While ADL does not believe that either version of the Human Rights Law authorizes or promotes quota, the League supports efforts of the City Council to state specifically that the law does not support quotas or racial preferences. In the section of the City Council's version dealing with disparate impact, Section 8-107(17)(e), it is explicitly stated that "nothing within this subsection shall be construed to mandate or endorse the use of quotas".

We reject the assertion of some of the legislation's critics that it will force employers to rely on quotas to maintain a "proper" percentage of nminority employees -- which they perceive would insulate them from the threat of costly legislation. ADL believes that uasing quotas as insurance against litigation is unnecessary, ineffective, and illegal.

Other critics charge that, like the Civil Rights Act pending in Congress, the Human Rights Law would impose liability on emplyers simply because their workforce does not reflect the racial/ethnic composition of the community. This claim is based on the misconception that a plaintiff can win a discrimination case merely by showing that an employer has a lower percentage of minorities on the job than are found in the general population. This is not the law today, and will not be the case after the Human Rights Law, or the federal Civil Rights Act, is signed into law.

For almost 20 years, moreover, the Supreme Court has held in disparate impact cases that in order to prove a violation of the law (under Title VII of the Civil Rights Law of 1964), the plaintiff must produce evidence connecting the seemingly neutral practice has resulted in discrimination. ADL welcomes this standard

(which comes almost verbatim from the Civil Rights Act before Congress) being explicitly adopted in Section 8-107(17)(e) of the City Council version:

"the mere existence of a statistical imbalance is not alone sufficient to establish a prima facie case of disparate impact violation."

In conclusion, ADL wishes to thank the Committee for scheduling this hearing and in giving our organization the opportunity to testify. We hope that the City Council will adopt the new Human Rights Law with our suggested changes.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036-6690

COMMITTEE ON CIVIL RIGHTS

JANICE GOODMAN
CHAIR
500 FIFTH AVENUE — SUITE 5225
NEW YORK, N.Y. 10110
(212) 869-1940
FAX # (212) 921-1437

Sherrie Nachman
SECRETARY
875 THIRD AVENUE
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FAX # (212) 909-6836

March 29, 1991

Ms. Yvonne Gonzales
Assistant Counsel
The City of New York
Speaker of the Council
City Hall
New York, New York 10007

RE: Proposed Human Rights Law

Dear Ms. Gonzales:

In response to your letter of March 21, 1991, I will be glad to testify on behalf of the Association of the Bar of the City of New York, regarding the above reference proposed legislation. I am sure I will be able to provide you with the necessary copies of the Association's report prior the hearing date. Can you please tell me how long I will be allotted for this presentation. Also, can a more definite time be set, since it is difficult for me to put aside the whole day? Your assistance in this is greatly appreciated.

-3 min.

Sincerely,

Jan Goodman /ps
Janice Goodman

JG:ps
cc: Alan Rothstein

(dictated but not read)

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Int. 465-A
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JUL 11 1991
DIRECTOR, CITY - LEGISLATIVE AFFAIRS

PUBLIC HEARING ON
LOCAL LAWS

June 18, 1991
1:30 in the afternoon

City Hall
The Blue Room
New York, New York

BEFORE:
HON. MAYOR DAVID DINKINS

SPEAKER: Peter Vallone
COUNCIL MEMBERS: Berman, Fisher, Greitzer,
Horwitz, Michel, Pinkett, Spigner

ELLEN P. REACH
Stenographic Reporting Services
4313 Arthur Kill Road
Staten Island, New York 10309
(718) 317-9875

2 THE MAYOR: I'm pleased to have before me
3 today Introductory 465-A, a bill that
4 dramatically overhauls the City's Human Rights
5 Law, and I'm joined here by Councilmember Carol
6 Greitzer, Stanley Michel, Speaker Peter Vallone,
7 Sam Horwitz, who is the sponsor, and Ken Fisher.
8 Introductory 465-A was introduced in the
9 Council at my request by Sam Horwitz, Chair of
10 the General Welfare Committee, and co-sponsored
11 by Councilmembers Horwitz, Foster, Maloney,
12 Fields, Povman, Ward, Dryfoos and Alter.
13 This bill gives us a human rights law that
14 is the most progressive in the nation, and
15 reaffirms New York's traditional leadership role
16 in civil rights.
17 I am particularly gratified to be signing
18 Introductory 465-A today because there has been
19 no time in the modern civil rights era when
20 vigorous law enforcement of anti-discrimination
21 laws has been more important. Since 1980, the
22 federal government has been steadily marching
23 backward on civil rights issues. Even on the
24 state level, narrow interpretations of civil
25 rights laws have retarded progress.

2 For example, the State Court of Appeals
3 has made it virtually impossible to hold taxi
4 companies responsible for the discriminatory acts
5 committed by their drivers. There is, therefore,
6 no incentive for these companies to curb bias on
7 the part of their drivers, and persons of color
8 still routinely face difficulty in getting a cab
9 to take us where we want to go.
10 In the face of these state and national
11 developments, we've had no choice but to move
12 forward independently. We've not only enhanced
13 specific sections of our law, like the provisions
14 relating to holding taxi companies and other
15 owners of public accomodations liable for acts of
16 their employees, we have set forth a policy that
17 enables the Commission to ensure that
18 discrimination plays no role in the public life
19 of the city.
20 As the committee report that accompanies
21 this bill makes clear, it is the intention of the
22 Council that judges interpreting the City's Human
23 Rights Law are not to be bound by restrictive
24 state and federal rulings and are to take
25 seriously the requirement that this law be

2 liberally and independently construed.

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

12 As the first comprehensive revision to the
13 Civil Rights Law in twenty-five years,
14 Introductory 465-A makes literally dozens of
15 improvements to the law. To illustrate just a
16 few of the major gaps in the law that are being
17 filled, consider the issue of civil penalties,
18 injunctions, and co-worker harassment.

19 Under current law, a person can be
20 compensated for the damages she has suffered as a
21 result of having been discriminated against, but
22 we have had no authority to levy a fine for the
23 harm that act of bias does to the social fabric
24 of the city. In other words, you can be fined if
25 you litter or double-park, but not if you

2 discriminate.

3 With potential civil penalties ranging up
4 to $100,000 under Introductory 465-A, it becomes
5 clear that discriminators now face much more
6 serious consequences for their acts. As cases
7 begin to be prosecuted under the new law, it is
8 my hope that the existence of these penalties
9 will exert a strong deterrent effect against acts
10 of bias.

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

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

2 possibility of legal action, co-worker harassment
3 has continued to poison many of our work places.
4 The new law takes the fundamental step of making
5 all people legally responsible for their own
6 discriminatory conduct.
7 Among other changes, people for the first
8 time will be able to go directly into State
9 Supreme Court to assert their discrimination
10 claims, and will be permitted to be awarded
11 attorneys' fees and punitive damages where
12 warranted. I hope that the creation of a private
13 right of action will supplement the Commission's
14 enforcement efforts and ease a portion of its
15 caseload burden.
16 Some forms of discrimination not
17 previously covered under City law, like age
18 discrimination in public accommodations and most
19 residential housing, and discrimination on the
20 basis of marital status in employment, will now
21 be prohibited.
22 I wish to commend and personally thank Sam
23 Horwitz for sponsoring this bill and shepherding
24 it through the Council.
25 And that sentence really doesn't say it,

2

2 but an awful lot of work, the hard, long work
3 that got done, Sam, you ought to be commended.
4 I note, too, the enormous contributions of
5 David Walker, Counsel to the Committee on General
6 Welfare.
7 Many members of my administration worked
8 tirelessly to shape this legislation. I thank
9 Deputy Mayor Bill Lynch and members of his
10 intergovernmental staff, including Martha Hirst
11 and Margo Wolf.
12 From the City Commission on Human Rights,
13 I'm grateful to the Chair, Dennis deLeon, and to
14 his staff members, Craig Gurian, Cheryl Howard,
15 Rolando Acosta and David Scott.
16 Corporation Counsel, Victor Kovner, was
17 ably assisted by a number of Law Department
18 attorneys in drafting and redrafting this
19 landmark bill, including Andrea Cohen, Olivia
20 Goodman and Martha Mann; also Jeffrey
21 Friedlander, Linda Howard, Paul Rephen, David
22 Clinton and Miles Kuwahaha (phonetic) --
23 Kuwahara.
24 Right?
25 UNIDENTIFIED VOICE: Kuwahara.

2 THE MAYOR: Anyway, he helped a lot.
3 By all accounts, the discussions and
4 negotiations on this bill between the
5 administration and the Council reflected
6 tremendous diligence and spirited cooperation,
7 and I'm grateful to you all.
8 And let me not fail to acknowledge the
9 always strong contribution assistance of the
10 Speaker, Peter Vallone.
11 I also want to thank the many
12 representatives of civil rights groups and the
13 business community who worked with us on this
14 legislation. Every effort was made to address
15 the major concerns of all parties.
16 There's still much work to be done to help
17 us achieve the goal of a truly open city. We
18 have learned over the years that change will not
19 come without resistance; that the struggle for
20 civil rights must constantly be renewed; and that
21 the struggle for the rights of one group is
22 indivisible from the struggle for the rights of
23 all other groups.
24 The new human rights bill gives us the
25 legal tools we need today to continue the fight.

2 I'm counting on the Commission and the Law
3 Department to use these tools to make sure that
4 meritorious claims of discrimination are promptly
5 and vigorously prosecuted.
6 Introductory 465-A affects all the people
7 of New York, of course, but none so much as our
8 children. We need to be able to say to them:
9 "If you work hard, you will be permitted to
10 succeed; you'll get the job you've earned; you
11 will be able to live where you like; this is as
12 much your city as it is anyone else's."
13 I turn first to the bill's prime sponsor,
14 Chairman Sam Horwitz.
15 COUNCILMEMBER HORWITZ: Thank you, Mr.
16 Mayor.
17 This is landmark legislation. I think the
18 federal government can really take a look at this
19 bill and realize that a lot more that could have
20 been done in Washington based on all of the
21 102-page document that we have here.
22 Originally there were two bills. There
23 was the Mayor's bill and there was the Council
24 bill, Peter Valone's leadership in the Council,
25 and the Mayor with his staff, and we worked

2 almost a year until we got this bill put together
3 properly.
4 A lot of research, a lot of work, a lot of
5 meetings, and Victor Kovner, the Corporation
6 Counsel, as the Mayor said, and Dennis deLeon,
7 the Commissioner of Human Rights, and also his
8 staff and the Mayor's Office was working very
9 closely, and I think this was a team effort to
10 really bring in this major legislation.
11 It's wonderful to be able to have this
12 passed at a time when there's so many problems in
13 the city, and the Mayor recognizes, and Peter
14 Vallone recognizes it, and I, as main sponsor of
15 the bill, recognizes it, and I think that the
16 Mayor should be commended for all his efforts and
17 time that he helped us with this, and of course
18 Peter Vallone gave me a lot of help and attention
19 by sitting down and discussing it as we went
20 along with this bill.
21 But I think that the time really is here
22 that human rights has to get the attention that
23 it deserves, and this bill does it, and I'm very
24 proud that we're able to do this today, and I
25 thank you, Mr. Mayor, and Peter Vallone, for

2 getting this legislation before the public.

3 THE MAYOR: We're joined by Councilmember

4 Mary Pinkett.

5 Anybody else wish to speak on this?

6 COUNCILMEMBER GREITZER: In noting the

7 co-sponsors of the bill, I didn't see my name on

8 it, although I'm quite certain that I was a

9 co-sponsor at least of --

10 THE MAYOR: Frank New will be discharged

11 immediately.

12 COUNCILMEMBER GREITZER: -- of one of --

13 Of at least one of the earlier --

14 THE MAYOR: We'll discharge him twice.

15 COUNCILMEMBER GREITZER: -- the earlier

16 versions of the bill.

17 At any rate, I was pleased at that hearing

18 that Sam mentioned that took place nearly a year

19 ago that I had suggested including language

20 having to do with bias hate crimes, which got

21 adopted in the final version of the bill, and I

22 was pleased to have played a role in crafting the

23 final legislation, and of course I urge you to

24 sign it, and I think it is, indeed, landmark

25 legislation.

1
2 COUNCILMEMBER MICHEL: Mayor, I, too, of
3 course, urge you to sign it, and I know you will.
4 After all, you were one of the people who
5 proposed it and it was done at your request.
6 I think the work that Sam and the
7 Committee and the Council and your staff did is
8 just remarkable. It is easily and probably the
9 most progressive piece of civil rights
10 legislation in the United States, perhaps in the
11 world, and it is something that's necessary.
12 But what you did was more that just put
13 something on paper that looks good. You put
14 something on paper with the teeth in which will
15 cause it to be enforced, including the cost of
16 private right of action, which is so important in
17 these times when we don't have enough staff and
18 the problems with the budget in getting people
19 to -- The government to enforce this
20 legislation.
21 But, of course, the bill and the words of
22 the bill will judge not on what is written here
23 but how it is enforced, and that is something
24 that you ought to be commended -- All of us
25 ought to be commended on for doing this wonderful

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2 work, because, as I said, in a year, really --
3 To say it in another way, when any group or
4 person is discriminated against, we really, in
5 this city, all of us are being discriminated, and
6 all our rights are impinged upon, and the
7 feelings of all of us are taken away and
8 lessened.
9 Thank you.
10 COUNCILMEMBER PINKETT: Well, Mr. Mayor,
11 I'm sure I don't have to urge you to sign this
12 bill, and I, too, would express my appreciation
13 for your leadership and the leadership of
14 Councilmember Horwitz and the leadership of
15 Speaker Vallone in terms of this legislation.
16 I think what it does, though, is re-affirm
17 the fact that New York City is, indeed, a key
18 place and a key player in this nation. And so
19 often we're made to apologize or made to feel
20 that we ought to apologize for being New York
21 City.
22 And what this legislation says is that we
23 don't have to apologize to anyone; that we know
24 exactly what is right to do and what we ought to
25 do, and we're doing the right thing with this

1
2 legislation, and I'm very proud of it, to be a
3 part of this particular piece of legislation at
4 this moment.
5 I think, most importantly, though, is that
6 we ought to take pride in doing this. We ought
7 to take a great deal of pride that when everyone
8 else is running for cover, that we're not running
9 for cover; that we are standing up and we're
10 moving ahead. And maybe the President won't have
11 to cry; he'll run ahead with us.
12 COUNCILMEMBER FISHER: Let me just briefly
13 echo the sentiments of my colleagues and urge you
14 to sign this important piece of legislation. I
15 hope that this sends a message to George Bush:
16 Mr. President, we don't want to read your lips;
17 we want you to read our bill.
18 SPEAKER VALLONE: You'd better watch that,
19 Ken.
20 No, I'm kidding. I'm only kidding.
21 This is obviously, Mr. Mayor -- When the
22 record is written of your administration and my
23 tenure, I think that this is going to be one of
24 the - my tenure as Speaker - that this will be
25 one of the items that will stand out.

2 So much attention is spent on what goes
3 wrong, and this is obviously an example of what
4 goes right with this city, and with your
5 administration, and with this Council, and it's a
6 pleasure to witness it being signed into law.
7 And I do want to say for Councilmember
8 Horwitz, who I have served with for such a long
9 time - we came in together in 1974 --
10 COUNCILMEMBER HORWITZ: Right.
11 SPEAKER VALLONE: That this -- Sam,
12 you've done a lot of good things for the Council,
13 but none finer than this, and I wanted to
14 congratulate you and say that publicly.
15 THE MAYOR: Hear! Hear!
16 Is there anyone in the general audience
17 who wishes to be heard in opposition to this
18 legislation?
19 MR. ZWEIBEL: Thank you, Mr. Mayor.
20 The Talmud relates that if there is a case
21 involving --
22 THE MAYOR: Could you give us your name.
23 MR. ZWEIBEL: Oh, I'm sorry. Sure.
24 I'm David Zweibel and I'm the General
25 Counsel for Agudath Israel of America.

2 I was going to say the Talmud relates that
3 if you have a case where the judges of a court
4 are considering a matter and the judgment is
5 unanimous to convict a particular defendant, then
6 that case is thrown out. And so I guess
7 sometimes it's helpful to sound a discordant note
8 and suggest that on a particular instance there
9 may be contrasting viewpoints.
10 There is, indeed, much in this bill that
11 is worthy of celebration. A great deal of effort
12 obviously went into the anti-discrimination
13 provisions of this bill. And I think that a
14 major contribution has been made specifically and
15 most importantly with respect to the enforcement
16 provisions that appear in the second half of the
17 bill that will enhance civil rights protection
18 for all New Yorkers that are, in fact, worthy of
19 support and celebration.
20 There are, however, certain aspects of the
21 bill about which our organization is concerned,
22 and I think will bear careful watching in the
23 months and years ahead, and I refer specifically
24 to two aspects of it.
25 One of them relates to the cutting back,

2 the curtailing, of the exemption under the human
3 rights law for two-family houses with respect to
4 housing discrimination provisions.
5 Currently, the Human Rights Law which
6 prohibits housing discrimination, as, indeed, it
7 should, includes an exception for small
8 two-family houses in which a landlord wishes to
9 rent one -- the other apartment in the house to
10 someone. That landlord is exempt from the Human
11 Rights Law.
12 That exemption is retained under this new
13 bill with one exception. If the apartment is
14 publicly advertised, listed, or otherwise offered
15 to the general public, then all of the provisions
16 of the Human Rights Law will apply to the renting
17 of that apartment.
18 We think that this could create serious
19 problems. There's a reason why there's an
20 exemption for two-family houses. It's
21 specifically, for example, in a situation --
22 Let's take one very careful example, and I'll
23 speak now as a member of a religious community.
24 If, for example, a member of my community were to
25 have a two-family house and offer one apartment

2 for rent, and, to take an example that's on many
3 people's minds, an openly gay couple were to come
4 and seek the second apartment, and the family had
5 young children and they approached their
6 clergyman, their rabbi, and the rabbi said that
7 our particular religious belief is such that this
8 is an improper mode of conduct and we are
9 concerned that having these people as your
10 tenants in an openly gay relationship could have
11 a negative influence on your children, and,
12 therefore, I would recommend that in raising your
13 children you ought to look elsewhere for proper
14 role models for your children.
15 We think that in that type of two-family
16 setting, there ought to be retained an expansive
17 exemption from the Civil Rights Law, and that's,
18 in fact, on order to promote the civil rights of
19 the landlord in those circumstances, the right to
20 raise his children in a manner which accords with
21 his own beliefs and viewpoints.
22 And so that particular provision of the
23 law troubles us.
24 Another provision of the law that troubles
25 us somewhat and bears careful, very careful,

2 watching relates to the issue of disparate
3 impact, and this is the one that, of course, has
4 raised a great deal of concern at the federal
5 level, as well.
6 The bottom line with respect to disparate
7 impact is that an employer can be found as having
8 violated the anti-discrimination provisions even
9 when he does not intend to violate the
10 anti-discrimination provisions. Disparate
11 impact, the concept goes to non-intentional
12 discrimination. And the way non-intentional
13 discrimination is proven under the disparate
14 impact theory is if it can be shown that an
15 employer's practices or a group of the employer's
16 employment practices leads to a significant
17 statistical disparity between his work force and
18 the general pool of qualified job applicants.
19 We think that by making it very difficult
20 for an employer to defend those particular types
21 of actions, as this bill does, it will, in fact,
22 cause many employers, surreptitiously, to hire by
23 numbers rather than to hire by merit, to make
24 sure that their work force is, indeed, balanced
25 racially, sexually, by religion, and so on,

2 balanced in a manner that will protect them
3 against a disparate impact lawsuit.
4 That type of conscious consideration of
5 the bottom line numbers of a work force - call it
6 quotas; call it what you will - undermines the
7 system of merit that ultimately is the best
8 guarantor of a fair and equal society. And
9 that's why we are concerned about this particular
10 aspect of this bill.
11 Obviously it's something that we ought to
12 pay careful attention to in the months and years
13 ahead to see whether, in fact, it will have that
14 impact. We are concerned that it will, and urge
15 you and urge the City Council to revisit that
16 question and consider whether or not it has, in
17 fact, had that negative impact.
18 Thank you.
19 THE MAYOR: Thank you.
20 MR. MAGARILL: Good afternoon, Mr. Mayor.
21 My name is Paul Magarill (phonetic). I'm the
22 Vice President of Government Affairs for the New
23 York Chamber of Commerce and Industry, and I'm
24 here to give our comments on this bill and not to
25 speak in opposition.

2 I'm here to comment on Intro 465, which
3 will revise dramatically the City's Human Rights
4 Law, and which is probably the most important
5 piece of legislation I've ever had the privilege
6 of working on.
7 Let me attempt to place our comments in
8 what I believe to be their proper context.
9 The Chamber is not a traditional business
10 advocacy organization. The city's business
11 community has shown that it is as committed to
12 strengthening the social fabric of the city as it
13 is to building a competitive and profitable
14 business economy. New York employers work
15 together to focus attention and devote resources
16 on problems which affect the entire New York City
17 community, including housing, education, economic
18 development and jobs.
19 Discrimination strikes at the very soul of
20 the city. It is a cancer that weakens the social
21 fabric that binds the city and undermines
22 directly the objectives of our membership.
23 From the beginning, the Chamber recognized
24 that the Human Rights Law should be revised and
25 that the power of the Human Rights Commission

2 should be strengthened if it is to become a more
3 effective and efficient body, capable of
4 protecting civil rights and fighting
5 discrimination.
6 The Chamber has believed that the city's
7 Human Rights Law should stand as an example to
8 the rest of the country and we sought a bill that
9 effectively balanced the interests of employers
10 and employees.
11 Consequently, we did not raise objections
12 to many of the bill's key provisions that
13 increase significantly the responsibilities and
14 potential liability of employers, such as the
15 imposition of civil penalties and the creation of
16 vicarious liability for the discriminatory acts
17 of employees.
18 We objected only to those provisions that
19 would impose unnecessary and excessive burdens on
20 business and that would delay rather than
21 expedite the process.
22 At our behest, a number of very important
23 amendments have been made to the bill.
24 While great progress has been made over
25 the past few months to improve the bill, a number

2 of problems still do remain.

3 Our primary concern is with the bill's

4 procedural requirements. The bill establishes

5 very formal procedural rules for the adjudication

6 of claims. At a time when modern administrative

7 practice seeks to streamline procedures resolving

8 disputes, these formal rules are a step backward

9 and are bound to generate new, purely procedural

10 disputes and ancillary proceedings.

11 In order to comply with these rules, many

12 businesses will be compelled to hire an attorney

13 just to answer a complaint. This is a financial

14 burden that will fall most heavily on those who

15 can least afford it, small businesses.

16 However, the fact remains that the bill

17 before you today is a dramatic improvement over

18 the original draft. This bill is fair and,

19 unlike the original draft, it attempts to address

20 the legitimate concerns of business without

21 undermining any of the essential provisions.

22 We have worked together to create a better

23 bill. This is just one example of what we can

24 accomplish when the city government and the

25 business community works together in a spirit of

5

2 cooperation.

3 Throughout the negotiating process, the
4 business community showed that it is a willing
5 partner and not an obstructing force on an
6 important issue such as this. We hope that the
7 constructive relationship we have established on
8 this issue will continue, and we look forward to
9 working with your administration and the City
10 Council during the rule-making process that is to
11 follow.

12 Despite our concerns with this bill, we
13 are mindful of the progress that has been made
14 and are pleased our comments were heard and that
15 many of our concerns were addressed.

16 We commend you, Mr. Mayor, your
17 administration, Speaker Vallone and the City
18 Council, Commissioner deLeon and his staff,
19 Victor Kovner and his staff, and we are
20 particularly appreciative of the efforts and
21 leadership of Councilman Horwitz and David
22 Walker, who worked so hard on this bill.

23 Thank you very much.

24 THE MAYOR: Thank you, sir.

25 Is there anyone else in opposition?

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2 MR. COHEN: Actually, I'd like to
3 introduce a brief statement in support of the
4 bill on behalf of the --
5 THE MAYOR: Just a second. Let me just
6 make sure there are no others who wish to speak
7 in opposition.
8 If none, then go right ahead, sir.
9 MR. COHEN: I'm Mark Cohen, representing
10 the Metropolitan Region of the American Jewish
11 Congress, and I would like to express our support
12 of the bill and this specific legislation.
13 For over four decades, the American Jewish
14 Congress' Metropolitan Region has worked towards
15 the enactment of City Human Rights Laws which
16 will effectively and fairly put an end to
17 invidious discrimination against New Yorkers on
18 the basis of race, sex, national origin, creed
19 and sexual orientation. This bill is a further
20 welcomed effort in this direction, and enjoys our
21 wholehearted support.
22 The need for strengthened city legislation
23 is particularly acute at a time when the United
24 States Supreme Court has given federal civil
25 rights laws the most grudging, narrow and

2 hypertechnical readings, losing sight entirely of
3 the broad remedial purposes served by those
4 statutes.
5 This bill takes direct aim at a series of
6 Supreme Court decisions which have been all but
7 universally criticized by those committed to
8 equal justice under law, which we at the American
9 Jewish Congress are, which we know that everyone
10 here is, and we congratulate everyone responsible
11 for the drafting of this legislation, the
12 tremendous work that went into producing this
13 final bill which has our wholehearted support.
14 THE MAYOR: Thank you very much, sir.
15 Dennis?
16 MR. deLEON: Mr. Mayor, I would ask that
17 you sign the legislation for several reasons.
18 On behalf of the Commissioners from the
19 Human Rights Commission and myself and the
20 agency, this bill would give us the teeth that we
21 need to enforce an effective Human Rights Law.
22 With diminishing resources, with fewer
23 staff, we find that this possible increase in
24 penalties and the other changes in this bill
25 procedurally will enable us to secure, we think,

2 proper settlements when cases are not strong
3 cases. And we think it will encourage employers
4 to voluntarily comply with the law without
5 seeking or having to wait until they're sued for
6 something. So, by adding teeth, I think we speed
7 up Human Rights Law enforcement.
8 And, secondly, Mr. Mayor, on the issue of
9 quotas, the bill goes to some length to say that
10 it specifically does not condone or mandate the
11 use of quotas. It states specifically that those
12 are, may be appropriate, though, after a hearing
13 and after a finding by one of our administrative
14 law judges.
15 Third, the bill has many provisions that
16 could be interpreted in any one of a number of
17 ways.
18 What we would ask the community, the
19 employer community, the landlord community, and
20 the City Council and others who care about this
21 law and how it's enforced is to work with us, is
22 to work with us in advising us about their views
23 on the law and its enforcement, because this law
24 will only be observed if people observe it.
25 Thank you.

2 THE MAYOR: That was Dennis deLeon, Chair
3 for the City Commission on Human Rights.
4 If there's no one else who wishes to
5 speak, we'd invite you to join --
6 Yes, sir?
7 MR. WATSON: I wish to speak in support.
8 THE MAYOR: Would you prefer to speak from
9 where you are?
10 MR. WATSON: I can. I think I can.
11 THE MAYOR: We'll bring the mike to you.
12 MR. WATSON: That's fine.
13 THE MAYOR: Here you are, Frank.
14 MR. WATSON: Thank you, Mr. Mayor.
15 I wish to speak in support of Introductory
16 465-A and urge your immediate signing of this
17 important legislation.
18 We also --
19 My name is Kipp Watson. I am Vice
20 President of the 504 Democratic Club, and we
21 thank you very much for always prominently
22 displaying the axis pin that we have given to
23 you.
24 Your administration is a symbol of
25 progressive leadership, and, as you know, we have

2 wholeheartedly supported your candidacy for Mayor
3 of our city.
4 We find a flaw in the bill, and that is
5 that it does not specifically provide for a
6 private right of action to have a trial by jury
7 of one's peers. This defect should not delay
8 your signing of this bill.
9 We urge the Dinkins Administration to, as
10 soon as possible, amend the Administrative Code
11 so that these important provisions may be tried
12 before a jury of one's peers.
13 We also note that this new law will
14 vigorously protect the rights of people with
15 disabilities.
16 Currently, the City's Affirmative
17 Employment Plan does not have goals and time-
18 tables for people with disabilities. This is in
19 conflict with Executive Order 17, which you
20 issued in September 1990.
21 We urge you to review this law and the
22 fact that the City's Affirmative Employment Plan
23 does not provide for goals and timetables for
24 people with disabilities, and take immediate
25 action to ensure that the City's Affirmative

2 Employment Plan does contain goals and timetables
3 for people with disabilities, so that the intent
4 of this new law may be carried out insofar as
5 provisions concerning the rights of people with
6 disabilities and their enforcement by city
7 agencies can be furthered.
8 THE MAYOR: Thank you very much. Good to
9 see you.
10 We'd invite those who wish to join us for
11 a photograph as we sign this now. Everybody is
12 welcome.
13 Take your time. We'll wait.
14 Watch. That way it might be easier.
15 Can you make a little space there, folks.
16 Way to go, Dennis.
17 Okay. Hear we go, history.
18
19 (Mayor signing bill.)
20 (Picture-taking ceremony.)
21
22 THE MAYOR: Congratulations.
23 MR. HORWITZ: Thank you.
24 THE MAYOR: Well done.
25

City's Human Rights Bill

VF: NYC Human Rights Commission (1990)

Employers Are Expected to Resist Broad Revisions

NY Law Jl 9/20/90 (p5)

BY BARBARA FRANKLIN

SWEEPING REVISIONS of New York City's human rights law are in the works, along with a major increase in the powers of the City and the Human Rights Commission to enforce its provisions.

The vehicle for the overhaul is expected to be one or a combination of two legislative proposals — the first is a bill before the City Council's General Welfare Committee introduced in June by Chairman Samuel Horwitz, and the second is proposed legislation by Mayor Dinkins awaiting introduction.

Counsel working on both drafts expressed optimism their differences can be resolved and the City will have a new law by the end of the year. More difficult than reconciling the views of the Council and the Mayor, however, will be satisfying the concerns of New York's business interests, who have objected to key provisions believed harmful to employers.

"There probably will be a problem with the business community. They're not going to like a lot of this," observed Olivia Goodman, Assistant Corporation Counsel who worked on the Mayor's bill.

Mayor Dinkins

Paul Magaril, Director of Government Affairs and Legislative Counsel for the New York Chamber of Commerce and Industry Inc., applauded the City's efforts to strengthen the law, but complained about several provisions, chief among them a section authorizing the Commission to require companies to keep records in response to a complaint or on its own initiative.

The proposed changes evolve from recommendations by a mayoral task force appointed by former Mayor Koch following the racial murders in Howard Beach and other race bias incidents.

Key Provisions

Among the key provisions found in both the Horwitz and Dinkins proposals are:

- Creation of a private right of action for individuals who believe they have been victims of discrimination and the ability to recover costs and attorney's fees. Presently, claims are disposed of through the Commission's administrative hearing process;
- Expansion of the ability of the Commission and the City to seek injunctive relief and civil penalties in state court. Under current law, the Commission can seek a preliminary injunction only in housing discrimination cases; the revisions would cover any type of discrimination covered by the Human Rights Law;
- Increase in the Commission's authority to order back pay, job reinstatement and compensatory damages;

Once the Commission has met the 'reason to believe' standard, an extremely easy burden to meet, it can force employers to generate and maintain records constrained by little more than its own imagination.'

Paul Magaril, of the New York Chamber of Commerce and Industry Inc.

- Authorization for the Commission to require companies under investigation to compile records and information;
- Increase in criminal fines for impeding an investigation or violating a Commission order from up to $500 to a maximum of $10,000;
- Expansion of the Corporation Counsel's authority to investigate and bring civil actions to eliminate systemic discrimination; under current law only the Commission has such power.
- Setting forth of standards, higher than those found in the state's human rights law, for when employers may be held liable for discriminatory conduct of employees. Employers can avoid civil penalties if they adopt a Commission-approved anti-discrimination policy. Having such a policy in place can also help employers found liable to mitigate damages.

Attorneys who worked on the two bills say that the provisions are basically the same, although the Council draft, known as Intro 465, gives more authority to lawyers for the Human Rights Commission to pursue cases independent of the Corporation Counsel's office.

Similar legislation was introduced last year by Mr. Horwitz at the request of Mayor Koch, but it never got out of the General Welfare Committee because of differences that arose between the Mayor and Council members. Many of those differences are said to have been resolved by the revisions.

'Top Priority'

"We hope we will have a new human rights bill by the end of this year because it's a top priority of the Committee and one of the most pressing needs of the city," said David Walker, Counsel to the General Welfare Committee.

'It's not such an unreasonable requirement. We've been more rational about it by limiting it only to instances where [there is] suspicion by the Commission something might be wrong.'

Olivia Goodman, Assistant Corporation Counsel who worked on the Mayor's bill.

Addressing the key provisions of the proposal, Mr. Walker said the Commission needs authority to bring actions in state court because its orders do not carry sufficient weight to enforce the law.

"Ignoring the agency's orders was a problem," he claimed.

Mr. Walker said he will be working with the business community and other parties on amendments to ensure the legislation enjoys broad support.

One group that may need some coaxing is the Chamber of Commerce. In a letter to the City Council last year detailing problems in the Koch proposal, the Chamber of Commerce said granting the Commission authority to order companies to maintain records was unprecedented and violated due process.

"The clear purpose of this section is to force employers to generate the specific evidence that can, and most assuredly will, be used against them," Mr. Magaril wrote. "Once the Commission has met the 'reason to believe' standard, an extremely easy burden to meet, it can force employers to generate and maintain records constrained by little more than its own imagination."

But according to Ms. Goodman, the same record-keeping requirements are found in the federal Title VII of the Civil Rights Act.

"It's not such an unreasonable requirement," she asserted. "We've been more rational about it by limiting it only to instances where [there is] suspicion by the Commission something might be wrong."

If enacted, the city's new law will more closely resemble both the federal and state human rights laws and in some respects leap ahead of the federal government, should President Bush follow through on a threat to veto the pending Civil Rights Act of 1990.

But some lawyers predict a revised law will only serve to create work for the plaintiffs bar. "All its going to do is benefit plaintiffs' lawyers," observed Jay Waks, co-leader of the management labor practice at Kaye, Scholer, Fierman, Hays & Handler.

"It just seems when the city is strapped for money, that it could spend its resources a lot better than [by] debating yet another civil rights [bill] duplicative of the state and in many respects federal legislation. The intelligent way to approach this is to wait and see what is done at the federal level. Reasonable minds can differ."

VF: NYC Human Rights Commission (1990)

New York City Bar Association Ethics Opinion

The following opinion was issued by the Committee on Professional and Judicial Ethics of the New York City Bar Association.

OPINION 1990-4

NY Law Jnl? 5/31/90

Facts

The New York City Commission on Human Rights (the Commission) is developing a *pro bono* assistance program to help resolve pending unassigned cases through mediation and adjudication. We have been asked to advise on the ethical implications of certain aspects of the proposed program.

The Commission is the administrative agency charged with enforcement of the New York City Human Rights Law, Administrative Code, Ch. 8. Complaints filed by persons alleging violations of the Human Rights Law, such as discrimination in employment, housing or public accommodations, are investigated by the Commission's Law Enforcement Bureau. When the investigation determines that probable cause exists to credit the allegations of a complaint, and when conciliation, if attempted, has failed, the matter is referred to the Commission's Hearings Division for trial. See Commission Rules of Practice, Rule 27.

The Commission wishes to use volunteer lawyers in private practice to represent complainants during proceedings before the Hearings Division. In addition, the Commission proposes that volunteer lawyers serve as administrative law judges (termed "Hearing Officers" under the Commission's Rules of Practice) and as mediators.

Under the proposed program, a volunteer lawyer would represent the complainant and a Bureau staff lawyer would be assigned to ensure that the Commission's interests are represented during the litigation; the Bureau staff lawyer is not expected to play a major role in presenting the case.

Volunteer mediators would serve at the investigative stage before a determination of probable cause is made. They would attempt to conciliate and settle matters during this phase, see id., Rules 24-26, and would report on the results of their efforts to a member of the Bureau staff or the *pro bono* coordinator, but not to any administrative law judge.

Volunteer administrative law judges would serve from time to time when assigned by the Bureau's Hearings Division. They would oversee pretrial motion and discovery practice and preside at hearings. After a hearing, the volunteer administrative law judge would submit recommended findings of fact and conclusions of law to the Commission, which would then issue a final decision and order. See Id., Rules 28-36.

It is expected that many of the individuals who will be asked to serve as volunteer administrative law judges (or their partners or associates) may frequently represent parties in proceedings before the Hearings Division. Similarly, many of the law firms and lawyers who are expected to participate in the program as counsel to complainants have represented, are now representing or may in the future represent respondents in Commission proceedings, and many of such volunteer lawyers and firms represent New York City or its agencies or are engaged in litigation against the City or its agencies.

Question

The proposed volunteer assistance program raises questions under the Code of Judicial Conduct (Judicial Code) and under the provisions of the Lawyer's Code of Professional Responsibility (Lawyer's Code) concerning the exercise of independent professional judgment on behalf of a client (Canon 5) and the preservation of client confidences and secrets (Canon 4).

Opinion

I.

We first address whether if a lawyer acts as an administrative law judge or as a mediator for the Commission, that lawyer or the lawyer's firm may also represent respondents or complainants before the Commission.

1. Administrative Law Judges. A preliminary issue is what ethical rules govern the conduct of an administrative law judge. The Judicial Code applies to "anyone . . . who is an officer of a judicial system performing judicial functions." Compliance with the Code of Judicial Conduct [Preamble]. This Committee and the New York State Bar Association Committee on Professional Ethics have interpreted this language broadly and have applied the Judicial Code's provisions to a variety of quasi-judicial officials. See N.Y. City 814 (1956) (tax commissioner); N.Y. State 365 (1974) (part-time member of Administrative Appeals Board of the New York State Motor Vehicle Department).[1]

Under the Judicial Code, the answer to the question posed depends upon whether the volunteer is treated as a "part-time" judge or a judge "*pro tempore*". A part-time judge is defined as "a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession;" a judge *pro tempore* is defined as "a person who is appointed to act temporarily as a judge."[2]

The Judicial Code provides that a part-time judge "should not practice law in the court in which he serves." Compliance ¶A(2). Several ethics opinions make it clear that DR 5-105(D), the vicarious disqualification rule of the Lawyer's Code, extends this prohibition to the partners and associates of a part-time judge. See, e.g., N.Y. State 342 (1974) (partners and associates of part-time town justice are disqualified whenever the justice himself would be disqualified); N.Y. State 29 (1966) and 29(a) (1967) (associate of justice of the peace's law firm may not appear before the other justice of the peace); N.Y. State 65 (1967) (partners of acting police court judge may not appear before regular judge of police court).[3]

Vicarious disqualification of partners and associates cannot be avoided by screening them from a directly disqualified lawyer through erection of a "Chinese wall." See N.Y. State 603 (1989); compare DR 9-101(B) (screening may be effective to prevent vicarious disqualification of partners and associates of a former government lawyer). Therefore, if the volunteer administrative law judge should be classified as a part-time judge, then the lawyer, along with the lawyer's entire firm, will be disqualified from representing clients before the Commission for as long as the volunteer part-time judge serves.

On the other hand, if the volunteer administrative law judge is treated as a judge *pro tempore*, then he or she is barred from acting as a lawyer only in proceedings in which he or she has served as a judge and in any related proceedings. See Judicial Code, Compliance ¶B(2). Since the lawyer serving as judge *pro tempore* is not barred from practicing law in the court in which the lawyer serves temporarily, neither would the lawyer's partners and associates be barred, although they may not appear before that judge.

Finally, although legal questions are beyond this Committee's jurisdiction, the volunteer administrative law judges in question may be subject to the Rules of the Chief Administrator of the Courts, which explicitly state:

> "No judge who is permitted to practice law shall permit his or her partners or associates to practice law in the court in which he or she is a judge. No judge who is permitted to practice law shall permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law." 22 NYCRR 100.5(f).

This broad disqualification rule, which extends to judicial hearing officers and to part-time judges, is reiterated in several opinions of the Advisory Committee on Judicial Ethics of the Office of Court Administration. See Opinions 88-156, 88-45 and 87-10.

Whether, under the foregoing principles and authorities, volunteer Commission administrative law judges will be viewed, under the Judicial Code — either as presently in effect or as proposed to be amended in the Model Code — as part-time judges (whose partners and associates would be disqualified) or judges *pro tempore* (who, and whose partners and associates, would not be disqualified) will depend in large part on how the Commission organizes its *pro bono* assistance program. For example, if lawyers are asked to serve as volunteer administrative law judges frequently and repeatedly, they are more likely to be considered part-time judges, who (along with their partners and associates) may be disqualified. If, on the other hand, lawyers are asked to serve only occasionally and sporadically, there should be no personal or vicarious disqualification.

2. Mediators. The position of lawyers serving as volunteer mediators raises a question of first impression. Although the mediator's role is quite distinct from that of the administrative law judge, we believe that, in order to preserve the appearance of fairness and propriety, the same rules should apply as for the volunteer administrative law judges. The volunteer mediator will have a role as part of the perceived institutional structure of the forum, albeit temporarily, and volunteer mediators should be treated in the same way as a judge *pro tempore* or as a part-time judge. If a particular mediator is properly analogized to a part-time judge, the person should not practice law in the court in which such person serves. But if the particular mediator is more appropriately treated as a judge *pro tempore*, the person is barred from acting as a lawyer only in proceedings in which such person served as a mediator and in related proceedings.

In determining whether a particular mediator should be analogized to a part-time judge or to a judge *pro tempore*, one would look not only to whether the mediator serves on a continuing or periodic basis or on a temporary basis but also to how the mediator functions within the Commission's procedures. If a mediator merely meets with the parties without any consultation with Commission staff and reports the success or failure of the mediation effort to a Commission representative, there is little if any reason to apply the disabling principles that govern part-time judges. On the other hand, if the mediator regularly consults with the Commission's staff, and particularly if the mediator expresses views on the merits in reporting on a failed mediation effort, it seems more appropriate to apply the above rules governing part-time judges.

II.

The second question we address is whether a lawyer or law firm may represent complainants before the Commission as part of the *pro bono* assistance program if the lawyer or law firm is also representing respondents in proceedings before the Commission.

This question raises the ethical dilemma of issues conflict or positional conflict. There is no *per se* rule that a firm that represents respondents before the Commission may not represent complainants before the Commission. However, the Lawyer's Code provides that a lawyer shall decline proffered employment and shall not continue multiple employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing "differing interests." Differing interests are defined as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." DR 5-105(A) and (B), Definition (1).

The Comment to Rule 1.7 of the Model Rules offers guidance on this issue:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

See Philadelphia Bar Association, Professional Guidance Committee, Opinion 89-27 (March 1990).

We believe the approach of the American Law Institute's proposed Restatement, *The Law Governing Lawyers* §209, comment f (Tent. Draft No. 3, April 10, 1990), gives more helpful guidance. According to the proposed Restatement commentary, "a lawyer ordinarily may take inconsistent legal positions in different courts at different times where necessary to pursue the interests of different clients." The proposed Restatement appropriately distinguishes, in our view, between a representation with "indirect precedential effect on another client's legal position" (which presents no conflict) and arguing "both sides of an unsettled point of law before the same tribunal on behalf of different clients" (which presents a conflict because "the argument in each case would inevitably affect the other").[4]

In all cases, each lawyer proposing to represent a complainant in the *pro bono* program who also represents respondents before the Commission ought to make an independent determination of the likely effect of any perceived conflict on the clients' interests and decline representation or withdraw (unless both clients consent) whenever the lawyer believes the concurrent representation would materially and adversely affect either client or both. If the lawyers in the *pro bono* assistance program are sensitive to these considerations, there should be no difficulty as a general matter if lawyers or law firms represent complainants before the Commission on a volunteer basis even though such volunteers represent respondents as paying clients in unrelated Commission proceedings.

III.

The third question is whether a lawyer may represent complainants before the Commission or act as an administrative law judge or mediator for the Commission if the lawyer or the lawyer's firm represents the City or litigates against the City.

We first consider whether a lawyer may represent a complainant who has asserted a claim against the City or a City agency when the lawyer or the lawyer's firm concurrently represents the City or an agency thereof.[5] The Lawyer's Code and judicial decisions bar simultaneous conflicting representations (absent consent) because of the lawyer's duty of undivided loyalty to each client. Successive representations in substantially related matters are barred because of the risk that the former client's confidences and secrets will be disclosed. The ethical rules governing litigation against present or former clients and their rationale are discussed in "Developments in the Law — Conflicts of Interest in the Legal Profession," 94 Harv. L. Rev. 1244, 1292 (simultaneous representation), 1315 (successive representation) (1981), and N.Y. City 80-7.

The lawyer's obligation of undivided loyalty normally precludes suing a client, subject to the two-pronged exception of DR 5-105(C).[6] A lawyer may not simultaneously represent adverse interests because such representations may impair the lawyer's independent exercise of professional judgment on behalf of the clients or may result in a diminution in the vigor of the lawyer's representation of the clients. See *Cinema 5 Ltd. v. Cinerama Inc.*, 528 F2d 1384 (2d Cir. 1976).

According to at least one bar association ethics committee, the rule against simultaneous adverse representation is so strict that it prohibits litigation against a current client even with informed consent and even if the litigation is wholly unrelated to the assignment for that current client. See N.Y. County 671 (89-5) (*NYLJ*, May 30, 1989). In the opinion of the New York County Lawyers' Association Committee on Professional Ethics, although informed consent may allow counsel to act in a non-litigated matter against the interests of a current client, the need for zealous representation and the need to avoid the appearance of impropriety render inappropriate adverse representation in a litigated matter. Our Committee, on the other hand, in Opinion 80-7 held that the exception provided in DR 5-105(C) (see page 9 n.5, supra) applies in the litigation context, and we adhere to that view.

If the City is a litigant, it is important to determine which agency of the City is involved. Where a governmental body is organized into a number of different departments or agencies, each department or agency should be treated as a distinct person for purposes of the rule which forbids the concurrent representation of one client against another. N.Y. City 894 (Ethical Guidelines for *Pro Bono* Legal Services to City) (1978); N.Y. State 447 (1976).

We conclude that the rule barring a lawyer from suing an existing client would, except as provided in the next paragraph, prevent a volunteer lawyer from representing a complainant in a proceeding before the Commission against the City or a City agency if the lawyer's firm at the same time represents the City or that same agency on another matter. Obviously, representation is barred if the lawyer's firm is representing the City in the same matter. DR 5-105(A), (B); EC 5-15; EC 5-16.

We believe a lawyer or law firm may simultaneously represent a complainant before the Commission in a proceeding against a City agency while representing the agency on another matter if (i) informed consent is obtained, (ii) the matters are not substantially related, and (iii) no other circumstances suggest the duty of loyalty owed by the volunteer and the volunteer's firm to the complainant and to the agency in the other matter would be compromised.[7] We caution, however, that the informed consent test may be difficult to satisfy when judged in hindsight by a complainant alleging discrimination and, therefore, the Commission's *pro bono* assistance program should endeavor to avoid such instances of simultaneous adverse representation. In any event, even with consent it must be obvious that the lawyer can adequately represent the interests of both clients without impairment of the ordinary and natural character of the lawyer's representation and without adverse effect on the lawyer's capacity to exercise full professional judgment on behalf of each client. N.Y. City 80-7.[5] The requirement that it be "obvious" that the lawyer can represent both parties adequately is a "very stringent standard" and any doubt should be resolved against concurrent adverse representation. Id.

After a lawyer-client relationship has been terminated, on the other hand, a law firm may undertake a representation adverse to a former client so long as the new representation is not substantially related to the prior matter and so long as there is not a substantial risk that confidences of the former client will be put to hostile use. DR 5-105(C); EC 4-5; EC 4-6.[8] The volunteer lawyer would thus be barred from representing a complainant only if there is a substantial relationship between the litigation matter in question and a matter in which the lawyer or the lawyer's firm previously represented the City.

If a lawyer or law firm is representing a complainant as a *pro bono* volunteer in a proceeding against the City and is at the same time suing the City in another matter, we see no ethical problem.

If a *pro bono* administrative law judge or the judge's law firm represents the City and the City is a party in a proceeding before the Commission which the *pro bono* administrative law judge is asked to adjudicate, the judge should seek to be recused. Judicial Code, Canon 3(C). Similarly, if a *pro bono* administrative law judge is sitting on a case in which the City is a party and the judge or the judge's law firm is litigating against the City, the judge should seek to be recused. We believe these same principles should apply to mediators.

(1) The substance of the opinion was that the partners and associates of the part-time quasi-

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OUTSIDE COUNSEL

By Michael Starr

Employment Impact of the 'New' City Human Rights Law

ON JUNE 19, 1991, Mayor Dinkins signed into law a major revision of the city law against discrimination in employment, housing, and public accommodations.[1] This "new and improved" version of the City Human Rights Law (the Revised HRL) (to be codified at NYC Admin. Code 8-101 et seq.) takes effect on Sep. 16, 1991. As it relates to employment, the Revised HRL will undoubtedly require adjustments by the New York City business community. Those employers who do not adjust may find themselves subject to substantial financial exposure beyond what they previously thought existed for unlawful employment discrimination. This article summarizes those aspects of the Revised HRL that most directly affect the employment relation.

Several major substantive changes are made by the Revised HRL. These include significantly extending the protected classifications and expanding employer liability for the acts of employees, agents and independent contractors. Under the Revised HRL, employers may be disadvantaged unless they act affirmatively to police their own workforces so as to prevent unlawful discrimination before it occurs.

Expansion of Protected Classifications: As relates to employment, the revised ordinance expands the coverage of the former Human Rights Law to include marital status, criminal conviction, and arrest record. The former city law already prohibited employment discrimination based on age, race, creed, color, national origin, sex (renamed gender), alienage or citizenship status, handicap (renamed disability), and sexual orientation.

The revised law protects against discrimination not only those who actually belong in the protected class, but also those who are "perceived" to have the protected characteristic (§8-107, subd. 1) and those who have as "known relationship or association" with someone who has or is "perceived" to have the protected characteristic (id., subd. 20). Some

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THIS DOCUMENT HAS BEEN ADDED BY
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GOVERNMENT FILE, HOWEVER, WE
FEEL THAT IT MAY BE HELPFUL.

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applications of this definitional expansion are of quite obvious: the person who is believed to be, but is not, homosexual and the person who lives with an HIV infected individual would both be protected under the Revised HRL. How far the Commission or the courts will go with this expansion of coverage remains to be seen.

Disability Discrimination: With regard to disability discrimination, the former Human Rights Law defined "disability" is such a way that the burden was on the complaining party to show that he or she could get the job done, since the law protected only those "otherwise qualified" individuals who could satisfy "essential requisites on the job." The recently enacted federal Americans with Disabilities Act of 1990 (ADA) takes a similar approach.[1]

In a significant departure, the Revised HRL requires the respondent, not the complainant, to prove, as an affirmative defense, that "the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job ... in question" (§8-107, subd. 15 [b]). This means that the respondent employer must "prove a negative," which may be almost impossible in many cases.

Furthermore, under the Revised HRL, it appears that the employer must identify and offer a reasonable accommodation not only with respect to workers who identify themselves as handicapped but also with respect to any disability about which the employer should have known. (Id., subd. 151[a].) This is also a departure from the federal ADA, which expressly limits an employer's reasonable-accommodation obligation only to instances of a "known" disability.

The new law is more in keeping with the federal ADA when it comes to questions of drug and alcohol abuse. Under the Revised HRL, protection is afforded only to "a person who (1) is recovering or has recovered and (2) currently is free of [substance] abuse"; current users of illegal drugs are expressly excluded (§8-102, subd. 16[c].) In addition, employers are expressly permitted to ban workplace use of illegal drugs, prohibit working while impaired by alcohol or illegal drug use, and conduct drug testing if "otherwise unlawful." (§8-107, subd. 15[c].)

abuse is one area in which state employment discrimination law may be more restrictive than city or federal law. The State Division of Human Rights seems to persist in its view that drug and alcohol abusers cannot be excluded from employment unless their job performance is actually impaired.[2] Although there is still no definitive judicial approval of the State Division's statutory interpretation on this issue, it is nevertheless a part of the legal context that New York City employers must take into account.

Expanded Liability

The question of employer liability is one of the major areas in which the legislative drafters intended to correct perceived inadequacies of current city law. The legislative intent was to overcome New York State precedents that had limited employer liability to instances of knowing condonation of the discriminatory act.[3]

There is little doubt that the most troubling issues of vicarious employer liability occur in cases of discriminatory harassment — sexual, racial, ethnic or otherwise. At least since *Meritor Savings Bank v. Vinson*,[4] federal discrimination law has been that vicarious employer liability in such cases is based solely on common-law agency principles. Federal cases since *Meritor* show that common law agency principles do, in fact, provide a coherent body of law appropriate for resolving issues of employer liability for unlawful discrimination.[5]

The Revised HRL takes a decidedly different approach. Employers are strictly liable for the unlawful discriminatory practices of any employee or agent in areas other than employment, such as, public accommodations or housing. (§8-107, subd. 13[a].) Thus, for example, if a company's employee fails to serve a customer because he or she belongs to a protected classification, the employer business is liable and cannot argue that the employee was acting contrary to company policy. Existence of an effective program to prevent discrimination (as is described below) *may* avoid civil penalties or punitive damages but will not relieve the employer of responsibility for compensatory damages or affirmative relief.

With respect to unlawful discrimination in employment, employers are liable for the unlawful discriminatory practices of their employees or agents if (a) the individual involved "exercised managerial or supervisory responsibility," (b) the employer "knew" of the discriminatory conduct and "acquiesced in" it or "failed to take immediate and appropriate corrective action," or (c) the employer "should have known" of the conduct and "failed to exercise reasonable diligence to *prevent it.*" (Id., subd. 13[b]

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the huge number of discrimination claims that are lodged (not always fairly) against New York City employers each year.

Requiring an Early, Formal Answer: The Revised HRL makes the pleading process substantially more formal than it is under former law and carries potentially stringent penalties for seemingly minor procedural defaults. Under the new law, a written verified answer must be filed within 30 days after the complaint is served. (§8-111[a].) Upon request of the respondent, this period may be extended but only "for good cause shown" and only in accordance with Commission rules. (§8-111[e].)

It is an express requirement of the revised law that the answer "specifically admit, deny, or explain" each fact alleged in the complaint (unless the party lacks sufficient knowledge or information). (§8-111[b].) Any allegation "not *specifically* denied or explained" is deemed admitted, unless "good cause to the contrary is shown." (§8-111[c] (emphasis added).) All affirmative defenses must be stated in the answer.

If the answer is untimely, the administrative law judge assigned to the case may enter a default. That default may be opened upon application of the respondent but again, only "for good cause shown" and under such "equitable terms and conditions" as the administrative law judge may impose. (§8-119[e].) The respondent's filing a timely answer or having a default excused is a prerequisite for the right to "appear at [the] hearing in person or otherwise, with or without counsel, cross-examine witnesses, present testimony or offer evidence." (§8-119[f].)

During the legislative process there were assurances that employer concerns as to these excessively formal procedures were overblown because respondents have the apparently unlimited right to make corrective amendments to their answer at any time. (§8-111[g].) Hopefully, the Commission's rules of practice will keep faith with both this legislative intent and the basic precept of New York law that legal disputes should be decided on the merits, not by technical defaults.

Expanded Pre-Hearing Procedures: Under the Revised HRL, the Commission is charged with adopting rules of hearing and pre-hearing procedures that could include the full panoply of discovery devises utilized in court proceedings. The Commission is also authorized to issue orders compelling discovery "[w]herever necessary" and rule on all objections to discovery, even though it is simultaneously the "prosecutorial" agent for all complaints. (§8-117.)

The new law enumerates precise and severe sanctions for non-compliance with discovery orders. These sanctions include resolving the disputed issue adversely to the non-complying party or preventing that party from calling witnesses or cross-examining with respect to the claim or defense involved. (§8-118.) Nothing in the ordinance permits direct judicial review of Commission discovery orders or sanctions. Presumably, they are reviewable, but only on appeal from a final Commission order and, thus, after the Commission action has already affected the hearing record.

These new discovery procedures create a serious potential for Commission abuse. Respondents can easily become overwhelmed by oppressive discovery requests, which cannot realistically be checked because the Commission both judge and prosecuting attorney. Conceivably, the Commission could use its procedural powers to force innocent respondents to settle meritless claims merely to avoid excessive litigation costs.

New Investigative Powers: In addition to its power to issue subpoenas for documents related complaints of unlawful discrimination, which the Commission always had, the Human Rights Law revision authorizes the Commission to demand persons subject to investigation (a) to "preserve" relevant records they may have and (b) to continue to maintain records of that type if the Commission views them as relevant to its determination. (§8-114 [b].)

Employers are given the right to object to a Commission recordkeeping demand, but this objection is ruled on by the Commission itself and the demand must be complied with pending the Commission decision, unless the Commission directs otherwise. (§8-114[c].) Furthermore, although the Commission can apparently seek a judicial order compelling compliance whenever it wants (§8-114[f]), the employer who fails to comply is subject to the same sanctions applicable for non-compliance with discovery orders and, as noted, can challenge the Commission's order only on appeal from an adverse final determination. Under those circumstances, there may well be cases in which it is just too risky not to comply with a Commission investigatory order no matter how excessive or unfair it may seem to the targeted employer.

Mediation and Conciliation: The new law authorizes the Commission to endeavor to resolve complaints "by any method of dispute resolution" its rules may prescribe, including mediation and conciliation. (§8-115[a].) While this is a welcome recognition of the benefits of informal dispute resolution, there are hidden pitfalls for employers who accept a Commission invitation to conciliate.

The Revised HRL mandates that the Commission "embody" each conciliation agreement in a Commission order. (§8-115[d].) The significance of this is that those who violate a conciliation agreement "embodied" in a Commission order are subject to the same civil penalties as those who violate a Commission remedial order made after a final determination that unlawful discrimination has occurred. These civil penalties can be as high as $50,000, plus $100 a day for each day of violation. (58-124.) The Commission is frequently willing to include in conciliation agreements a provision that the respondent does not admit liability, but that conciliatory gesture has a hollow ring when one understands the legal significance of conciliating with the Commission under the new law.

It must also be noted that conciliation agreements "embodied" in a Commission order would be subjected to the Commission's unilateral power to reopen, vacate or modify any order "whenever justice so requires, in accordance with [its] rules." (§8-121.) Unless the rules adopted by the Commission adequately circumscribe its power to reopen, this could be an additional impediment to voluntarily conciliation. After all, respondents may be reluctant to conciliate and provide the affirmative relief required by conciliation agreements if, sometime later, the Commission could re-

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(emphasis added).)

There are several significant features of these rules for employer liability. First, the employer is made liable for the conduct of supervisory personnel, even if there is no exercise, actual or implied, of the supervisor's superior economic power. This might happen, for example, if a supervisor harasses an employee of an entirely separate department. Second, an employer is "deemed" to know that unlawful discrimination occurs if any manager or supervisor knows it. (Id., subd. 13[b](2).) This is clearly intended to cover such cases as when, for example, the foreman of the company's maintenance crew turns a blind eye to co-worker sexual harassment of his sole female subordinate, but it may have a broader and, as yet, undefined reach. Third, the idea that an employer is liable for failing "to exercise reasonable diligence to prevent" discriminatory practices it "should have known" about suggests that employers are implicitly required to take affirmative action to ferret out and fix any unlawful discrimination occurring beneath the level of corporate visibility.

That such an affirmative obligation exists is implied by provisions of the Revised HRL under which employers can mitigate civil penalties and punitive damages or, possibly, avoid liability entirely if they (1) establish "policies, programs and practices for the prevention and detection of unlawful discriminatory practices" and (2) maintain a record of no or "relatively few" prior incidents of unlawful discrimination (apparently without regard to the pervasiveness or seriousness of the incidents). (Id., subd. 13[d], [e].) It is, however, the employer's burden to prove that these conditions are met.

In addition, the Revised HRL authorizes the Commission to establish by thorough rule making model preventive programs for employers to adopt. Employers who can prove their adherence to the Commission's model are immunized from any civil penalties or punitive damages which could otherwise have been imposed for unlawful discrimination.

Disparate Impact

In an apparent response to debates over the proposed Civil Rights Act of 1990[6] — which was passed by Congress but vetoed by President Bush — the Revised HRL contains a special provision to address "disparate impact" discrimination. The new city law expressly provides that a *prima facie* case of unlawful employment discrimination can be established by showing that "a policy or practice . . . or a group of policies or practices. results in a disparate impact to the detriment of any [protected] group"; no proof is required as to which specific component or components caused the adverse effect. (§8-107, subd. 17[a].) The respondent can then establish, as affirmative defense, that *each* such practice or policy "bears a significant relationship to a significant business objective of the [employer] or does not contribute to the disparate impact." (Id.)

In some ways, the new law shows a greater sensitivity to legitimate business concerns than appears in some congressional proposals to amend federal discrimination law. Notably, the city law would permit employers to defend their practices by showing that they serve a "significant business objective." The objective is expressly not limited to successful job performance, but could include other legitimate business needs as well, although what those might be is left undefined.

In addition, the Revised HRL states expressly that its "disparate impact" provisions are not "to be construed to mandate or endorse the use of quotas" (id., subd. 17[c]). At the same time, no limitation is placed on the scope of Commission authority to order "affirmative action" as a remedy to unlawful discrimination; and court-ordered remedies or settlements that "are otherwise in accordance with law" are expressly unaffected with the "no-quota" provision. There is, one might say, a built-in tension in the Revised HRL on the question of employment quotas. Only time will tell how that tension will work its way out.

Procedures, Remedies

Significant changes are made in administrative procedures and remedies applicable to claims of unlawful discrimination. There is little doubt that the legislative drafters viewed this as a way to reduce the extended delays in resolving complaints for which the City Commission has long been criticized. Some of these changes could, however, actually cause further delays and increase litigation costs for employers who may have done no wrong. In addition, other changes could impede voluntary mediation and conciliation. Yet, such voluntary resolution of disputes may be the only realistic way to deal effectively with

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open the matter virtually at will and determine that even more relief is required.

Dismissals

Under Revised HRL, the Commission is given discretion to dismiss complaints for administrative convenience. (§8-113[a].) This authority undercuts the election of remedies provisions of the new law that ostensibly prohibit a complainant from filing with the Commission if a different legal proceeding has commenced (§8-109[f]), or maintaining a private lawsuit if a Commission complaint has been made (§8-502[a]). However, a person who has filed a Commission complaint that is dismissed for "administrative convenience" may then file a court action "as if" there had been no administrative proceeding. (§8-502[b].)

The most troubling aspect of this is the explicit protection given to complainants who refuse "to accept a reasonable proposed conciliation agreement." (Id.) There may be little incentive for employers to be forthcoming in conciliation if recalcitrant complainants can reject a *reasonable* proposal, obtain administrative-convenience dismissal of the administrative complaint and then use the employer's offer as a "floor" for even greater demands in a subsequent civil action.

Civil Penalties

A major addition to the revised Human Rights Law is the authority given the Commission to impose civil penalties in addition to any other remedies it might direct for unlawful discrimination. The civil penalty for an unlawful discriminatory act can be up to $50,000, or in the case of "willful, wanton or malicious" acts up to $100,000. (§8-126[a].)

There is also a penalty of up to $50,000 and $100 per day for failure to comply with a Commission order, including an order embodying a conciliation agreement. (§8-124.) No state-of-mind standard is specified for the latter penalties, so that merely negligent or inadvertent noncompliance can conceivably be sufficient for liability. If there is a willful violation of a Commission order, there are criminal penalties of up to one year's imprisonment and a $10,000 fine. (§8-129.)

Civil Actions

Under the former City Human Rights Law, there was no provision authorizing court actions on claims of unlawful discrimination. Commission proceedings were the sole means of enforcement. The Revised HRL changes that system by creating new civil actions.

Two of the new civil actions have a direct bearing on alleged employment discrimination. These include: (1) a new mechanism for government-initiated remedies for "systematic discrimination" and (2) a right of individuals who claim to be aggrieved by unlawful discrimination to go directly to court for redress. Although these latter two civil actions duplicate, in large degree, court actions already available under existing state and federal law, they do expand the range of remedies employers may be required to provide for unlawful discrimination.

Systematic Discrimination Action: The revised law authorizes civil actions on behalf of the Commission or the city 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 [the HRL]." (§8-402[a].) Systematic discrimination in employment with respect to hiring, promotion and discharge are among the explicit targets of this new authority.

Prior to commencing an action for systematic discrimination, the Corporation Counsel may initiate investigations and has subpoena power in that regard. There is no express prohibition against utilizing in these cases information obtained by the Commission through its discovery and investigative recordkeeping procedures, which are more sweeping and less subject to judicial oversight than is the subpoena power given to the Corporation Counsel. Consequently, employers who comply with Commission recordkeeping demands must understand that the information supplied could conceivably be turned over to the Corporation Counsel for use in a systematic discrimination lawsuit.

Remedies available in systematic discrimination actions include injunctive relief, punitive as well as compensatory damages, and all forms of affirmative action that the Commission is authorized to grant. Furthermore, a civil penalty of up to $250,000 may be imposed for systematic discrimination where needed to "vindicate the public interest." (§8-404.) The statute expressly provides that civil penalties may be imposed *in addition to* any punitive damages or other affirmative remedies that might also be awarded.

Individual Civil Actions: The revised law also authorizes persons "aggrieved" by an unlawful discriminatory practice to sue for both compensatory and punitive damages, injunctive relief and "such other remedies as may be appropriate." (§8-502[a].) There is a three-year statute of limitations, which is tolled for prior administrative proceedings dismissed for "administrative convenience." In the court's discretion, the prevailing party may be awarded costs and reasonable attorney's fees.

The issue of punitive damages for unlawful discrimination is a much debated topic. The proposed Civil Right Act of 1990 allowed for punitive damages but only for intentional discrimination committed "with malice, or with reckless or callous disregard to the federally protected rights of others." Furthermore, such damages were limited to $150,000 or actual compensatory damages, whichever is greater. Various versions of the civil rights legislation presently before Congress contain similar provisions. Neither restriction, however, is contained in the Revised HRL. Without statutory limitation, there is the ever-present possibility of a staggering punitive damages award.[7]

The extensive relief available under the HRL certainly increases the likelihood that truly aggrieved persons will have their rights fully vindicated. It also "ups the ante" for all civil actions under the discrimination law, which makes them much more difficult to settle and gives complaining party an incentive to by-pass the Commission and go directly to court. It may legitimately be asked whether this will unwisely diverts resources to lawsuits rather than to corrective, remedial and preventive measures that, in the long run, would more effectively serve the public good.

The Revised HRL is an unmistakable departure from the traditional approach for enforcing laws against employment discrimination. Its tenor is more formal and more punitive than prior law, with wide latitude given to the Commission for the enforcement of human rights. Hopefully, the Commission will adopt reasonable policies and procedures and in the exercise of its powers, assure the employer community that it will be evenhanded toward those who have been merely accused, but not yet convicted of unlawful discrimination.

Meanwhile, employers must make adjustments to minimize their potential exposure. Policies will have to be reviewed to avoid inadvertent violations and to satisfy the implicit statutory duty to "prevent and detect" unlawful discrimination. While it is still unclear just how much protection these preventive programs will provide, reasonable steps involving limited expense can be taken now.

(1) 42 USC §12101 et seq.

(2) See SDHR Gen. Couns. Mem., dated Oct. 28, 1987, re: *Parris Moxley* v. *Regional Transit Authority* ("a decision to discipline or fire an employee solely because he or she is suspected of being a drug user on the basis of a "positive" urinalysis, without regard to the employees actual job performance, would constitute illegal discrimination"); SDHR Gen. Couns. Mem., dated Nov. 21,1979, re: *Perez v. State of New York et al.* But see *Porcello* v. *General Motors Corp.*, Case No. 3-E-D-85-103394 (SDHR Jan. 18, 1990) ("a social or casual drug user is not disabled within the meaning of the [State] Human Rights Law").

(3) See, e.g., *Totem Taxi v. State Human Rights Appeal Bd.*, 65 NY2d 300, 305, 491 NYS2d 293, 295 (1985) ("the employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it"); *State University v. State Human Rights Appeal Bd.*, 81 AD2d 688, 438 NYS2d 643 (3d Dept. 1981), aff'd, 55 NY2d 896, 449 NYS2d 29 (1982).

(4) 477 U.S. 57 (1986).

(5) See, e.g., *Daniels v. Essex Group Inc.*, — F2d —, 1991 U.S. App. LEXIS 16158 (7th Cir. July 24, 1991); *North v. Madison Area Assoc. for Retarded Citizens*, 844 F2d 401,407 (7th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F2d 1406, 1418 (10th Cir. 1987); *Sparks v. Pilot Freight Carriers Inc.*, 830 F2d 1554, 1558-60 (11th Cir. 1987); *Yates v. Avco Corp.*, 819 F2d 630, 635-36 (6th Cir. 1987).

(6) S. 2104, 101st. Cong., 2d Sess. (1990).

(7) See *Thoreson v. Penthouse International Ltd.*, 149 Misc2d 150, 563 NYS2d 968 (Sup.Ct. N.Y. Co. 1990) (awarding $4 million in punitive damages and $60,000 in compensatory damages in sexual harassment case) (size of punitive damage award based in part on net worth of defendant).

Michael Starr *is counsel to Parker Chapin Flattau & Klimpl. He is a member of a committee of the New York Chamber of Commerce and Industry, which represented business interests in the legislative drafting of the statute. Parker Chapin associate* **Robert D. Webb,** *assisted in the preparation of this article.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, I will turn to the general audience.

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

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

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

1
2 CITY COUNCIL
3 CITY OF NEW YORK
4 ----------------------------------x
5 In the Matter of the Hearing
6 On
7 General Welfare. Prop. Int. 465-A
8 and 536-A.
9 ----------------------------------x
10 City Hall
11 New York, New York
12 June 3, 1991
13 1:20 p.m.
14
15 B E F O R E:
16 Samuel Horwitz, Chairperson
17 David Walker, Staff Counsel
18
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PEPPER COURT REPORTING SERVICE
(516) 483-2900

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3 THE CHAIRPERSON: Good afternoon.

4 I am Councilman Horwitz, of the General

5 Welfare Committee.

6 We are waiting for some work to be done

7 on a new revision in the bill. We will not be able

8 to start until we can start with the full bill,

9 discuss the full bill in its entirety.

10 If you have some patience, we will

11 start in a few minutes. Sorry about the delay.

12 (Recess.)

13 THE CHAIRPERSON: The Committee on

14 General Welfare is now in session.

15 Again, I apologize for the delay. We

16 are ready to go now. I want to make an opening

17 statement here.

18 I want to welcome the members of the

19 committee. I have Council Member Miriam

20 Friedlander from Manhattan, Herbert Povman from

21 Queens, Karen Koslowitz from Queens, a new member,

22 Council Member Dear from Brooklyn, and Walter

23 Ward.

24 I want to indicate that the proposed

25 Intro. No. 465 is the new human rights bill, and

1
2 and the proposed 536-A, is the human rights bill.
3 I am pleased to announce that the
4 council and the administration have reached
5 agreement on all issues that distinguish the two
6 aforementioned bills, and have a consolidated bill,
7 465-A, which reflects the provisions that have been
8 agreed upon by the council and the Mayor.
9 Thus the , proposed Intro 465-A is the
10 document that we will focus on during today's
11 hearing.
12 As many of you know, there were primary
13 situations in which the council and the Mayor
14 differed on many issues, on the Commission and the
15 civil penalties. We have agreed to review the
16 issue of Commission autonomy one year after
17 enactment of the legislation, and also with respect
18 to civil penalties against the city.
19 If a city agency violates a final order
20 of the Commission, the full details of both of
21 these provisions are contained in the Committee
22 report, and I am sure that the administration will
23 speak about these issues during its testimony.
24 I believe that we all recognize the
25 importance of the legislation that we are

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2 considering today, to say the least. This is a
3 milestone legislation, and arriving at the final
4 draft of the bill, the committee was in constant
5 contact with business and real estate and religious
6 organizations, educational institutions and a wide
7 range of human rights organizations.
8 Working on the legislation was indeed
9 an intricate process. I am confident that the
10 present draft of proposed 465-A addresses all of
11 the various concerns raised by this legislation in
12 a reasonable manner.
13 It is clear that this bill will put the
14 city's law at the forefront of human rights laws,
15 and faced with restrictive interpretations of human
16 rights law at this time, particularly attention
17 would be given to section 9-130, of proposed Intro
18 465-A, which provides that the provisions of the
19 chapter, of this chapter shall be construed for the
20 accomplishment of the proposed thereof -- of the
21 purpose thereof.
22 It is imperative that restrictive
23 interpretations of the state or federal laws not be
24 imposed upon the city.
25 With that much said, I will begin the

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2 hearing and call up the administration. The office

3 of Management and Budget, Victor Kovner, the

4 Commissioner of Human Rights, Commissioner DeLeon

5 and other people.

6 Would you identify who will be sitting

7 there speaking on behalf of the city

8 administration.

9 MR. DeLEON: Good afternoon. My name is

10 Dennis DeLeon.

11 With me is our legal counsel, Craig

12 Gurian, legal counsel in the Law Enforcement Bureau

13 and myself, and Ms. Cohen from the Law Department

14 and Mr. Kovner. Both of these people have worked

15 long and hard with your staff.

16 THE CHAIRPERSON: Yes.

17 MR. DeLEON: Yes.

18 THE CHAIRPERSON: I am glad that we

19 have got to this point and I hope today that we can

20 pass the legislation and go beyond the road to

21 doing the things that the legislation says.

22 Commissioner.

23 MR. DeLEON: Dennis DeLeon,

24 Commissioner, chair of the City Human Rights

25 Commission.

1
2 We have been before this committee
3 several times in the past, and talked about the
4 different provisions of the law. I think that it
5 is a tribute to the City Council, that you would
6 have taken this action, this with the Mayor's
7 office on such an aggressive and forward looking
8 piece of legislation.
9 I think that this will be seen in

10 retrospect as one of the major accomplishments of
11 the City Council, during fiscal year 1991.
12 So, I think it is a major legislation
13 that will forever go to your benefit.
14 THE CHAIRPERSON: When I acknowledged
15 the members of the committee, excuse me--.
16 Sitting on my right is Walter Ward from
17 Queens. I apologize.
18 MR. DeLEON: Let me add to this. We
19 worked with your staff in closely trying to
20 identify legitimate concerns of the nonprofit
21 sector of religious institutions, of employers, of
22 employer organizations, and I think all the, I
23 think that the actual final product reflects that
24 input, reflects the desire to serve both interests,
25 both the legitimate interests of business and the

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2 legitimate interest of those that care about human
3 rights enforcement.
4 It is a very thoughtful and subtle
5 compromise, to enable both sides, both interests to
6 be expressed adequately. It is earth shattering,
7 groundbreaking and earth shattering legislation and
8 it will forever be to your credit.
9 MR. KOVNER: Let me add, Mr. Chairman
10 -- Victor Kovner, the Corporation Counsel -- I
11 too would like to thank the enormous efforts of the

12 committee staff, David Walker on your left, who has
13 worked together with Andrew Cohen of the Law
14 Department, so many hours to put together what I
15 think is a remarkable piece of legislation, in
16 which the council can take great pride.
17 The Mayor, this morning, expressed once
18 again his enthusiasm and that we have before us,
19 before you, an outstanding piece of legislation
20 that moves the city forward in an important area,
21 more important area in protecting the human rights
22 of all who live in the City of New York.
23 There is a wide range of subjects.
24 There are remedies available to all who
25 face discrimination, that their claims will be

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2 fairly and fully considered, and in terms of the
3 institutions affected by this, both the nonprofit
4 and the private sector, and the for profit
5 institutions. I think we heard them and have
6 addressed their principal concerns, so I think that
7 we have, it is rare that we can get such broad
8 support for so difficult a piece of legislation and
9 that is in large part because you, Mr. Chairman,
10 have stayed with it, and given so much of your time
11 to it; and I personally want to express my
12 appreciation for that.
13 MR. DeLEON: Let me add to the

14 appreciation to the Chair.
15 I have worked on a lot of bills over
16 the years, where I was with the Corporation
17 Counsel, and now with the City Human Rights
18 Commission and you recognize leadership when you
19 see it. What you provided on this bill was true
20 leadership, that has seen it through despite the
21 tough times and hard questions.
22 We always worked it out, pursuant to
23 your instructions and the Mayor's.
24 Thank you very much. I have similar
25 thanks to the staff and the hard work that they

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2 provided on the issue.
3 THE CHAIRPERSON: Let me say this.
4 I as the chairman found that it was
5 very nice, in the meetings that we had, and we were
6 able to discuss things intelligently and at no time
7 did we yell and scream. We tried to do this thing
8 and do it right.
9 It was very nice working with all of
10 you, your people and and Victor Kovner and Dennis
11 DeLeon, and all your people. I want to thank Dave
12 Walker, counsel to my committee, who put a lot of
13 hours and work into it. I thank him publicly for
14 all the work that he did on it.
15 We will get into discussion on the

16 bill, because there are a few questions that we
17 need a little clarification for the people out
18 there, some people that came to testify on the
19 bill. We want to let them know, that everything is
20 clarified.
21 Some of the questions here may sound
22 familiar to you, but I think that they have to be
23 spelled out. If you don't mind, it might be a
24 little repetitious, of what we asked at the
25 previous meetings, but now that the final bill is

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2 before you, it should be clarified.
3 What is a desperate impact case?
4 MR. DeLEON: A desperate impact case is
5 a case in which an employer practice, a test or
6 some standard, has a differential impact,
7 minorities or women, it affects them more than any
8 other group.
9 It has, it is a disproportionate impact
10 on one group, one of the protected groups.
11 All that does basically is gets you
12 past the first stage of the case, that you must
13 show as a plaintiff a desperate impact for a case
14 that you are relying upon, adequate statistics or
15 job practices to show discrimination, as opposed to
16 a case of discriminatory intent.
17 In an intent case, you look to see what

18 was said, what was done by the employer who
19 allegedly discriminated. An impact case is
20 important because you don't always have statements,
21 you don't always have things to infer
22 discriminatory intent, so what the law has done
23 over the years is said, well, we will look at the
24 impact of the practices that you think led to
25 discrimination and see whether they have a

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2 disproportionate impact on minorities and women, et
3 cetera. If it does, then the employer has a burden
4 of showing that it is a business necessity, that it
5 has some job relationship.
6 That is the rationale for including
7 it. It is really a code differentiation also of
8 the existing case law decision in the council.
9 MR. KOVNER: I would add, this is an
10 area where we have gone beyond federal law. New
11 York City law, unlike what the Supreme Court did,
12 in the U.S. code, shifts the burden of proof and we
13 are not, we will not be bound in the council, by
14 the unfortunate decisions of the U.S. Supreme Court
15 a few years ago, and the appropriate burden will
16 rest where it should, with respect to the
17 employer.
18 THE CHAIRPERSON: How does the standard
19 of employer liability under the two bills differ

20 from the existing standard? The one bill, I should
21 say.
22 MR. DeLEON: I will ask Craig Gurian
23 from my staff to answer that question, please.
24 MR. GURIAN: In the housing area, it
25 clarifies and codifies existing law that housing

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2 providers are reliable for the acts of their
3 employees and agents; they are liable.
4 In the areas of public accommodations
5 and employment, it takes some new steps to clarify
6 that an employer is going to be held liable for
7 actions that are known, committed by managerial or
8 supervisory personnel, and is also going to be held
9 liable when the employer should have known both the
10 conduct and either -- and failed to take
11 reasonable steps to prevent that behavior.
12 In addition, there is another step that
13 has been taken, which is liability for the acts of
14 independent contractors when they are carrying out
15 work in furtherance of an employer's business, and
16 committed discriminatory acts.
17 In that circumstance, where the
18 employer knows and acquiesces or condones the
19 discriminatory behavior, that employer will be held
20 liable as well.
21 MR. KOVNER: The legislation goes on to

22 provide, I think wisely, for the opportunity for
23 the employer to mitigate his or her liability for
24 penalties or punitive damages, by proving the
25 establishment of the policies, programs and

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2 procedures, the prevention and detection of
3 discrimination in the work place.
4 I think that is the kind of salutatory
5 remediation that this legislation encourages.
6 MR. DeLEON: I think that's important
7 to see it as an incentive for employers to do the
8 right thing, because if they do the right thing and
9 have the structure set up, and there is a claim of
10 discrimination, which possibly proves true, but the
11 employer is not directly involved with, the
12 mitigation provision enables the employer to speak
13 out against the fines, based upon their actions.
14 It is a helpful provision, which will
15 make a difference.
16 THE CHAIRPERSON: Thank you.
17 How would the bill, have sanctions to
18 protect people with disabilities against
19 discrimination, affect employers in drug testing
20 policies?
21 MR. GURIAN: Here again, I think the
22 concerns of the business community were heard in
23 the drafting process, and there is a provision in

24 the bill that makes clear that legitimate concerns
25 in relation to otherwise lawful drug testing are

1
2 not described by this legislation.
3 MR. KOVNER: If the practices are
4 lawful, they are, they will not be impeded in the
5 slightest legislation -- (inaudible).
6 THE CHAIRPERSON: If an employee is a
7 reformed drug abuser and starts using them again
8 and begins to behave radically on job, missing days
9 and showing up late, would the employer be
10 prevented from firing the employee?
11 MR. DeLEON: They would not be
12 prevented in firing them. If the employee resumed
13 their drug additive status, that is not a covered
14 disorder, therefore would not be a disability.
15 Therefore, for practical purposes, it
16 would be treated as if any other abhorrent behavior
17 by an employee, which would be punished or
18 disciplined by the management. No, there is no
19 inhibition to firing an employee because they are
20 on drugs, actively on drugs.
21 THE CHAIRPERSON: I see. Okay.
22 Schools and other educational
23 institutions are included under the bill's
24 definition of placing-- place or provider of
25 public accommodations, whether they are currently

1
2 exempt, whereas they are currently exempt in the
3 definition.
4 What is the impact of including
5 educational institutions of providers of public
6 accommodations?
7 MR. DeLEON: In areas of delivery of
8 services, it will enable children or parents who
9 have a claim that one group of kids of one race or
10 one ethnicity are being excluded from certain
11 common activities.
12 For example, in the schools, it would
13 not require us to look into pedagogical questions,
14 which make it clear in the legislation that we will
15 not inquire into the teaching aspects of school,
16 but we are looking instead at the enrollment, at
17 the extension of different opportunities to give to
18 the school, making sure they are equal.
19 THE CHAIRPERSON: Well, including
20 schools under the definition of provider of public
21 accommodations, for schools to adopt a
22 multicultural curriculum or include information
23 about women's contributions to our country's
24 development and in their curriculum.
25 MR. DeLEON: We made a clear point of

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2 not addressing pedagogical issues. The Commission
3 urged school boards to do that.
4 We don't have the authority in this
5 legislation, as I read it, currently, to require
6 multicultural anything or women settings.
7 MR. KOVNER: It would not reach
8 curriculum at all.
9 THE CHAIRPERSON: Are there any members
10 of the committee that have any questions that they
11 would like to ask?
12 Carol Maloney, who is not a member of
13 the committee, but who is a co-sponsor of the
14 bill. Yes.
15 COUNCILMEMBER MALONEY: I would like to
16 commend our Chairman and David Walker for his hard
17 work, for chairing it.
18 The Mayor's office, you have shown a
19 commitment and concern and very deep caring about
20 the issue. All of you supported it and worked very
21 hard.
22 There is only one thing, children in
23 public accommodations was not added as a
24 discriminatory issue, under Section 4107, being
25 unlawful discriminatory practices.

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2 As a mother of two small children,
3 where we have been barred from restaurants, just
4 because I am with a child, I feel is
5 discrimination. It is one thing if they were
6 crying or misbehaving, but if they are politely
7 sitting in their chair, and wanting to order
8 something to drink and being told to leave because
9 they are children, I feel that that is a
10 discrimination and I would like to put it forward,
11 as an amendment to the bill, and --
12 MR. DeLEON: May I respond.
13 After the issue was raised, I had my
14 staff go back and look at the legislation again.
15 It was my impression that age discrimination, based
16 upon age, was covered for public accommodations.
17 Therefore, the protection that you
18 desired is already there.
19 COUNCILMEMBER MALONEY: You believe age
20 covers children?
21 MR. DeLEON: Yes. On page 12 of your
22 copy, I believe, the Commission is going to issue
23 regulations after the hearings, that would add the
24 age component. We are empowered at the top of page
25 12 there, the amendment adding age would not take

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2 effect until the commission promulgates its rules
3 setting forth any exemptions.
4 I am sorry. The report that came with
5 the bill. I apologize.
6 COUNCILMEMBER MALONEY: I did not see
7 it in the bill.
8 MR. DeLEON: The report itself, not the
9 bill. The word age is part of the bill, for public
10 accommodations. We are looking for the exact
11 section now.
12 MR. KOVNER: By barring discrimination
13 on the grounds of age, that does not simply bar
14 discrimination as to seniors, but as to children as
15 well.
16 COUNCILMEMBER MALONEY: I would like to
17 see it in the bill. I would like to see where it
18 is in the bill and not in the memo of support.
19 MR. DeLEON: I will refer you to page
20 25, the very bottom section, four, where it says
21 public accommodations. If you go to the next page
22 you will see the word age or gender. The very top
23 of the page. Page 27.
24 COUNCILMEMBER MALONEY: You feel that
25 that covers it?

1
2 MR. DeLEON: Unlawful discriminatory
3 practice against any person, being the owner, et
4 cetera, et cetera, of any place, public
5 accommodation or provide public accommodation --
6 and we are missing a page here.
7 The version that I have of the City
8 Council bill is missing a page.
9 Could have actual or perceived race,
10 creed, color, national origin, age, gender,
11 disability, marital status -- et cetera.
12 COUNCILMEMBER MALONEY: Very well.
13 THE CHAIRPERSON: I think that covers
14 it.
15 Does anyone else have any questions?
16 Thank you.
17 I will relate it to the Mayor,
18 personally.
19 I appreciate the time and cooperation
20 and work that we did on the bill together, and the
21 cohesive working together of the City Council and
22 the Mayor's office.
23 I certainly hope that this will
24 continue with respect to other milestone
25 legislation as this is. This is a great bill and I

1
2 am very pleased to be the chairman of the
3 committee, and the members of the committee, I am
4 sure, will be jumping on to get co-sponsorship of
5 this and we will have many more sponsors when we
6 are finished.

7 Thank you. Thanks again, and we will
8 now have some people testify.
9 First, we will call on Dianne Dixon.
10 Ms. Dixon, would you identify yourself
11 for the record and your organization.
12 MS. DIXON: Yes. Good afternoon.
13 My name is Dianne Dixon, and I am
14 associate, assistant counsel for the Center for Law
15 and Social Justice. I am here today as the
16 Center's representative to the ad hoc coalition on
17 civil rights. Formed last fall, the Coalition,
18 composed of civil rights litigators and advocates,
19 reflects a broad cross section of diverse
20 interests, including racial minorities, the
21 disabled, gays and lesbians, women's groups and
22 religious organizations. Our common goal is the
23 promotion of human and civil rights in New York
24 City.
25 Let me begin by congratulating the

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2 Committee on General Welfare for recognizing the
3 importance of strong civil rights laws especially
4 in these times when economic woes have increased
5 fear and intolerance among many who prefer
6 scapegoats to solutions. I would like to thank
7 this committee for scheduling this hearing and
8 thereby providing an opportunity for public comment

9 on the pending bill.
10 As you may remember, the coalition
11 testified on these bills at the last hearing, which
12 was held on April 22, 1991. At that time we
13 expressed our concern that the Mayor's version of
14 amendments would greatly erode the autonomy of the
15 New York City Commission on Human Rights. Given
16 that the Commission is entrusted with the authority
17 to enforce the city's human rights law, we were
18 distressed by the provisions in the Mayor's bill
19 which sought to undermine that authority by
20 requiring the Commission to refer those cases
21 appropriate for civil action to the Corporation
22 Counsel's office. We were pleased to see that the
23 council's version protected the Commission's
24 autonomy. Unfortunately, the current revisions in
25 the council's bill make it impossible for us to

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2 support either version on this issue.
3 Now, under both bills, the Commission
4 must defer to the Corporation Counsel's office for
5 representation in a civil action. Apparently, what
6 makes the provision palletable to the council is
7 the addition of a requirement that this issue of
8 autonomy be reexamined, one year after the
9 enactment of the bill. Yet, it is a mystery, at
10 least to Coalition members, why this body believes

11 such a requirement would alleviate the obvious
12 conflict of interest problems inherent in the
13 current scheme and brought to the attention of the
14 body by almost every speaker who testified at the
15 last hearing, excluding obviously Victor Kovner.
16 Additionally, given that this
17 reexamination will be conducted by the Corporation
18 Counsel, and the Chairperson of the City Commission
19 on Human Rights, it is doubtful, at best, that a
20 meaningful scrutiny of the procedures will take
21 place. At the very least an independent body
22 should be commissioned to study the issue.
23 Anything less reeks of pretense and sham.
24 The other troublesome provisions which
25 the Coalition would like to address relate to the

1
2 issue of civil penalties. As currently drafted,
3 both bills allow an employer to mitigate penalties
4 and damages much too easily. Whenever an employer
5 demonstrates that he or she adopted one or more of
6 a list of various anti-discrimination policies and
7 programs, prior to the discriminatory conduct
8 alleged in the complaint, the bills required that
9 these programs be considered to mitigate against
10 the imposition of civil penalties. Yet, under both
11 current state and federal law, an employer is
12 required to have an anti-discrimination policy in

13 place, which takes the form of the very programs
14 listed in the bills. Thus, you reward an employer
15 who complies procedurally with the existing law,
16 despite the fact that the same employer has been
17 found, either by the Commission or a court of law,
18 to discriminate. This is insane and sends a clear
19 signal to employers that this city is not serious
20 about stopping discrimination in the workplace.
21 The Coalition believes that the better
22 procedure is to change one word, in Section
23 8-107(13)(d).
24 I am not sure what the section is in
25 the new hot off the press bill that you have, but

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2 that is the number in the old bill.
3 Instead of stating that the listed
4 factors shall be considered in mitigation of the
5 amount of civil penalties, the provision should
6 read that the factors may be considered. In this
7 way, employers who have the programs in place, in
8 name only, will not be allowed to use these paper
9 policies to escape civil penalties.
10 Finally, we urge the Committee to allow
11 the imposition of civil penalties against city
12 defendants at the time liability is determined,
13 rather than require that a finding of contempt be
14 made. Civil penalties are always appropriate
15 whenever the public or the society at large has
16 been harmed by the egregious conduct of the
17 defendant. The intention is to compensate that
18 public harm and to deter others from engaging in
19 the in the unlawful conduct. This underlying
20 purpose for civil penalties does not change merely
21 because the defendant is a city agency. Thus, city
22 agencies should not be given a second chance to
23 discriminate as the triggering event for the
24 imposition of civil penalties.
25 Additionally, we agree that it would be

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2 inappropriate to deposit the funds collected from
3 city defendants into the city treasury. However,
4 we recommend that these monies be used to finance
5 anti-bias education programs, which are conducted
6 by non-city agency consultants. In this way, the
7 civil penalties compensate the public harm, punish
8 the city defendant and deter, through education,
9 future discrimination.
10 In closing, the Coalition wishes to
11 thank the Committee on General Welfare for its work
12 in bringing forth legislation which will truly
13 strengthen the protection of our rights enjoyed by
14 every citizen in the city.
15 We hope that a revised human rights law
16 for New York City will be enacted quickly.

17 Thank you.
18 THE CHAIRPERSON: Thank you very much.
19 Next is Bruce Egert.
20 MR. EGERT: Good afternoon
21 Mr. Chairman. My name is Bruce Egert. I am a
22 practicing lawyer here in New York County and I am
23 also the Chair of the Civil Rights Committee of New
24 York, regional office of the Anti-defamation
25 League, and a member of the National Legal Affairs

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2 Council.
3 I previously testified before this
4 Committee in support of this bill, and I am not
5 going to go over the reason for our support, but I
6 wish to underscore it. We are in favor of the
7 bill. I refer you, Mr. Chairman, as well as the
8 Committee Members to the two page testimony that I
9 have introduced here today and I will just go over
10 it briefly, in the short amount of time that we
11 have.
12 The problems that we have with the
13 human rights bill, as proposed, is that it allows
14 the Corporation Counsel, the sole right to litigate
15 cases in court when it chooses to delegate the
16 responsibility to the Commission.
17 We feel that this would weaken the
18 enforcement of the bill and create a conflict of
19 interest. A number of people have mentioned this
20 fact. It is unacceptable to have a conflict of
21 interest, when the lawyer for the Corporation
22 Counsel is in effect litigating against itself.
23 Secondly, the ADL reaffirms its long
24 held position of being against quotas. That has
25 become an issue in the federal legislation, now

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2 being considered. ADL supported the 1990 Civil
3 Rights bill, it also supported, now supports the
4 1991 Civil Rights bill, but it is against quotas.
5 The bill before this committee right
6 now does make mention of the disparate impact, and
7 we feel that this will solve the problem, so long
8 as you have the language in there that says nothing
9 within this subsection shall be construed to
10 mandate or enforce the use of quotas.
11 We further point out that the mere
12 existence after statistical imbalance is not alone
13 sufficient to establish a prima facie case of
14 disparate impact violation. Several steps have to
15 be taken before quotas or that type of quota
16 activity can be used.
17 Thirdly, we welcome the solution found
18 in your bill as to civil penalties assessed against
19 city agencies by proposing that such funds be
20 used by city agencies for anti-bias and

21 anti-discrimination purposes. We don't feel that
22 such assessment should be shifted from one agency
23 to another. That won't solve the problem. But,
24 rather if they can be earmarked towards specific
25 anti-bias activities that the city regularly

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2 engages in, it will provide a more useful
3 solution.
4 Other than that, Mr. Chairman, I thank
5 you for the time on behalf of the ADL. We wish to
6 thank the Committee for scheduling the hearing,
7 giving me the opportunity on behalf of the ADL to
8 testify, and we hope that the City Council will
9 reconsider the compromise that was made with the
10 administration on Commission autonomy and quickly
11 adopt the new Human Rights bill.
12 Thank you very much.
13 THE CHAIRPERSON: Thank you for your
14 testimony.
15 Next is Raul Magril. Would you
16 identify yourself for the record.
17 MR. MAGRIL: Yes.
18 THE CHAIRPERSON: We are joined by
19 Mr. Jose Rivera from the Bronx.
20 MR. MAGRIL: I am Paul Magril, the
21 vice-president of government affairs for the New
22 York Chamber of Commerce and industry. I thank you

23 for the opportunity to appear before you.
24 This is the third time that I have
25 appeared before this committee to express the

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2 concerns of our members regarding the two bills,
3 now one bill that would amend the city's human
4 rights law.
5 From the beginning, the chamber
6 recognized that the Human Rights law should be
7 revised and the power of the Human Rights
8 Commission should be strengthened, if it is to be a
9 more effective body capable of fighting
10 discrimination.
11 Consequently, we have not raised
12 objections to many of the bill's key provisions
13 that increase significantly the responsibilities
14 and potential liability of employers, such as the
15 imposition of civil penalties and the creation of
16 liability for discriminatory acts of employees.
17 We have objected only to those
18 provisions that would impose what we believe to be
19 unnecessary and excessive burdens on business, and
20 that would delay rather than expedite the process.
21 While great progress has been made over
22 the past few months to improve the bill, a number
23 of flaws remain that we believe will undermine its
24 effectiveness.

25 However, I must stress that in the

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2 previous times that we have testified, our
3 objections dealt with entire sections of the bill,
4 and I am pleased to be able to say that our
5 objections now have been reduced to changes in
6 wording that we would like to see. These need to
7 be fundamental, but I stress the progress that has
8 been made.
9 Rather than going into all of what we
10 see are the flaws in the bill, I will mention a few
11 of the ones that are of most concern to us.
12 The first is in the procedural area.
13 The bill seeks to establish very formal
14 procedural rules for the adjudication of claims.
15 At a time when moderate administrative practice
16 seeks to streamline procedures regarding disputes,
17 the formal rules are a step backward and will
18 generate disputes. The council rules would delay
19 rather than expedite the process and increase the
20 Commission's large backlog of cases.
21 Increased litigation and longer delays
22 will hurt employers and individuals with valid
23 discrimination claims, ironically.
24 For example, the employers would still
25 be required to have their answer verified, and to

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2 state all of their affirmative defenses in their
3 answer.
4 We believe that just these two
5 provisions alone establish and are a trap for the
6 unwary, particularly for the businesses, most of
7 whom are small that don't have the benefit of
8 in-house council. Many attorneys don't even know
9 what an affirmative defense is (inaudible) and
10 others are unfamiliar with the law, and could get
11 trapped by many of the procedural requirements.
12 We would like see some of those
13 changed.
14 Also, we think that those requirements
15 are going to further delay the process rather than
16 expedite it. I found interesting that while the
17 bill imposes substantial procedural obligations on
18 the respondents, the time limitations placed on the
19 Commission, with respect to investigate the
20 complaint, will be dropped and will be set by rule
21 and regulation.
22 The second area that we would like to
23 see changed deals with the reasonable accommodation
24 of the disabled. The definition of disability in
25 particular is not consistent with the definition

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2 found in the federal ADA, Americans with Disability
3 Act. There is no showing that the ADA, which has
4 been, which is seen by virtually everyone as a
5 landmark piece of progressive legislation, is
6 insufficient in this area. We do not believe that
7 it is necessary to require business to comply with
8 the different standards, especially when the
9 federal standards have been shown to be effective
10 and there is no showing that they are not doing the
11 job.
12 Another area is in the penalty
13 provisions. The punitive damages we seek have been
14 added to civil penalties, so that a claimant can
15 receive both civil penalties and punitive damages.
16 No standards have been given for the
17 punitive damages. Since both punitive and civil
18 penalties are intended to deter discriminatory
19 conduct, we don't see the need for both to be in
20 there.
21 We have a number of specific objections
22 to the bill, but I would like to make a general
23 comment -- on what I view to be a fundamental
24 problem in the process of developing the bill.
25 The Chamber is not a traditional

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2 business advocacy organization. The city's
3 business community has shown that it is committed
4 to strengthening the social fabric of the city and
5 want to build a competitive and profitable
6 businesses community.
7 We work together to devote resources on
8 problems that affect the entire New York community,
9 including housing, education, economic development
10 and jobs.
11 Despite the commitment, the business
12 community was excluded from all discussions
13 concerning the original drafting of these bills.
14 Consequently, the bill attempted to balance the
15 interests of employees and employers, or to resolve
16 issues in a way that increased protection from
17 discrimination without imposing excessive burdens
18 on business.
19 Rather than being viewed as a willing
20 partner, I believe that the business community was
21 viewed by some as a group that would seek to
22 obstruct the development of this very important
23 legislation.
24 I would hope that our conduct during
25 the negotiations that have produced the final

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2 version of the bill, this bill, show that we are
3 interested in working with the City Council and the
4 administration in a constructive manner in this
5 area.
6 The fact that so many of our concerns
7 have been heard and that many of our principal
8 concerns have been addressed in the final version,
9 I think does show that we have been moving in that
10 direction.
11 We look forward to continuing to work
12 with you in this manner and that the Commission
13 promulgates the rules and regulations that are to
14 follow.
15 The fact remains that the bill before
16 you represents a dramatic improvement over the
17 original draft. Unlike the original draft
18 amendments that have been made, which address the
19 legitimate concerns of business without undermining
20 any of the essential provisions of the bill.
21 While there may be some who would be
22 sceptical, our aim throughout the process was to
23 develop a bill that the business community could
24 support, with a message to send to Washington and
25 the other localities around the country.

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2 While we can't support the bill, we are
3 mindful of the progress that has been made and
4 pleased that our comments have been heard and so
5 many of our concerns have been addressed.

6 We commend the administration and the
7 Council for working with us to develop what we
8 think is a great improved bill, and we are
9 particularly appreciative of the efforts of
10 leadership of Councilman Horwitz and your staff.
11 It has been a long haul and we have
12 been dealing with the bill for about a year and a
13 half, and there are many things in here that I
14 think everybody can be proud of.
15 The business community also, I think,
16 can be included in that group and we thank all of
17 you for your efforts and your leadership on this
18 issue.
19 THE CHAIRPERSON: Thank you. I
20 appreciate your comments.
21 At this point, there is nobody else who
22 wishes to testify?
23 THE SERGEANT AT ARMS: Yes. We have
24 one more person.
25 THE CHAIRPERSON: Please identify

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2 yourself for the record.
3 THE WITNESS: Mark Leeds, counsel to
4 the New York City Mayor's office, People with
5 Disabilities.
6 I just wanted to note in response to
7 the last speaker that there are differences already

8 between the city and the federal laws, with respect
9 to certain people with disabilities, and there are
10 differences with state laws and business.
11 They are required to comply with the most
12 stringent situations with respect to each of
13 these.
14 I believe that the city Human Rights
15 law provisions relating to disabilities, I think,
16 represent a step forward in that regard, to bring
17 the city again into the forefront in this area.
18 One other note that I would make is
19 that under the city Human Rights law, there is a
20 need for an answer and the requirement that the
21 respondents do answer, because in order to move the
22 proceedings along at an appropriate pace, we right
23 now, what happens is frequently the respondents do
24 not answer, or delay significantly in answering,
25 and this legislation addresses that issue.

1

2 Thank you.

3 THE CHAIRPERSON: Thank you very much.

4 THE WITNESS: May I testify?

5 THE CHAIRPERSON: Did you fill out a

6 form?

7 THE WITNESS: No.

8 THE CHAIRPERSON: Would you identify

9 yourself? You can fill it out when you finish it.

10 THE WITNESS: Walter Fields, Community

11 Service Society of New York.

12 THE CHAIRPERSON: Yes.

13 MR. FIELDS: Let me begin by saying

14 that I regret that I did not have the opportunity

15 to review the compromise bill, so some of the

16 remarks that I make maybe dated.

17 I am the government policy analyst of

18 the political development department of the

19 Community Service Society and I am here testifying

20 on behalf of the Community Service Society and its

21 president David R. Jones.

22 The Community Service Society is a

23 not-for-profit social service agency that for

24 nearly 150 years has addressed the health,

25 education and social welfare needs of the poor,

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2 recent immigrants and the racial and ethnic

3 minorities of our city. Today, we continue our

4 mission by seeking the political empowerment of

5 those who have historically been discriminated

6 against and kept out of the political process.

7 I would like to thank the Committee for

8 the opportunity to comment on the proposed

9 amendments to our city's Human Rights law. It is

10 appropriate that this discussion is taking place

11 considering the current level of debate in

12 Washington over the Civil Rights act of 1991. The

13 tone of the debate in our nation's capitol should

14 serve as a motivation for our city to reaffirm its

15 commitment to protect and advance the rights of all

16 citizens, regardless of race, ethnicity, gender,

17 religion or sexual preference.

18 Indeed, the City Council should be

19 commended for its efforts with respect to the

20 legislation before us today.

21 We have reviewed the introductions of

22 465-A and 536-A and raise the following points of

23 concern.

24 Each bill contains language which

25 stipulates that the Corporation Counsel can

1
2 initiate litigation on behalf of the complainant.
3 In the Mayor's bill only the Corporation Counsel is
4 given that power. This provision creates a
5 potentially akward situation as the city's Law
6 Department could conceivably act as counsel for a
7 plaintiff and defendant if a city agency is the
8 object of a complaint. This arrangement also
9 significantly weakens the enforcement powers and
10 independence of the City's Commission on Human
11 Rights. The Commission should have the power to
12 independently bring a civil action on behalf of a
13 complainant. We would suggest that a review of the
14 procedures relating to legal representation be
15 reviewed by the Commission and the Corporation
16 Counsel within a year after the enactment of this
17 law.
18 Let me add that I would concur with on
19 the need for an independent review of this
20 process.
21 Economic boycotts have also been
22 included in the language of both bills.
23 Introduction 536-A includes economic boycotts
24 within the definition of an unlawful discriminatory
25 practice. We too have the concerns over the use of

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2 boycotts as a retaliatory weapon. We are concerned
3 that the language in the bill walks a very fine
4 line and may be interpreted as an infrigement upon
5 First Amendment guarantees of freedom of
6 expression. The Committee should keep in mind that
7 boycotts have been used by disenfranchised groups
8 as a means of protest to demand equal rights. It is
9 fair to say that de jure segregation might still
10 exist today would it not for the efforts of blacks
11 in Alabama during the Montgomery bus boycott.
12 While there are provisions which would allow
13 boycotts to to protest unlawful discriminatory
14 practices, we advise the Commission to exercises
15 caution in its attempt to regulate the frequently

16 used instrument of protest.
17 We also see potential problems in the
18 area of disparate impact. The Mayor's bill
19 contains stronger language. It requires covered
20 entities to use the least discriminatory
21 alternatives available and describes more
22 explicitly the burden of proof for covered
23 entities.
24 We still have some very grave concerns
25 because the legislation allows the discriminatory

1
2 practice if that practice can be justified on the
3 basis of business necessity. This provisions
4 provides an easy out for employers that are
5 involved in discriminatory practices. Furthermore,
6 465-A, exempts standardized tests under the
7 disparate impact provisions. Knowing the cultural
8 bias found in many standardized tests, this
9 exemption could prove damaging to many potential
10 litigants.
11 Introduction 465-A also allows the
12 mitigation of civil penalties and punitive damages,
13 if the employer can demonstrate that it had adopted
14 one or more of the list of anti-discriminatory
15 policies or programs, included in the statute.
16 This is a true back door for employers as the
17 policies and programs cited in the statute are

18 already required by law. 465-A allows an employer
19 to be held harmless against civil penalties if,
20 after being found liable for discrimination, the
21 employer agrees to take steps to establish
22 anti-discrimination policies and programs. Once
23 again, this is a convenient back door for employers
24 to engage in discriminatory practices.
25 The bill would also allow the

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2 Commission on Human Rights to dismiss a complaint
3 for administrative convenience whenever a
4 complainant is unwilling to accept a reasonable
5 proposed conciliation agreement. The language
6 used, in particular the term reasonable, is bound
7 to cause serious problems in attempting to
8 reconcile a dispute.
9 In the area of independent contractors,
10 the legislation limits the liability of the an
11 employer to those instances where a complainant can
12 prove that the employer had actual knowledge or
13 acquiesced in the discriminatory practice of an
14 employer. We believe that this provision puts an
15 unfair burden upon the employee and will ultimately
16 result in many cases of discrimination going
17 unpunished. We urge the Committee to move away
18 from an intent standard and include language that
19 focus on the results of employer sanctioned

20 practices by contractors.
21 In general, the Community Service
22 Society supports the legislation. It does move in
23 the right direction in spite of the aforementioned
24 shortcomings. The inclusion of provisions
25 protecting against systemic discrimination and

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2 discriminatory harassment is significant. We are
3 well aware that individual expressions of racism or
4 hate are often sanctioned by institutional
5 arrangements. The institutional nature of systemic
6 discrimination is particularly volatile as it is
7 often a product of some policy or procedure.
8 We also applaud the the inclusion of
9 provisions which will allow a private right of
10 action. It will give individuals the option to
11 bring an action in state court or file charges with
12 the Commission on Human Rights. An individual who
13 files such a claim would be able to recover all
14 costs, and attorney's fees and punitive damages.
15 We also agree with the suggestion made in the
16 previous testimony by the Puerto Rican Legal
17 Defense and Education Fund that the proposal be
18 further amended to include ordinary legal costs and
19 expert witness fees.
20 In closing, we hope that the Committee
21 will take our concerns into consideration.

22 The Community Service Society supports
23 our city's Human Rights law and is committed to its
24 enforcement.
25 Thank you. (Pause).

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2 THE CHAIRPERSON: The Committee on
3 General Welfare, will continue. This might be the
4 time to vote on that item.
5 We will take the roll call, first.
6 THE CLERK: Roll call.
7 Horwitz.
8 THE CHAIRPERSON: I would like to just
9 say that being this bill is so important and is
10 milestone legislation, I am happy that the General
11 Welfare Committee can work out this bill with the
12 Mayor's side of City Hall, to make it a very strong
13 and productive bill.
14 Of course, such a big subject, the
15 problem of discrimination -- and so much you can
16 put into a bill -- but, I think we have covered it
17 pretty well.
18 Some people testified that they would
19 like to see a little more and maybe we can add more
20 to it. Right now the bill does what we want it to
21 do, and I am very happy that the Committee is part
22 of it.
23 So, I vote aye and certainly ask my

24 members of the Committee to come on as co-sponsors
25 because this will be definite landmark

1
2 legislation.
3 THE CLERK: Yes.
4 THE CHAIRPERSON: Aye.
5 THE CLERK: Ward.
6 COUNCILMEMBER WARD: After many, many
7 months, a year and-a-half that the bill is being
8 heard.
9 THE CHAIRPERSON: Yes. Carried off
10 from the last administration.
11 COUNCILMEMBER WARD: I am happy at long
12 last that we have come to some sort of decision,
13 and I vote aye.
14 THE CLERK: Povman.
15 COUNCILMEMBER POVMAN: Aye.
16 THE CLERK: Friedlander?
17 COUNCILMEMBER FRIEDLANDER:
18 Mr. Chairman, despite our attempts over the last
19 two months to become co-sponsors on this bill, we
20 have sent notes, we have said yes to telephone
21 calls and all that, but my name is still not on the
22 bill.
23 THE CHAIRPERSON: It will be on the
24 bill.
25 COUNCILMEMBER FRIEDLANDER: That is

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2 wonderful. In any case, I have the history of
3 having worked with and been part of a number of
4 very important bills that have come through,
5 including one that we worked on together, the
6 rights of not all people, of all people including
7 gays and lesbians and others.
8 This is another step in the right
9 direction, and it is important, not only to have a
10 bill, but now we have to see to it that it is
11 enforced -- the enforcement of it. That will be
12 our big job.
13 Thank you.
14 THE CLERK: Dear?
15 COUNCILMEMBER DEAR: Aye.
16 COUNCILMEMBER FRIEDLANDER: I voted
17 aye, I believe.
18 THE CLERK: Rivera?
19 COUNCILMEMBER RIVERA: Yes.
20 THE CLERK: Koslowitz?
21 COUNCILMEMBER KOSLOWITZ: Aye.
22 THE CLERK: Seven in the affirmative
23 and none in the negative, no abstentions, the item
24 is adopted.
25 Please sign the report.

1

2 (Applause.)

3 THE CHAIRPERSON: The General Welfare

4 Committee has concluded its vote.

5 Frieda Zames.

6 We got so excited about the vote on the

7 bill. We have your written statement. Would you

8 tell us what you would like to say.

9 Would you identify yourself for the

10 record.

11 THE WITNESS: Dr. Frieda Zames. I am

12 testifying as the president of the Disabled in

13 Action of Metropolitan New York.

14 In this testimony, I will deal with

15 three issues: The Human Rights Commission should

16 be independent of the New York City Corporation

17 Counsel. Two, to determine who should receive

18 damages in cases where there are financial

19 penalties, and three, employment of people with

20 disabilities.

21 We prefer the City Council bill. It is

22 important that the Human Rights Commission begin

23 handling this, the New York City Council, to the

24 Corporation Counsel, because when there is a

25 lawsuit against New York City, the attorneys would

1
2 come from the same agency.
3 I know that the Corporation Counsel
4 today, with these attorneys, for human rights
5 lawsuits, would come from a distinct group.
6 However, there would still be the appearance of a
7 conflict of interest because the head of the agency
8 would be the same for both groups and could use
9 that position to impact on a case.
10 Disabled in Action has won two lawsuits
11 against New York City. The accessible public
12 transit lawsuit required New York City to purchase
13 lift-equipped buses and the accessible polling site
14 lawsuit required New York City to make all polling
15 places accessible, by the 1990 election. In the
16 polling site lawsuit we were forced to go back to
17 court several times to force the city to comply
18 with the mandate of the court. If DIA had filed
19 the lawsuit as the Human Rights complaint case,
20 where the Human Rights Commission was not of the
21 Corporation Counsel, we feel the results may have
22 been different.
23 Financial penalties in a successful
24 human rights case should be treated like financial
25 penalties in a contingency case. Two-thirds should

1
2 go to the client or clients of the Human Rights
3 Commission and one-third should go to New York City
4 to support those agencies that are designed to
5 eradicate discrimination.
6 It is assumed that employment
7 discrimination for people with disabilities can be
8 dealt with by using the litigation process. That
9 is, when disabled people encounter employment
10 discrimination they would file complaints, which
11 eventually would lead to the decrease of such
12 discrimination.
13 My situation is a good example of the
14 problem. I filed the lawsuit against the
15 university where I teach and work in New Jersey,
16 using New Jersey State Civil Rights law. The
17 restrictions imposed in a very clear case of
18 discrimination were so great that after the
19 university gave me a promotion, the New Jersey
20 Civil Rights Commission declared that there was no
21 discrimination, when I refused to drop the case
22 because I had also sued for back pay and pension
23 compensation.
24 There also was no way in this situation
25 to look at overall discrimination in my department

1
2 or in the university. I could only use a very
3 blatant specific example to prove my case.
4 Therefore, cases of discrimination of

5 people with disabilities should be treated like
6 discrimination against other minority groups and
7 women, that is goals and timetables must be set for
8 them. However, concept of goals and timetables was
9 developed precisely because the litigation process
10 did not work for racial and ethnic minorities and
11 women.
12 Why should this process work for people
13 with disabilities any better?
14 I won't read the best of rest of my
15 testimony because I had given it before, and
16 because I am pleased that you have voted on it.
17 I did want to make those comments.
18 THE CHAIRPERSON: Thank you. We
19 appreciate your comments and thank you for coming
20 and thank you all for coming.
21 Again, it is a big day for the Mayor's
22 office and the City Council in passing this
23 legislation.
24 The meeting is adjourned.
25 (Time noted 2:35 p.m.)

1986 WL 379985 (N.Y.C.Com.Hum.Rts.)

Commission on Human Rights

City of New York

THE JOSEPH A. TARTAGLIA, Complainant,
- against -
JACR LALANNE FITNESS CENTERS, INC., Respondent

Complaint No. 04153182-PA
Dated: June 9, 1986

DECISION AND ORDER

*1 BEFORE: William Rirchgaessner

Administrative Law Judge

APPEARANCES: For the Respondents

Miller & Seeger
60 East 42nd Street
New York, New York 10165

For the Complainant

Daniel Topper, Esq.
Legal Division
Commission on Human Rights
By: LYNN GOLDBERG

COMPLAINT AND HEARING

On April 15, 1983, Complainant filed a verified complaint with the New York City Commission on Human Rights (hereinafter "Commission") charging that Respondent Jack LaLanne Fitness Centers, Inc. discriminated against him because of his physical handicap in violation of New York City Administrative Code, Chapter I, Title B (hereinafter "Code"), Section B1-7.1. Specifically, Complainant, who is blind, alleges that he was denied access to Respondent's health spa located at 505 Park Avenue, New York, New York, in February of 1983, because he used a guide dog.

The hearing in this case was held before William Rirchgaessner, Administrative Law Judge, on November 13, 14 and 15, 1985. Both parties were represented by counsel.

SUMMARY OF THE PARTIES' CONTENTIONS

COMPLAINANT

Complainant, a blind male, contends that in early February of 1983, he attempted to obtain membership in Respondent's Park Avenue spa facility, which he alleges is a place of public accommodation.

Complainant maintains that when he attempted to submit the completed membership agreement to Respondent's agent and manager, she told him that officials of the Respondent had decided that he could not become a member if he insisted on being accompanied by his guide dog in the downstairs "spa area", including the exercise and "we" areas.

Complainant alleges that, although he has a legal right to have his guide dog accompany him throughout all areas of the health spa, he intended only to use his guide dog to lead him to the shower room, and did not intend to allow his guide dog into the swimming pool, or into any of the other "wet areas" of the spa.

Complainant further alleges that he was discriminatory denied membership in Respondent's Park Avenue facility because he used a guide dog; and that permitting Complainant to be accompanied by his guide dog throughout the spa would neither impose undue burdens upon the Respondent nor create a threat to health or safety.

Finally Complainant contends that Respondent's actions also caused Complainant to suffer detrimental physical and emotional effects, and to incur certain out-of-pocket expenses.

RESPONDENT

Respondent contends that it never denied membership to Complainant, but offered Complainant the same terms of membership it claims are offered to any other applicant.

Respondent alleges that it was bound by legal, health and safety constraints to prohibit the guide dog from the "wet areas" and other areas of the spa facility.

***2** Respondent maintains that, as evidence of its good faith, it would have permitted Complainant to bring into the spa, at no cost to himself, another individual to accompany him in his use of the facility, as well as a place in which Complainant's guide dog could be kept and looked after during his use of the spa facility.

Respondent contends that Complainant is charged with the burden in this proceeding of showing that he was discriminated against in some way, and that Complainant has not met that burden. Respondent finally alleges that Complainant has failed to establish any basis upon which damages may be awarded.

ISSUES

1. Did Complainant establish by sufficient evidence that Respondent discriminated against him because of his handicap in violation of Code Section B1-7.1?

2. To what relief, if any, is Complainant entitled?

FINDINGS OF FACT

1. Complainant is a legally blind male who uses a guide dog as his primary means of mobility in order to be self-sufficient. (T. 25, 87) [1]

2. Respondent is a profit-making corporation whose primary business is the ownership and operation of health spas, including facilities located within New York City. (T. 243)

3. Prior to February, 1983, Respondent took over the ownership and operation of European Health Club's New York metropolitan area health spa facilities, including a bi-level spa facility known as the Park Avenue Spa (hereinafter "Span), which was located at that time at 505 Park Avenue in Manhattan. (T. 243, 244, 246, 247)

4. The Spa consisted of a street level lobby and two executive offices, accessible from 59th Street, with stairs leading down to spa facilities and equipment on the lower level, including: a weight room and gym area, and a "wet area" consisting of a pool, whirlpool, steam room, sauna, locker room and shower room. (T. 246, 247, 24, 42)

5. Prior to becoming blind in 1973 as a result of illness, Complainant had been employed as a research assistant in Japan. (T. 29, 30) While there Complainant had studied the martial arts of Jodo and kendo, and attained a black belt in each. (T. 30, 31)

6. In 1982, Complainant briefly used another health spa with Nautilus equipment, but did not become a member because of the high cost involved. (T. 33, 65, 66) Complainant was accompanied by his guide dog during his use of these facilities.

7. Complainant's only source of income in 1983 was Social Security Disability. (T. 43, 35)

8. In February, 1983, Complainant had wished to join a health spa in order to improve his physical condition. (T. 33)

9. Complainant knew of the Respondent through advertising and word of mouth, and was aware that Respondent operated a health spa at the 505 Park Avenue location. (T. 23, 24)

10. Complainant became interested in joining the Spa because of its relative affordability and because it was located on the same block as The Lighthouse (The New York Association for the Blind) where the Complainant frequently went to have materials read to him. (T. 43, 44, 24)

***3** 11. Complainant first entered the Spa in early February of 1983 to inquire about membership. (T. 24) At that time, he spoke to Sheila Diaz, the manager of the facility in her office on the ground level regarding the facilities, program and fees. (T. 24, 25, 225, 238)

12. At their first meeting Ms. Diaz was concerned about allowing Complainant's guide dog to accompany him throughout the Spa. (T. 25, 51) Complainant assured her that there were no legal problems with his bringing the guide dog into all areas of the Spa. (T. 25)

13. At that meeting Ms. Diaz filled out a routine information sheet, and prepared a membership agreement for Complainant to sign. (T. 225-226) She then offered it to Complainant for his signature. (T. 59) However, Complainant did not sign the agreement at that time because he wanted time to think about the commitment. (T. 60) Complainant then left the facility. (T. 60)

14. On February 9, 1983, a few days after he first visited the spa, Complainant returned to the facility. (T. 35) Since Ms. Diaz was not present at that time, he met with Barry Eason, then assistant manager of the facility in Mr. Eason's office. (T. 229, 35) Complainant told Mr. Eason that he wished to become a member of Respondent's Park Avenue Spa. (T. 36) Mr. Eason found Complainant's forms which had already been completed by Ms. Diaz, and again reviewed the terms of the contract with Complainant. (T. 229, 60, 61). During the meeting, Mr. Eason made no reference to the exclusion of Complainant's guide dog from any part of the Spa facilities. (T. 38, 61)

Complainant then wrote out a personal check to leave as a membership deposit. (C. Ex. 1) Complainant also requested that he be allowed to take the membership agreement with him in order to have it read to him at The Lighthouse. (T. 36) Mr. Eason accepted the check and agreed to permit Complainant to take the unsigned agreement with him to The Lighthouse. (T. 36-37)

15. Complainant then left the spa and went to The Lighthouse, where he had the membership agreement read to him. (T. 37-38, 61)

16. Sometime after her first meeting with the Complainant, Ms. Diaz contacted John Wilton, the area director of Jack LaLanne, to explain the circumstances of Complainant's membership application. (T. 227, 249) She was told to inform the Complainant that he would have to leave his guide dog in the lobby or one of the executive offices, and that he would be given the option of bringing a friend with him, who could attend free of charge. (T. 227, 231, 249) Ms. Diaz had not, however, informed Mr. Eason of Mr. Wilton's instructions prior to Mr. Eason's meeting with the Complainant. (T. 229, 36, 38, 61)

17. On February 9, 1983, after his visit to The Lighthouse, Complainant returned to the Spa, and once again met with Ms. Diaz in her office. (T. 38) At that meeting, Complainant submitted a completed membership contract to Ms. Diaz. (T. 38-39) Ms. Diaz told Complainant that his guide dog would not be allowed downstairs in the spa area, but must stay in one of the executive offices on the ground floor and that he could select someone to escort him throughout the spa at no additional charge. (T. 3940) These limitations, she informed Complainant, were based on orders from her "superiors" (T. 38, 39, 62)

***4** 18. Complainant was very disappointed, frustrated, and angry (T. 232, 44) He informed Ms. Diaz that those conditions were unacceptable. (T. 39, 41) Complainant asked her to give him some written documentation of the conditions which Respondent wanted to impose on his membership. (T. 39, 233)

19. Ms. Diaz complied fed with this request by handwriting a note, dated February 9, 1983, on European Health Spas, Inc. stationary (T. 39, 233; R. Ex. 2) which read as follows:
"To Whom It May Concern,

I Sheila Diaz, Mgr. of Jack LaLanne Health Spa 59th Street was told by the lawyer for Jack LaLanne (Mr. Miller) that Joseph Tartaglia cannot bring his seeing eye ["guide dog" written above "seeing eye"] dog downstairs, to spa area. He may bring another person for free but the dog is not permitted.

/s/ Sheila Diaz Mgr".

(R. Ex. 2) Complainant was given the letter. (T. 75-76)

20. Ms. Diaz voided the agreement which the Complainant had signed, and returned Complainant's uncashed deposit check to him. (T. 232, 39) Complainant then left the spa. (T. 233).

21. Complainant felt that the conditions which Respondent attempted to impose on his membership were not acceptable for the following reasons: (a) Complainant was not happy with the security arrangements proposed for his guide dog's comfort and security, since it would be left in an unlocked office or public lobby (T. 40, 63); (b) Complainant was concerned that the guide dog's separation from his master would have been traumatic for the guide dog (T. 40, 63); (c) Complainant did not think he could find another person to go to the spa during the hours he wished to use it, i.e., 7:30 - 8:00 a.m. (T. 41); and (d) Complainant was not familiar or trained in the use of a cane, and he would feel less secure when accompanied by a human guide than by his guide dog. (T. 87-91)

22. In late March, 1983, Complainant telephoned John Wilton, area director for Respondent regarding his membership. (T. 242, 245) Mr. Wilton insisted that the guide dog must be excluded from the "wet areas" downstairs, including the shower room, steam room, jacuzzi and pool. (T. 42) He reiterated the offer he had previously asked Ms. Diaz to relay to Complainant. (T. 245, 42) Mr. Wilton felt that members and prospective members would be concerned or offended if the Complainant's guide dog were allowed to accompany him anywhere in the spa, and that he himself would feel that way also. (T. 252-253, 42) In response to Mr. Wilton's reiteration of Ms. Diaz's offer, Complainant told him that it was not acceptable. (T. 250, 43)

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23. A few months after the February 9, 1983 meeting, Complainant opened the front door of the spa and shouted in to Ms. Diaz that "it is not over yet.. (T. 235, 263)

24. Richard J. Krokus, who has been employed at the Seeing-Eye Incorporated since 1946, testified as an expert witness at the hearing in the instant case on the training and disposition of seeing-eye dogs. Mr. Krokus has had 39 years of experience in the training of both seeing eye dogs and their blind masters and has supervised their adjustment to each other. (T. 131-134) Mr. Krokus has personally trained 355 dogs and has supervised the training of approximately 5,000 guide dogs. (T. 143)

***5** Mr. Krokus testified that certain breeds are selected because of "their sight, stability, soundness, temperament, tractability, manageability . . . " and because they "want to do things to please man." (T. 135-136)

The dogs are trained for a period of three months, during which time the dog is taught to deal with a variety of situations including street traffic, crowded public places, and public transportation. (T. 139-141) Each dog is trained to be "fully aware of his master's safety and security" and is specifically taught to be aware of obstructions which may cause injury to the owner (e.g., "overhead training"). Finally, the dogs are taught to disobey any command which would lead its master into a dangerous situation (i.e., "intelligent disobedience"). (T.147148) Thus, the dogs are taught to assess any potential problem which their master may encounter and to avoid any situation which could cause harm. (T. 165) Once the training period is completed, those dogs with behavioral, temperament and/or health problems are rejected, and the remaining dogs are paired with masters.

Once paired, the master and dog go through a three to four week training program. During this phase, the new owners learn about the dog's capabilities, and how to care for the animal. (T. 143-144) Each individual learns how to maintain the dog on a rigid schedule so that urination and defecation can be predicted. (T. 145)

25. Martin Kurtz, Director of the New York City Department of Health, Bureau of Animal Affairs, testified as an expert witness on the New York City Health Code. Mr. Kurtz testified that the Health Code does not prohibit guide dogs in health clubs. (T. 111) Mr. Kurtz further testified that, in his opinion as an expert, allowing a guide dog in a health club would not be a violation of the Health Code. (T. 111-112)

26. Terry Lynn Smith, manager of Manhattan Plaza Health Club, testified that a former blind member, Maureen Young, was accompanied by her guide dog when she used the Health Club facilities. Ms. Young subsequently became an employee, and successfully performed her responsibilities with the assistance of her guide dog. (T. 205-210).

Ms. Smith also testified that the only cost incurred by the Health Club as a result of permitting Ms. Young to use her guide dog was $100 per year for additional shampooing.

27. After having his membership rejected by Respondent, Complainant could feel an increase in his heart rate and throbbing in his temples. (T. 45) Complainant also experienced such symptoms whenever he discussed what had occurred at Jack LaLanne. (T. 46)

As a result of his treatment by Respondent's agents, Complainant felt angry and "put down a bit mentally.. (T. 44) Complainant "felt [he] was being . . . put down as a second-class citizen" (T. 44) and could not understand how he could be denied "the privilege of joining Jack LaLanne,. if "the law state[s] this is illegal or not permitted." (T. 47) Complainant also discussed his feelings of anger resulting from his rejection by Jack LaLanne with two friends, Elaine Gerson and Jack Goldfein. (T. 44)

ANALYSIS OF EVIDENCE AND CONCLUSIONS OF LAW

I.

***6** The issue presented is whether Respondent Jack LaLanne Fitness Centers, Inc. discriminatory denied Complainant Joseph A. Tartaglia access to and membership in a place of public accommodation because of his physical handicap.

Since the facts in this case are not disputed, we must review the statutory and legal authority in order to resolve the issue set out above. Thus, the Administrative Law Judge's conclusions are crucial to-our determinations.

On the basis of the facts and the evidence offered by both parties at hearing, the Administrative Law Judge found, and we concur, that Respondent Jack LaLanne Fitness Centers, Inc., through the actions of its agents, discriminated against Complainant by denying him access to Respondent's facility in violation of the Code.

Section B1-7.0(2) of the Code, in relevant part, states:
It shall be an unlawful discriminatory practice for any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . .

In addition to those protected classes mentioned in Section B1-7.0(2), Code Section B1-7.1 mandates that:
The provisions heretofore set forth in section B1-7.0 as unlawful discriminatory practices shall be construed to include an otherwise qualified person who is physically . . . handicapped.

The United States Supreme Court, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) set out a specific order of proof to be applied in establishing a case of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. The Supreme Court majority in that case contemplated that the specific standards of proof formulated for that case, which involved a discriminatory refusal to hire, may change as the facts vary. Id., at 803, n. 13. The Court of Appeals of the State of New York has adopted the general McDonnell Douglas framework and burdens of proof to cases of discrimination arising under the Code. Pace College v. Commission on Human Rights, 38 N.Y.2d 29 (1975).

These standards and order of proof have been modified for application by analogy to cases of discrimination on the basis of physical handicap. Doe v. New York University, 666 F.2d 761, 776 (2nd Cir. 1981); see also, Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1386-87 (lOth Cir. 1981) (citing Southeastern Community College v. Davis 442 U.S. 397 (1979g)). In addition, these standards have been applied to cases involving discrimination by a place of public accommodation. Batavia Lodge No. 196 v. New York State Division on Human Rights, 42 A.D.2d 807 (4th Dept. 1973), rev'd on other grounds, 35 N.Y.2d 143 (1974); see also, Figeroa v. New Yu Lung Corporation d/b/a Shu Yu Restaurant, Stanley Tso, Owner/Manager, New York City Commission on Human Rights Complaint No. 9370-PA (Dec. 5, 1980).

***7** Synthesizing the McDonnell Douglas derivative burdens and order of proof, as represented by the above cases, and modifying the burden and order of proof slightly to reflect the facts of this case, the Commission requires the Complainant to establish a prima facie case of discrimination by showing the following:
(i) That Complainant is a handicapped person, as defined by Bl-2.0(16)(a) of the Code;

(ii) That Respondent is a person, as defined by B1-2.0(1) of the Code, who maintains a requisite relationship with a place of public accommodation, as defined by B1-7.0(2) of the Code;

(iii)That Complainant is otherwise qualified apart from his handicap, as defined by Bl-2.0(16)(e) of the Code; and

(iv) That action was taken against Complainant under circumstances which give rise to the inference that this action constituted discrimination on the basis of an impermissible factor under the Code.

Should the Complainant successfully meet this prima facie burden, the burden is shifted to the Respondent to rebut the presumption of discrimination by coming forward with evidence that the action complained of was taken for a legitimate non-discriminatory reason. If Respondent succeeds in meeting this rebuttal burden, Complainant is then given an opportunity to prove that the reasons articulated by the Respondent were not true, but merely a pretext for impermissible discrimination. Complainant may prove pretextuality by showing that the reasons articulated are based on misconceptions or unfounded factual conclusions, and/or that they encompass unjustified consideration of the handicap itself. Doe v. New York University, supra, at 776; Pushkin v. Regents of University of Colorado, supra, at 1386-87.

II.

The Commission adopts the Administrative Law Judge's finding that Complainant has met his prima facie burden through exhibits and credible testimonial evidence.

Complainant has clearly shown that he is a handicapped person within the meaning of Section Bl-2.0(16)(a) of the Code. He has been blind since 1973, and has been declared legally blind by federal and state authorities.

Under step (ii) of our analysis, the evidence presented has shown that Respondent is a corporation, and is therefore a "person" as defined in Section B1-2.0(1) of the Code. There is ample evidence that Respondent is owner, proprietor and/or manager of the Park Avenue Spa. As such, Respondent maintains the relationship with the Park Avenue Spa required by Section B17.0(2). The Park Avenue Spa did contain a swimming pool and gymnasium facilities. Therefore, the Park Avenue Spa falls within the definition of a "place of public accommodation, resort or amusement" as set forth in Section B1-2.0(9) of the Code.

Under step (iii), Complainant has proven through his credible testimony that apart from his blindness, he was otherwise qualified to become a member of the health spa. 8e has shown himself to be "a handicapped person, who, with reasonable accommodation can satisfy the essential requisites of the benefit in question." Section Bl-2.0(16)(e). Complainant's uncontroverted testimony demonstrated that he had used a similarly equipped health club on occasions prior to his application for membership in Respondent's facility, and that he was in fact offered a chance to enter into a membership contract by at least two of Respondent's agents.

***8** Finally, Complainant has shown circumstances which give rise to an inference of discrimination on the basis of handicap, which is prohibited by Code Section B1-7.1. There is very little dispute that, in or around early February, 1983, Complainant, if he intended to be accompanied by his guide dog, was denied access to the exercise and wet areas of Respondent's spa facility; and that Respondent conditioned the acceptance of Complainant's application for membership on Complainant's acquiescence to and strict compliance with this restriction on the use of his guide dog. Complainant demonstrated that no state or local laws prohibited Respondent from allowing the guide dog into all areas of the facility. Complainant has, therefore, shown that Respondent took action which resulted in a limitation directed in general at handicapped owners of guide dogs, and at Complainant in this specific instance. Respondent's restrictions would only apply to this class of handicapped persons, and not to the general population which has no need for such dogs. As such, these are unquestionably circumstances which give rise to an inference of discrimination on the basis of handicap, and Complainant has met his burden of establishing a prima facie case of discrimination.

III.

Respondent is now called upon to rebut this prima facie inference, specifically by showing: (i) that Complainant is not an otherwise qualified handicapped person eligible for membership in Respondent's spa facilities apart from his handicap; and/or (ii) that Complainant was not permitted to become, and is not now, a member for reasons other than his handicap.

Respondent has failed to show that Complainant is not otherwise qualified to use Respondent's facilities apart from his handicap. It is clear that Respondent concedes that Complainant, with reasonable accommodation of some sort, can satisfy the essential

requisites for use of Respondent's spa facilities. Respondent, in fact, through its agents, was prepared to accept Complainant's application for membership without qualifications or restrictions which addressed anything other than conditions related to Complainant's handicap.

Continually stressed by Respondent is the assertion that Complainant was "offered membership on the same terms as anyone else.. (T. 52-57, see also, Respondent's Post-Hearing Brief at p. 14). Respondent contends that it was Complainant's choice not to enter into an agreement subject to the rules and regulations of the health spa. Respondent argues that it made "reasonable accommodation" of Complainant's blindness in order to allow him to use the facilities. Respondent has shown that its agents offered Complainant: (1) a chance to leave his guide dog home, or in the facility's lobby or executive offices; and (2) the opportunity to be accompanied throughout the spa by another person of Complainant's choice, who would even be allowed to participate in spa activities at no additional cost. Respondent has shown that Complainant at all times refused this offer. For purposes of the Commission's analysis, however, Respondent has successfully articulated several reasons why Complainant was not permitted to become a member of Respondent's facilities. These reasons, Respondent argues, have nothing whatsoever to do with Complainant's blindness.

***9** Respondent has shown that guide dogs were restricted based on management's belief that the presence of guide dogs constituted a threat to the health and safety of members and personnel of the facilities, citing as examples the potentiality of defecation by the guide dog and the possibility of its disorderly and uncontrollable behavior. Respondent argues that the possibility that other handicapped persons with guide dogs might attempt to join the spas, resulting in chaos and the additional cleaning costs due to the presence of guide dogs, prohibits Respondent from allowing guide dogs to have access to all spa facilities.

Respondent has also argued that its agents, and in particular those in charge of making policy decisions relating to the conduct of business, have made a judgment that the presence of a dog in the spa areas would tend to frighten and cause the discomfort of both members and prospective members. Respondent contends that perceived customer preference in favor of restricting canine access to spa facilities is a factor which can and must be taken into account in the exercise of sound business judgment, and is wholly unrelated to Complainant or the fact that he is blind. By the foregoing reasons, Respondent has offered some evidence of other factors unrelated to Complainant's handicap which show on their face legitimate non-discriminatory reasons for the action taken here.

IV.

Complainant is now required to show facts by which Respondent's articulated reasons are shown to amount to a pretext for discrimination, either based on unfounded factual conclusions or misconceptions, or discriminatory treatment of Complainant because of his blindness.

Complainant has shown that he has chosen to use a guide dog almost exclusively in his efforts to accommodate his own handicap in order to perform several "major life activities" including those aspects of mobility and caring for oneself which are affected by loss of vision. Complainant did not use nor was he trained in the use of a cane. For practical reasons Complainant has rarely relied on a human guide to perform those functions which he has learned to depend on his guide dog to carry out. These facts lead to an observation that is basic to our analysis: in certain contexts, the means by which a handicapped person chooses to accommodate his handicap in order to perform "major life activities" becomes an extension of that person himself.

We find that a guide dog is an extension of its master for purposes of performing the necessary activity which it facilitates. At all times, first and foremost, the guide dog's primary function is to aid its master in his/her performance of requisite life activities, such as walking and avoiding danger. When such a dog becomes the means by which its owner is able to do things s/he would otherwise be prohibited from doing by virtue of his/her handicap, that dog cannot be considered separate and distinct from the individual who is totally dependent on that form of assistance.

***10** At times, the assistance of wheelchairs, canes and artificial limbs are not required by their owners. In the same way, guide dogs may occasionally be of little use. However, when such means of accommodation are necessary to overcome the handicap, it would be both unlawful and absurd to withhold such form of assistance from the individual person who wishes and needs to rely on it.

This observation finds its basis in common sense, but it also finds support in the laws of this City, as well as similar state and federal legislation. Under Section B1-7.1 of the Code, as amended in 1981, it is unlawful to discriminate against an otherwise qualified individual who is physically or mentally handicapped. Prior to 1981, however, this provision was strictly and expressly limited to protect only those who fell under the more strict definition of "physically handicapped". The 1981 change not only added the general class of mentally handicapped as a protected class, but also led to a radical alteration of the definition of "physically handicapped. under the Code.

Whereas the pre-1981 code expressly referred to persons who depended on a seeing eye dog as being physically handicapped, the present Code does not contain references to any devices or appliances which had been specifically mentioned in the pre-1981 definition. Notwithstanding Respondent's somewhat misguided reading of this development, the decision to amend the law to exclude an express listing of devices was not designed to exclude those who prior to 1981 were considered "physically handicapped", but rather to expand the protected class to include, among others, the physically handicapped who may not depend on such devices. Thus, the present law has its very roots in the express protection of individuals utilizing devices (including guide dogs) in order to perform essential daily responsibilities.

While the instant decision is based entirely on the New York City Administrative Code and the applicable sections therein, it must be pointed out that this reading of the Code in no way runs counter to the likely result under the New York State Civil Rights Law Section 47-b(l). That law expressly prohibits discriminatory action on the basis of a handicapped individual's use of a guide dog. Although state law contributes no basis for our decision, the apparent unlawfulness of Respondent's policy under state law certainly buttresses our finding that Respondent's action was discriminatory.

Complainant has shown that Respondent's restriction as to the use of Complainant's guide dog was the one and only factor which prevented him from becoming a member. He has also shown that by requiring him to use the facilities without his guide dog, Respondent has effectively prevented the Complainant himself from functioning as any other member could, and from using Respondent's facilities to their fullest advantage. Without his guide dog, Complainant would be stripped of the very means by which he is able to overcome certain limitations posed by his handicap. As such, Complainant would be left to face the prospects of adapting to a new and relatively unfamiliar environment with a form of assistance to which he is unaccustomed, or in the alternative, abandoning his entire endeavor.

***11** "Reasonable accommodation" requires places of public accommodation to recognize the unitary nature of a handicapped individual and the means s/he chooses to adapt to such handicap. Whenever possible the place of public accommodation must make any and all such accommodations so as to allow the handicapped individual to function normally, unless the accommodation causes an undue burden or economic hardship. Philbrook v. Ansonia Board of Education, 757 F.2d 476 (2nd Cir. 1985); Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. PA 1983). In the instant case, Respondent's offer to permit Complainant to bring with him a sighted individual to assist him in the spa facilities was not a reasonable accommodation., but rather a conciliatory gesture following the commission of a discriminatory act, i.e. the Respondent's refusal to permit and accommodate Complainant and his guide dog. Especially where, as here, the means employed by the handicapped individual to overcome his/her handicap is commonly utilized and almost universally accepted, it is not the prerogative of one who operates a place of public accommodation to substitute a means by which a handicapped person will compensate for his/her impairment. See, Philbrook v. Ansonia Board of Education, supra.

Respondent points out that there may be situations or occasions in which allowing a guide dog to accompany its master might not be reasonable -- when there may be legitimate health or safety reasons why the unitary nature of the guide dog and master

must yield to more important considerations. Such a possibility must be acknowledged. Situations may occur in which one who relies on a guide dog must be excluded, or given the opportunity to be included without his/her guide dog.

Complainant has shown, however, through his own testimony and the testimony of three witnesses, that Respondent's claims of health and safety threats posed by permitting a guide dog in a health spa setting are totally unfounded factual conclusions and outright misconceptions. First, Martin Kurtz, Director of the New York City Department of Health, Bureau of Animal Affairs, testified as an expert witness that the New York City Health Code does not prohibit the use of guide dogs in any facilities of health spas.

In addition, the solid regimen of tests and training that guide dogs are exposed to over many months in the various training programs are designed to acclimate the guide dogs to new environments. The dogs are selected, and allowed to continue training, on the basis of their non-violent temperament. Furthermore, a well-trained guide dog, under normal conditions, would not be likely to defecate indoors. Richard Krokus, Director of Instruction and Training for Seeing-Eye Incorporated, through his testimony as an expert witness, has amply demonstrated that the training of guide dogs enhances their overall ability to function in different environments, such as health spas, and was able to cite specific past instances of successful assimilation.

***12** The successful use of guide dogs in health spas was testified to by one of Complainant's witnesses, Terry Lynn Smith, Manager of Manhattan Plaza Health Club. Ms. Smith testified that a former blind member, who became employed by Manhattan Plaza Health Club, successfully performed her daily responsibilities at the spa facility with the use of her guide dog. (T. 205-210) Complainant also testified regarding his experience in using the facilities of another health club in which his own guide dog adapted without incident.

Finally, Respondent contends that the presence of a guide dog would be disturbing to members, prospective members and staff. Customer preference is not and can never be a legitimate reason for discrimination, however. Wigginess Inc. v. Fruchtman, 482 F. Supp.2d 681 (S.D.N.Y. 1979), aff'd 628 F.2d 1346 (S.D.N.Y. 1980), cert. denied 449 U.S. 842, 101 S.Ct. 122, citing Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 289 (5th Cir. 1971), cert. denied 404 U.S. 950, 92 S.Ct.a 275, 30 L.Ed.2d 267 (1971). Especially where, as here, there has been no actual showing of either customer preference or its impact on the "primary function or service" offered by Respondent, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the . . . discrimination was valid.. Diaz, supra. Thus, Respondent's reliance on perceived customer preference as a defense is misguided and has no support in law.

Furthermore, it appears that the only legitimate anticipated problem with allowing guide dogs access to health clubs is that annual maintenance costs attributable to cleaning might rise slightly. While no specific proof was offered by Respondent in the instant case regarding such increased cost, testimony elicited from Complainant's witness, Terry Lynn Smith, indicated that costs would be minimal and would not pose an undue burden on Respondent. We therefore find, based on all the evidence, that Respondent's policy of prohibiting guide dogs from the spa facilities was a calculated and deliberate act of discrimination against blind individuals who depended on guide dogs in the performance of "major life activities".

V.

Pursuant to Section B1-8.0(2) (c) of the Code, this Commission is given broad power to fashion both legal and equitable remedies for a prevailing Complainant. Batavia Lodge v. State Division of Human Rights, 35 N.Y. 2d 143, 359 N.Y.S.2d 25 (1974); State Commission for Human Rights v. Sneer, 29 N.Y.2d 555, 324 N.Y. S. 2d 297 (1971) . We find, based on the record, that Complainant is entitled to be awarded the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges of the Jack LaLanne Fitness Centers, Inc. As such, Complainant should be offered a full membership in any New York City spa facility operated by Respondent with the accommodation required by Complainant, i.e., the use of his guide dog to lead him through all of the spa facilities including wet areas. Said membership should be offered to Complainant at the same cost as the program in which Complainant was discriminatory denied membership.

***13** It is the practice of this Commission to order payment for mental suffering resulting from discriminatory treatment when such injury is sufficiently demonstrated by the evidence. Rudow v. New York City Commission on Human Rights, 123 Misc.2d 709, 474 N.Y.S.2d 1005 (Sup. Ct. N.Y. Cty. 1984), aff'd., 0g App. Div. 2d 1111, 487 N.Y.S.2d 453 (1st Dept. 1985), rem'd to CCHR on other grounds, 497 N.Y.S.2d 602 (Sup. Ct., N.Y. Cty. 1985); Casellas v. N.Y.C. Dept. of Correction, N.Y.C.C.H.R. Complaint No. 5986-CE-PH (Oct. 29, 1975) ($2,500.00); Regan v. Walston and Co., N.Y.C.C.H.R. Complaint No. 5095-PA (Apr. 2g, 1975) ($5,000.00); Matter of Silverman, 56 N.Y.2d 608, 450 N.Y.S.2d 480, 435 N.E.2d 1095 (N.Y.Ct. App. 1982), reinstating Oschak v. International Brotherhood of Teamsters, N.Y.C.C.H.R. Complaint No. 6975-J-S (Aug. 3, 1979) ($1,500.00). Mental anguish has also been recognized as a proper element of compensatory damages by courts upholding such awards under the New York State Human Rights Law, N.Y. Exec. Law Section 290 et. seq. (McRinney). Matter of State Commission of Human Rights v. Speer, 29 N.Y.2d 555 (1971), 121-129 Broadway Realty. Inc. v. State Division of Human Rights, 48 A.D.2d 975, 369 N.Y.S.2d 837 (3d Dept. 1975).

The standard of proof required to demonstrate mental anguish in discrimination cases is less stringent than that required in common law actions. Damages may be awarded on a sufficient showing of the existence and extent of such injury. Batavia Lodge v. New York State Division of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25 (1974). Evidence showing the existence and extent of the injury is to be drawn from credible testimony and corroboration furnished either by competent medical proof or the circumstances of the case itself. Such evidence must be sufficient to support a determination that "a reasonable person of average sensibilities could fully be expected to suffer mental anguish from the incident.. Batavia Lodge v. New York State Division of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273 (4th Dept. 1973) (dissenting opinion setting forth guidelines adopted by the Court of Appeals on reversal, 35 N.Y.2d 143, 359 N.Y. S.2d 25, 27 (1974)).

Viewed in its entirety, the record in this case provides ample evidence that Complainant was caused considerable humiliation and emotional distress as a result of Respondent's discriminatory conduct. The record demonstrates that Complainant had an intense interest in physical fitness. Complainant testified that, after becoming blind, his level of physical activity had declined. As a result of this decline, Complainant decided to join Respondent's health spa in 1983 in an attempt to improve his overall physical condition through the use of its Nautilus equipment. Under these circumstances Respondent's rejection of Complainant's membership application resulted in extreme anger and frustration to Complainant.

When Complainant learned he could not join the Park Avenue Spa because he required the assistance of a guide dog, he felt "that [he] was being . . . put down as a second-class citizen. (T. 44) He felt a throbbing in his temples and an increase in his heart rate immediately after his conversations with both Ms. Diaz and Mr. Wilton, two employees of Jack LaLanne. Complainant also felt pulsation's in his body and recognized all these sensations as symptoms of increased blood pressure.

***14** Complainant spoke with his friend Jack Goldfein on the day his contract was voided and told him he was angry. He spoke to Mr. Goldfein numerous times thereafter. When he spoke about Jack LaLanne's, Complainant would experience the same symptoms he felt the day he learned he could not join. Complainant also spoke to his friend Elaine Gerson one or two days after his membership contract had been voided, and also told Ms. Gerson he was angry about what had happened to him at Respondent's facility.

The anger and outrage Complainant felt did not dissipate entirely over time. Even several months after his contract had been voided, Complainant still felt angry. Illustrative of his anger was an incident in which Complainant, a few months after his rejection, opened the door to the Park Avenue Spa and shouted to Ms. Diaz that "it is not over yet. n At the hearing two and a half years later, when testifying about the incident, Complainant, a man who by training is "alert, calm and quiet., again felt the sensations he associates with an increase in his blood pressure.

Thus, it is abundantly clear that Complainant suffered, and continues to suffer, pain, outrage and extreme mental anguish. We therefore find that Complainant is entitled to an award of $2,500.00 as compensatory damages for humiliation, outrage and mental anguish.

ORDER

It is hereby Ordered that Respondent Jack LaLanne Fitness Centers, Inc.:

1. Pay Complainant the sum of $2,500.00 which represents compensatory damages for the mental anguish suffered by Complainant as a result of Respondent's discriminatory conduct;

2. Offer Complainant a full membership to any New York City spa facility operated by Respondent, and permit Complainant to be accompanied by his guide dog. Said membership should be at the same cost as the program to which Complainant was discriminatory denied access; and 3. Cease and desist from engaging in further discriminatory practices with respect to the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges of the health spas owned and operated by Jack LaLanne Fitness Centers, Inc. to visually impaired individuals who use guidedogs.

Dated: June 9, 1986
Issued: June 12, 1986

Marcella Maxwell
Chairperson
Commission on Human Rights

Footnotes

1 "T." preceding a page number refers to the transcript of the hearing; "C. Ex. n refers to Complainant's Exhibits; °R. Ex. n refers to Respondent's Exhibits.

1986 WL 379985 (N.Y.C.Com.Hum.Rts.)

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1991 WL 790558 (N.Y.C.Com.Hum.Rts.)

Commission on Human Rights

City of New York

In the Matter of the Complaint of NEW YORK CITY COMMISSION ON HUMAN RIGHTS, Complaint,
- against -
UNITED VETERANS MUTUAL HOUSING NO. 2 CORPORATION, Respondent

Complaint No. EMC00986-08/14/87 DE
Docket No. 90-116H (SP/ 1s)
Dated: June 7, 1991

DECISION AND ORDER

***1** In this case, the Law Enforcement Bureau of the New York City Commission on Human Rights alleged that the United Veterans Mutual Housing No. 2 Corporation's policy with respect to providing reasonable accommodations to residents with disabilities is discriminatory. Specifically, the Bureau alleges that the Respondent has maintained a policy of refusing at its own cost and expense to construct or insure any improvements to the common areas to accommodate the needs of the residents with disabilities. Respondent did not dispute the existence of this policy. As such, the Administrative Law Judge (ALJ) properly concluded that such an out right refusal to contemplate the provision of any reasonable accommodation irrespective of costs is not consistent with the contents of the Code. The blanket refusal to expend corporate funds on * * * consideration given to nondisability-related needs is very plainly an inappropriate and illegal difference in treatment because of disability. Further, the general refusal to make any accommodations that case the expenditure of corporate funds may be considered to be a possible per se failure to make a reasonable accommodation as required by the law.

Within 90 days or the date or this Decision, Respondent is hereby ordered to provide the ALJ and the Law Enforcement Bureau of the New York City Commission on Human Rights with a compliance report, accompanied by any relevant documentation, demonstrating that the existing discriminatory policy effecting people with disabilities has been changed and that necessary measures are being taken to implement a policy of nondiscrimination consistent with 107(5)(a)(2), 8-108 and 8-102(16)(e). Within 10 days of receipt of the compliance report, the Law Enforcement Bureau must file a response to the report with the ALJ and Respondent. If deemed necessary, the ALJ may then schedule a hearing on the adequacy of compliance.

CONCLUSION

Accordingly, upon review of the ALJ's Recommended Decision and Order, the submitted memoranda and the proceedings had herein, the Commission adopts the ALJ's Recommended Decision as modified by this Decision and Order the relief provided there as the additional relief provides in this Decision and Order.

Dated: June 7, 1991 New York, New York
IT IS SO ORDERED.

Dennis deLeon
Commissioner/Chair
For the Commission on Human Rights

1991 WL 790558 (N.Y.C.Com.Hum.Rts.)

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KeyCite Yellow Flag - Negative Treatment
Implied Overruling Recognized by Lawrence Paper Co. v. Gomez, Kan., June 2, 1995

103 S.Ct. 2890
Supreme Court of the United States

Robert R. SHAW, Acting Commissioner, etc., et al., Appellants
v.
DELTA AIR LINES, INC., et al.

No. 81–1578.
|
Argued Jan. 10, 1983.
|
Decided June 24, 1983 [*].

Synopsis

Airlines and other employers sought declaratory judgment of preemption of New York's Human Rights Law by Employee Retirement Income Security Act, and airlines also sought judgment as to preemption of New York's Disability Benefits Law. From judgments entered by the United States District Court for the Southern District of New York, 485 F.Supp. 300, and by the United States District Court for the Western District of New York, appeals were taken. The Court of Appeals for the Second Circuit, 650 F.2d 1287, 650 F.2d 1308, and 650 F.2d 1309, reversed and remanded but, at 666 F.2d 21, 666 F.2d 26, and 666 F.2d 27, vacated original decisions and affirmed. Probable jurisdiction was noted, and the Supreme Court, Justice Blackmun, held that: (1) New York's Human Rights Law was preempted with respect to ERISA benefit plans only insofar as it prohibited practices that were lawful under federal law, and (2) Disability Benefits Law was not preempted by ERISA, although New York could not enforce its provisions through regulation of ERISA-covered benefit plans.

Affirmed in part; vacated and remanded in part.

West Headnotes (21)

[1] States
Congressional intent

In deciding whether federal law preempts state statute, Supreme Court's task is to ascertain Congress' intent in enacting civil statute at issue.

278 Cases that cite this headnote

[2] Courts
Restraining Particular Proceedings

Federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.

86 Cases that cite this headnote

[3] Federal Courts
Matters of Procedure in General

Plaintiff who seeks injunctive relief from state regulation on ground that such regulation is preempted by federal statute which, by virtue of supremacy clause of Constitution, must prevail presents federal question which federal courts have jurisdiction to resolve under federal question statute. 28 U.S.C.A. § 1331; U.S.C.A. Const. Art. 6, cl. 2.

223 Cases that cite this headnote

[4] States
Discrimination; retaliatory discharge
States
Pensions and benefits

New York Human Rights Law, forbidding discrimination in employment including discrimination in employee benefit plans on basis of pregnancy, and Disability Benefits Law, requiring employers to pay sick leave benefits to employees unable to work because of pregnancy or other nonoccupational disabilities, "related to" employee benefit plans within meaning of section of Employee Retirement Income Security Act providing for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1144(a); N.Y.McKinney's Executive

Law §§ 290–301; N.Y.McKinney's Workers' Compensation Law §§ 200–242.

202 Cases that cite this headnote

[5] States
Pensions and benefits

In normal sense of phrase, a law "relates to" an employee benefit plan, as required by section of Employee Retirement Income Security Act providing for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA, if it has connection with or reference to such plan. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1144(a).

1806 Cases that cite this headnote

[6] States
Pensions and benefits

In determining whether New York Human Rights Law and Disability Benefits Law "related to" employee benefit plans and therefore were preempted pursuant to section of Employee Retirement Income Security Act providing for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA, Supreme Court had to give effect to plain "relates to" language unless there was good reason to believe that Congress intended language to have some more restrictive meaning. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1144(a); N.Y.McKinney's Executive Law §§ 290–301; N.Y.McKinney's Workers' Compensation Law §§ 200–242.

701 Cases that cite this headnote

[7] States
Pensions and benefits

Section of Employee Retirement Income Security Act providing for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA, did not preempt only state laws specifically designed to affect employee benefit plans; rather, Congress used words "relate to" in their broad sense. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

1326 Cases that cite this headnote

[8] States
Pensions and benefits

Section of Employee Retirement Income Security Act providing for preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA does not preempt only state laws dealing with subject matters covered by ERISA, i.e., reporting, disclosure, fiduciary responsibility, and the like. Employee Retirement Income Security Act of 1973, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

419 Cases that cite this headnote

[9] States
Pensions and benefits

Title VII does not transform state fair employment laws into federal laws saved from Employee Retirement Income Security Act preemption by section of ERISA providing that Act's preemption not "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." Employee Retirement Income Security Act of 1974, §§ 2 et seq., 514(a, d), as amended, 29 U.S.C.A. §§ 1001 et seq., 1144(a, d); Civil Rights Act of 1964, §§ 701 et seq., 706(a, b), 708, 1104, as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e–5(b, c), 2000e–7, 2000h–4.

19 Cases that cite this headnote

[10] States
Pensions and benefits

Preemption of New York Human Rights Law by Employee Retirement Income Security Act would impair Title VII, within meaning of savings clause of ERISA, to extent that Human

Rights Law provided means of enforcing Title VII's commands and therefore Law was not preempted to such extent. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 514(a, d), as amended, 29 U.S.C.A. §§ 1001 et seq., 1144(a, d); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.; N.Y.McKinney's Executive Law §§ 290–301.

56 Cases that cite this headnote

[11] States
Discrimination; retaliatory discharge
States
Pensions and benefits

Insofar as New York Human Rights Law prohibited employment practices that were lawful under Title VII, preemption by Employee Retirement Income Security Act would not impair Title VII within meaning of savings clause of ERISA, and therefore Law's prohibition of pregnancy discrimination prior to effective date of Pregnancy Discrimination Act of 1978 was preempted by ERISA. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 514(a, d), as amended, 29 U.S.C.A. §§ 1001 et seq., 1144(a, d); Civil Rights Act of 1964, § 701 et seq., as amended, § 2000e et seq.; N.Y.McKinney's Executive Law §§ 290–301.

92 Cases that cite this headnote

[12] Civil Rights
Practices prohibited or required in general; elements

Title VII is neutral on subject of all employment practices it does not prohibit. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3 Cases that cite this headnote

[13] States
Pensions and benefits

Minor practical difficulties in determining whether employment practices prohibited by state fair employment laws were prohibited by Title VII and therefore whether state fair employment laws were preempted by Employee Retirement Income Security Act did not represent kind of "impairment" or "modification" of federal law that could save state law from preemption under savings clause of ERISA. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 514(a, d), as amended, 29 U.S.C.A. §§ 1001 et seq., 1144(a, d); Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

50 Cases that cite this headnote

[14] States
Pensions and benefits

Section of Employee Retirement Income Security Act exempting "any employee benefit plan * * * maintained solely for the purpose of complying with applicable * * * disability insurance laws" from ERISA preemption excludes "plans," not portions of plans, from ERISA coverage. Employee Retirement Income Security Act of 1974, §§ 4(a, b), (b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1003(a), (b)(3), 1144(a).

81 Cases that cite this headnote

[15] States
Pensions and benefits

Portions of airlines' multibenefit plans maintained to comply with New York Disability Benefits Law, which required employers to pay sick leave benefits to employees unable to work because of pregnancy or other nonoccupational disabilities, were not exempt from coverage of Employee Retirement Income Security Act and were not subject to state regulation. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4(b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1003(b)(3), 1144(a); N.Y.McKinney's Workers' Compensation Law §§ 200–242.

5 Cases that cite this headnote

[16] Labor and Employment
Disability plans

Congress did not use word "plan" in section of Employee Retirement Income Security Act exempting "any employee benefit plan * * * maintained solely for the purpose of complying with applicable * * * disability insurance laws" to refer to individual benefits offered by employee benefit plan; rather, purpose of entire plan must be to comply with applicable disability insurance law. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4(b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1003(b)(3), 1144(a); N.Y.McKinney's Workers' Compensation Law §§ 200–242.

37 Cases that cite this headnote

[17] Labor and Employment
Disability plans

Employee benefits plans that not only provide benefits required by applicable disability insurance law but also more broadly serve employee needs as result of collective bargaining are not exempt from coverage of Employee Retirement Income Security Act. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4(b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1003(b)(3), 1144(a); N.Y.McKinney's Workers' Compensation Law §§ 200–242.

8 Cases that cite this headnote

[18] Labor and Employment
Disability plans

Test of whether employee benefit plan is exempt from coverage of Employee Retirement Income Security Act coverage under section of ERISA exempting "any employee benefit plan * * * maintained solely for the purpose of complying with applicable * * * disability insurance laws" is not employer's motive but whether plan, as administrative unit, provides only those benefits required by applicable state law. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4(b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1003(b)(3), 1144(a); N.Y.McKinney's Workers' Compensation Law §§ 200–242.

29 Cases that cite this headnote

[19] Labor and Employment
Disability plans

Only separately administered disability plans maintained solely to comply with New York's Disability Benefits Law were exempt from coverage of Employee Retirement Income Security Act under section of ERISA exempting "any employee benefit plan * * * maintained solely for the purpose of complying with applicable * * * disability insurance laws." Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4(b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1003(b)(3), 1144(a); N.Y.McKinney's Workers' Compensation Law §§ 200–242.

28 Cases that cite this headnote

[20] States
Pensions and benefits

State may require employer to maintain disability plan complying with state law as separate administrative unit, and such plan would be exempt from coverage of Employee Retirement Income Security Act under section of ERISA exempting "any employee benefit plan * * * maintained solely for the purpose of complying with applicable * * * disability insurance laws," but fact that state law permits employers to meet their state law obligations by including disability insurance benefits in multibenefit ERISA plan does not make state law wholly unenforceable as to employers who choose such option. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4(b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1003(b)(3), 1144(a); N.Y.McKinney's Workers' Compensation Law §§ 200–242.

112 Cases that cite this headnote

[21] States
Pensions and benefits

While state may not require employer to alter its Employee Retirement Income Security Act

plan, it may force employer to choose between providing disability benefits in separately administered plan and including state-mandated benefits in its ERISA plan; if state is not satisfied that ERISA plan comports with requirements of its disability insurance law, it may compel employer to maintain separate plan that does comply. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 4(b)(3), 514(a), as amended, 29 U.S.C.A. §§ 1001 et seq., 1003(b)(3), 1144(a); N.Y.McKinney's Workers' Compensation Law §§ 200–242.

203 Cases that cite this headnote

West Codenotes

Limited on Preemption Grounds
McKinney's Executive Law § 296.

****2893** *Syllabus* [**]

***85** New York's Human Rights Law forbids discrimination in employee benefit plans on the basis of pregnancy, and its Disability Benefits Law requires employers to pay sick leave benefits to employees unable to work because of pregnancy. Section 514(a) of the federal Employee Retirement Income Security Act of 1974 (ERISA) provides, with enumerated exceptions, that ERISA shall supersede "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. ERISA does not mandate that employers provide any particular benefits, ****2894** and does not itself proscribe discrimination in the provision of employee benefits. Prior to the effective date of the Pregnancy Discrimination Act of 1978 (PDA), which made discrimination based on pregnancy unlawful under Title VII of the Civil Rights Act of 1964, appellee employers had welfare benefit plans subject to ERISA that did not provide benefits to employees disabled by pregnancy. Appellees brought three separate declaratory judgment actions in Federal District Court, alleging that the Human Rights Law was pre-empted by ERISA. Appellee airlines also alleged that the Disability Benefits Law was preempted. The District Court in each case held that the Human Rights Law was pre-empted, at least insofar as it required the provision of pregnancy benefits prior to the effective date of the PDA. As to appellee airlines' challenge to the Disability Benefits Law, the District Court construed § 4(b)(3) of ERISA as exempting from ERISA coverage those provisions of an employee benefit plan maintained to comply with state disability insurance laws, and, because it concluded that appellees would have provided pregnancy benefits solely to comply with the Disability Benefits Law, the court dismissed the portion of the complaint seeking relief from that law. The Court of Appeals affirmed as to the Human ***86** Rights Law. With respect to the Disability Benefits Law, the Court of Appeals held that § 4(b)(3)'s exemption from pre-emption applied only when a benefit plan, "as an integral unit," is maintained solely to comply with the disability law. The Court of Appeals remanded for a determination whether appellee airlines provided benefits through such plans, in which event the Disability Benefits Law would be enforceable, or through portions of comprehensive plans, in which case ERISA regulation would be exclusive.

Held:

1. Given § 514(a)'s plain language, and ERISA's structure and legislative history, both the Human Rights Law and the Disability Benefits Law "relate to any employee benefit plan" within the meaning of § 514(a). Pp. 2899 – 2901.

2. The Human Rights Law is pre-empted with respect to ERISA benefit plans only insofar as it prohibits practices that are lawful under federal law. Pp. 2902 – 2905.

(a) Section 514(d) of ERISA provides that § 514(a) "shall not be construed to ... modify [or] impair ... any law of the United States." To the extent that the Human Rights Law provides a means of enforcing Title VII's commands, pre-emption of the Human Rights Law would modify and impair federal law within the meaning of § 514(d). State fair employment laws and administrative remedies play a significant role in the federal enforcement scheme under Title VII. If ERISA were interpreted to pre-empt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit employment practices relating to such plans and the state agency no longer would be authorized to grant relief. The Equal Employment Opportunity Commission thus would be unable to refer claims involving covered plans to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII. Pp. 2902 – 2903.

(b) Insofar as state laws prohibit employment practices that are lawful under Title VII, however, pre-emption would not impair Title VII within the meaning of § 514(d). While

§ 514(d) may operate to exempt state laws upon which federal laws, such as Title VII, depend for their enforcement, the combination of Congress' enactment of § 514(a)'s all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision militate against expanding § 514(d) into a more general saving clause. Section 514(d)' s limited legislative history is entirely consistent with Congress' goal of ensuring that employers would not face conflicting or inconsistent state and local regulation of employee benefit plans. Pp. 2903 – 2905.

3. The Disability Benefits Law is not pre-empted by ERISA. Pp. 2905 – 2906.

***87** ****2895** (a) Section 4(b)(3) of ERISA, which exempts from ERISA coverage "any employee benefit plan ... maintained solely for the purpose of complying with applicable ... disability insurance laws," excludes "plans," not portions of plans, from ERISA coverage. Hence, those portions of appellee airlines' multibenefit plans maintained to comply with the Disability Benefits Law are not exempt from ERISA and are not subject to state regulation. Section 4(b)(3)'s use of the word "solely" demonstrates that the purpose of the entire plan must be to comply with an applicable disability insurance law. Thus, only separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3). P. 2905.

(b) A State may require an employer to maintain a separate disability plan, but the fact that state law permits employers to meet their state-law obligations by including disability benefits in a multibenefit ERISA plan does not make the state law wholly unenforceable as to employers who choose that option. Pp. 2905 – 2906.

650 F.2d 1287 and 666 F.2d 21; and 666 F.2d 27 and 666 F.2d 26, affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

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Gordon Dean Booth, Jr., argued the cause for appellees. With him on the brief for appellees Delta Air Lines, Inc., et al. was *William H. Boice. Robert C. Bernius, William E. McKnight,* and *Robb M. Jones* filed a brief for appellee Burroughs Corp. *Edward Silver, Sara S. Portnoy,* and *Jeffrey A. Mishkin* filed a brief for appellee Metropolitan Life Insurance Co.†

† Briefs of *amici curiae* urging reversal were filed by *LeRoy S. Zimmerman,* Attorney General, and *Ellen M. Doyle* for the Commonwealth of Pennsylvania et al.; by *Mary L. Heen, Joan E. Bertin,* and *Isabelle Katz Pinzler* for the American Civil Liberties Union et al.; and by *J. Albert Woll, Marsha Berzon, Laurence Gold,* and *John Fillion* for the American Federation of Labor and Congress of Industrial Organizations et al.

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Opinion

***88** Justice BLACKMUN delivered the opinion of the Court.

New York's Human Rights Law forbids discrimination in employment, including discrimination in employee benefit plans on the basis of pregnancy. The State's Disability Benefits Law requires employers to pay sick-leave benefits to employees unable to work because of pregnancy or other nonoccupational disabilities. The question before us is whether these New York laws are pre-empted by the federal Employee Retirement Income Security Act of 1974 (ERISA).

I

A

The Human Rights Law, N.Y.Exec.Law §§ 290–301 (McKinney 1982 and Supp.1982–1983), is a comprehensive anti-discrimination statute prohibiting, among other practices, employment discrimination on the basis of sex. § 296.1(a).[1] The New York Court of Appeals has held that a private employer whose employee benefit plan treats pregnancy differently from other nonoccupational disabilities engages in sex discrimination within the meaning of the Human Rights Law. *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board,* 41 N.Y.2d 84, 390 N.Y.S.2d 884, 359 N.E.2d 393 (1976). In contrast, two

weeks before the decision in *Brooklyn Union Gas,* this Court ruled that discrimination based on pregnancy was not sex discrimination under Title VII of the Civil Rights ****2896** Act of 1964, 78 Stat. 253, as amended, ***89** 42 U.S.C. § 2000e *et seq.* (1976 ed.). *General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976).[2] Congress overcame the *Gilbert* ruling by enacting § 1 of the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1976 ed., Supp. V), which added subsection (k) to § 701 of the Civil Rights Act of 1964.[3] See *Newport News Shipbuilding and Dry Dock Co. v. EEOC,* ––– U.S. –––, –––, 103 S.Ct. 2622, 2627, 75 L.Ed.2d ––– (1983). Until that Act took effect on April 29, 1979, see § 2(b), 92 Stat. 2076, the Human Rights Law in this respect had a reach broader than Title VII.

The Disability Benefits Law, N.Y.Work.Comp.Law §§ 200–242 (McKinney 1965 and Supp.1982–1983), requires employers to pay certain benefits to employees unable to work because of nonoccupational injuries or illness. Disabled employees generally are entitled to receive the lesser of $95 per week or one-half their average weekly wage, for a maximum of 26 weeks in any one-year period. §§ 204.2, 205.1. Until August 1977, the Disability Benefits Law provided that employees were not entitled to benefits for pregnancy-related disabilities. § 205.3 (McKinney 1965). From August 1977 to June 1981, employers were required to provide eight weeks of benefits for pregnancy-related disabilities. ***90** 1977 N.Y.Laws, ch. 675, § 29 (formerly codified as N.Y.Work.Comp.Law § 205.3). This limitation was repealed in 1981, see 1981 N.Y.Laws, ch. 352, § 2, and the Disability Benefits Law now requires employers to provide the same benefits for pregnancy as for any other disability.[4]

B

The federal Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.* (1976 ed. and Supp. V), subjects to federal regulation plans providing employees with fringe benefits. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. See *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446 U.S. 359, 361–362, 100 S.Ct. 1723, 1726–1727, 64 L.Ed.2d 354 (1980); *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 510, 101 S.Ct. 1895, 1899, 68 L.Ed.2d 402 (1981). The term “employee benefit plan” is defined as including both pension plans and welfare ***91** plans.[5] The statute imposes participation, funding, and vesting requirements on pension plans. §§ 201–306, 29 U.S.C. §§ 1051–1086 (1976 ed. ****2897** and Supp. V). It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans. §§ 101–111, 401–414, 29 U.S.C. §§ 1021–1031, 1101–1114 (1976 ed. and Supp. V). ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), pre-empts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.[6] State laws regulating insurance, banking, or securities are exempt from this pre-emption provision, as are generally applicable state criminal laws. §§ 514(b)(2)(A) and (b)(4), 29 U.S.C. §§ 1144(b)(2)(A) and (b)(4). Section 514(d), 29 U.S.C. § 1144(d), moreover, provides that “[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States ... or any rule or regulation issued under any such law.” And § 4(b)(3) ***92** of ERISA, 29 U.S.C. § 1003(b)(3), exempts from ERISA coverage employee benefit plans that are “maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws.”

II

Appellees in this litigation, Delta Air Lines, Inc., and other airlines (Airlines), Burroughs Corporation (Burroughs), and Metropolitan Life Insurance Company (Metropolitan), provided their employees with various medical and disability benefits through welfare plans subject to ERISA. These plans, prior to the effective date of the Pregnancy Discrimination Act, did not provide benefits to employees disabled by pregnancy as required by the New York Human Rights Law and the State's Disability Benefits Law. Appellees brought three separate federal declaratory judgment actions against appellant state agencies and officials,[7] alleging that the Human Rights Law was pre-empted by ERISA. The Airlines in their action alleged that the Disability Benefits Law was similarly pre-empted.[8]

The United States District Court in each case held that the Human Rights Law was pre-empted, at least insofar as it ***93** required the provision of pregnancy benefits prior to the effective date of the Pregnancy Discrimination Act. [9] With respect to the Airlines' ****2898** challenge to the Disability Benefits Law, the District Court construed § 4(b)(3) of ERISA as exempting from the federal statute "those provisions of an employee plan which are maintained to comply with" state disability insurance laws. *Delta Air Lines, Inc. v. Kramarsky,* 485 F.Supp. 300, 307 (SDNY 1980). Because it concluded that the Airlines would have provided pregnancy benefits solely to comply with the Disability Benefits Law, the court dismissed the portion of their complaint seeking relief from that law.

The United States Court of Appeals for the Second Circuit affirmed as to the Human Rights Law. *Delta Air Lines, Inc. v. Kramarsky,* 666 F.2d 21 (1981); *Metropolitan Life* ***94** *Insurance Co. v. Kramarsky,* 666 F.2d 26 (1981); *Burroughs Corp. v. Kramarsky,* 666 F.2d 27 (1981). [10] Relying on this Court's decision in *Alessi, supra,* and on its own ruling in *Pervel Industries, Inc. v. Connecticut Commission on Human Rights & Opportunities,* 603 F.2d 214 (1979), mem. aff'g 468 F.Supp. 490 (Conn.1978), cert. denied, 444 U.S. 1031, 100 S.Ct. 701, 62 L.Ed.2d 667 (1980), the court held that § 514(a) of ERISA operated to pre-empt the Human Rights Law, and that § 514(d) did not save that law from pre-emption. [11] With respect to the Disability Benefits Law, the Court of Appeals had concluded earlier that § 4(b)(3)'s exemption from pre-emption applied only when a benefit plan, "as ***95** an integral unit," is maintained solely to comply with a disability law. *Delta Air Lines, Inc. v. Kramarsky,* 650 F.2d 1287, 1304 (1981). The court remanded for inquiries into whether the Airlines provided disability benefits through plans constituting separate administrative ****2899** units, in which event the Disability Benefits Law would be enforceable, or through portions of comprehensive benefit plans, in which case ERISA regulation would be exclusive.

Because courts have disagreed about the scope of ERISA's pre-emption provisions, [12] and because of the continuing importance of the issues presented, [13] we noted probable jurisdiction in all three cases. 456 U.S. 924, 102 S.Ct. 1968, 72 L.Ed.2d 439 (1982).

III

[1] [2] [3] In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 [97 S.Ct. 1305, 1309, 51 L.Ed.2d 604] (1977)." *Fidelity Federal Savings & Loan Assn. v. de la Cuesta,* 458 U.S. ––––, ––––, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). See *Exxon Corp. v. Eagerton,* ––– U.S. ––––, ––––, ***96** 103 S.Ct. 2296, 2300–2301, 75 L.Ed.2d ––– (1983); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n,* ––– U.S. ––––, ––––, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). In this case, we address the scope of several provisions of ERISA that speak expressly to the question of pre-emption. The issues are whether the Human Rights Law and Disability Benefits Law "relate to" employee benefit plans within the meaning of § 514(a), see n. 6, *supra,* and, if so, whether any exception in ERISA saves them from pre-emption. [14]

[4] [5] [6] We have no difficulty in concluding that the Human Rights Law and Disability Benefits Law "relate to" employee benefit plans. The breadth of § 514(a)'s ****2900** pre-emptive reach is apparent from that section's language. [15] A law "relates to" an ***97** employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. [16] Employing this definition, the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly "relate to" benefit plans. [17] We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); see *North Dakota v. United States,* –––U.S. ––––, ––––, ***98** 103 S.Ct. 1095, 1102, 75 L.Ed.2d 77 (1983); *Dickerson v. New Banner Institute, Inc.,* –––U.S. ––––, ––––, 103 S.Ct. 986, 990, 74 L.Ed.2d 845 (1983).

[7] In fact, however, Congress used the words "relate to" in § 514(a) in their broad sense. To interpret § 514(a) to preempt

only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans.

[8] Nor, given the legislative history, can § 514(a) be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like. The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA.[18] The ****2901** Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language. See H.R.Conf.Rep. No. 93–1280, p. 383 (1974); S.Conf.Rep. No. 93–1090, p. 383 (1974), U.S.Code Cong. & Admin.News 1974, p. 4639.[19] Statements by the bill's ***99** sponsors during the subsequent debates stressed the breadth of federal pre-emption. Representative Dent, for example, stated:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong.Rec. 29197 (1974).
> Senator Williams echoed these sentiments:
>
> > "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." *Id.,* at 29933.[20]

***100** Given the plain language of § 514(a), the structure of the Act, and its legislative history, we hold that the Human Rights Law and the Disability Benefits Law "relate to any employee benefit plan" within the meaning of ERISA's § 514(a).[21]

**2902 IV

We next consider whether any of the narrow exceptions to § 514(a) saves these laws from pre-emption.

A

Appellants argue that the Human Rights Law is exempt from pre-emption by § 514(d), which provides that § 514(a) ***101** shall not "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." According to appellants, pre-emption of state fair employment laws would impair and modify Title VII because it would change the means by which it is enforced.

[9] State laws obviously play a significant role in the enforcement of Title VII. See, *e.g., Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468–469, 472, 477, 102 S.Ct. 1883, 1890–1891, 1892, 1895, 72 L.Ed.2d 262 (1982); *id.,* at 504, 102 S.Ct., at 1908 (dissenting opinion); *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 63–65, 100 S.Ct. 2024, 2030–2031, 64 L.Ed.2d 723 (1980). Title VII expressly preserves nonconflicting state laws in its § 708:

> "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 78 Stat. 272, 42 U.S.C. § 2000e–7.[22]

Moreover, Title VII requires recourse to available state administrative remedies. When an employment practice prohibited by Title VII is alleged to have occurred in a State or locality which prohibits the practice and has established an ***102** agency to enforce that prohibition, the Equal Employment Opportunity Commission (EEOC) refers the charges to the state agency. The EEOC may not actively process the charges "before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." § 706(c), 86 Stat. 104, 42 U.S.C. § 2000e–5(c); see *Love v. Pullman Co.,* 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972). In its subsequent proceedings, the EEOC accords "substantial weight" to the state administrative determination. § 706(b), 86 Stat. 104, 42 U.S.C. § 2000e–5(b).

[10] Given the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands. Before the enactment of ERISA, an employee claiming discrimination in connection with a benefit plan would have had his complaint referred to the New York State Division of Human Rights. If ERISA were interpreted to pre-empt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination **2903 prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of § 514(d), "modify" and "impair" federal law. [23]

[11] [12] *103 Insofar as state laws prohibit employment practices that are lawful under Title VII, however, pre-emption would not impair Title VII within the meaning of § 514(d). Although Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, see § 708, 78 Stat. 262, 42 U.S.C. § 2000e–7, it in no way depends on such extensions for its enforcement. Title VII would prohibit precisely the same employment practices, and be enforced in precisely the same manner, even if no State made additional employment practices unlawful. Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit. [24] We fail to see how federal *104 law would be impaired by pre-emption of a state law prohibiting conduct that federal law permitted.

ERISA's structure and legislative history, while not particularly illuminating with respect to § 514(d), caution against applying it too expansively. As we have detailed above, Congress applied the principle of pre-emption "in its broadest sense to foreclose any non-Federal regulation of employee benefit plans," creating only very limited exceptions to pre-emption. 120 Cong.Rec. 29197 (remarks of Rep. Dent); see *id.*, at 29933 (remarks of Sen. Williams). Sections 4(b)(3) and 514(b), which list specific exceptions, do not refer to state fair employment laws. While § 514(d) may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand § 514(d) into a more general saving clause.

The references to employment discrimination in the legislative history of ERISA provide no basis for an expansive construction of § 514(d). During floor debates, Senator Mondale questioned whether the Senate bill should be amended to require nondiscrimination in ERISA plans. Senator Williams replied that no such amendment was necessary or desirable. He noted that Title VII already prohibited discrimination in benefit plans, and stated: "I believe that the thrust toward centralized administration **2904 of nondiscrimination in employment must be maintained. And I believe this can be done by the Equal Employment Opportunity Commission under terms of existing law." 119 Cong.Rec. 30409 (1973). Senator Mondale, "with the understanding that nondiscrimination in pension and profit-sharing plans is fully required under the Equal Employment Opportunity Act," *id.*, at 30410, chose not to offer a nondiscrimination amendment. This colloquy was repeated on the floor of the House by Representatives Abzug and Dent. 120 Cong.Rec. 4726 (1974).

*105 These exchanges demonstrate only the obvious: that § 514(d) does not pre-empt federal law. The speakers referred to federal law, the EEOC, and the need for centralized enforcement. The limited legislative history dealing with § 514(d) is entirely consistent with Congress' goal of ensuring that employers would not face "conflicting or inconsistent State and local regulation of employee benefit plans," 120 Cong.Rec. 29933 (1974) (remarks of Sen. Williams). Congress might well have believed, had it considered the precise issue before us, that ERISA plans should be subject only to the nondiscrimination provisions of Title VII, and not also to state laws prohibiting other forms of discrimination. By establishing benefit plan regulation "as exclusively a federal concern," *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S., at 523, 101 S.Ct., at 1906, Congress minimized the need for interstate employers to administer their plans differently in each State in which they have employees. [25]

[13] We recognize that our interpretation of § 514(d) as requiring partial pre-emption of state fair employment laws may cause certain practical problems. Courts and state agencies, rather than considering whether employment practices are *106 unlawful under a broad state law, will have to determine whether they are prohibited by Title VII. If they are not, the state law will be superseded and

the agency will lack authority to act. It seems more than likely, however, that state agencies and courts are sufficiently familiar with Title VII to apply it in their adjudicative processes. Many States look to Title VII law as a matter of course in defining the scope of their own laws.[26] In any event, these minor practical difficulties do not represent the kind of "impairment" or "modification" of *federal* law that can save a *state* law from pre-emption under § 514(d). To the extent that our construction of ERISA causes any problems in the administration of state fair employment laws, those problems are the result of congressional choice and should be addressed by congressional action. To give § 514(d) the broad construction advocated by appellants would defeat ****2905** the intent of Congress to provide comprehensive pre-emption of state law.

B

The Disability Benefits Law presents a different problem. Section 514(a) of ERISA pre-empts state laws that relate to benefit plans "described in section 4(a) and not exempt under section 4(b)." Consequently, while the Disability Benefits Law plainly is a state law relating to employee benefit plans, it is not pre-empted if the plans to which it relates are exempt from ERISA under § 4(b). Section 4(b)(3) exempts "any employee benefit plan ... maintained solely for the purpose of complying with applicable ... disability insurance laws." The Disability Benefits Law is a "disability insurance law," of course; the difficulty is that at least some of the benefit ***107** plans offered by the Airlines provide benefits not required by that law. The question is whether, with respect to those among the Airlines using multi-benefit plans, the Disability Benefits Law's requirement that employers provide particular benefits remains enforceable.

[14] [15] [16] [17] [18] As the Court of Appeals recognized, § 4(b)(3) excludes "plans," not portions of plans, from ERISA coverage; those portions of the Airlines' multi-benefit plans maintained to comply with the Disability Benefits Law, therefore, are not exempt from ERISA and are not subject to state regulation. There is no reason to believe that Congress used the word "plan" in § 4(b) to refer to individual benefits offered by an employee benefit plan. To the contrary, § 4(b)(3)'s use of the word "solely" demonstrates that the purpose of the entire plan must be to comply with an applicable disability insurance law. As the Court noted in *Alessi,* plans that not only provide benefits required by such a law, but also "more broadly serve employee needs as a result of collective bargaining," are not exempt. 451 U.S., at 523, n. 20, 101 S.Ct., at 1906, n. 20. The test is not one of the employer's motive—any employer could claim that it provided disability benefits altruistically, to attract good employees, or to increase employee productivity, as well as to obey state law—but whether the plan, as an administrative unit, provides only those benefits required by the applicable state law.

[19] Any other rule, it seems to us, would make little sense. Under the District Court's approach, for which appellants argue here, one portion of a multi-benefit plan would be subject only to state regulation, while other portions would be exclusively within the federal domain. An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State, depending on what benefits the State mandated under disability, workmen's compensation, and unemployment compensation laws. The administrative impracticality of permitting mutually exclusive pockets of federal and state ***108** jurisdiction within a plan is apparent. We see no reason to torture the plain language of § 4(b)(3) to achieve this result. Only separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3).

[20] This is not to say, however, that the Airlines are completely free to circumvent the Disability Benefits Law by adopting plans that combine disability benefits inferior to those required by that law with other types of benefits. Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible. A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3). The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multi-benefit ERISA plan, see N.Y.Work.Comp.Law App. § 355.6 (McKinney ****2906** Supp.1982–1983), does not make the state law wholly unenforceable as to employers who choose that option.

[21] In other words, while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan. If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a

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separate plan that does comply. The Court of Appeals erred, therefore, in holding that appellants are not at all free to enforce the Disability Benefits Law against those appellees that provide disability benefits as part of multi-benefit plans.

V

We hold that New York's Human Rights Law is pre-empted with respect to ERISA benefit plans only insofar as it prohibits practices that are lawful under federal law. To ***109** this extent, the judgments of the Court of Appeals are affirmed. To the extent the Court of Appeals held any more of the Human Rights Law pre-empted, we vacate its judgments and remand the cases.

We further hold that the Disability Benefits Law is not pre-empted by ERISA, although New York may not enforce its provisions through regulation of ERISA-covered benefit plans. We therefore vacate the Court of Appeals' judgment in the Airlines' case on this ground and remand that case for further proceedings consistent with this opinion.

No costs are allowed.

It is so ordered.

All Citations

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Footnotes

* Together with *Shaw, Acting Commissioner, New York State Division of Human Rights v. Burroughs Corp.;* and *Shaw, Acting Commissioner, New York State Division of Human Rights, et al. v. Metropolitan Life Insurance Co.,* also on appeal from the same court (see this Court's Rule 10.6).

** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 296.1 provides:

"1. It shall be an unlawful discriminatory practice:

"(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

2 The New York court in *Brooklyn Union Gas* noted the *Gilbert* decision, but declined to follow it in interpreting the analogous provision of the Human Rights Law. 41 N.Y.2d, at 86, n. 1, 390 N.Y.S.2d, at 886, n. 1, 359 N.E.2d, at 395, n. 1. Most state courts have done the same. See *Minnesota Mining & Manufacturing Co. v. Minnesota,* 289 N.W.2d 396, 399, n. 2 (Minn.1979) (collecting cases), appeal dismissed, 444 U.S. 1041, 100 S.Ct. 725, 62 L.Ed.2d 726 (1980).

3 Subsection (k) provides in relevant part:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise."

4 The current version of the Disability Benefits Law provides in relevant part:

"§ 204. Disability during employment

"1. Disability benefits shall be payable to an eligible employee for disabilities ... beginning with the eighth consecutive day of disability and thereafter during the continuance of disability, subject to the limitations as to maximum and minimum amounts and duration and other conditions and limitations in this section and in sections two hundred five and two hundred six....

"2. The weekly benefit which the disabled employee is entitled to receive for disability commencing on or after July first, nineteen hundred seventy-four shall be one-half of the employee's average weekly wage, but in no case shall such benefit exceed ninety-five dollars nor be less than twenty dollars; except that if the employee's average weekly wage is less than twenty dollars, his benefit shall be such average weekly wage....

"§ 205. Disabilities and disability periods for which benefits are payable

"No employee shall be entitled to benefits under this article:

"1. For more than twenty-six weeks during a period of fifty-two consecutive calendar weeks or during any one period of disability...."

5 ERISA § 3(3), 29 U.S.C. § 1002(3). An "employee pension benefit plan" provides income deferral or retirement income. § 3(2), 29 U.S.C. § 1002(2). An "employee welfare benefit plan" includes any program that provides benefits for contingencies such as illness, accident, disability, death, or unemployment. § 3(1), 29 U.S.C. § 1002(1).

6 Section 514(a) provides:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)."

The term "State law" includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." § 514(c)(1), 29 U.S.C. § 1144(c)(1). The term "State" includes "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." § 514(c)(2), 29 U.S.C. § 1144(c)(2).

7 The Airlines brought their action in the United States District Court for the Southern District of New York and named as defendants the New York State Division of Human Rights, the Division's Commissioner, the Division's General Counsel, the New York State Workmen's Compensation Board, and the Board's Chairman. App. 28. Burroughs brought its action in the Western District of New York against only the Commissioner of the Division of Human Rights. App. 81. Metropolitan, suing in the Southern District of New York, named the Commissioner, the Division, and the New York State Human Rights Appeal Board. App. 88.

8 The Airlines also contended that the Human Rights Law and Disability Benefits Law were pre-empted by the Railway Labor Act, 45 U.S.C. §§ 151–188; the Equal Pay Act, 29 U.S.C. § 206(d); Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.); and Title VII. These claims were resolved against the Airlines, see *Delta Air Lines, Inc. v. Kramarsky,* 666 F.2d 21, 26, n. 2 (CA2 1981); *Delta Air Lines, Inc. v. Kramarsky,* 650 F.2d 1287, 1296–1302 (CA2 1981), and are not before us.

9 The opinion in the Airlines' case is reported as *Delta Air Lines, Inc. v. Kramarsky,* 485 F.Supp. 300 (SDNY 1980); the District Court opinions in the two other cases are not reported. In the Airlines' case, the District Court enjoined appellants from enforcing the Human Rights Law against the Airlines' benefit plans with respect to the period from December 20, 1976 (the date of the New York Court of Appeals' decision in *Brooklyn Union Gas*) to April 29, 1979 (the effective date of the federal Pregnancy Discrimination Act). See App. to Juris. Statement A75. As of the latter date, the court held, the Airlines' claims for relief were moot because federal law required the Airlines to include pregnancy disabilities in their employee benefit plans. 485 F.Supp., at 302.

In Burroughs' case, the District Court enjoined prosecution of Burroughs for its refusal to compensate New York employees for pregnancy-related disability claims between January 1, 1975 (the effective date of ERISA) and April 1, 1979 (which the court mistakenly believed to be the effective date of the Pregnancy Discrimination Act). App. to Juris. Statement A103–A104. In Metropolitan's case, the District Court enjoined enforcement of the Human Rights Law with respect to employee benefit plans subject to ERISA. The court's order was not limited to pregnancy benefits and did not refer specifically to any time period. App. to Juris. Statement A119–A120.

The cases, of course, are not moot with respect to the period before the effective date of the Pregnancy Discrimination Act, since enforcement of the Human Rights Law would subject appellees to liability.

10 The three cases were not consolidated on appeal, but were argued the same day. The court treated the Airlines' appeal as the "lead" case.

11 Initially, the Court of Appeals had reversed the District Courts' holdings that ERISA pre-empted the Human Rights Law. *Delta Air Lines, Inc. v. Kramarsky,* 650 F.2d 1287 (1981); *Burroughs Corp. v. Kramarsky,* 650 F.2d 1308 (1981); *Metropolitan Life Insurance Co. v. Kramarsky,* 650 F.2d 1309 (1981). Although *Pervel* ordinarily would have been controlling, the court concluded that it was bound by this Court's dismissals, for want of a substantial federal question, of

the appeals in *Minnesota Mining & Manufacturing Co. v. Minnesota,* 289 N.W.2d 396 (Minn.1979), appeal dismissed, 444 U.S. 1041, 100 S.Ct. 725, 62 L.Ed.2d 726 (1980), and *Mountain States Telephone & Telegraph Co. v. Commissioner of Labor & Industry,* 608 P.2d 1047 (Mont.1979), appeal dismissed, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980). In those cases the state courts had determined that state fair employment laws similar to the Human Rights Law were not pre-empted by ERISA.

The Court of Appeals observed that this Court had denied certiorari in *Pervel,* which reached the opposite result, only a week before dismissing the appeal in *Minnesota Mining.* Understandably viewing this sequence of events as "rather mystifying," 650 F.2d, at 1296, the court noted that dismissals of appeals are binding precedents for the lower courts, see *Hicks v. Miranda,* 422 U.S. 332, 343–345, and n. 14, 95 S.Ct. 2281, 2288–2290, and n. 14, 45 L.Ed.2d 223 (1975), while denials of certiorari have no precedential force. After this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981), the Court of Appeals granted rehearing and returned to its *Pervel* reasoning, holding that *Alessi* was a "doctrinal development," see *Hicks v. Miranda,* 422 U.S., at 344–345, 95 S.Ct., at 2289–2290, that warranted departure from the precedent set by the Court's summary dispositions. 666 F.2d, at 25–26.

12 See *Minnesota Mining & Manufacturing Co. v. Minnesota, supra; Mountain States Telephone & Telegraph Co. v. Commissioner of Labor & Industry, supra;* see also *Bucyrus-Erie Co. v. Department of Industry, Labor & Human Relations,* 599 F.2d 205 (CA7 1979), cert. denied, 444 U.S. 1031, 100 S.Ct. 701, 62 L.Ed.2d 667 (1980).

13 Under the Pregnancy Discrimination Act, the kind of discrimination at issue here is now unlawful regardless of state law. The controversy about the Human Rights Law has not thereby become less significant, however; the Human Rights Law and other state fair employment laws may contain proscriptions broader than Title VII in other respects, see *e.g.,* N.Y.Exec.Law. § 296.1(a) (prohibiting discrimination in employment based on marital status), and there is uncertainty about whether state fair employment laws may be enforced to the extent they prohibit the same practices as Title VII.

14 The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S.1, 103 S.Ct. 2841, 77 L.Ed.2d 420, does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted.

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young,* 209 U.S. 123, 160–162, 28 S.Ct. 441, 454–455, 52 L.Ed. 714 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. See *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 199–200, 41 S.Ct. 243, 244–245, 65 L.Ed. 577 (1921); *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed.2d 126 (1908); see also *Franchise Tax Board,* 463 U.S., at ——, and n. 20, 103 S.Ct., at 2851–2852, and n. 20, 75 L.Ed.2d, at ——, and n. 20; Note, Federal Jurisdiction over Declaratory Suits Challenging State Action, 79 Colum.L.Rev. 983, 996–1000 (1979). This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture. See, *e.g., Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Jones v. Rath Packing Co., supra; Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963); *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

15 The Court recently considered § 514(a) in *Alessi, supra.* In that case, a New Jersey statute prohibited a method of computing pension benefits which, the Court found, Congress intended to permit when it enacted ERISA. Finding that Congress "meant to establish pension plan regulation as exclusively a federal concern," 451 U.S., at 523, 101 S.Ct., at 1906, and that the New Jersey law "eliminates one method for calculating pension benefits—integration—that is permitted by federal law," *id.,* 451 U.S., at 524, 101 S.Ct., at 1907, the Court held that the law was pre-empted. The Court relied not on § 514(a)'s language and legislative history, but on the state law's frustration of congressional intent. That kind of tension is not present in this case; while federal law did not prohibit pregnancy discrimination during the relevant period, Congress, in enacting ERISA, demonstrated no desire to permit it. *Alessi's* recognition of the exclusive federal role in regulating benefit plans, therefore, is instructive but not dispositive. See also *Franchise Tax Board v. Construction Laborers Vacation Trust,* ——U.S. ——, ——, n. 26, 103 S.Ct. 2841, 2854, n. 26, 75 L.Ed.2d —— (1983) (describing § 514(a) as a "virtually unique pre-emption provision"); *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 248, n. 21, 98 S.Ct. 2716, 2724, n. 21, 57 L.Ed.2d 727 (1978) (dictum).

16 See Black's Law Dictionary 1158 (5th ed. 1979) ("Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with"). See also *Sinclair Refining Co. v. Jenkins Petroleum Process Co.,* 289 U.S. 689, 695, 53 S.Ct. 736, 738, 77 L.Ed. 1449 (1933).

17 Accord, *Bucyrus-Erie Co. v. Department of Industry, Labor & Human Relations,* 599 F.2d 205, 208–210 (CA7 1979), cert. denied, 444 U.S. 1031, 100 S.Ct. 701, 62 L.Ed.2d 667 (1980); *Pervel Industries, Inc. v. Connecticut Commission on Human Rights & Opportunities,* 468 F.Supp. 490, 492 (Conn.1978), aff'd mem., 603 F.2d 214 (CA2 1979), cert. denied, 444 U.S. 1031, 100 S.Ct. 701, 62 L.Ed.2d 667 (1980).

Of course, § 514(a) pre-empts state laws only insofar as they relate to plans covered by ERISA. The Human Rights Law, for example, would be unaffected insofar as it prohibits employment discrimination in hiring, promotion, salary, and the like.

18 The bill that passed the House, H.R. 2, 93d Cong., 2d Sess., § 514(a) (1974), 3 Legislative History of the Employee Retirement Income Security Act of 1974 (Committee Print compiled by the Senate Committee on Labor and Public Welfare), pp. 4057–4058 (1976) (Legislative History), provided that ERISA would supersede state laws "relat[ing] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies." The bill that passed the Senate, H.R. 2, 93d Cong, 2d Sess., § 699(a) (1974), 3 Legislative History 3820, provided for pre-emption of state laws "relat[ing] to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act."

19 In deciding to pre-empt state laws relating to benefit plans, rather than those laws relating to subjects covered by ERISA, the Conference Committee rejected a much narrower Administration proposal. The Administration's recommendations to the conferees described the pre-emption provision of the House and Senate bills as "extremely vague" and "too broad," respectively, and suggested language making explicit the areas of state law to be pre-empted. Administration Recommendations to the House and Senate Conferees on H.R. 2 to Provide for Pension Reform 107–108, 3 Legislative History 5145–5146. The version of § 514(a) that emerged from Conference bore no resemblance to the Administration proposal. See Hutchinson and Ifshin, Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974, 46 U.Chi.L.Rev. 23, 39–40, and n. 121 (1978).

20 See also 120 Cong.Rec. 29942 (remarks of Sen. Javits):

"Both [original] House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

"Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs."

Sen. Javits noted that the conferees had assigned the Congressional Pension Task Force the responsibility of studying and evaluating ERISA pre-emption in order to determine whether modifications in the pre-emption policy would be necessary. *Ibid.* See ERISA §§ 3021, 3022(a)(4), 88 Stat. 999 (1974) (formerly codified as 29 U.S.C. §§ 1221, 1222(a)(5) (1976 ed.)). After a period of monitoring by the Task Force, and hearings by the Subcommittee on Labor Standards of the House Committee on Education and Labor, a report was issued evaluating ERISA's pre-emption provisions. The report expressed approval of ERISA's broad pre-emption of state law, explaining that "the Federal interest and the need for national uniformity are so great that enforcement of state regulation should be precluded." H.R.Rep. No. 94–1785, p. 47 (1977). The report recommended only that the exceptions described in § 514(b) be narrowed still further. *Ibid.*

21 Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan. Cf. *American Telephone and Telegraph Co. v. Merry,* 592 F.2d 118, 121 (CA2 1979) (state garnishment of a spouse's pension income to enforce alimony and support orders is not pre-empted). The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.

22 See also § 1104, 78 Stat. 268, 42 U.S.C. § 2000h–4. The Court of Appeals properly rejected the simplistic "double saving clause" argument—that because ERISA does not pre-empt Title VII, and Title VII does not pre-empt state fair employment laws, ERISA does not pre-empt such laws. 666 F.2d, at 25–26. Title VII does not transform state fair employment laws into federal laws that § 514(d) saves from ERISA pre-emption. Furthermore, since Title VII's saving clause applies to all state laws with which it is not in conflict, rather than just to nondiscrimination laws, and since many federal laws contain nonpre-emption provisions, the double saving clause argument, taken to its logical extreme, would save almost all state laws from pre-emption. The question whether pre-emption of state fair employment laws would "impair" Title VII, in light of Title VII's reliance on state laws and agencies, is the more difficult question we address in the text.

23 Pre-emption of this sort not only would eliminate a forum for resolving disputes that, in certain situations, may be more convenient than the EEOC, but also would substantially increase the EEOC's workload. Because the EEOC would be unable to refer claims to state agencies for initial processing, those claims that would have been settled at the state level would require the EEOC's attention. Claims that would not have settled at the state level, but would have produced an administrative record, would come to the EEOC without such a record. The EEOC's options for coping with this added burden, barring discoveries of reserves in the agency budget, would be to devote less time to each individual case or to accept longer delays in handling cases. The inevitable result of complete pre-emption, in short, would be less effective enforcement of Title VII.

24 Appellants argue that pre-emption of the Human Rights Law's prohibition of pregnancy discrimination would impair Title VII because that law encourages States to enact fair employment laws providing greater substantive protection than Title VII. See, *e.g.,* Tr. of Oral Arg. 6–7, 11. We have found no statutory language or legislative history suggesting that the federal interest in state fair employment laws extends any farther than saving such laws from pre-emption by Title VII itself. As the court stated in *Pervel,* 468 F.Supp., at 493, "Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII."

The legislative history of the Pregnancy Discrimination Act does not assist appellants. Although the Conference Report observed that many employers already were subject to state laws prohibiting pregnancy discrimination, H.R.Rep. No. 95–948, p. 9–11 (1978); see S.Rep. No. 95–331, p. 10–11 (1977), U.S.Code Cong. & Admin.News 1978, p. 4749, this observation subsequent to ERISA's enactment conveys no information about the intent of the Congress that passed ERISA. The conferees did not even mention ERISA; evidently, they simply failed to consider whether ERISA plans were subject to state laws prohibiting pregnancy discrimination.

25 An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult. The employer might choose to offer a number of plans, each tailored to the laws of particular States; the inefficiency of such a system presumably would be paid for by lowering benefit levels. Alternatively, assuming that the state laws were not in conflict, the employer could comply with the laws of all States in a uniform plan. To offset the additional expenses, the employer presumably would reduce wages or eliminate those benefits not required by any State. Another means by which the employer could retain its uniform nationwide plan would be by eliminating classes of benefits that are subject to state requirements with which the employer is unwilling to comply. ERISA's comprehensive pre-emption of state law was meant to minimize this sort of interference with the administration of employee benefit plans.

26 See, *e.g., Arizona Civil Rights Division v. Olson,* 132 Ariz. 20, 24, n. 2, 643 P.2d 723, 727, n. 2 (1982); *Scarborough v. Arnold,* 117 N.H. 803, 807, 379 A.2d 790, 793 (1977); *Snell v. Montana-Dakota Utilities Co.,* —— Mont. ——, ——, 643 P.2d 841, 844 (Mont.1982); *Orr v. Clyburn,* 277 S.C. 536, 539, 290 S.E.2d 804, 806 (S.C.1982); *Albertson's, Inc. v. Washington State Human Rights Comm'n,* 14 Wash.App. 697, 699–700, 544 P.2d 98, 100 (1976).

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KeyCite Red Flag - Severe Negative Treatment
Superseded by Statute as Stated in Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc., U.S., June 25, 2015

109 S.Ct. 2115
Supreme Court of the United States

WARDS COVE PACKING COMPANY, INC., et al., Petitioners,
v.
Frank ATONIO et al.

No. 87–1387.
|
Argued Jan. 18, 1989.
|
Decided June 5, 1989.

Synopsis

Former salmon cannery workers brought class action suit alleging employment discrimination on basis of race. The United States District Court for the Western District of Washington, Walter T. McGovern, Chief Judge, dismissed action for lack of jurisdiction. The Court of Appeals, 703 F.2d 329, affirmed in part and reversed and remanded in part. On remand, the District Court, Justin L. Quackenbush, J., entered judgment for employers. On appeal, the Court of Appeals for the Ninth Circuit, 768 F.2d 1120, affirmed. On rehearing en banc, the Court of Appeals, 810 F.2d 1477, determined that disparate-impact analysis could be applied, and returned case to original panel. The Court of Appeals, 827 F.2d 439, then reversed and remanded. On certiorari, the Supreme Court, Justice White held that statistical evidence showing high percentage of nonwhite workers in employer's cannery jobs and low percentage of such workers in noncannery positions did not establish prima facie case of disparate impact in violation of Title VII.

Reversed and remanded.

Justice Stevens filed dissenting opinion in which Justices Brennan, Marshall and Blackmun joined.

Justice Blackmun filed dissenting opinion in which Justices Brennan and Marshall joined.

West Headnotes (12)

[1] **Civil Rights**
Disparate impact

Under “disparate impact” theory of liability in Title VII action, facially neutral employment practice may be deemed violative of Title VII without evidence of employer's subjective intent to discriminate that is required in “disparate-treatment” case. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

76 Cases that cite this headnote

[2] **Civil Rights**
Prima facie case

Statistical evidence showing high percentage of nonwhite workers in employer's cannery jobs and low percentage of such workers in noncannery positions did not establish prima facie case of disparate impact in violation of Title VII. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

232 Cases that cite this headnote

[3] **Civil Rights**
Disparate impact
Civil Rights
Admissibility of evidence; statistical evidence

Comparison between racial composition of qualified persons in labor market and persons holding at-issue jobs generally forms proper basis for initial inquiry in disparate-impact Title VII case; alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, certain other statistics, such as measures indicating racial composition of “otherwise-qualified applicants” for at-issue jobs, are equally probative for this purpose. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

298 Cases that cite this headnote

[4] Civil Rights
Prima facie case

Racial imbalance in one segment of employer's work force does not, without more, establish prima facie case of disparate impact under Title VII with respect to selection of workers for employer's other positions, even where workers for the different positions may have somewhat fungible skills. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

103 Cases that cite this headnote

[5] Civil Rights
Admissibility of evidence; statistical evidence

If percentage of selected applicants who are nonwhite is not significantly less than percentage of qualified applicants who are nonwhite, percentage of nonwhite workers found in other positions in employer's labor force is irrelevant to question of prima facie statistical case of disparate impact under Title VII. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

83 Cases that cite this headnote

[6] Civil Rights
Disparate impact

Title VII plaintiff does not make out case of disparate impact simply by showing that, at the bottom line, there is racial imbalance in work force; as general matter, plaintiff must demonstrate that it is application of specific or particular employment practice that has created disparate impact under attack. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

255 Cases that cite this headnote

[7] Civil Rights
Prima facie case

Former salmon cannery workers who claimed that employment practices such as nepotism, separate hiring channels and rehire preferences had disparate impact on nonwhites were required to demonstrate that each challenged practice had significantly disparate impact on employment opportunities for whites and nonwhites in order to establish prima facie case of disparate impact under Title VII. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

239 Cases that cite this headnote

[8] Civil Rights
Disparate impact

Business justification phase of disparate-impact Title VII case contains two components: first, consideration of justification employer offers for use of challenged employment practices; and second, availability of alternate practices to achieve same business ends, with less racial impact. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

62 Cases that cite this headnote

[9] Civil Rights
Pleading

Generally, at justification stage of disparate-impact Title VII case, dispositive issue is whether challenged practice serves, in significant way, legitimate employment goals of employer. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

101 Cases that cite this headnote

[10] Civil Rights
Presumptions, Inferences, and Burden of Proof

In justification phase of Title VII employment discrimination case, employer carries burden of producing evidence of business justification for his employment practice; burden of persuasion, however, remains with disparate-impact plaintiff. Civil Rights Act of 1964, §§

701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a); Fed.Rules Evid.Rule 301, 28 U.S.C.A.

147 Cases that cite this headnote

[11] Civil Rights
Disparate impact

Even if salmon cannery workers established prima facie case of race discrimination in Title VII action but could not persuade trier of fact on question of employer's business necessity defense, workers could still prevail if they could come forward with alternatives to employer's hiring practices that reduced racially disparate impact of practices currently being used, and employer refused to adopt those alternatives. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

149 Cases that cite this headnote

[12] Civil Rights
Relief

Judiciary should proceed with care before mandating that employer must adopt plaintiff's alternate selection or hiring practice in response to Title VII suit. Civil Rights Act of 1964, §§ 701 et seq., 703(a), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a).

25 Cases that cite this headnote

****2116** *Syllabus* [*]

***642** Jobs at petitioners' Alaskan salmon canneries are of two general types: unskilled "cannery jobs" on the cannery lines, ****2117** which are filled predominantly by nonwhites; and "noncannery jobs," most of which are classified as skilled positions and filled predominantly with white workers, and virtually all of which pay more than cannery positions. Respondents, a class of nonwhite cannery workers at petitioners' facilities, filed suit in the District Court under Title VII of the Civil Rights Act of 1964, alleging, *inter alia,* that various of petitioners' hiring/promotion practices were responsible for the work force's racial stratification and had denied them employment as noncannery workers on the basis of race. The District Court rejected respondents' claims, finding, among other things, that nonwhite workers were overrepresented in cannery jobs because many of those jobs were filled under a hiring hall agreement with a predominantly nonwhite union. The Court of Appeals ultimately reversed in pertinent part, holding, *inter alia,* that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery jobs, relying solely on respondents' statistics showing a high percentage of nonwhite workers in cannery jobs and a low percentage of such workers in noncannery positions. The court also concluded that once a plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer to prove the challenged practice's business necessity.

Held:

1. The Court of Appeals erred in ruling that a comparison of the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a prima facie disparate-impact case. Rather, the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market. *Hazelwood School Dist. v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768. With respect to the skilled noncannery jobs at issue, the cannery work force in no way reflected the pool of *qualified* job applicants or the *qualified* labor force population. Petitioners' selection methods or employment practices cannot be said to have had a disparate impact on nonwhites if ***643** the absence of minorities holding such skilled jobs reflects a dearth of qualified nonwhite applicants for reasons that are not petitioners' fault. With respect to the unskilled noncannery jobs, as long as there are no barriers or practices deterring qualified nonwhites from applying, the employer's selection mechanism probably does not have a disparate impact on minorities if the percentage of selected nonwhite applicants is not significantly less than the percentage of qualified nonwhite applicants. Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to a prima facie statistical disparate-impact case. Moreover, isolating the cannery workers as the potential labor force for unskilled noncannery jobs is both too broad—because the majority of cannery workers did not seek noncannery jobs—and too narrow—because there are many qualified persons in the relevant labor market who are not cannery workers.

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Under the Court of Appeals' method of comparison, any employer having a racially imbalanced segment of its work force could be haled into court and made to undertake the expensive and time-consuming task of defending the business necessity of its selection methods. For many employers, the only practicable option would be the adoption of racial quotas, which has been rejected by this Court and by Congress in drafting Title VII. The Court of Appeals' theory is also flawed because, if minorities are over-represented in cannery jobs by virtue of petitioners' having contracted with a predominantly nonwhite union to fill those positions, as the District Court found, petitioners could eliminate respondents' prima facie case simply by ceasing to use the union, *without making any change whatsoever* in their hiring practices for the noncannery positions at issue. Pp. 2120–2123.

****2118** 2. On remand for a determination whether the record will support a prima facie disparate-impact case on some basis other than the racial disparity between cannery and noncannery workers, a mere showing that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth herein will not alone suffice. Rather, the courts below must also require, as part of respondents' prima facie case, a demonstration that the statistical disparity complained of is the result of one or more of the employment practices respondents are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. This specific causation requirement is not unduly burdensome, since liberal discovery rules give plaintiffs broad access to employers' records, and since employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures must maintain records disclosing the impact of tests and selection procedures ***644** on employment opportunities of persons by identifiable race, sex, or ethnic group. Pp. 2123–2125.

3. If, on remand, respondents establish a prima facie disparate-impact case with respect to any of petitioners' practices, the burden of producing evidence of a legitimate business justification for those practices will shift to petitioners, but the burden of persuasion will remain with respondents at all times. This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts and with the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment practice was based solely on a legitimate, neutral consideration. See *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256–258, 101 S.Ct. 1089, 1095–1096, 67 L.Ed.2d 207. To the extent that some of this Court's decisions speak of an employer's "burden of proof" with respect to the business justification defense, they should be understood to mean an employer's burden of production, not persuasion. Even if respondents cannot persuade the trier of fact on the business necessity question, they may still prevail by coming forward with alternatives that reduce the disparate impact of petitioners' current practices, provided such alternatives are equally effective in achieving petitioners' legitimate employment goals in light of the alternatives' costs and other burdens. Pp. 2125–2126.

827 F.2d 439 (CA9 1987) reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 2127. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post,* p. 2129.

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Opinion

***645** Justice WHITE delivered the opinion of the Court.

[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq., makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms and condition of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin.[1] § 2000e–2(a). ****2119** *Griggs v. Duke Power Co.,* 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971), construed Title VII to proscribe "not only overt discrimination but also practices that are fair in form but discriminatory in practice." Under this basis for liability, which is known as the "disparate-impact" theory and which is involved in this case, a facially neutral ***646** employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a "disparate-treatment" case.

I

The claims before us are disparate-impact claims, involving the employment practices of petitioners, two companies that operate salmon canneries in remote and widely separated areas of Alaska. The canneries operate only during the salmon runs in the summer months. They are inoperative and vacant for the rest of the year. In May or June of each year, a few weeks before the salmon runs begin, workers arrive and prepare the equipment and facilities for the canning operation. Most of these workers possess a variety of skills. When salmon runs are about to begin, the workers who will operate the cannery lines arrive, remain as long as there are fish to can, and then depart. The canneries are then closed down, winterized, and left vacant until the next spring. During the off-season, the companies employ only a small number of individuals at their headquarters in Seattle and Astoria, Oregon, plus some employees at the winter shipyard in Seattle.

The length and size of salmon runs vary from year to year, and hence the number of employees needed at each cannery also varies. Estimates are made as early in the winter as possible; the necessary employees are hired, and when the time comes, they are transported to the canneries. Salmon must be processed soon after they are caught, and the work during the canning season is therefore intense.[2] For this ***647** reason, and because the canneries are located in remote regions, all workers are housed at the canneries and have their meals in company-owned mess halls.

Jobs at the canneries are of two general types: "cannery jobs" on the cannery line, which are unskilled positions; and "noncannery jobs," which fall into a variety of classifications. Most noncannery jobs are classified as skilled positions.[3] Cannery jobs are filled predominantly by nonwhites: Filipinos and Alaska Natives. The Filipinos are hired through, and dispatched by, Local 37 of the International Longshoremen's and Warehousemen's Union pursuant ****2120** to a hiring hall agreement with the local. The Alaska Natives primarily reside in villages near the remote cannery locations. Noncannery jobs are filled with predominantly white workers, who are hired during the winter months from the companies' offices in Washington and Oregon. Virtually all of the noncannery jobs pay more than cannery positions. The predominantly white noncannery workers and the predominantly nonwhite cannery employees live in separate dormitories and eat in separate mess halls.

In 1974, respondents, a class of nonwhite cannery workers who were (or had been) employed at the canneries, brought this Title VII action against petitioners. Respondents alleged that a variety of petitioners' hiring/promotion practices—*e.g.,* nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within—were responsible for the racial stratificationof ***648** the work force and had denied them and other nonwhites employment as noncannery workers on the basis of race. Respondents also complained of petitioners' racially segregated housing and dining facilities. All of respondents' claims were advanced under both the disparate-treatment and disparate-impact theories of Title VII liability.

The District Court held a bench trial, after which it entered 172 findings of fact. 34 EPD ¶ 34,437, pp. 32,822–

33,836 (WD Wash.1983). It then rejected all of respondents' disparate-treatment claims. It also rejected the disparate-impact challenges involving the subjective employment criteria used by petitioners to fill these noncannery positions, on the ground that those criteria were not subject to attack under a disparate-impact theory. *Id.,* at I–102. Petitioners' "objective" employment practices (*e.g.,* an English language requirement, alleged nepotism in hiring, failure to post noncannery openings, the rehire preference, etc.) were found to be subject to challenge under the disparate-impact theory, but these claims were rejected for failure of proof. Judgment was entered for petitioners.

On appeal, a panel of the Ninth Circuit affirmed, 768 F.2d 1120 (CA9 1985), but that decision was vacated when the Court of Appeals agreed to hear the case en banc, 787 F.2d 462 (CA9 1985). The en banc hearing was ordered to settle an intra-circuit conflict over the question whether subjective hiring practices could be analyzed under a disparate-impact model; the Court of Appeals held—as this Court subsequently ruled in *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)—that disparate-impact analysis could be applied to subjective hiring practices. 810 F.2d 1477, 1482 (CA9 1987). The Ninth Circuit also concluded that in such a case, "[o]nce the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer," *id.,* at 1485, to "prov[e the] business necessity" of the challenged practice, *id.,* at 1486. Because the en banc holding on subjective employment practices reversed ***649** the District Court's contrary ruling, the en banc Court of Appeals remanded the case to a panel for further proceedings.

On remand, the panel applied the en banc ruling to the facts of this case. 827 F.2d 439 (CA9 1987). It held that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery positions. The panel remanded the case for further proceedings, instructing the District Court that it was the employer's burden to prove that any disparate impact caused by its hiring and employment practices was justified by business necessity. Neither the en banc court nor the panel disturbed the District Court's rejection of the disparate-treatment claims.[4]

****2121** Petitioners sought review of the Court of Appeals' decision in this Court, challenging it on several grounds. Because some of the issues raised by the decision below were matters ***650** on which this Court was evenly divided in *Watson v. Fort Worth Bank & Trust, supra,* we granted certiorari, 487 U.S. 1232, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), for the purpose of addressing these disputed questions of the proper application of Title VII's disparate-impact theory of liability.

II

[2] In holding that respondents had made out a prima facie case of disparate impact, the Court of Appeals relied solely on respondents' statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the noncannery positions.[5] Although statistical proof can alone make out a prima facie case, see *Teamsters v. United States,* 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977); *Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741–2742, 53 L.Ed.2d 768 (1977), the Court of Appeals' ruling here misapprehends our precedents and the purposes of Title VII, and we therefore reverse.

[3] "There can be no doubt," as there was when a similar mistaken analysis had been undertaken by the courts below in *Hazelwood, supra,* at 308, 97 S.Ct., at 2741, "that the ... comparison ... fundamentally misconceived the role of statistics in employment discrimination cases." The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market." *Ibid.* It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms ***651** the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs—are equally probative for this purpose. See, *e.g., New York City Transit Authority v. Beazer,* 440 U.S. 568, 585, 99 S.Ct. 1355, 1366, 59 L.Ed.2d 587 (1979).[6]

****2122** It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected "the pool of *qualified* job applicants" or the

"*qualified* population in the labor force." Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other "skilled" noncannery positions found to exist by the District Court, see 34 EPD ¶ 34,437, p. 33,832—by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault),[7] petitioners' ***652** selection methods or employment practices cannot be said to have had a "disparate impact" on nonwhites.

One example illustrates why this must be so. Respondents' own statistics concerning the noncannery work force at one of the canneries at issue here indicate that approximately 17% of the new hires for medical jobs, and 15% of the new hires for officer worker positions, were nonwhite. See App. to Brief for Respondents B–1. If it were the case that less than 15 to 17% of the applicants for these jobs were nonwhite and that nonwhites made up a lower percentage of the relevant qualified labor market, it is hard to see how respondents, without more, cf. *Connecticut v. Teal,* 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), would have made out a prima facie case of disparate impact. Yet, under the Court of Appeals' theory, simply because nonwhites comprise 52% of the cannery workers at the cannery in question, see App. to Brief for Respondents B–1, respondents would be successful in establishing a prima facie case of racial discrimination under Title VII.

Such a result cannot be squared with our cases or with the goals behind the statute. The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII. See 42 U.S.C. § 2000e–2(j); see also *Watson v. Fort Worth Bank & Trust,* 487 U.S. at 992–994, and n. 2, 108 S.Ct., at 2787–2789, and n. 2 (opinion of O'CONNOR, J.). The Court of Appeals' theory would "leave the employer little choice ... but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." ***653** *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 449, 95 S.Ct. 2362, 2387, 45 L.Ed.2d 280 (1975) (BLACKMUN, J., concurring in judgment).

[4] [5] The Court of Appeals also erred with respect to the unskilled noncannery positions. Racial imbalance in one segment ****2123** of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills (as is arguably the case for cannery and unskilled noncannery workers). As long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions, see n. 6, *supra,* if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities.[8] Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to the question of a prima facie statistical case of disparate impact. As noted above, a contrary ruling on this point would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past.

Moreover, isolating the cannery workers as the potential "labor force" for unskilled noncannery positions is at once both too broad and too narrow in its focus. It is too broad because the vast majority of these cannery workers did not ***654** seek jobs in unskilled noncannery positions; there is no showing that many of them would have done so even if none of the arguably "deterring" practices existed. Thus, the pool of cannery workers cannot be used as a surrogate for the class of qualified job applicants because it contains many persons who have not (and would not) be noncannery job applicants. Conversely, if respondents propose to use the cannery workers for comparison purposes because they represent the "qualified labor population" generally, the group is too narrow because there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers.

The peculiar facts of this case further illustrate why a comparison between the percentage of nonwhite cannery workers and nonwhite noncannery workers is an improper basis for making out a claim of disparate impact. Here, the District Court found that nonwhites were "overrepresent[ed]"

among cannery workers because petitioners had contracted with a predominantly nonwhite union (local 37) to fill these positions. See 34 EPD ¶ 33,437, p. 33,829. As a result, if petitioners (for some permissible reason) ceased using local 37 as its hiring channel for cannery positions, it appears (according to the District Court's findings) that the racial stratification between the cannery and noncannery workers might diminish to statistical insignificance. Under the Court of Appeals' approach, therefore, it is possible that *with no change whatsoever* in their hiring practices for noncannery workers—the jobs at issue in this lawsuit—petitioners could make respondents' prima facie case of disparate impact "disappear." But *if* there would be no prima facie case of disparate impact in the selection of noncannery workers absent petitioners' use of local 37 to hire cannery workers, surely petitioners' reliance on the union to fill the cannery jobs not at issue here (and its resulting "overrepresentation" of nonwhites in those positions) does not—standing alone—make out a prima facie case of disparate impact. Yet it is precisely ***655** such an ironic result that the Court of Appeals reached below.

Consequently, we reverse the Court of Appeals' ruling that a comparison between ****2124** the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a prima facie case of disparate impact. Of course, this leaves unresolved whether the record made in the District Court will support a conclusion that a prima facie case of disparate impact has been established on some basis other than the racial disparity between cannery and noncannery workers. This is an issue that the Court of Appeals or the District Court should address in the first instance.

III

Since the statistical disparity relied on by the Court of Appeals did not suffice to make out a prima facie case, any inquiry by us into whether the specific challenged employment practices of petitioners caused that disparity is pretermitted, as is any inquiry into whether the disparate impact that any employment practice may have had was justified by business considerations.[9] Because we remand for further proceedings, however, on whether a prima facie case of disparate impact has been made in defensible fashion in this case, we address two other challenges petitioners have made to the decision of the Court of Appeals.

***656** A

First is the question of causation in a disparate-impact case. The law in this respect was correctly stated by Justice O'CONNOR's opinion last Term in *Watson v. Fort Worth Bank & Trust,* 487 U.S., at 994, 108 S.Ct., 2788–2789:

> "[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged.... Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Cf. also *id.,* at 1000, 108 S.Ct., at 2792 (BLACKMUN, J., concurring in part and concurring in judgment).

Indeed, even the Court of Appeals—whose decision petitioners assault on this score—noted that "it is ... essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact." 827 F.2d, at 445. Notwithstanding the Court of Appeals' apparent adherence to the proper inquiry, petitioners contend that that court erred by permitting respondents to make out their case by offering "only [one] set of cumulative comparative statistics as evidence of the disparate impact of each and all of [petitioners' hiring] practices." Brief for Petitioners 31.

[6] Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), see ***657** *Connecticut v. Teal,* 457 U.S., at 450, 102 S.Ct., at 2532, a Title VII plaintiff

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does not make out a case of disparate impact simply by showing that, "at the **2125 bottom line," there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII.

[7] Here, respondents have alleged that several "objective" employment practices (*e.g.,* nepotism, separate hiring channels, rehire preferences), as well as the use of "subjective decision making" to select noncannery workers, have had a disparate impact on nonwhites. Respondents base this claim on statistics that allegedly show a disproportionately low percentage of nonwhites in the at-issue positions. However, even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth in Part II, *supra,* this alone will *not* suffice to make out a prima facie case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson v. Fort Worth Bank & Trust, supra,* 487 U.S., at 992, 108 S.Ct., at 2787.

Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims. Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988), ***658** are required to "maintain ... records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s]." See § 1607.4(A). This includes records concerning "the individual components of the selection process" where there is a significant disparity in the selection rates of whites and nonwhites. See § 1607.4(C). Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force; respondents presumably took full advantage of these opportunities to build their case before the trial in the District Court was held. [10]

Consequently, on remand, the courts below are instructed to require, as part of respondents' prima facie case, a demonstration that specific elements of the petitioners' hiring process have a significantly disparate impact on nonwhites.

B

[8] If, on remand, respondents meet the proof burdens outlined above, and establish a prima facie case of disparate impact with respect to any of petitioners' employment practices, the case will shift to any business justification petitioners offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact. See, *e.g., Albemarle Paper Co. v. Moody,* 422 U.S., at 425, 95 S.Ct., at 2375. We consider these two components in turn.

*659 **2126 (1)

[9] Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. See, *e.g., Watson v. Fort Worth Bank & Trust,* 487 U.S., at 997–999, 108 S.Ct., at 2790–2791; *New York City Transit Authority v. Beazer,* 440 U.S., at 587, n. 31, 99 S.Ct., at 1366, n. 31; *Griggs v. Duke Power Co.,* 401 U.S., at 432, 91 S.Ct., at 854. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. See *supra,* at 2122.

[10] In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, see 810 F.2d, at 1485–1486, or in the panel's decision on remand, see 827 F.2d, at 445, 447—suggesting that the persuasion burden should shift to petitioners once respondents established a prima facie case of disparate impact —its decisions were erroneous. "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times.* " *Watson, supra,* 487 U.S., at 997, 108 S.Ct., at 2790 (O'CONNOR, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production burdens ***660** in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. See *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 256–258, 101 S.Ct. 1089, 1095–1096, 67 L.Ed.2d 207 (1981). We acknowledge that some of our earlier decisions can be read as suggesting otherwise. See *Watson, supra,* 487 U.S., at 1006–1008, 108 S.Ct., at 2795–2796 (BLACKMUN, J., concurring in part and concurring in judgment). But to the extent that those cases speak of an employers' "burden of proof" with respect to a legitimate business justification defense, see, *e.g., Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977), they should have been understood to mean an employer's production—but not persuasion—burden. Cf., *e.g., NLRB v. Transportation Management Corp.,* 462 U.S. 393, 404, n. 7, 103 S.Ct. 2469, 2475, n. 7, 76 L.Ed.2d 667 (1983). The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was "because of such individual's race, color," etc., that he was denied a desired employment opportunity. See 42 U.S.C. § 2000e–2(a).

(2)

[11] Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners' business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]"; by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination." ****2127** *Albemarle Paper Co., supra,* 422 U.S., at 425, 95 S.Ct., at 2375; see also *Watson,* 487 U.S., at 998, 108 S.Ct., at 2790–2791 (O'CONNOR, J.); *id.,* at 1005–1006, 108 S.Ct., at 2794–2795 (BLACKMUN, J., concurring in part and concurring in judgment). If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that ***661** reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

[12] Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson, supra,* at 998, 108 S.Ct., at 2790 (O'CONNOR, J.). "Courts are generally less competent than employers to restructure business practices," *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit.

IV

For the reasons given above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

I fully concur in Justice STEVENS' analysis of this case. Today a bare majority of the Court takes three major strides backwards in the battle against race discrimination. It reaches out to make last Term's plurality opinion in *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 108 S.Ct. 2777,

101 L.Ed.2d 827 (1988), the law, thereby upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases. It bars the use of internal work force comparisons in the making of a prima ***662** facie case of discrimination, even where the structure of the industry in question renders any other statistical comparison meaningless. And it requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible.

The harshness of these results is well demonstrated by the facts of this case. The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which, as Justice STEVENS points out, resembles a plantation economy. *Post,* at ——, n. 4. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority's legal rulings essentially immunize these practices from attack under a Title VII disparate-impact analysis.

Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was. Cf. *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

Justice STEVENS, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join, dissenting.

Fully 18 years ago, this Court unanimously held that Title VII of the Civil ****2128** Rights Act of 1964 [1] prohibits employment practices that have discriminatory effects as well as those that are intended to discriminate. *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Federal courts and agencies consistently have enforced that interpretation, thus promoting our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race, color, national ***663** origin, and other traits that are easily identified but utterly irrelevant to one's qualification for a particular job. [2] Regrettably, the Court retreats from these efforts in its review of an interlocutory judgment respecting the "peculiar facts" of this lawsuit. [3] Turning a blind eye to the meaning and purpose of Title VII, the majority's opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified work force. [4] I cannot join this latest sojourn into judicial activism.

***664** I

I would have thought it superfluous to recount at this late date the development of our Title VII jurisprudence, but the majority's facile treatment of settled law necessitates such a primer. This Court initially considered the meaning of Title VII in *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), in which a class of utility company employees challenged ****2129** the conditioning of entry into higher paying jobs upon a high school education or passage of two written tests. Despite evidence that "these two requirements operated to render ineligible a markedly disproportionate number of Negroes," [5] the Court of Appeals had held that because ***665** there was no showing of an intent to discriminate on account of race, there was no Title VII violation. *Id.,* at 429, 91 S.Ct. at 852. Chief Justice Burger's landmark opinion established that an employer may violate the statute even when acting in complete good faith without any invidious intent. [6] Focusing on § 703(a)(2), [7] he explained:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S., at 429–430, 91 S.Ct., at 852–853.

The opinion in *Griggs* made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose. "The touchstone is business necessity," the Court stressed. *Id.,* at 431, 91 S.Ct., at 853. Because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation [,] ... Congress has placed on the employer the burden of showing ***666** that any given requirement must have a manifest relationship to the employment in question." [8] *Id.,* at 432, 91 S.Ct., at 854 (emphasis in original).

Congress has declined to act—as the Court now sees fit —to limit the reach of this "disparate-impact" theory, see *Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 1854, n. 15, 52 L.Ed.2d 396 (1977); indeed it has extended its application.[9] **2130 This approval lends added force to the *Griggs* holding.

The *Griggs* framework, with its focus on ostensibly neutral qualification standards, proved inapposite for analyzing an individual employee's claim, brought under § 703(a)(1),[10] that an employer intentionally discriminated on account of race.[11] *667 The means for determining intent absent direct evidence was outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), two opinions written by Justice Powell for unanimous Courts. In such a "disparate-treatment" case, see *Teamsters,* 431 U.S., at 335, n. 15, 97 S.Ct., at 1854, n. 15, the plaintiff's initial burden, which is "not onerous," 450 U.S., at 253, 101 S.Ct., at 1093, is to establish "a prima facie case of racial discrimination," 411 U.S., at 802, 93 S.Ct., at 1824, that is, to create a presumption of unlawful discrimination by "eliminat [ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[12] 450 U.S., at 254, 101 S.Ct., at 1094. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S., at 802, 93 S.Ct., at 1824; see 450 U.S., at 254, 101 S.Ct., at 1094. Finally, *668 because "Title VII does not ... permit [the employer] to use [the employee's] conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1)," the employee "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." 411 U.S., at 804–805, 93 S.Ct., at 1825; see 450 U.S., at 256, 101 S.Ct., at 1095. While the burdens of producing evidence thus shift, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times **2131 with the plaintiff."[13] 450 U.S., at 253, 101 S.Ct., at 1093.

Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate-treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate-impact case is proof of an affirmative defense of business necessity.[14] Although the majority's opinion blurs *669 that distinction, thoughtful reflection on common-law pleading principles clarifies the fundamental differences between the two types of "burdens of proof."[15] In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her. See, *e.g.,* 2 Restatement (Second) of Torts §§ 328 A, 433 B (1965) (hereinafter Restatement). The defendant may undercut plaintiff's efforts both by confronting plaintiff's evidence during her case in chief and by submitting countervailing evidence during its own case.[16] But if the plaintiff proves the existence of the harmful act, the defendant can escape liability only by persuading the factfinder that the act was justified or excusable. See, *e.g.,* Restatement §§ 454–461, 463–467. The plaintiff in turn may try to refute this affirmative defense. Although the burdens of producing evidence regarding the existence of harm or excuse thus shift between the plaintiff *670 and the defendant, the burden of proving either proposition remains throughout on the party asserting it.

**2132 In a disparate-treatment case there is no "discrimination" within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. If there is direct evidence of intent, the employee may have little difficulty persuading the factfinder that discrimination has occurred. But in the likelier event that intent has to be established by inference, the employee may resort to the *McDonnell/ Burdine* inquiry. In either instance, the employer may undermine the employee's evidence but has no independent burden of persuasion.

In contrast, intent plays no role in the disparate-impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a prima facie case. But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense.[17]

*671 Failing to explore the interplay between these distinct orders of proof, the Court announces that our frequent statements that the employer shoulders the burden of proof respecting business necessity "should have been understood to mean an employer's production—but not persuasion

—burden."[18] *Ante,* at 2126. Our opinions always have emphasized that in a disparate-impact case the employer's burden is weighty. "The touchstone," the Court said in *Griggs,* "is business necessity." 401 U.S., at 431, 91 S.Ct., at 853. Later, we held that prison administrators had failed to "rebu [t] the prima facie case of discrimination by showing that the height and weight requirements are ... essential to effective job performance," *Dothard v. Rawlinson,* 433 U.S. 321, 331, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). Cf. n. 14, *supra.* I am thus astonished to read that the "touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice.... [T]here is no requirement that the challenged practice be ... 'essential,' " *ante,* at 2126. This casual—almost summary **2133 —rejection *672 of the statutory construction that developed in the wake of *Griggs* is most disturbing. I have always believed that the *Griggs* opinion correctly reflected the intent of the Congress that enacted Title VII. Even if I were not so persuaded, I could not join a rejection of a consistent interpretation of a federal statute. Congress frequently revisits this statutory scheme and can readily correct our mistakes if we misread its meaning. *Johnson v. Transportation Agency, Santa Clara Cty.,* 480 U.S. 616, 644, 107 S.Ct. 1442, 1458, 94 L.Ed.2d 615 (1987) (STEVENS, J., concurring); *Runyon v. McCrary,* 427 U.S. 160, 190–192, 96 S.Ct. 2586, 2604–2605, 49 L.Ed.2d 415 (1976) (STEVENS, J., concurring). See *McNally v. United States,* 483 U.S. 350, 376, 107 S.Ct. 2875, 2890, 97 L.Ed.2d 292 (1987) (STEVENS, J., dissenting); *Commissioner v. Fink,* 483 U.S. 89, 102–105, 107 S.Ct. 2729, 2736–2738, 97 L.Ed.2d 74 (1987) (STEVENS, J., dissenting); see also *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 486, 109 S.Ct. 1917, 1922, 104 L.Ed.2d 526 (1989) (STEVENS, J., dissenting).

Also troubling is the Court's apparent redefinition of the employees' burden of proof in a disparate-impact case. No prima facie case will be made, it declares, unless the employees " 'isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities.' " *Ante,* at 2124 (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994, 108 S.Ct. 2777, 2789, 101 L.Ed.2d 827 (1988) (plurality opinion)). This additional proof requirement is unwarranted.[19] It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. *E.g.,* Restatement § 430. Although the causal link must have substance, the act *673 need not constitute the sole or primary cause of the harm. §§ 431–433; cf. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Thus in a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities.[20] Ordinary principles of fairness require that Title VII actions be tried like "any lawsuit." Cf. *U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714, n. 3, 103 S.Ct. 1478, 1481, n. 3, 75 L.Ed.2d 403 (1983). The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.

II

Petitioners seek reversal of the Court of Appeals and dismissal of this suit on the ground that respondents' statistical evidence failed to prove a prima facie case of discrimination. Brief for Petitioners 48. The District Court concluded "there were 'significant disparities' " between the racial composition of the cannery workers and the noncannery workers, but it "made no precise numerical findings" on this and other critical points. See *ante,* at 2121, n. 5. Given this dearth of findings and the Court's newly articulated preference for individualized proof of causation, it would be manifestly unfair to consider respondents' evidence in the aggregate and deem it insufficient. Thus the Court properly rejects petitioners' request for a final judgment **2134 and remands for further determination of the strength of respondents' prima facie case. See *ante,* at 2123. Even at this juncture, however, I believe that respondents' evidence deserves greater credit than the majority allows.

*674 Statistical evidence of discrimination should compare the racial composition of employees in disputed jobs to that " 'of the qualified ... population in the relevant labor market.' " *Ante,* at 2121 (quoting *Hazelwood School Dist. v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977)). That statement leaves open the definition of the qualified population and the relevant labor market. Our previous opinions, *e.g., New York City Transit Authority v. Beazer,* 440 U.S. 568, 584–586, 99 S.Ct. 1355, 1365–1366, 59 L.Ed.2d 587 (1979); *Dothard v. Rawlinson,* 433 U.S., at 329–330, 97 S.Ct., at 2726–2727; *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Griggs,* 401 U.S., at 426, 430, n. 6, 91 S.Ct., at 851, 853, n. 6, demonstrate that in reviewing statistical evidence, a court should not strive for numerical exactitude at the expense of the needs of the particular case.

The District Court's findings of fact depict a unique industry. Canneries often are located in remote, sparsely populated areas of Alaska. 34 EPD ¶ 34,437, p. 33,825 (WD Wash.1983). Most jobs are seasonal, with the season's length and the canneries' personnel needs varying not just year to year but day to day. *Ibid.* To fill their employment requirements, petitioners must recruit and transport many cannery workers and noncannery workers from States in the Pacific Northwest. *Id.,* at 33,828. Most cannery workers come from a union local based outside Alaska or from Native villages near the canneries. *Ibid.* Employees in the noncannery positions—the positions that are "at issue"—learn of openings by word of mouth; the jobs seldom are posted or advertised, and there is no promotion to noncannery jobs from within the cannery workers' ranks. *Id.,* at 33,827–33,828.

In general, the District Court found the at-issue jobs to require "skills," ranging from English literacy, typing, and "ability to use seam micrometers, gauges, and mechanic's hand tools" to "good health" and a driver's license.[21] *Id.,* at ***675** 33,833–33,834. All cannery workers' jobs, like a handful of at-issue positions, are unskilled, and the court found that the intensity of the work during canning season precludes on-the-job training for skilled noncannery positions. *Id.,* at 33,825. It made no findings regarding the extent to which the cannery workers already are qualified for at-issue jobs: individual plaintiffs testified persuasively that they were fully qualified for such jobs,[22] but the court neither credited nor discredited this testimony. Although there are no findings concerning wage differentials, the parties seem to agree that wages for cannery workers are lower than those for noncannery workers, skilled or unskilled. The District Court found that "nearly all" cannery workers are nonwhite, while the percentage of nonwhites employed in the entire Alaska salmon canning industry "has stabilized at about 47% to 50%." *Id.,* at 33,829. The precise stratification of the work force is not described in the findings, but the parties seem to agree that the noncannery jobs are predominantly held by whites.

Petitioners contend that the relevant labor market in this case is the general population of the " 'external' labor market for the jobs at issue." Brief for Petitioners 17. ****2135** While they would rely on the District Court's findings in this regard, those findings are ambiguous. At one point the District Court specifies "Alaska, the Pacific Northwest, and California" as "the geographical region from which [petitioners] draw their employees," but its next finding refers to "this relevant geographical area for cannery worker, laborer, and other nonskilled jobs," 34 EPD ¶ 34,437, p. 33,828. There ***676** is no express finding of the relevant labor market for noncannery jobs.

Even assuming that the District Court properly defined the relevant geographical area, its apparent assumption that the population in that area constituted the "available labor supply," *ibid.,* is not adequately founded. An undisputed requirement for employment either as a cannery or noncannery worker is availability for seasonal employment in the far reaches of Alaska. Many noncannery workers, furthermore, must be available for preseason work. *Id.,* at 33,829, 33,833–33,834. Yet the record does not identify the portion of the general population in Alaska, California, and the Pacific Northwest that would accept this type of employment.[23] This deficiency respecting a crucial job qualification diminishes the usefulness of petitioners' statistical evidence. In contrast, respondents' evidence, comparing racial compositions within the work force, identifies a pool of workers willing to work during the relevant times and familiar with the workings of the industry. Surely this is more probative than the untailored general population statistics on which petitioners focus. Cf. *Hazelwood,* 433 U.S., at 308, n. 13, 97 S.Ct., at 2742, n. 13; *Teamsters,* 431 U.S., at 339–340, n. 20, 97 S.Ct., at 1856, n. 20.

***677** Evidence that virtually all the employees in the major categories of at-issue jobs were white,[24] whereas about two-thirds of the cannery workers were nonwhite,[25] may not by itself suffice to establish a prima facie case of discrimination.[26] But such evidence of racial stratification puts the specific employment practices challenged by respondents into perspective. Petitioners ****2136** recruit employees for at-issue jobs from outside the work force rather than from lower paying, overwhelmingly nonwhite, cannery worker positions. 34 EPD ¶ 34,437, pp. 33,828–33,829. Information about availability of at-issue positions is conducted by word of mouth;[27] therefore, ***678** the maintenance of housing and mess halls that separate the largely white noncannery work force from the cannery workers, *id.,* at 33,836, 33,843–33,844, coupled with the tendency toward nepotistic hiring,[28] are obvious barriers to employment opportunities for nonwhites. Putting to one side the issue of business justifications, it would be quite wrong to conclude that these practices have no discriminatory consequence.[29] Thus I agree with the Court of Appeals, 827

F.2d 439, 444–445 (CA9 1987), that when the District Court makes the additional findings prescribed today, it should treat the evidence of racial stratification in the work force as a significant element of respondents' prima facie case.

III

The majority's opinion begins with recognition of the settled rule that that "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." *Ante,* at 2119. It then departs from the body of law engendered by this disparate-impact ***679** theory, reformulating the order of proof and the weight of the parties' burdens. Why the Court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me.

I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Title 42 U.S.C. § 2000e–2(a), provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

2 "Independent fishermen catch the salmon and turn them over to company-owned boats called 'tenders,' which transport the fish from the fishing grounds to the canneries. Once at the cannery, the fish are eviscerated, the eggs pulled, and they are cleaned. Then, operating at a rate of approximately four cans per second, the salmon are filled into cans. Next, the canned salmon are cooked under precise time-temperature requirements established by the FDA, and the cans are inspected to ensure that proper seals are maintained on the top, bottom and sides." 768 F.2d 1120, 1123 (CA9), vacated, 787 F.2d 462 (1985).

3 The noncannery jobs were described as follows by the Court of Appeals: "Machinists and engineers are hired to maintain the smooth and continuous operation of the canning equipment. Quality control personnel conduct the FDA-required inspections and recordkeeping. Tenders are staffed with a crew necessary to operate the vessel. A variety of support personnel are employed to operate the entire cannery community, including, for example, cooks, carpenters, store-keepers, bookkeepers, beach gangs for dock yard labor and construction, etc." 768 F.2d, at 1123.

4 The fact that neither the District Court, nor the Ninth Circuit en banc, nor the subsequent Court of Appeals panel ruled for respondents on their disparate-treatment claims—*i.e.,* their allegations of intentional racial discrimination—warrants particular attention in light of the dissents' comment that the canneries "bear an unsettling resemblance to aspects of a plantation economy." *Post,* at 2127–2128, n. 4 (STEVENS, J., dissenting); *post,* at 2136 (BLACKMUN, J., dissenting).

Whatever the "resemblance," the unanimous view of the lower courts in this litigation has been that respondents did not prove that the canneries practice intentional racial discrimination. Consequently, Justice BLACKMUN's hyperbolic allegation that our decision in this case indicates that this Court no longer "believes that race discrimination ... against nonwhites ... is a problem in our society," *ibid.,* is inapt. Of course, it is unfortunately true that race discrimination exists in our country. That does not mean, however, that it exists at the canneries—or more precisely, that it has been proved to exist at the canneries.

Indeed, Justice STEVENS concedes that respondents did not press before us the legal theories under which the aspects of cannery life that he finds to most resemble a "plantation economy" might be unlawful. *Post,* at 2128, n. 4. Thus, the question here is not whether we "approve" of petitioners' employment practices or the society that exists at the canneries, but, rather, whether respondents have properly established that these practices violate Title VII.

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5 The parties dispute the extent to which there is a discrepancy between the percentage of nonwhites employed as cannery workers and those employed in noncannery positions. Compare, *e.g.,* Brief for Petitioners 4–9 with Brief for Respondents 4–6. The District Court made no precise numerical findings in this regard, but simply noted that there were "significant disparities between the at-issue jobs [*i.e.,* noncannery jobs] and the total workforce at the canneries" which were explained by the fact that "nearly all employed in the 'cannery worker' department are non-white." See 34 EPD ¶ 34,437, pp. 33,841, 33,829 (WD Wash.1983).

For reasons explained below, the degree of disparity between these groups is not relevant to our decision here.

6 In fact, where "figures for the general population might ... accurately reflect the pool of qualified job applicants," cf. *Teamsters v. United States,* 431 U.S. 324, 340, n. 20, 97 S.Ct. 1843, 1856 n. 20, 52 L.Ed.2d 396 (1977), we have even permitted plaintiffs to rest their prima facie cases on such statistics as well. See, *e.g., Dothard v. Rawlinson,* 433 U.S. 321, 329–330, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977).

7 Obviously, the analysis would be different if it were found that the dearth of qualified nonwhite applicants was due to practices on petitioners' part which—expressly or implicitly—deterred minority group members from applying for noncannery positions. See, *e.g., Teamsters v. United States, supra,* 431 U.S., at 365, 97 S.Ct., at 1869.

8 We qualify this conclusion—observing that it is only "probable" that there has been no disparate impact on minorities in such circumstances—because bottom-line racial balance is not a defense under Title VII. See *Connecticut v. Teal,* 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). Thus, even if petitioners could show that the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, respondents would still have a case under Title VII, if they could prove that some particular hiring practice has a disparate impact on minorities, notwithstanding the bottom-line racial balance in petitioners' workforce. See *Teal, supra,* at 450, 102 S.Ct., at 2532.

9 As we understand the opinions below, the specific employment practices were challenged only insofar as they were claimed to have been responsible for the overall disparity between the number of minority cannery and noncannery workers. The Court of Appeals did not purport to hold that any specified employment practice produced its own disparate impact that was actionable under Title VII. This is not to say that a specific practice, such as nepotism, if it were proved to exist, could not itself be subject to challenge if it had a disparate impact on minorities. Nor is it to say that segregated dormitories and eating facilities in the workplace may not be challenged under 42 U.S.C. § 2000e–2(a)(2) without showing a disparate impact on hiring or promotion.

10 Of course, petitioners' obligation to collect or retain any of these data may be limited by the Guidelines themselves. See 29 CFR § 1602.14(b) (1988) (exempting "seasonal" jobs from certain recordkeeping requirements).

1 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

2 Title VII also bars discrimination because of religion or sex. 42 U.S.C. § 2000e–2(a). Discrimination based on other characteristics has been challenged under other statutes. See, *e.g., School Board of Nassau County v. Arline,* 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (determining scope of protection for handicapped schoolteacher under § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. § 794); *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) (Pregnancy Discrimination Act of 1978, Pub.L. 95–555, § 1, 92 Stat. 2076, 42 U.S.C. § 2000e(k)); *Lorillard v. Pons,* 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) (Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.*); *Corning Glass Works v. Brennan,* 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974) (Equal Pay Act of 1963, 77 Stat. 56, § 3, enacted as § 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d)).

3 See *ante,* at 2123. The majority purports to reverse the Court of Appeals but in fact directs the District Court to make additional findings, some of which had already been ordered by the Court of Appeals. Compare 827 F.2d 439, 445 (CA9 1987), with *ante,* at 2124–2125. Furthermore, nearly half the majority's opinion is devoted to two questions not fairly raised at this point: "the question of causation in a disparate impact case," *ante,* at 2124, and the nature of the employer's defense, *ante,* at 2125. Because I perceive no urgency to decide "these disputed questions," *ante,* at 2121, at an interlocutory stage of such a factually complicated case, I believe the Court should have denied certiorari and allowed the District Court to make the additional findings directed by the Court of Appeals.

4 Respondents constitute a class of present and former employees of petitioners, two Alaskan salmon canning companies. The class members, described by the parties as "nonwhite," include persons of Samoan, Chinese, Filipino, Japanese, and Alaska Native descent, all but one of whom are United States citizens. 34 EPD ¶ 34,437, pp. 33,822, 33,836–33,838 (WD Wash.1983). Fifteen years ago they commenced this suit, alleging that petitioners engage in hiring, job assignment, housing, and messing practices that segregate nonwhites from whites in violation of Title VII. Evidence included this response in 1971 by a foreman to a college student's inquiry about cannery employment:

" 'We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups.' " *Id.,* at 33,836.

Some characteristics of the Alaska salmon industry described in this litigation—in particular, the segregation of housing and dining facilities and the stratification of jobs along racial and ethnic lines—bear an unsettling resemblance to aspects of a plantation economy. See generally Plantation, Town, and County, Essays on the Local History of American Slave Society 163–334 (E. Miller & E. Genovese eds. 1974). Indeed the maintenance of inferior, segregated facilities for housing and feeding nonwhite employees, see 34 EPD ¶ 34,437, pp. 33,836, 33,843–33,844, strikes me as a form of discrimination that, although it does not necessarily fit neatly into a disparate-impact or disparate-treatment mold, nonetheless violates Title VII. See generally Brief for National Association for the Advancement of Colored People as *Amicus Curiae.* Respondents, however, do not press this theory before us.

5 This Court noted that census statistics showed that in the employer's State, North Carolina, "while 34% of white males had completed high school, only 12% of Negro males had done so.... Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks." *Griggs,* 401 U.S., at 430, n. 6, 91 S.Ct., at 853, n. 6.

6 "The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but *good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.*" *Id.,* at 432, 91 S.Ct., at 854 (emphasis added) (citation omitted).

7 See *id.,* at 426, n. 1, 91 S.Ct., at 851, n. 1. This subsection provides that "[i]t shall be an unlawful employment practice for an employer—

"(a) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(2).

8 The opinion concluded:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. *What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.*" 401 U.S., at 436, 91 S.Ct., at 856 (emphasis added).

9 Voting Rights Act Amendments of 1982, Pub.L. 97–205, 96 Stat. 131, 134, as amended, codified at 42 U.S.C. §§ 1973, 1973b (1982 ed. and Supp. V). Legislative Reports leading to 1972 amendments to Title VII also evince support for disparate-impact analysis. H.R.Rep. No. 92–238, pp. 8, 20–22 (1971); S.Rep. No. 92–415, p. 5, and n. 1 (1971); accord, *Connecticut v. Teal,* 457 U.S. 440, 447, n. 8, 102 S.Ct. 2525, 2531, n. 8, 73 L.Ed.2d 130 (1982). Moreover, the theory is employed to enforce fair housing and age discrimination statutes. See Note, Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act, 54 Ford.L.Rev. 563 (1986); Note, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 Minn.L.Rev. 1038 (1984).

10 This subsection makes it unlawful for an employer

"to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e–2(a)(1).

11 In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), Justice Powell explained:

"*Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens,

resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of 'artificial, arbitrary, and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove." *Id.*, 411 U.S., at 806, 93 S.Ct., at 1826 (citations omitted).

12 "This may be done by showing (i) that he 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." *Id.*, at 802, 93 S.Ct., at 1824.

13 Although disparate impact and disparate treatment are the most prevalent modes of proving discrimination violative of Title VII, they are by no means exclusive. See generally B. Schlei & P. Grossman, Employment Discrimination Law 13–289 (2d ed. 1983) (four chapters discussing "disparate treatment," "present effects of past discrimination," "adverse impact," and "reasonable accommodation" as "categories" of discrimination). Cf. n. 4, *supra.* Moreover, either or both of the primary theories may be applied to a particular set of facts. See *Teamsters v. United States,* 431 U.S. 324, 336, n. 15, 97 S.Ct. 1843, 1854, n. 15, 52 L.Ed.2d 396 (1977).

14 See *McDonnell Douglas,* 411 U.S., at 802, n. 14, 93 S.Ct., at 1824, n. 14. See also, *e.g., Teal,* 457 U.S., at 446, 102 S.Ct., at 2530 ("employer must ... demonstrate that 'any given requirement [has] a manifest relationship to the employment in question' "); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587, 99 S.Ct. 1355, 1366, 59 L.Ed.2d 587 (1979) (employer "rebutted" prima facie case by "demonstration that its narcotics rule ... 'is job related' "); *Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977) (employer has to "prov[e] that the challenged requirements are job related"); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975) (employer has "burden of proving that its tests are 'job related' "); *Griggs,* 401 U.S., at 432, 91 S.Ct., at 854 (employer has "burden of showing that any given requirement must have a manifest relationship to the employment"). Court of Appeals opinions properly treating the employer's burden include *Bunch v. Bullard,* 795 F.2d 384, 393–394 (CA5 1986); *Lewis v. Bloomsburg Mills, Inc.,* 773 F.2d 561, 572 (CA4 1985); *Nash v. Jacksonville,* 763 F.2d 1393, 1397 (CA11 1985); *Segar v. Smith,* 238 U.S.App.D.C. 103, 121, 738 F.2d 1249, 1267 (1984), cert. denied *sub nom. Meese v. Segar,* 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); *Moore v. Hughes Helicopters, Inc., Div. of Summa Corp.,* 708 F.2d 475, 481 (CA9 1983); *Hawkins v. Anheuser–Busch, Inc.,* 697 F.2d 810, 815 (CA8 1983); *Johnson v. Uncle Ben's, Inc.,* 657 F.2d 750 (CA5 1981), cert. denied, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982); contra, *Croker v. Boeing Co.,* 662 F.2d 975, 991 (CA3 1981) (en banc). Cf. Equal Employment Opportunity Comm'n, Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988).

15 See, *e.g.,* 9 J. Wigmore, Evidence §§ 2485–2498 (J. Chadbourn rev.1981); D. Louisell & C. Mueller, Federal Evidence §§ 65–70 (1977) (hereinafter Louisell); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5122 (1977) (hereinafter Wright); J. Thayer, A Preliminary Treatise on Evidence 353–389 (1898) (hereinafter Thayer); C. Langdell, Equity Pleading 108–115 (2d ed. 1883).

16 Cf. Thayer 357 (quoting *Caldwell v. New Jersey S. B. Co.,* 47 N.Y. 282, 290 (1872)) (" 'The burden of maintaining the affirmative of the issue, and, properly speaking, the burden of proof, remained upon the plaintiff throughout the trial; but the burden or necessity was cast upon the defendant, to relieve itself from the presumption of negligence raised by the plaintiff's evidence' ").

17 Accord, Fed.Rule Civ.Proc. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively ... any ... matter constituting an avoidance or affirmative defense"). Cf. Thayer 368–369:

> "An admission may, of course, end the controversy; but such an admission may be, and yet not end it; and if that be so, it is because the party making the admission sets up something that avoids the apparent effect of it.... When this happens, the party defending becomes, in so far, the *actor* or plaintiff. In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in admitting his adversary's contention and

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setting up an affirmative defence, takes the rôle of *actor (reus excipiendo fit actor),*—must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law."

Similarly, in suits alleging price discrimination in violation of § 2 of the Clayton Act, as amended by the Robinson Patman Act, 15 U.S.C. § 13, it is well settled that the defendant has the burden of affirmatively establishing as a defense either a cost justification, under the proviso to subsection (a), *United States v. Borden Co.,* 370 U.S. 460, 467, 82 S.Ct. 1309, 1313, 8 L.Ed.2d 627 (1962), or a good-faith effort to meet a competitor's equally low price, pursuant to subsection (b), *Standard Oil Co. v. FTC,* 340 U.S. 231, 250, 71 S.Ct. 240, 250, 95 L.Ed. 239 (1951).

18 The majority's only basis for this proposition is the plurality opinion in *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 997, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988), which in turn cites no authority. As Justice BLACKMUN explained in *Watson,id.,* at 1001–1002, 108 S.Ct., at 2792–2793 (concurring in part and concurring in judgment), and as I have shown here, the assertion profoundly misapprehends the difference between disparate-impact and disparate-treatment claims.

The Court also makes passing reference to Federal Rule of Evidence 301. *Ante,* at 2126. That Rule pertains only to shifting of evidentiary burdens upon establishment of a presumption and has no bearing on the substantive burdens of proof. See Louisell §§ 65–70; Wright § 5122.

19 The Solicitor General's brief *amicus curiae* on behalf of the employers agrees:

"[A] decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole." Brief for United States as *Amicus Curiae* 22 (footnote omitted).

20 The Court discounts the difficulty its causality requirement presents for employees, reasoning that they may employ "liberal civil discovery rules" to obtain the employer's statistical personnel records. *Ante,* at 2125. Even assuming that this generally is true, it has no bearing in this litigation, since it is undisputed that petitioners did not preserve such records. Brief for Respondents 42–43; Reply Brief for Petitioners 18–19.

21 The District Court found that of more than 100 at-issue job titles, all were skilled except these 15: kitchen help, waiter/waitress, janitor, oil dock crew, night watchman, tallyman, laundry, gasman, roustabout, store help, stockroom help, assistant caretaker (winter watchman and watchman's assistant), machinist helper/trainee, deckhand, and apprentice carpenter/carpenter's helper. 34 EPD ¶ 34,437, p. 33,835.

22 Some cannery workers later became architects, an Air Force officer, and a graduate student in public administration. Some had college training at the time they were employed in the canneries. See *id.,* at 33,837–33,838; App. 38, 52–53; Tr. 76, 951–952, 1036, 1050, 2214.

23 The District Court's justification for use of general population statistics occurs in these findings of fact:

"119. Most of the jobs at the canneries entail migrant, seasonal labor. While as a general proposition, most people prefer full-year, fixed location employment near their homes, seasonal employment in the unique salmon industry is not comparable to most other types of migrant work, such as fruit and vegetable harvesting which, for example, may or may not involve a guaranteed wage.

"120. Thus, while census data is *[sic]* dominated by people who prefer full-year, fixed-location employment, such data is *[sic]* nevertheless appropriate in defining labor supplies for migrant, seasonal work." 34 EPD ¶ 34,437, p. 33,829.

The court's rather confusing distinction between work in the cannery industry and other "migrant, seasonal work" does not support its conclusion that the general population composes the relevant labor market.

24 For example, from 1971 to 1980, there were 443 persons hired in the job departments labeled "machinists," "company fishing boat," and "tender" at petitioner Castle & Cooke, Inc.'s Bumble Bee cannery; only 3 of them were nonwhites. Joint Excerpt of Record 35 (Exh. 588). In the same categories at the Red Salmon cannery of petitioner Wards Cove Packing Co., Inc., 488 whites and 42 nonwhites were hired. *Id.,* at 36 (Exh. 589).

25 The Court points out that nonwhites are "overrepresented" among the cannery workers. *Ante,* at 2123–2124. Such an imbalance will be true in any racially stratified work force; its significance becomes apparent only upon examination of the pattern of segregation within the work force. In the cannery industry nonwhites are concentrated in positions offering low wages and little opportunity for promotion. Absent any showing that the "underrepresentation" of whites in this stratum is the result of a barrier to access, the "overrepresentation" of nonwhites does not offend Title VII.

26 The majority suggests that at-issue work demands the skills possessed by "accountants, managers, boat captains, electricians, doctors, and engineers." See *ante,* at 2122. It is at least theoretically possible that a disproportionate number of white applicants possessed the specialized skills required by some at-issue jobs. In fact, of course, many at-issue jobs involved skills not at all comparable to these selective examples. See 34 EPD ¶ 34,437, pp. 33,833–33,834. Even the

District Court recognized that in a year-round employment setting, "some of the positions which this court finds to be skilled, *e.g.,* truckdriving on the beach, [would] fit into the category of jobs which require skills that are readily acquirable by persons in the general public." *Id.,* at 33,841.

27 As the Court of Appeals explained in its remand opinion:

"Specifically, the companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest paying jobs which was predominantly Alaska Native and Filipino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious." 827 F.2d, at 446.

28 The District Court found but downplayed the fact that relatives of employees are given preferential consideration. See 34 EPD ¶ 34,437, p. 33,840. But "of 349 nepotistic hires in four upper-level departments during 1970–75, 332 were of whites, 17 of nonwhites," the Court of Appeals noted. "If nepotism exists, it is by definition a practice of giving preference to relatives, and where those doing the hiring are predominantly white, the practice necessarily has an adverse impact on nonwhites." 827 F.2d, at 445.

29 The Court suggests that the discrepancy in economic opportunities for white and nonwhite workers does not amount to disparate impact within the meaning of Title VII unless respondents show that it is "petitioners' fault." *Ante,* at 2122; see also *ante,* at 2122–2123. This statement distorts the disparate-impact theory, in which the critical inquiry is whether an employer's practices *operate* to discriminate. *E.g., Griggs,* 401 U.S., at 431, 91 S.Ct., at 853. Whether the employer intended such discrimination is irrelevant.

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Superseded by Statute as Stated in U.S. v. State of N.C., E.D.N.C., February 8, 1996

91 S.Ct. 849
Supreme Court of the United States

Willie S. GRIGGS et al., Petitioners,
v.
DUKE POWER COMPANY.

No. 124.
|
Argued Dec. 14, 1970.
|
Decided March 8, 1971.

Synopsis

Class action by Negro employees against employer alleging that employment practices violated Civil Rights Act. The United States District Court for the Middle District of North Carolina, at Greensboro, 292 F.Supp. 243, dismissed complaint, and plaintiffs appealed. The Court of Appeals, 420 F.2d 1225, affirmed, in part, reversed in part, and remanded, holding that in absence of a discriminatory purpose, requirement of high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs was permitted by the Civil Rights Act, and rejecting claim that because such requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under the Act unless shown to be job-related. Certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that employer was prohibited by provisions of Act pertaining to employment opportunities from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs, where neither standard was shown to be significantly related to successful job performance, both requirements operated to disqualify Negroes at a substantially higher rate than white applicants, and jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites.

Reversed.

Mr. Justice Brennan took no part in consideration or decision of case.

West Headnotes (9)

[1] **Civil Rights**
Purpose and construction in general
Civil Rights
Discrimination by reason of race, color, ethnicity, or national origin, in general

Objective of Congress in enacting provisions of Civil Rights Act pertaining to employment opportunities was to achieve equality of employment opportunities and remove barriers that operated in the past to favor an identifiable group of white employees over other employees. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

210 Cases that cite this headnote

[2] **Civil Rights**
Disparate impact

Under provisions of Civil Rights Act pertaining to employment opportunities, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

372 Cases that cite this headnote

[3] **Civil Rights**
Affirmative Action; Remedial Measures

Congress did not intend by provisions of Civil Rights Act pertaining to employment opportunities to guarantee a job to every person regardless of qualifications; the Act does not command that any person be hired simply because he was formerly subject of discrimination, or because he is a member of a minority group; discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed; what is required by Congress is removal of

artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on basis of race or other impermissible classification. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

585 Cases that cite this headnote

[4] **Civil Rights**
Disparate impact

Provisions of Civil Rights Act pertaining to employment opportunities proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Civil Rights Act of 1964 §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

237 Cases that cite this headnote

[5] **Civil Rights**
Discrimination by reason of race, color, ethnicity, or national origin, in general
Civil Rights
Disparate impact

If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited by provisions of Civil Rights Act pertaining to employment opportunities. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

92 Cases that cite this headnote

[6] **Civil Rights**
Disparate impact
Civil Rights
Educational requirements; ability tests

Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

837 Cases that cite this headnote

[7] **Administrative Law and Procedure**
Employment discrimination
Civil Rights
Administrative Agencies and Proceedings

Administrative interpretation of Civil Rights Act by enforcing agency is entitled to great deference. Civil Rights Act of 1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

285 Cases that cite this headnote

[8] **Civil Rights**
Disparate impact
Civil Rights
Educational requirements; ability tests

Equal Employment Opportunity Commission's construction of section of Civil Rights Act authorizing use of any professionally developed ability test that is not designed, intended, or used to discriminate because of race to require that employment tests be job-related comports with congressional intent. Civil Rights Act of 1964, § 703(h), 42 U.S.C.A. § 2000e–2(h).

176 Cases that cite this headnote

[9] **Civil Rights**
Disparate impact
Civil Rights
Educational requirements; ability tests

Employer was prohibited, by provisions of Civil Rights Act pertaining to employment opportunities, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs, where neither standard was shown to be significantly related to successful job performance, both requirements operated to disqualify Negroes at a substantially higher rate than white applicants, and the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites. Civil Rights Act of

1964, §§ 701 et seq., 703(a) (2), (h), 42 U.S.C.A. §§ 2000e et seq., 2000e–2(a) (2), (h).

714 Cases that cite this headnote

Attorneys and Law Firms

****850 *425** Jack Greenberg, New York City, for petitioners.

****851** George W. Ferguson, Jr., for respondent.

Lawrence M. Cohen for the Chamber of Commerce of the United States, as amicus curiae.

Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education ***426** or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites. [1]

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the ***427** Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four 'operating' departments in which only whites were employed. [2] Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling to any 'inside' department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the 'operating' ****852** departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it become necessary to register satisfactory scores on two professionally prepared aptitude ***428** tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an 'inside' job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates. [3]

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

***429** The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.[4] The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related.[5] We ****853** granted the writ on these claims. 399 U.S. 926, 90 S.Ct. 2238, 26 L.Ed.2d 791.

[1] **[2]** The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove ***430** barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

[3] The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, 'whites register far better on the Company's alternative requirements' than Negroes.[6] 420 F.2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in Gaston County v. United States, 395 U.S. 285, 89 S.Ct. 1720, 23 L.Ed.2d 309 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any ***431** person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

[4] **[5]** Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

****854** The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria ***432** are now used.[7] The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next

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succeeding position or related future promotion might be utilized upon a showing that such longrange requirements fulfill a genuine business need. In the present case the Company has made no such showing.

[6] The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' 420 F.2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

***433** The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by s 703(h) of the Act. [8] That section authorizes the use of 'any professionally developed ability test' that is not 'designed, intended or used to discriminate because of race * * *.' (Emphasis added.)

[7] The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting s 703(h) to permit only the use of job-related tests. [9] The administrative ****855** interpretation of the ***434** Act by the enforcing agency is entitled to great deference. See, e.g., United States v. City of Chicago, 400 U.S. 8, 91 S.Ct. 18, 27 L.Ed.2d 9 (1970); Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); Power Reactor Development Co. v. Electricians, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

Section 703(h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination. [10] Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.' 110 Cong.Rec. 7247. [11] (Emphasis added.) Despite ***435** these assurances, Senator Tower of Texas introduced an amendment authorizing 'professionally developed ability tests.' Proponents of Title VII opposed the amendment because, as written, it would permit an employer to give any test, 'whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the ****856** guise of compliance with the statute.' 110 Cong.Rec. 13504 (remarks of Sen. Case).

[8] The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of s 703(h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: 'Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this ***436** amendment and have found it to be in accord with the intent and purpose of that title.' 110 Cong.Rec. 13724. The amendment was then adopted. [12] From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of s 703(h) to require that employment tests be job related comports with congressional intent.

[9] Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably

a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

All Citations

401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, 3 Fair Empl.Prac.Cas. (BNA) 175, 3 Empl. Prac. Dec. P 8137, 88 P.U.R.3d 90

Footnotes

1 The Act provides:
'Sec. 703. (a) It shall be an unlawful employment practice for an employer—
'(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
'(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer * * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. * * *' 78 Stat. 255, 42 U.S.C. s 2000e—2.

2 A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department.

3 The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

4 The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

5 One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used

6 In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.
Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl.Prac. Guide, 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70—552, CCH Empl.Prac. Guide, 6139 (Feb. 19, 1970).

7 For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

8 Section 703(h) applies only to tests. It has no applicability to the high school diploma requirement.

9 EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:
'The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was

prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.'

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 29 CFR s 1607, 35 Fed.Reg. 12333 (Aug. 1, 1970). These guidelines demand that employers using tests have available 'data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' Id., at s 1607.4(c).

10 The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in Myart v. Motorola Co. (The decision is reprinted at 110 Cong.Rec. 5662.) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong.Rec. 5614—5616; Smathers, id., at 5999—6000; Holland, id., at 7012—7013; Hill, id., at 8447; Tower, id., at 9024; Talmadge, id., at 9025—9026; Fulbright, id., at 9599—9600; and Ellender, id., at 9600.

11 The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

'There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.' 110 Cong.Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong.Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure 'applicable job qualifications' are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine qualifications. Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

12 Senator Tower's original amendment provided in part that a test would be permissible 'if * * * in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved * * *.' 110 Cong.Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

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KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Payan v. Aramark Management Services Ltd. Partnership, 9th Cir.(Ariz.), August 2, 2007

892 F.2d 1442
United States Court of Appeals,
Ninth Circuit.

Karen L. EDWARDS, Plaintiff–Appellee,
v.
OCCIDENTAL CHEMICAL CORPORATION, Defendant–Appellant.

Nos. 88–3782, 88–4144.
|
Argued and Submitted Sept. 14, 1989.
|
Decided Jan. 9, 1990.

Synopsis

Female employee brought employment discrimination action against employer. The United States District Court for the Western District of Washington, Jack E. Tanner, J., entered judgment in favor of female employee. Employer appealed. The Court of Appeals, David R. Thompson, Circuit Judge, held that: (1) substantial evidence supported District Court's finding that female employee was discriminated against on basis of sex, and (2) District Court's determination that employer's explanation for failure to promote female was pretextual was not clearly erroneous.

Affirmed in part and remanded in part.

West Headnotes (12)

[1] **Civil Rights**
Time for proceedings; limitations

Title VII complainant may file action prior to receiving right to sue letter, provided there is no evidence showing that premature filing precluded state from performing its administrative duties or that defendant was prejudiced by filing. Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C.A. § 2000e–5(f)(1).

46 Cases that cite this headnote

[2] **Limitation of Actions**
Nature of action in general

Employee's second Title VII complaint, which named proper corporate defendant, was an amended complaint which related back to original timely filed complaint which had named wrong defendant; amendment was based on same transaction or occurrence upon which first complaint was based, and the proper defendant had notice of claim. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

31 Cases that cite this headnote

[3] **Limitation of Actions**
Intervention or bringing in new parties

To satisfy notice requirement of rule governing relation back of amendment adding a new party, plaintiff must show that new defendant had actual notice of action prior to expiration of limitations. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

11 Cases that cite this headnote

[4] **Civil Rights**
Questions of law or fact

Federal Courts
Employment discrimination

Finding of discriminatory intent in Title VII case is a question of fact and will not be overturned unless clearly erroneous. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4 Cases that cite this headnote

[5] **Civil Rights**
Sex discrimination

Substantial evidence supported district court's finding that employer discriminated against female employee on basis of her sex when he

failed to promote her to position of shipping supervisor; female had been "acting" supervisor following previous supervisor's illness and death, job classification was modified to include new job qualifications which female employee did not have, and for the last 50 years no woman ever had held the job. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3 Cases that cite this headnote

[6] **Civil Rights**
Questions of law or fact
Federal Courts
Employment discrimination

District court's determination that employer's explanation for promotion decision is pretextual involves essentially factual inquiry and is reviewable under clearly erroneous standard.

2 Cases that cite this headnote

[7] **Civil Rights**
Sex discrimination

District court's determination that employer's explanation for failure to promote female employee was pretextual was not clearly erroneous. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[8] **Civil Rights**
Relief

District court has wide discretion in awarding remedies to make Title VII plaintiff whole. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

6 Cases that cite this headnote

[9] **Civil Rights**
Aggravation, mitigation, or reduction of loss

Fact that female employee continued to work for employer following employer's failure to promote her to shipping supervisor position did not constitute failure to mitigate damages under Title VII; employer did not prove that female employee unreasonably failed to seek comparable substitute employment, and availability of other employment comparable to shipping supervisor position was never shown. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

5 Cases that cite this headnote

[10] **Civil Rights**
Measure and amount

Female employee, who was discriminated against on basis of sex, was entitled to back pay based upon difference between what she earned at her shipping assistant position and what she would have earned had she received promotion calculated from time promotion was given to another person to date of judgment.

7 Cases that cite this headnote

[11] **Civil Rights**
Back pay or lost earnings

Female employee, who was discriminated against on basis of sex, was not entitled to front pay beyond date female employee obtained desired promotion.

9 Cases that cite this headnote

[12] **Civil Rights**
Costs and fees on appeal

Appellate court has discretion to award attorney fees on appeal to prevailing parties as part of costs in Title VII cases. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3 Cases that cite this headnote

Attorneys and Law Firms

***1443** Robert L. Beale, Tacoma, Wash., for defendant-appellant.

***1444** Jerry J. Belur, Cromwell, Mendoza & Belur, P.S., Seattle, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, WALLACE and THOMPSON, Circuit Judges.

Opinion

DAVID R. THOMPSON, Circuit Judge:

After a bench trial, the district court awarded Karen Edwards judgment in her Title VII action against Occidental Chemical Corporation ("OCC"). The court found that Edwards had been denied a promotion because she was a female. The district court awarded her back pay of $46,238.00, front pay in an amount equal to the annual salary she would have earned during the duration of her working life expectancy had she received the promotion, and attorney fees. OCC appeals. It contends that (1) Edwards' Title VII action was time barred, (2) the evidence does not support the judgment that OCC discriminated against Edwards, and (3) the damage award was improper.

We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and remand for further proceedings.

FACTS

Edwards and OCC stipulated to the following facts in an agreed pretrial order: OCC hired Edwards on June 23, 1979 as a clerk typist in the shipping department. Two years later OCC promoted her to traffic clerk. On September 26, 1983 she became the shipping assistant. During times when her supervisor was hospitalized and following his death, Edwards performed the duties of freight supervisor. She performed these duties from December 1, 1983 until March 1, 1984 and from December 3, 1984 until February 1, 1985. She performed the duties of freight supervisor well and was qualified for this position.

No woman had ever been promoted to freight supervisor. Ever since 1950 every freight supervisor had been selected from within the shipping department, the department in which Edwards worked.

On February 1, 1985 OCC promoted James Phillips, a male employee in the tank car maintenance division, to the supervisor position. This promotion occurred after OCC added five job requirements related to tank car maintenance. The position was renamed "shipping supervisor." The five new requirements account for approximately ten percent of the time required for the overall duties of the shipping supervisor. The remaining ninety percent of the shipping supervisor's time is spent on duties previously performed by the freight supervisor and involves shipping. The district court found that Phillips had no prior shipping or freight experience.

When Edwards was denied the promotion, she filed a complaint with the Tacoma Human Rights Commission, a designated Equal Employment Opportunity Commission ("EEOC") agency. She alleged that her employer, OCC, refused to promote her because she was a female. On July 31, 1986 Edwards filed a complaint in district court asserting a Title VII action. The Commission issued a right to sue letter on August 14, 1986.

The complaint's caption named as defendants "Occidental Petroleum Corporation, a foreign corporation, d/b/a Occidental Chemical Corporation and Occidental Chemical Properties Corporation, d/b/a Hooker Industrial Specialty Chemicals" and various individual defendants. The body of the complaint described the corporate defendant as "Occidental Petroleum Corporation ... a commercial corporation licensed to do business in the State of Washington and doing business in Tacoma, Washington as Occidental Chemical Properties Corporation and Occidental Chemical Corporation." Process was served on "Joe Morgan, President" of OCC on September 4, 1986.

Attorneys for Occidental Petroleum Corporation ("OPC") filed a notice of appearance on September 23, 1986 on behalf of OPC and a related company, reserving their objections to jurisdiction and service of process. OPC filed an answer on March ***1445** 20, 1987, asserting that the court lacked personal jurisdiction over OPC and that OPC was not named in the Commission complaint as required under Title VII. OPC filed a summary judgment motion on April 21, 1987. The motion and accompanying affidavits set forth the relationships of the various corporations connected with OPC

and OCC. These pleadings showed that OCC was Edwards' employer, not OPC.

Edwards' memorandum in opposition to OPC's motion for summary judgment noted the confusion over the appropriate name of Edwards' employer. This memorandum asserted that OCC had been named in the complaint (as a d/b/a of OPC) and had been put on notice of the suit by service of summons and the complaint on J.H. Morgan, the employee relations manager of OCC. Edwards requested an opportunity to amend her complaint under Fed.R.Civ.P. 15, if the court found OCC had not been properly named as a defendant in the action.

The court dismissed the complaint without prejudice on June 1, 1987, without explanation. Edwards filed a second complaint in which she named OCC as the sole defendant. This second complaint was filed July 2, 1987. OCC filed an answer on August 5, 1987 and moved for summary judgment, because the second complaint had not been filed within ninety days of Edwards' receipt of her right to sue letter. *See* 42 U.S.C. § 2000e–5(f)(1). The district court denied the motion, tried the lawsuit, and on April 4, 1988 awarded judgment in favor of Edwards. Throughout these proceedings Edwards continued to work at OCC as a shipping assistant. OCC appealed from the judgment. On April 10, 1989, while the appeal was pending, Edwards was given the contested promotion. She has been employed by OCC as the shipping supervisor ever since.

ANALYSIS

A. *Statute of Limitations*

[1] **[2]** An action brought under Title VII must be filed within ninety days of receipt of a right to sue letter from the EEOC or appropriate state agency. 42 U.S.C. § 2000e–5(f)(1). This filing period is a statute of limitations. *Valenzuela v. Kraft, Inc.,* 801 F.2d 1170, 1174 (9th Cir.1986), *amended, reh'g denied,* 815 F.2d 570 (9th Cir.1987). Edwards filed her first complaint, incorrectly naming OPC as the defendant employer, on July 1, 1986, prior to receipt of her right to sue letter on August 14, 1986.[1] She filed her second complaint after the ninety-day period had expired. Unless the second complaint is an amendment which relates back to the date of the filing of the first complaint, Edwards' action is indeed time barred.

We first note that the "principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts," and "decisions on the merits are not to be avoided on the basis of mere technicalities." *Schiavone v. Fortune,* 477 U.S. 21, 27, 106 S.Ct. 2379, 2383, 91 L.Ed.2d 18 (1986) (cites omitted) (nonetheless holding that because notice of the original complaint was missing, amendment to add the proper party defendant was barred).

Federal Rule of Civil Procedures 15(a) states that leave to amend "shall be freely given when justice so requires." *See, e.g., Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Hurn v. Retirement Fund Trust,* 648 F.2d 1252 (9th Cir.1981). Under Ninth Circuit precedent, Edwards' request for leave to amend her complaint to name OCC as the proper defendant should have been granted.[2] *See,* ***1446** *e.g., Breier v. Northern California Bowling Proprietors' Ass'n,* 316 F.2d 787, 789–90 (9th Cir.1963) (leave to amend should be granted if underlying facts provide proper grounds for relief or if complaint can be saved by amendment). There was no undue delay, bad faith, futility of amendment, or prejudice to the opposing party. *See Hurn,* 648 F.2d at 1254. The amendment requested would have saved the complaint.

The district court dismissed Edwards' first complaint "without prejudice." It gave no reason for the dismissal, and said nothing about the request for leave to amend. After Edwards filed her second complaint, OCC moved for summary judgment and asserted the ninety-day statute of limitations as a bar to the action. This was the only ground on which OCC's summary judgment motion was based. The district court denied the motion without comment.

Logic forces the conclusion that the district court did indeed allow Edwards to amend her first complaint. The only reason for dismissal of the first complaint was that Edwards had sued the wrong corporate defendant. The dismissal was "without prejudice," and the underlying action was not dismissed. When OCC moved to dismiss Edwards' second complaint, the district court denied the motion. Because the ninety-day limitations period clearly had expired by the time the second complaint was filed, the only logical reason for the district court's denial of OCC's summary judgment motion had to be that the district court regarded the second complaint as the functional equivalent of an amendment of the original complaint which had been timely filed. This analysis is further buttressed by the fact that the district court in its Findings of Fact and Conclusions of Law stated that "the plaintiff's claim in this matter was timely filed." This finding could only

be true if the second complaint was treated as an amended complaint.

But even if the district judge correctly viewed the second complaint as an amended complaint, Edwards' Title VII action against OCC would still be time barred unless the amendment related back to the date the earlier complaint was filed. Relation back depends upon the application of Fed.R.Civ.P. 15(c).

Under Rule 15(c) a defendant not accurately named in an original complaint may be added after the statute of limitations has expired. *Korn v. Royal Caribbean Cruise Line, Inc.,* 724 F.2d 1397, 1399 (9th Cir.1984); *Craig v. United States,* 413 F.2d 854, 857 (9th Cir.), *cert. denied,* 396 U.S. 987, 90 S.Ct. 483, 24 L.Ed.2d 451 (1969). An amendment relates back to the date of the original filing if the claim asserted by the amendment arose out of the same conduct, transaction or occurrence upon which the first complaint was based, and if, within the filing period prescribed by law, the party being brought in by amendment:

> (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15(c); *Schiavone,* 477 U.S. at 29, 106 S.Ct. at 2384; *Miles v. Department of the Army,* 881 F.2d 777, 781 (9th Cir.1989).

Edwards' second complaint plainly meets the same transaction or occurrence test of ***1447** Rule 15(c). Only the named defendant changed.

[3] To satisfy the notice requirement of Rule 15(c), the plaintiff must show the new defendant had actual notice of the action prior to the expiration of the limitations period. *Cooper v. United States Postal Serv.,* 740 F.2d 714, 716–17 (9th Cir.1984), *cert. denied,* 471 U.S. 1022, 105 S.Ct. 2034, 85 L.Ed.2d 316 (1985); *Korn,* 724 F.2d at 1399; *Craig,* 413 F.2d at 857–58. Notice may be formal or informal. *Korn,* 724 F.2d at 1399.

OCC had the requisite notice. Edwards' first complaint, together with a summons, was served on Joe (or J.H.) Morgan, OCC's employee relations manager, at OCC's business address on September 4, 1986. This notice was well within the ninety-day filing period which began to run on August 14, 1986.

Under Fed.R.Civ.P. 4(d)(3), service may be made on a corporation "by delivering a copy of the summons and of the complaint to an officer, managing or a general agent, or to any other agent authorized by appointment or by law to receive service of process." In this circuit, service may be made upon any individual " 'so integrated with the organization that he will know what to do with the papers' " and " 'who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service.' " *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.,* 840 F.2d 685, 688 (9th Cir.1988) (quoting *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa,* 428 F.Supp. 1237, 1251 (S.D.N.Y.1977)). Morgan received service of the EEOC charge and forwarded a copy to OCC. As employee relations manager of OCC, Morgan responded to the EEOC charge by letter on behalf of OCC. Service on Morgan to effectuate service on OCC was appropriate.

In addition to the notice OCC received through service on Morgan, OCC's attorney, Barbara Jo Sylvester, had notice of Edwards' employment discrimination charge and the filing of her original complaint. Sylvester was the attorney for both OPC and OCC. She represented OCC before the EEOC and in the trial. She knew that OCC, not OPC, was the proper defendant when the original complaint was filed, but she did not file an answer asserting that OPC was the wrong defendant until March 20, 1987, more than six months after service of process.

We conclude that Edwards' second complaint, which was an amended complaint, met the relation back requirements of Rule 15(c). The amendment related back to the filing of Edwards' original complaint, and as a result her Title VII claim was timely filed.

B. *Sufficiency of Evidence*

[4] A finding of discriminatory intent in a Title VII case is a question of fact and will not be overturned unless clearly erroneous. *Jauregui v. City of Glendale,* 852 F.2d 1128, 1131 (9th Cir.1988). We must affirm the district court's factual findings unless left with the "definite and firm conviction

that a mistake has been committed." *Atonio v. Wards Cove Packing, Co.,* 827 F.2d 439, 443 (9th Cir.1987), *rev'd in part on other grounds,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).

[5] OCC asserts that the district court erred in finding Edwards was not considered for the shipping supervisor position, and the court incorrectly concluded that the decision not to consider Edwards was itself evidence of discriminatory intent. We disagree. Edwards presented evidence, with which OCC agreed, that after she had been working as "acting" freight supervisor during Meyers' illness and following his death, the freight supervisor position job classification was modified to include five new job qualifications which she did not have. For the last fifty years the position had been filled from within the shipping department, no woman ever had held the job. OCC went outside the shipping department to give the job promotion to James Phillips.

Edwards testified that Webber told her she was not being considered for the position, and that when she asked him if it was ***1448** because she was a woman, Webber replied he would be a fool if he told her that. David Scholes, Chemical's plant manager, testified that Webber had made the decision to hire Phillips, and Scholes had approved that decision based on Webber's recommendation. Webber testified at trial that he had recommended Phillips for promotion, but on cross-examination admitted that he had stated in a prior deposition that he had never made a recommendation regarding the promotion and had not participated in the hiring process or decision to fill the vacancy. Neither Phillips nor Edwards were ever interviewed for the job.

Scholes also testified that he promoted Phillips based on a recommendation that it would take longer to train Edwards in the five tank car maintenance job areas than it would take to train Phillips in the shipping areas. Morgan, OCC's employee relations manager, testified that the maintenance duties were technical, and that it would take only thirty days for Phillips to learn the shipping duties. In contrast, Frank O'Bryan, the maintenance technician who preceded Phillips, testified that the only training necessary for the maintenance duties was the ability to use a telephone to call the appropriate person to get the maintenance work done. Edwards also testified that it took over two years to train Phillips in the shipping duties. While the evidence may have been conflicting, the trial court resolved the conflicts and it did not clearly err in so doing.

[6] [7] OCC also argues that the district court erred in refusing to adopt OCC's expressed reasons for promoting Phillips instead of Edwards. The district court determined that OCC's proffered reasons were pretextual. There has been some suggestion in our cases that the standard of review for such a determination is de novo. *See Atonio,* 827 F.2d at 443; *Thorne v. City of El Segundo,* 726 F.2d 459, 465 & n.6 (9th Cir.1983), *cert. denied,* 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984). Notwithstanding these suggestions, we have not heretofore decided the issue. We do now. We conclude that a district court's determination that an employer's explanation for a promotion decision is pretextual involves an essentially factual inquiry and is reviewable under the clearly erroneous standard. *See United States v. McConney,* 728 F.2d 1195, 1202 (9th Cir.), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984); *Daniels v. Board of Ed.,* 805 F.2d 203, 209 (6th Cir.1986); *Goostree v. State,* 796 F.2d 854, 861–62 & n. 2 (6th Cir.1986), *cert. denied,* 480 U.S. 918, 107 S.Ct. 1374, 94 L.Ed.2d 689 (1987); *see also Wrighten,* 726 F.2d at 1356 (applying the clearly erroneous standard of review of district court's finding of pretext); *Boudreaux v. Helena–West Helena School Dist.,* 819 F.2d 854, 855–56 (8th Cir.1987) (same); *cf. Jauregui,* 852 F.2d at 1131–32 (finding of discriminatory intent in Title VII cases is a question of fact reviewed under the clearly erroneous standard). Applying this standard of review, we cannot say the district court's determination that OCC's explanations were pretextual is clearly erroneous.

We conclude that there is substantial evidence in the record to support the district court's finding that OCC discriminated against Edwards on the basis of her sex when it failed to promote her to the position of shipping supervisor.

C. *Damages*

[8] The district court has wide discretion in awarding remedies to make a Title VII plaintiff whole. *Thorne v. City of El Segundo,* 802 F.2d 1131, 1133 (9th Cir.1986). We review a district court's award of damages under an abuse of discretion standard. *See Sangster v. United Airlines, Inc.,* 633 F.2d 864, 867 (9th Cir.1980), *cert. denied,* 451 U.S. 971, 101 S.Ct. 2048, 68 L.Ed.2d 350 (1981).

1. Mitigation

[9] OCC argues that because Edwards continued to work at OCC following the company's failure to promote her to the shipping supervisor position, Edwards failed to mitigate her

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damages by not seeking other employment, comparable to the shipping supervisor position.

***1449** This contention flies in the face of Title VII's purpose. One of Title VII's primary objectives is to eradicate discrimination in the workplace. *Thorne,* 802 F.2d at 1133–34. "The purposes of Title VII are best served when parties, *where possible,* attack discrimination within the context of their existing employment relationships.... An employee, faced with an obstacle in the logical progression and development of a career should not quit at the first sign of institutional discrimination." *Id.* at 1134.

Further, the burden is on OCC to prove that Edwards failed to mitigate her damages. *Coleman v. City of Omaha,* 714 F.2d 804, 808 (8th Cir.1983). OCC did not prove that Edwards unreasonably failed to seek comparable substitute employment. *See E.E.O.C. v. Pacific Press Publishing Association,* 482 F.Supp. 1291, 1317 (N.D.Cal.1979), *aff'd,* 676 F.2d 1272 (9th Cir.1982). Moreover, the availability of other employment comparable to the shipping supervisor position was never shown.

[10] The district court did not err in awarding back pay based upon its computation of the difference between what Edwards earned at her shipping assistant position and what she would have earned had she received the shipping supervisor promotion, calculated from the time the promotion was given to Phillips, February 1, 1985, to the date of the judgment, March 31, 1988. The district court computed this back pay to be $46,238.00. We find no error in this computation.

2. Front Pay

[11] OCC argues that the district court's award of front pay was inappropriately vague and failed to specify that the award would be offset by any income earned by Edwards during the time of the front pay award. *See Cassino v. Reichhold Chemicals, Inc.,* 817 F.2d 1338, 1347 (9th Cir.1987), *cert. denied,* 484 U.S. 1047, 108 S.Ct. 785, 98 L.Ed.2d 870 (1988). The front pay order also failed to specify an ending date of the award. However, these concerns have been overcome by Edwards' willingness to stipulate to a modification of the front pay award limiting it to the difference between the salary she received as shipping assistant and the salary she would have received as the shipping supervisor for the period from the date of the district court's judgment, March 31, 1988, to the date she was promoted, April 10, 1989.

The district court's award of front pay beyond the date Edwards obtained the desired promotion must be vacated. The award of front pay was designed to provide Edwards with the salary differential to which she would have been entitled had she received the promotion. Once she did in fact receive the promotion, there was no basis for a further front pay damage award. *See E.E.O.C. v. Pacific,* 482 F.Supp. at 1320–21 n. 44.

We decline to address the issue of whether hostility is required to support the award of front pay in the context of this case. The parties' joint pretrial order frames the front pay issue: "If plaintiff prevails under RCW 49.60, should she be awarded lost wages, past and future, as compensatory damages?" The presence or absence of hostility with regard to an award of front pay under 42 U.S.C. §§ 2000(e) et seq. was never presented to the district court, nor was it designated an issue, made the subject of any evidence one way or the other, or argued by the parties to the district court or in their briefs to this court. Accordingly, the effect, if any, of hostility or the lack of it as it may pertain to the front pay award need not be decided in this case and we decline to do so. *See e.g., Kates v. Crocker National Bank,* 776 F.2d 1396, 1398 (9th Cir.1985); *In re Municipal Bond Reporting Antitrust Litigation,* 672 F.2d 436, 439 n. 6 (5th Cir.1982); *Werner v. Hearst Publishing Co.,* 297 F.2d 145, 149 (9th Cir.1961).

D. *Attorney Fees for Appeal*

Edwards seeks attorney fees for this appeal pursuant to section 706(k) of Title VII, 42 U.S.C. § 2000e–5(k), and Ninth Circuit Rule 28–2.3.

[12] Under section 2000e–5(k), "the court ... may allow the prevailing party ... a reasonable attorney's fee as part of costs...." The appellate court has discretion ***1450** to award attorney fees on appeal to prevailing parties as part of costs in Title VII cases. *Harmon v. San Diego County,* 736 F.2d 1329, 1331 (9th Cir.1984). Edwards is entitled to attorney fees for this appeal.

CONCLUSION

We affirm the district court's award of back pay in the sum of $46,238.00. We vacate the district court's award of front pay and remand to the district court for computation of front pay damages in an amount consistent with this opinion. Edwards' attorney fees and costs for this appeal are to be fixed by the district court on remand.

AFFIRMED in part and REMANDED.

All Citations

892 F.2d 1442, 51 Fair Empl.Prac.Cas. (BNA) 1602, 52 Empl. Prac. Dec. P 39,585, 15 Fed.R.Serv.3d 665

Footnotes

1 A Title VII complainant may file an action prior to receiving her right to sue letter, provided there is not evidence showing that the premature filing precluded the state from performing its administrative duties or that the defendant was prejudiced by such filing. *Wrighten v. Metropolitan Hospitals, Inc.,* 726 F.2d 1346, 1351 (9th Cir.1984). There is no such evidence in this case.

2 Edwards did not call the request in her opposition to OPC's motion for summary judgment a "motion for leave to amend," and she did not tender a formal amendment. But these circumstances did not preclude the district court from granting leave to amend. *See* *Simons v. United States,* 497 F.2d 1046, 1049 n. 2 (9th Cir.1974) (citing *Davis v. Yellow Cab Co.,* 35 F.R.D. 159, 162 (E.D.Pa.1964); *Smith v. Blackledge,* 451 F.2d 1201 (4th Cir.1971)); *cf.* *Galindo v. Stoody Co.,* 793 F.2d 1502, 1513 (9th Cir.1986) ("Although no formal amendment was made, a district court may amend the pleadings merely by entering findings on the unpleaded issues."); *Davis & Cox v. Summa Corp.,* 751 F.2d 1507, 1522 (9th Cir.1985) (Rule 15(b) allows amendment to conform pleadings to evidence "even if the parties have failed formally to amend the pleadings."); *Consolidated Data Terminals v. Applied Digital Data Sys., Inc.,* 708 F.2d 385, 396 (9th Cir.1983) ("even if the pleadings are never amended, the rule allows a judgment on an issue to stand if the issue has been tried by express or implied consent"); *Dunn v. Trans World Airlines,* 589 F.2d 408, 413 (9th Cir.1978) ("Failure to formally amend the pleadings will not jeopardize a verdict or judgment based upon competent evidence.").

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38 N.Y.2d 329, 342 N.E.2d 563, 379 N.Y.S.2d 788, 11 Empl. Prac. Dec. P 10,749

In the Matter of Rubin Maloff et al., Appellants,
v.
City Commission on Human Rights et al., Respondents.

Court of Appeals of New York
Argued November 20, 1975;
decided December 29, 1975

CITE TITLE AS: Matter of Maloff v City Commn. on Human Rights

HEADNOTES

Civil rights
discrimination based on sex
New York City Commission on Human Rights does not lack jurisdiction to decide controversy regarding teacher's complaint that her performance was rated unsatisfactory in retaliation for earlier complaint alleging sexual discrimination in New York City school system--board of education subject to municipal control in matters "not strictly educational or pedagogic"-- discrimination not "strictly educational or pedagogic"--board of education does not have exclusive jurisdiction over complaints regarding rating process.

() The New York City Commission on Human Rights does not lack jurisdiction to decide a controversy brought on by a teacher's complaint that her performance was rated unsatisfactory in retaliation for filing an earlier complaint alleging sexual discrimination in the New York City school system. While the Board of Education of the City of New York is a State agency and the commission's powers and duties extend only to discrimination "practiced by private persons, associations, corporations and *** by city officials or city agencies" (Administrative Code of City of New York, § B1-5.0), a city agency is defined to include any "agency of government, the expenses of which are paid in whole or in part from the city treasury" (Administrative Code of City of New York, § 1150-1.0, subd 1). The Board of Education of the City of New York falls into this category, and literally comes within the jurisdiction conferred on the commission.

() Although the board of education is a State agency, it is subject to municipal control in matters "not strictly educational or pedagogic". Discrimination in the school system is not considered "strictly educational or pedagogic".

() Although the State Division of Human Rights is responsible for eliminating discrimination from the city school system, the city commission is not precluded from exercising similar powers. General Municipal Law (§ 239- s) provides that "the jurisdiction of the New York city commission on human rights in relation to matters within *330 the city of New York shall be deemed to be concurrent with the jurisdiction of the New York state division of human rights."

() The special competence of the board of education in evaluating teacher performance does not require that the board should have exclusive jurisdiction over all complaints regarding the rating process, including allegations of discrimination.

Matter of Maloff v City Comm. on Human Rights, 46 AD2d 852, affirmed.

SUMMARY

Appeals from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered December 3, 1974, which (1) reversed, on the law, and vacated an order and judgment of the Supreme Court at Special Term (Martin B. Stecher, J.), entered in New York County in a proceeding pursuant to CPLR article 78, (a) adjudging that the respondent commission lacked jurisdiction to proceed upon a complaint filed by respondent Mary McAulay charging petitioners with discrimination, and (b) prohibiting said commission from proceeding on said complaint, and (2) dismissed the petition.

POINTS OF COUNSEL

Leonard Greenwald, Max H. Frankle and *Sheldon Schorer* for Rubin Maloff, appellant.
I. The court below erred in holding that the board of education is amenable to the jurisdiction of the city commission. *(Matter*

of Board of Higher Educ. of City of N. Y. v Carter, 16 AD2d 443, 14 NY2d 138; *Lanza v Wagner,* 11 NY2d 317; *Schnepel v Board of Educ. of City of Rochester,* 302 NY 94; *Berkey v Downing,* 68 Misc 2d 595, 39 AD2d 1008; *ofenloch v Gaynor,* 66 Misc 2d 185, 35 AD2d 913; *Matter of Board of Educ. of Cent. School Dist. No. 1 v Stoddard,* 268 App Div 966, 294 NY 667; *Matter of Daniman v Board of Educ. of City of N. Y.,* 306 NY 532.) II. The city commission must not be vested with the "competence" to pass on and determine issues of educational policy and direction. *(Matter of Stone v Gross,* 25 AD2d 753; *Matter of Goldberg v Board of Examiners of Bd. of Educ. of City of N. Y.,* 28 AD2d 533.) III. The decision below does not best serve public policy of the State. *(Matter of Divisich v Marshall,* 281 NY 170; *Matter of Board of Educ. of City of N. Y. v State Div. of Human Rights,* 42 AD2d 854; *Board of Educ. of Union Free School Dist. No. 2 v New York State Div. of Human Rights,* 42 AD2d 49; *Board of Educ. of Union Free School Dist. No. 2 v New York State Div. of Human Rights,* 42 AD2d 600.)

Gary J. Greenberg, Charles G. Moerdler and *Leonard M. Wasserman* for Board of Education of the City of New York, appellant.

I. Human rights agencies are without jurisdiction to ***331** entertain complaints pertaining to teacher ratings issued by principals employed by the Board of Education of the City of New York. II. No human rights agency of this State may entertain a complaint concerning a teacher rating. *(Matter of Board of Higher Educ. of City of N. Y. v Carter,* 14 NY2d 138; *Union Free School Dist. No. 6 v New York State Human Rights Appeal Bd.,* 35 NY2d 371; *Matter of Valdivieso v Community School Bd. of Dist. One,* 67 Misc 2d 1007; *Matter of Board of Educ. of City of N. Y. v Allen,* 6 NY2d 127; *Matter of McAulay v Board of Educ. of City of N. Y.,* 46 AD2d 84; *Matter of Community School Bd. Dist. No. 3 of City of N. Y. v Board of Educ. of City of N. Y.,* 68 Misc 2d 826; *Matter of Bergstein v Board of Educ., Union Free School Dist. No. 1,* 34 NY2d 318; *Matter of Tischler v Board of Educ. of Monroe Woodbury Cent. School Dist. No. 1,* 37 AD2d 261.) III. Assuming a human rights agency has jurisdiction to entertain complaints concerning teacher ratings, it is without jurisdiction to enter an order requiring the board to expunge an unsatisfactory rating.

W. Bernard Richland, Corporation Counsel (William Kirchgaessner of counsel), for City Commission on Human Rights, respondent.

I. The commission has jurisdiction pursuant to chapter I of title B of the New York City Administrative Code, to entertain complaints alleging discrimination in employment by the Board of Education of the City of New York and its agents. *(Matter of Daniman v Board of Educ. of City of N. Y.,* 306 NY 532; *People v Engel,* 200 Misc 60.) II. The fact that discrimination or retaliation is manifested in the form of an unsatisfactory teacher rating does not immunize such action from scrutiny as an unlawful employment practice or bar the granting of appropriate relief for such unlawful acts. *(Long v Ford Motor Co.,* 352 F Supp 135; *Leisner v New York Tel. Co.,* 358 F Supp 359; *Rowe v General Motors Corp.,* 457 F2d 344; *Matter of Board of Higher Educ. of City of N. Y. v Carter,* 14 NY2d 138; *Matter of Board of Educ., Cent. School Dist. No. 1 of Town of Grand Is. v Helsby,* 37 AD2d 493, 32 NY2d 660; *Matter of Board of Educ. of Syracuse City School Dist. v State Div. of Human Rights,* 38 AD2d 245, 33 NY2d 946; *Alexander v Gardner-Denver,* 415 US 36.)

OPINION OF THE COURT

Wachtler, J.

In this article 78 proceeding the petitioners seek an order prohibiting the New York City Commission on Human Rights from proceeding on a teacher's complaint that ***332** her performance was rated unsatisfactory in retaliation for filing an earlier complaint alleging sexual discrimination in the New York City school system. Petitioners claim that the Commission on Human Rights lacks jurisdiction to decide the controversy. Each of the petitioners raises a separate point.

Petitioner Maloff urges that the city commission is not authorized to inquire into allegations of discrimination involving the Board of Education of the City of New York. He notes that it is well settled that the Board of Education of the City of New York is a State agency (see, e.g., *Matter of Daniman v Board of Educ. of City of N. Y.,* 306 NY 532). Thus, he argues, the city could not subject it to the jurisdiction of the commission,--a city agency--and in any event, did not do so since the commission's "powers and duties" extend only to discrimination "practiced by private persons, associations, corporations and *** by city officials or city agencies." (Administrative Code of City of New York, § B1-5.0.)

We note however, that elsewhere in the code a city agency is defined to include any "agency of government, the expenses of which are paid in whole or in part from the city treasury" (Administrative Code of City of New York, § 1150-1.0, subd 1). There is no doubt that the Board of Education of the City of New York falls into this category, and thus literally comes within the jurisdiction conferred on the commission by the city. (See, also, *Metzger v Swift,* 258 NY

440, holding that members of the board of higher education are "city officers" within the meaning of the city charter provision prohibiting dual office holding by city officers.)

We perceive in this no conflict with the State's authority over the board. Although the board is a State agency, we have held on many occasions that it is not wholly independent of municipal action (see, e.g., *Matter of Hirshfield v Cook,* 227 NY 297, 309-310; *Matter of Divisich v Marshall,* 281 NY 170; *Matter of Daniman v Board of Educ. of City of N. Y., supra,* at p 542). The distinction is this: "While the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not strictly educational or pedagogic" *(Matter of Hirshfield v Cook, supra,* at p 304; see, also, *Matter of Daniman v Board of Educ. of City of N. Y., supra,* at p 542). Of course discrimination in the school system is, in the broadest sense, an educational affair, and the board clearly has authority to deal with it. But it has never been considered "strictly ***333** educational or pedagogic" so as to be a matter within the board's *exclusive* jurisdiction (see, e.g., *Matter of Board of Higher Educ. of City of N. Y. v Carter,* 14 NY2d 138).

Finally we note that although the State Division of Human Rights is responsible for eliminating discrimination from the city school system *(Matter of Board of Higher Educ. v Carter, supra),* that alone does not preclude the city commission from exercising similar powers. Section 239-s of the General Municipal Law provides that "the jurisdiction of the New York city commission on human rights in relation to matters within the city of New York shall be deemed to be concurrent with the jurisdiction of the New York state division of human rights."

The petitioner, board of education, raised a more fundamental question. They urge that no human rights agency of the city or the State should entertain a complaint concerning a teacher's rating, even when discrimination is alleged, since a teacher's ability involves an educational judgment which is solely within the province and competence of the board.

In *Carter (supra)* the board of higher education made a similar argument. There they unsuccessfully argued that because of their special role in formulating educational policy, they should be the sole arbiter of all complaints of discrimination arising within the school system. Here the board concedes that they do not have exclusive jurisdiction of all complaints of discrimination within the system but argue that because of their exclusive power and unique competence to evaluate teacher performance, we should create an exception and recognize that the board has exclusive jurisdiction over all complaints regarding the rating process, including allegations of discrimination.

Although teacher ratings undoubtedly play a major part in the board's formulation of educational policy, they are also crucial to the teacher's continued employment, salary and advancement. If discrimination in employment is to be eliminated, discrimination in the vital rating process can hardly be ignored. No one of course questions the power or competence of the board to rate teacher performance. On the other hand, the Legislature has determined that when discrimination in employment or promotion is alleged, the complainant should be permitted to seek redress before the State or local human rights agency. To hold that such agencies lack the power to review a claim of discrimination in the rating process would seriously frustrate the legislative policy. ***334**

We recognize of course that review in these cases poses special problems. Indeed we recently noted that "[n]either the commission nor the courts should invade, and only rarely assume academic oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion, and tenure" *(Matter of Pace Col. v Commission on Human Rights of City of N. Y.,* 38 NY2d 28, 38). However as our decision in that case demonstrates, the delicacy of the task is not sufficient to preclude the inquiry (cf. *Matter of Board of Educ., Cent. School Dist. No. 1 v State Div. of Human Rights,* 35 NY2d 822).

The order of the Appellate Division should be affirmed.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Fuchsberg and Cooke concur.
Order affirmed, with costs.

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94 Misc.2d 574, 405 N.Y.S.2d 589

In the Matter of the Board of Education of the City of New York, Petitioner,
v.
Harrison J. Goldin, as Comptroller of the City of New York, Respondent

Supreme Court, Special Term, Kings County
May 12, 1978

CITE TITLE AS: Matter of Board of Educ. of City of N.Y. v Goldin

SUMMARY

The Supreme Court in Kings County (John A. Monteleone, J.), held that the Comptroller of the City of New York has no power under the guise of the asserted power to audit the operations and programs of "city agencies" to compel the board of education by the issuance of a subpoena duces tecum, to produce records, documents and all other materials pertaining to vocational education in the city's high schools for the purpose of determining whether "funds are being expended or utilized efficiently and economically and whether the desired goals, results or benefits" of the vocational programs are being achieved (New York City Charter, § 93, subd d) since the Comptroller or any other municipal official lacks the power to inquire into or interfere with such matters of strictly educational or pedagogic concern which fall exclusively within the jurisdiction of the board of education and are not subject to control by any municipal official.

HEADNOTES

Schools
Municipal Interference with Strictly Educational or Pedagogic Matters

() The Comptroller of the City of New York, in calling for the production of records, documents and all other materials pertaining to vocational education in the city's high schools for the purpose of determining whether "funds are being expended or utilized efficiently and economically and whether the desired goals, results or benefits" of the vocational programs of the board of education are being achieved (New York City Charter, § 93, subd d), is impermissibly seeking to inquire into or concern himself with matters of strictly educational or pedagogic concern which fall exclusively within the jurisdiction of local boards of education and are not subject to interference by municipalities or their officials.

Schools
Municipal Interference with Strictly Educational or Pedagogic Matters

() Pursuant to the public policy to place matters of public education beyond control by municipalities and politics, matters which are strictly educational or pedagogic are protected from control and interference by the local municipality with the board of education being subject to municipal control only in matters not strictly educational or pedagogic. While the municipality must make appropriations of money to run the schools, the expenditure of that money once appropriated vests solely in the board of *575 education so as to enable it to properly discharge its responsibility of furnishing an efficient system of public education.

Schools
Municipal Interference with Strictly Educational or Pedagogic Matters

() Subdivision d of section 93 of the New York City Charter which empowers the city Comptroller to audit the operations and programs of "city agencies" for the broad purpose of determining whether "funds are being expended or utilized efficiently and economically and whether the desired goals, results or benefits are being achieved", does not empower the Comptroller to compel the board of education by the issuance of a subpoena duces tecum, to produce records, documents and all other materials pertaining to vocational educational programs and operations in the city's high schools for the purpose of determining whether the board's vocational programs are achieving the desired goals or benefits, since the Comptroller lacks the power to inquire into or interfere with such matters of strictly educational or pedagogic concern which fall exclusively within the jurisdiction of the board of education and are not subject to control by any municipal official. Assertion of authority to compel

the board to submit to examination by the Comptroller's office would impermissibly infringe upon the board's right to exercise independence of judgment in strictly educational or pedagogic matters, and would serve to inhibit the exercise of judgment and freedom of action by the board in matters entrusted to their exclusive jurisdiction. Accordingly, the board's motion to quash the subpoena is granted.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

39 NY Jur, Municipal Corporations § 276

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 275 et seq; 68 Am Jur 2d, Schools § 50

Am Jur Pl & Pr Forms (Rev), Witnesses, Forms 118, 119

APPEARANCES OF COUNSEL

Proskauer, Rose, Goetz & Mendelsohn (Morton M. Maneker of counsel), for petitioner. *Allen G. Schwartz, Corporation Counsel (James J. Greilsheimer* of counsel), for respondent.

OPINION OF THE COURT

John A. Monteleone, J.

Petitioner, the Board of Education of the City of New York (hereinafter also referred to as the board), moves for an order pursuant to CPLR 2304 quashing a subpoena duces tecum (hereinafter subpoena) dated March 15, 1978 which was served upon the board. The subpoena was issued by the respondent ***576** Goldin, Comptroller of the City of New York (hereinafter Comptroller).

The Comptroller cross-moves for an order pursuant to CPLR 2308 (subd [b]) directing the board's president to comply with the subpoena.

The subpoena, addressed to the board's president, commands the production "for review and inspection" of "all records and documents in your possession or control pertaining to the New York City Board of Education's vocational education program". The language of the subpoena makes clear that the material to be produced is inclusive of, "but not limited to," 13 categories of documents and records as therein listed. These categories include, among others, the following: the complete personnel files for all vocational high school teachers for certain specified years; "[a]ll documents relating to the retraining and updating of all shop teachers in all New York City High Schools engaged in providing vocational training"; and "[a]ll documents relating to curriculum planning and design for the years 1970-71 through 1977-78 for New York City High Schools engaged in providing vocational education". The call for production of the records and documents referred to in the categories described in the subpoena concludes with a demand for "[a]ll other records which pertain to vocational education in New York City's High Schools."

The submitted papers on the instant motion and cross motion clearly establish that the acknowledged general purpose to be subserved by the subpoena is, as stated in a letter dated March 13, 1978 from the Comptroller to the board's president, quoting subdivision d of section 93 of the New York City Charter, "to determine whether funds are being expended or utilized efficiently and economically and whether the desired goals, results or benefits [of the board's programs] are being achieved." The specific aspects of the Comptroller's proposed inquiry, with respect to which the production of the material mentioned in the subpoena is sought, are reflected in the statement made in the Comptroller's afore-mentioned letter that "[w]e expect, among other things, to ask recent graduates of vocational high schools if they are currently employed in the fields for which they were trained; we will compare the curriculum offered by vocational high schools to the current labor market to determine its relevancy; we will examine equipment to see if it reflects current job conditions, or if it is out-dated and inappropriate; we will examine personnel ***577** practices to determine if personnel are periodically retrained so that the staff is capable of providing an education that is relevant to the job market of today and tomorrow."

The board's motion to quash rests upon its contention that the Comptroller lacks authority to require from the board by way of subpoena the production, for the hereinabove stated purposes, of records, documents, and other papers involving matters which are strictly and essentially educational or pedagogic. This position is based upon the long-standing public policy in this State of barring interference by municipalities or their officials, with strictly educational matters entrusted to local boards of education, and on the board's contention that none of the statutory enactments or judicial decisions on which the Comptroller relies furnishes support for his view that they authorize or permit an investigation into such matters through compulsory process.

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The board maintains that the power and authority of the Comptroller in relation to the board is defined and limited by subdivision 7 of section 2590-m of the New York State Education Law, which provides that "[t]he comptroller of the city of New York shall audit the accounts of the city board and each community board." The board claims that although it offered to co-operate with the Comptroller in the conduct of an audit of its accounts pursuant to subdivision 7 of section 2590-m, the Comptroller has disclaimed any intent to conduct an audit of the accounts of the board and has unlawfully asserted the right, in purported reliance upon subdivision d of section 93 of the City Charter, to exercise his powers for the broad purpose specified in subdivision d of section 93.

The papers submitted to the court in this controversy amply demonstrate that the Comptroller's claim that he is authorized to exercise the power of subpoena with respect to the matters described or otherwise stated in his subpoena basically derives from his reliance on subdivision d of section 93 of the City Charter. Subdivision d of section 93 reads in pertinent part as follows: "The comptroller shall audit the operations and programs of city agencies to determine whether funds are being expended or utilized efficiently and economically and whether the desired goals, results or benefits of agency programs are being achieved."

The Comptroller also relies, as authority for issuance of the subpoena, upon subdivision b of section 93 of the charter, which states that the Comptroller "shall have power to investigate ***578** all matters relating to or affecting the finances of the city, including without limitation the performance of contracts and the receipt and expenditure of city funds, and for such purpose he shall have power to require the attendance and examine and take the testimony under oath of such persons as he may deem necessary." The Comptroller in addition invokes section 93 (subd c, par [3]), which empowers the Comptroller to "audit the expenditure of city funds by any public or private agency that receives such funds from the city." The Comptroller also adverts to subdivision a of section 93, which authorizes the Comptroller to make "such recommendations, comments and criticisms in regard to the operations, fiscal policies and financial transactions of the city as he may deem advisable in the public interest." The Comptroller goes so far as to maintain that his power to conduct an audit of the board in all of the far-ranging aspects reflected in the subpoena is recognized in subdivision 7 of section 2590-m of the Education Law, hereinabove referred to, a view which finds no support in the express language therein contained, which only authorizes and directs an audit of the "accounts" of the board. The Comptroller additionally cites section 20 of the General City Law of the State of New York and, specifically, subdivisions 21 and 23 thereof. However, it is to be noted on this score that the grant of power to the city "[t]o investigate and inquire into all matters of concern to the city or its inhabitants, and to require and enforce by subpoena the attendance of witnesses at such investigations" (subd 21), and "[t]o exercise all powers necessary and proper for carrying into execution the powers granted to the city" (subd 23), is expressly stated in the opening sentence of section 20 to be "[s]ubject to the constitution and general laws of this state".

Basically, the Comptroller's claim of a right to require the production of records and other material for the purposes herein indicated rests, as hereinabove stated, upon the provisions of section 93 of the City Charter and, more particularly, upon the provisions of subdivision d of section 93. The Comptroller submits that the provisions of subdivision d of section 93 which empower him to audit the operations and programs of "city agencies" for the broad purpose therein stated are applicable to the programs and operations of the board since, according to the Comptroller, the board is a city agency within the meaning of section 93 of the charter and, in this connection, quotes from subdivision 2 of section 1150 of the ***579** charter which defines the term "agency" to include "[any] agency of government, the expenses of which are paid in whole or in part from the city treasury."

The Comptroller asserts, moreover, that the board is seeking an appropriation for the fiscal year 1979 which is substantially greater than the sum that the city will be required to appropriate to the board under the stipulation of settlement between the city and the board resolving their differences under the Stavisky-Goodman law (Education Law, § 2576, subd 5), and that it is especially important during this period of fiscal crisis confronting the city that, pursuant to "obligation" imposed on him by subdivision a of section 93 of the charter to make recommendations, comments and criticisms in regard to the city's operations, fiscal policies and financial transactions, the Comptroller furnish the City Council and the Board of Estimate with information and recommendations that will facilitate intelligent consideration of the board of education's request for appropriations in excess of the sum mandated by the stipulation of settlement.

Finally, it is contended by the Comptroller that any objection to the scope of the subpoena or as to any particular items

sought therein is meritless, since the requested documents are clearly material and relevant to the authorized purpose for which an audit can be conducted by the Comptroller as stated in subdivision d of section 93 of the charter.

()The resolution of the instant controversy rests fundamentally upon a two-fold determination of a question of fact and of an issue of law. The factual question is whether the Comptroller, in calling for production of the records, documents and other material mentioned in the subpoena is seeking, whether purposefully or in effect, to inquire into or concern himself with matters entrusted to the board that are of a strictly educational or pedagogic nature. If this be the fact, the legal issue which comes to the fore for consideration and determination is whether the Comptroller has the inherent power or is otherwise authorized by law to utilize the power of subpoena to inquire into such matters.

The court finds no difficulty in answering the factual question in the affirmative, since it clearly appears that in the present case the Comptroller is attempting to exercise his subpoena powers with respect to matters, many of which are intrinsically and strictly involved in the educational process. There is no other way to describe the Comptroller's attempt to ***580** inquire into all matters pertaining to vocational education in New York City's high schools, embracing in broad fashion the board's vocational education programs and operations. Indeed, nowhere in the papers submitted in this controversy does the Comptroller purport or attempt to claim that matters of strictly educational import which are involved in the board's programs and operations are not a subject of the inquiry.

(,)Turning next to the issue of law which is at the heart of this controversy, a reference to well-settled controlling principles respecting the *sui generis* character of boards of education vis-a- vis the local municipalities which they serve, is in order. These principles which have been stated time and again find expression in *Matter of Divisich v Marshall* (281 NY 170, 173), wherein it is declared that "[i]f there be one public policy well- established in this State it is that public education shall be beyond control by municipalities and politics. The Board of Education of the City of New York is not a department of the city government, it is an independent corporate body and may sue and be sued in its corporate name [citations.] As early as 1921 *(Matter of Emerson v. Buck*, 230 N. Y. 380) we decided that while the municipality must make appropriations of money to run the schools, the expenditure of that money when once appropriated vested solely in the Educational Board." The court, in *Divisich*, then went on to quote with evident approval the views expressed in *Matter of Fuhrmann v Graves* (235 NY 77, 82) wherein the court said: "The intent of the legislature in enacting the Education Law is clear. It imposes upon boards of education, as separate corporate bodies representing the state, the responsibility of furnishing an efficient system of public education *(People ex rel. Wells & Newton Co. v. Craig*, 232 N. Y. 125), and in this respect they are not subject to or controlled by the city authorities. In order to enable such boards to properly discharge the duties thus imposed, they are clothed with authority to act independently of the city authorities. As to when, how and where the amounts placed at their disposal shall be disbursed, each board exercises an independent judgment, uncontrolled by and in no respect interfered with or influenced by the city authorities."

It is doubtless true that although the board is a State agency, it is not wholly independent of municipal action, in that it is subject to municipal control in matters not strictly educational or pedagogic (see ***581** *Matter of Hirshfield v Cook*, 227 NY 297, 304; *Matter of Maloff v City Comm. on Human Rights*, 38 NY2d 329, 332). "[T]he distinction is this: 'While the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not strictly educational or pedagogic'" *(Maloff, supra*, p 332, quoting from *Matter of Hirschfield v Cook* and citing *Matter of Daniman v Board of Educ. of City of N. Y.*, 306 NY 532, 542). The clear implication, conversely, is that matters which are strictly educational or pedagogic are protected from control and interference by the local municipality. This is clearly indicated in *Maloff (supra)*, involving a charge of discrimination in respect to teacher ratings, wherein the court declared (pp 332-333) that " discrimination in the school system is, in the broadest sense, an educational affair, and the board clearly has authority to deal with it. But it has never been considered 'strictly educational or pedagogic' so as to be a matter within the board's *exclusive* jurisdiction" (citing *Matter of Board of Higher Educ. of City of N. Y. v Carter*, 14 NY2d 138). The independence of boards of education in strictly educational or pedagogic matters was earlier given supportive expression in *Matter of Daniman v Board of Educ. of City of N. Y. (supra*, p 542), where the court noted that "[w]e have, in many cases involving teachers, written that in matters *strictly* educational or pedagogic a board of education is not a department of the city government, but an independent public body; that public education is a State and not a municipal function and that it is the policy of the State to separate

matters of public education from the control of municipal government.“

Matter of Hirschfield v Cook (supra), from which the Comptroller seeks, in the instant case, to glean support for his claim of right to serve the subpoena upon the board, did not depart from the principle that a board of education is not subject to municipal authorities in matters strictly educational or pedagogic. This was made clear in that very case, as is indicated by the authorities hereinabove cited, even though the court in that case upheld the power of the Commissioner of Accounts of the City of New York to examine an auditor of the Board of Education under oath concerning the expenditures and the financial needs of the board. That case arose out of a Board of Education request to the then-existing city Board of Estimate and Apportionment for additional appropriations of funds to meet liabilities alleged to have been incurred ***582** by the Board of Education in the year 1918 in excess of appropriations made for it for that year. The Board of Estimate and Apportionment requested the Board of Education to furnish the facts and particulars in detail with respect to such alleged liabilities and the necessity for an additional appropriation to cover said liabilities. When the Board of Education failed to furnish the information thus sought, the Commissioner of Accounts was directed by the Mayor to examine the accounts of the Board of Education. The Board of Education's auditor, under the advice and direction of the State Commissioner of Education, refused to obey a subpoena calling for his appearance and testimony under oath. In sustaining the issuance of a warrant of attachment to compel the auditor's attendance for examination by the Commissioner of Accounts, the court, notwithstanding the independence of boards of education in matters strictly educational or pedagogic, stated (227 NY 297, 309) that ”[the Commissioner of Accounts] is entitled to conduct such examination for the purpose of ascertaining the financial condition of the city and the needs of the public schools therein, if any, over and above the amount that must be appropriated simply on the request of the board of education.“ True, that the court continued (pp 309-310) as follows: ” If the state through its legislature intends to make the board of education of the city wholly independent of municipal action and prevent the city or the officers and boards thereof from asserting any authority relating to matters connected with the public schools and the determination of the expenditures therefor, it should be stated by it in such clear language that its intention is 'unmistakable.'“ The position reflected in the foregoing view is, however, nothing more or less than that not all matters connected with the public schools and the determination of expenditures for public education involve matters ”strictly educational or pedagogic“ as to which municipal action or control is barred. It is one thing for a municipal official to conduct an inquiry for the purpose of determining the financial needs of the Board of Education, as in *Hirschfield*; and, in this connection, it is not inapposite to note that the court in *Matter of Fuhrmann v Graves* (235 NY 77, 82, *supra)*, in stressing the independence of judgment accorded to boards of education as to the manner in which the funds appropriated to their use shall be disbursed, did point out that ”the boards cannot incur a liability or an expense chargeable against the funds under their control ***583** except for educational purposes, and this only to the extent of the amounts placed at their disposal.“

A far different situation, however, is presented where a dominant purpose of the inquiry by the municipal officer is to evaluate critically the programs and operations of the board and the adequacy of performance of the board's administrative and teaching staffs in matters coming strictly within the educational and pedagogic domains. The *Hirschfield* case does not stand as an authority for permitting an inquiry of the latter kind by a municipal official.

Similarly, the Comptroller's reliance in the instant case upon statutory grants of power to the cities or their officials, to which reference has hereinbefore been made, must be viewed and construed as applying, vis-a-vis the board, only to such matters as cannot reasonably be deemed strictly educational or pedagogic.

The continuing validity of the distinction between matters of strictly educational or pedagogic concern and those which fall outside of or transcend such matters, in determining the limits of the Comptroller's authority with respect to the board's programs and activities, impels a conclusion that is dispositive of the legal issue here presented. It is this: The statutory provisions invoked by the Comptroller, including subdivision d of section 93 of the City Charter, may not be given a construction authorizing the exercise of inquisitorial power, enforceable by way of subpoena, in areas of the board's activities which are as a matter of public policy, excluded from interference or control by the local municipal authorities.

Assertion of authority to compel the board to submit to examination by the Comptroller's office, if permitted, would in effect infringe upon the board's right to exercise independence of judgment in strictly educational or

pedagogic matters, and would serve to inhibit the exercise of judgment and freedom of action by the board in matters entrusted to their exclusive jurisdiction.

Accordingly, the board's motion to quash the subpoena is granted and the Comptroller's cross motion is denied. The foregoing conclusion and determination of this court is not to be construed as restricting the right of the Comptroller to examine into any and all matters that are not "strictly educational or pedagogic" nor as a declaration that all of the records, documents and other material mentioned or referred to in the subpoena relate to matters beyond the inquisitorial ***584** power of the Comptroller. However, since it clearly appears to the court that production of the material referred to in the subpoena was intended to serve purposes outside the purview of the Comptroller's lawful concern, it would not be feasible or desirable or otherwise serve a useful purpose to winnow out the objectionable features and permit, at this time, the production of such of the records, documents and other papers referred to in the subpoena as may deal with matters within the Comptroller's proper area of concern. ***585**

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72 A.D.2d 603, 420 N.Y.S.2d 1022 (Mem)

In the Matter of the Board of Education of the City of New York, Respondent,
v.
Harrison J. Goldin, as Comptroller of the City of New York, Appellant

Supreme Court, Appellate Division, Second Department, New York
October 29, 1979

CITE TITLE AS: Matter of Board of Educ. of City of N.Y. v Goldin

Order of the Supreme Court, Kings County, dated May 25, 1978, affirmed, without costs or disbursements, on the opinion of Mr. Justice Monteleone at Special Term.

Hopkins, J. P., Titone, O'Connor and Margett, JJ., concur. [94 Misc 2d 574.]

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