Supreme Court, Appellate Division, First Department, New York.
Deborah PHILLIPS, Plaintiff-Appellant,
v.
CITY OF NEW YORK, et al., Defendants-Respondents.
July 28, 2009.

Background: Former city employee with noncompetitive civil service title brought action under state and city human rights laws (HRL) alleging that city failed to reasonably accommodate her serious medical condition. The Supreme Court, New York County, Carol Robinson Edmead, J., dismissed complaint, and employee appealed.

Holdings: The Supreme Court, Appellate Division, Acosta, J., held that:
(1) city's policy of entertaining requests for extended medical leaves only for permanent civil service employees violated state and city HRLs;
(2) fact issues remained as to whether city agency would have suffered undue hardship from employee's proposed one-year absence and whether provision of accommodation would have enabled employee to return to work; and
(3) employee's breast cancer constituted "disability" under city HRL.

Reversed.

Andrias, J.P., dissented and filed opinion.

West Headnotes

[1] Civil Rights 78 1225(4)

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of Handicap, Disability, or Illness
78k1225 Accommodations
78k1225(4) k. Requesting and Choosing Accommodations; Interactive Process; Cooperation. Most Cited Cases
Under state and city human rights laws (HRL), first step in providing reasonable accommodation is to engage in good faith interactive process that assesses disabled individual's needs and reasonableness of accommodation requested, and interactive process continues until, if possible, accommodation reasonable to employee and employer is reached. McKinney's Executive Law §§ 296(3)(a), 300; New York City Administrative Code, § 8-107(15)(a).

[2] Civil Rights 78 1225(4)

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of Handicap, Disability, or Illness
78k1225 Accommodations
78k1225(4) k. Requesting and Choosing Accommodations; Interactive Process; Cooperation. Most Cited Cases
City's policy of entertaining requests for extended medical leaves only for permanent civil service employees, but not for city employees with noncompetitive civil service titles, violated provisions of state and city human rights laws (HRL) requiring employers to engage in individualized interactive process to try to find reasonable accommodation for disabled employees. McKinney's Executive Law §§ 296(3)(a), 300; New York City Administrative Code, § 8-107(15)(a).

[3] Pretrial Procedure 307A 680

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak680 k. Fact Questions. Most Cited Cases
Issues of whether city agency would have suffered undue hardship from employee's proposed one-year absence while seeking treatment for her breast can-

cer, and whether provision of accommodation would have enabled employee to return to work after period of recuperation involved fact questions that could not be resolved on motion to dismiss employee's claim that city's denial of her request for one-year leave as reasonable accommodation violated state human rights law (HRL). McKinney's Executive Law §§ 296(3)(a), 300.

[4] Civil Rights 78 ⚿1744

78 Civil Rights
78V State and Local Remedies
78k1742 Evidence
78k1744 k. Employment Practices. Most Cited Cases
Under New York City Human Rights Law (HRL), burden of establishing that city employee could not, with reasonable accommodation, satisfy essential requisites of her job, and thus was not entitled to one-year medical leave while obtaining treatment for her breast cancer, fell upon city, not employee. New York City Administrative Code, § 8-107(15)(b).

[5] Civil Rights 78 ⚿1218(3)

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of Handicap, Disability, or Illness
78k1218 Who Is Disabled; What Is Disability
78k1218(3) k. Particular Conditions, Limitations, and Impairments. Most Cited Cases
Employee's breast cancer constituted "disability" under New York City Human Rights Law (HRL), even if it did not substantially limit any major life activity. New York City Administrative Code, § 8-107(16)(a).

[6] Civil Rights 78 ⚿1225(3)

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of Handicap, Disability, or Illness
78k1225 Accommodations
78k1225(3) k. Particular Cases. Most Cited Cases
Provision of additional leave time as accommodation for city employee's breast cancer was not per se unreasonable under New York City Human Rights Law (HRL), even though civil service rules and regulations already set forth leave scheme. New York City Administrative Code, § 8-107(15)(a).

***370** Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch, Stephen J. McGrath and Jamie M. Zinaman of counsel), for respondents.

RICHARD T. ANDRIAS, J.P., DAVID B. SAXE, ROLANDO ACOSTA, DIANNE T. RENWICK, JJ.

ACOSTA, J.

This case requires us to examine the "reasonable accommodation" provisions of the New York State and City Human Rights Laws (HRLs) in the context of a CPLR 3211 motion. We begin with the recognition of the New York City Council's mandate that courts should be sensitive to the distinctive language, purposes and liberal construction analysis required by the City HRL under *Williams v. New York ***371** City Hous. Auth.*, 61 A.D.3d 62, 65, 872 N.Y.S.2d 27 [2009].

I. Background

Plaintiff was hired by defendant Department of Homeless Services (DHS) in a noncompetitive civil service title in 1988. After 18 years of satisfactory employment, she was granted an approved medical leave extending from about July 26 to October 30, 2006, due to a serious medical condition-breast cancer. By letter dated August 11, 2006, plaintiff requested leave for one full year, beginning that

date. DHS denied this request in a letter dated October 16, informing plaintiff that her 12-week medical leave was granted pursuant to the Family and Medical Leave Act, and that as an "employee in a non-competitive title," she was ineligible for additional unpaid medical leave, which is "only granted to permanent civil service employees, per the Rules and Regulations for Employees Covered under the Career & Salary Plan." DHS informed plaintiff that if she failed to return to work by her already agreed upon return date of October 30, 2006, she would be "subject to disciplinary action." In a separate letter dated October 27, DHS advised plaintiff that if she did not return to work by October 30, she would be subject to discharge from her employment.

On or about that same date, plaintiff modified her request for leave, asking a DHS employee in the Medical Assistance Unit if she could obtain *any* further extension of her medical leave. The City employee denied this request, telling plaintiff that if she failed to return to work as scheduled, her employment and medical benefits would be terminated.

Plaintiff did not return to work on October 30, 2006, and was terminated thereafter.[FN1] In this action against the City and DHS, plaintiff alleged that (1) she is a disabled person within the meaning of the State and City HRLs, (2) her request for an extension of medical leave sought a reasonable accommodation under those statutes, and (3) defendants violated the statutes by denying her request and terminating her employment. She further alleged that at the time of her termination she was "unable to return to work for the respondent DHS because of her medical condition of breast cancer," a condition that still existed on the date the complaint was verified. Plaintiff further asserted that as a result of her loss of medical benefits following termination, she had to delay her scheduled cancer surgery, adversely affecting her medical condition, which was diagnosed as stage III breast cancer. Plaintiff sought reinstatement to her former position at DHS with full back pay retroactive to November 1, 2006, the date she was allegedly terminated, with prejudgment interest thereon, as well as compensatory and punitive damages.

> FN1. Plaintiff claims that she was terminated on November 1, 2006, while the City claims the termination date was January 5, 2007.

Defendants moved to convert the complaint to an Article 78 proceeding,[FN2] and for judgment of dismissal on the ground that the denial of plaintiff's request for accommodation was reasonable and lawful. In support, they submitted their Career and Salary Plan, which provided that the two-year limit on leave without pay applies only to "permanent employees," and not ***372** those in "non-competitive" titles. In addition, defendants argued that plaintiff was not disabled within the meaning of the State and City HRLs since (1) she could not perform her job functions either with or without a reasonable accommodation, and (2) the "year long" leave of absence she requested was not a reasonable accommodation.

> FN2. Defendants argued that plaintiff's complaint lies in the nature of mandamus to review an administrative determination denying her unpaid medical leave, which should have been brought under CPLR 7803. The court granted defendants' request "to the extent that the Court will treat the Complaint as a hybrid action in law and as a proceeding pursuant to Article 78." Plaintiff does not challenge this aspect of the court's decision.

In opposition, plaintiff argued that the extended leave of absence she sought *was* a reasonable accommodation, and denial of her request and her subsequent termination because of her disability violated the State and City HRLs.

II. The Motion Court's Decision

With respect to plaintiff's causes of action for dis-

ability discrimination, the court found she had failed to allege "facts demonstrating that her cancer condition falls within the definition of the term 'disability' as contemplated" by the State and City HRLs. The court also determined that plaintiff "failed to set forth in her Complaint factual allegations sufficient to show that, upon the provision of reasonable accommodations, she could perform the essential functions of her job." In particular, the court found that there was no allegation that plaintiff intended to return to work at the end of the requested leave or that she would be able to perform the essential functions of her job at the end of that period. The complaint, it said, "sets forth only the untenable claim that DHS was required to accommodate plaintiff by holding her job open indefinitely," and this was insufficient under the State HRL and its "equivalent," the City HRL. In addition, the court found that there were "no allegations in the Complaint indicating that the decisions made by DHS were based on any factor other tha[n] plaintiff's noncompetitive title." Since the court found that plaintiff's discrimination claims were "insufficiently stated, and that DHS's determinations were based on its leave policies applicable to non-competitive titles," the court dismissed the claim for compensatory and punitive damages arising from DHS's denial of plaintiff's request for leave and her termination.

Plaintiff argues on appeal that in dismissing her complaint, the court failed to address whether defendants had violated the State and City HRLs by denying her request for an extension of unpaid medical leave based on a uniform policy denying such leave to noncompetitive employees, without considering the feasibility of her request for a reasonable accommodation. We agree with plaintiff.

III. Discussion

In considering a CPLR 3211 motion to dismiss, the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference, and must determine whether "the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez,* 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *see also Cron v. Hargro Fabrics,* 91 N.Y.2d 362, 366, 670 N.Y.S.2d 973, 694 N.E.2d 56 [1998]), in this case, violations of the State and City HRLs.

For the reasons set forth herein, we find that defendants have failed to engage in the required individualized process when considering plaintiff's request for extended medical leave, i.e., for reasonable accommodations. We further find that plaintiff has stated causes of action for violations of the State and City HRLs with respect to defendants' alleged failure to reasonably accommodate plaintiff.

A. The Need for an Individualized Process

The need for individualized inquiry when making a determination of reasonable accommodation***373** is deeply embedded in the fabric of disability rights law (*see School Bd. of Nassau County, Fla. v. Arline,* 480 U.S. 273, 287, 107 S.Ct. 1123, 94 L.Ed.2d 307 [1987]). Rather than operating on generalizations about people with disabilities, employers (and courts) must make a clear, fact-specific inquiry about each individual's circumstance.

As explained in *Barnett v. U.S. Air,* 228 F.3d 1105, 1116 [9th Cir.2000] [en banc], *vacated on other grounds* 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 [2002], when confronted with a disabled employee's request for reasonable accommodation, the employer is required to engage in a good faith interactive process whereby employer and employee clarify the individual needs of the employee and the business, and identify the appropriate reasonable accommodation. This good faith process is "the key mechanism for facilitating the integration of disabled employees into the workplace" (228 F.3d at 1116). Without it,

> many employees will be unable to identify effective reasonable accommodations. Without the possib-

ility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations. The result would be less accommodation and more litigation, as lawsuits become the only alternative for disabled employees seeking accommodation. This is a long way from the framework of cooperative problem solving based on open and individualized exchange in the workplace that the ADA intended. Therefore, summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith (*id.*).

The State HRL provides protections broader than the Americans With Disabilities Act (ADA); FN3 and the City HRL is broader still (*see Williams,* 61 A.D.3d at 65, 872 N.Y.S.2d 27). As *Barnett* advises, summary judgment is not available where there is a genuine dispute as to whether the employer has engaged in a good faith interactive process.

> FN3. For example, unlike the ADA, the State HRL definition of disability has no requirement that a physical or mental impairment must substantially limit one or more major life activities of an individual (*compare* 42 USC § 12102[2] *with* Executive Law § 292[21]).

Similarly, dismissal would not be available in the CPLR 3211 context, particularly where, as here, we are not faced with a dispute as to *whether* there was an "interactive process," but rather a record that makes clear that there *was no* interactive process.

[1] Accordingly, we hold that under the broader protections afforded by the State and City HRLs, the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested. The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached.

The intended purpose of the State HRL cannot be achieved without requiring that employers, in every case, *consider* the requested accommodations by engaging in an individualized, interactive process (*see generally* Executive Law § 300). A failure to consider the accommodation, therefore, is a violation of Executive Law § 296(3)(a), since the "employer has the responsibility to investigate an employee's request for accommodation and determine its feasibility"***374** (*Pimentel v. Citibank, N.A.,* 29 A.D.3d 141, 149, 811 N.Y.S.2d 381 [2006], *lv. denied* 7 N.Y.3d 707, 821 N.Y.S.2d 813, 854 N.E.2d 1277 [2006]; *cf. Parker v. Columbia Pictures Indus.,* 204 F.3d 326, 338 [2d Cir.2000], an ADA case in which the court ruled that "[a]t the very least ... an employee who proposes an accommodation while still on short-term leave ... triggers a responsibility on the employer's part to investigate that request and determine its feasibility. An employer who fails to do so, and instead terminates the employee based on exhaustion of leave, has discriminated 'because of' disability within the meaning of the ADA").

An individualized interactive process is also required by the more protective City HRL, and its absence represents a violation of New York City Administrative Code § 8-107(15)(a). The City HRL's goal of preventing discrimination (which includes failures to accommodate) "from playing any role in actions relating to employment, public accommodations, and housing and other real estate" (Administrative Code § 8-101) would otherwise be undermined. FN4 This conclusion is bolstered by the fact that the 1991 amendments to the City HRL strove in a multitude of ways to maximize protection of people with disabilities. FN5

> FN4. *See also Matter of United Veterans Mut. Hous. No. 2 Corp. v. New York City Comm. on Human Rights* (N.Y.L.J., March 2, 1992, 35:3, at col. 4 [Sup. Ct. Queens County] [upholding the Commission's "determination that [the housing pro-

vider's] outright refusal to contemplate the provision of any reasonable accommodation irrespective of costs was not consistent with the provisions of the Administrative Code"], *affd.* 207 A.D.2d 551, 616 N.Y.S.2d 84 [1994] [noting that the State Supreme Court had denied the housing provider's petition to annul the Commission's determination as academic "because, while the petition was pending, *the City Council amended the Administrative Code to explicitly adopt the Commissioner's interpretation thereof* "] [emphasis added]).

FN5. By way of illustration only, the Fair Housing Amendment Act of 1988 required housing providers to *permit* persons with disabilities to make reasonable modifications of dwellings *at that person's own expense* (42 USC § 3604[f][3][A]); the City HRL, which uses the term "accommodation" to encompass "modifications," requires the housing provider to *make* the change, and does not shift the cost to the person with a disability (unless the housing provider demonstrates undue hardship) (Administrative Code §§ 8-107[15][a]; 8-102[18]). Under the ADA, damages, including actual damages, shall not be awarded against a covered entity that, in connection with a request for accommodation, has in good faith engaged in an interactive process with the requester of the accommodation (42 USC § 1981a[a][3]); the City Council, acting the year after passage of the ADA, did not impose any "good faith" safe harbor against actual damages. The obligation to make reasonable accommodation arises not only when a covered entity "knows" of a person's disability, but when the disability "should have been known" by the covered entity (Administrative Code § 8-107[15] [a]).

[2] The relief available to a plaintiff for an employer's failure to engage in the interactive process will depend on whether the process could have yielded a substantive accommodation that was reasonable. FN6 Defendants cannot avoid engaging in the interactive process contemplated by both statutes by citing their policy that employees in a "non-competitive" title, such as plaintiff, are not allowed medical leave beyond the original 12-week medical leave granted pursuant to the Family and Medical***375** Leave Act. An employer simply cannot abrogate the requirements of the HRLs by carving out a category of employees who are not subject to an interactive process. Accordingly, defendants' policy of entertaining requests for extended medical leaves only for permanent civil service employees, pursuant to the Rules and Regulations for Employees Covered Under the Career & Salary Plan, is in direct violation of both statutes. Plaintiff sufficiently alleged violations of both statutes, and it was error to dismiss the complaint at this stage.

FN6. If so, full remedies under the respective statutes are available. If not, remedies are available under the City HRL only, and are limited to those designed to respond only to the failure to engage in the interactive process. The precise contours of the limitations on relief are best left to be determined in a case where, unlike the instant matter, a substantive accommodation has been shown not to be a reasonable accommodation.

IV. Plaintiff's Allegations under the State & City HRL

Separate and apart from the City's failure to engage in an individualized interactive process in evaluating plaintiff's request for accommodation, plaintiff has sufficiently pleaded causes of actions for disability discrimination under both statutes.

A. The State HRL

Under the State HRL, "[a] complainant states a

prima facie case of discrimination if the individual suffers from a disability and the disability caused the behavior for which the individual was terminated" (*Matter of McEniry v. Landi,* 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 644 N.E.2d 1019 [1994]). Here, giving plaintiff the benefit of every possible favorable inference, it is clear that she has stated a cause of action.

The State HRL defines "disability" as "a physical, mental or medical impairment ... which, upon the provision of reasonable accommodations [such as a leave of absence], do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held" (Executive Law § 292[21]).

In determining whether plaintiff properly alleged that she could perform her job given a reasonable accommodation, the motion court focused exclusively on plaintiff's initial request for a one-year leave of absence, even though defendants also denied plaintiff's modified request for "any" additional medical leave. This fact alone requires remand because the IAS court's decision was premised on the incorrect assumption that the only leave request at issue was effectively "open-ended," i.e., longer than one year or indefinitely. However, according all inferences to plaintiff, we fail to see how she was not asking for an extension of leave for up to one year, and why the City could not reasonably accommodate that request.

Even had plaintiff's request been only for a one-year extension of her leave, however, it was error under the circumstances to dismiss the case on the basis that she failed to allege that she could reasonably perform the job with a reasonable accommodation of extended leave. Plaintiff alleged that she had cancer surgery scheduled, which was delayed by the termination of plaintiff's job and associated medical benefits. She also alleged that she was a person with a "disability" whose impairment, upon the provision of reasonable accommodation, would not prevent her "from performing in a reasonable manner the activities involved in the job or occupation sought or held."

From these allegations, it can reasonably be inferred that plaintiff needed the requested leave to be able to have and recover from cancer surgery, after which time she anticipated that she would be able to return to work. Accordingly, the IAS court's conclusions that the request was for open-ended leave and that there was no basis on which to believe that plaintiff, with her impairment ameliorated by surgery, might then be able to return to work-were incorrect.

***376** While we recognize that in a great many cases a request for a one-year leave will not turn out to be a "reasonable accommodation" as contemplated by the State HRL, we specifically decline to hold, as a matter of law, that such a request cannot be a reasonable accommodation.[FN7] It is true that under the State HRL, the concept of "reasonable accommodation" has contained within it the issues of whether the accommodation will be effective and whether the accommodation would cause the employer an undue hardship.[FN8] The resolution of these issues is, however, singularly case-specific, further illustrating the need for an individualized, interactive fact-specific process.

> FN7. The Equal Employment Opportunity Commission's guidance on these issues sets forth no "red line" beyond which leave time is automatically unreasonable (*see e.g.* EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act). In particular, item 17 provides that an employer may not apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period, unless there is another effective accommodation or the granting of the additional leave would cause an undue hardship. "Modifying workplace policies, including

leave policies, is a form of reasonable accommodation." Item 44 indicates that providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation, unless an employer is able to show that the lack of a fixed return date causes an undue hardship.

FN8. Under the State HRL, "reasonable accommodation" means "actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested" (Executive Law § 292[21-e]). The very different conception and statutory architecture of "reasonable accommodation" under the City HRL is discussed *infra*.

[3] There are, after all, a great variety of medical conditions (with a great variety of prognoses), just as there are a great variety of covered employers (some very large, others very small). Likewise, there are a great variety of jobs that are held by employees (some whose services cannot be dispensed with for an extended period, and others who can easily be replaced for longer periods). Without a specific evidentiary record, it cannot be said that DHS would have suffered undue hardship from a one-year absence of this employee. Nor can it be said on this record that the provision of the accommodation would not have enabled plaintiff to return to work after a period of recuperation.[FN9]

FN9. The motion court's focus on the statement in the complaint that plaintiff "remains" unable to return to work is misplaced for two reasons. First, the lawfulness of a request for reasonable accommodation is measured at the time the request is acted upon (or not acted upon). By definition, *any* accommodation leave for the purpose of having surgery involves some period of time during which the person with a disability is not available or able to work. Second, even from a retrospective point of view, the statement shows only that plaintiff was not ready to return to work three months after the rejection of accommodation (when the complaint was verified), not that a one-year leave would not have been useful. The import of the statement would need to be developed as part of a fuller factual record.

B. Plaintiff's Claim under the City HRL

Plaintiff also sufficiently stated a discrimination claim pursuant to the City ***377** HRL. We separate the analysis because the disability provisions of the City HRL and State HRL are not "equivalent," and require distinct analyses.[FN10]

FN10. By means of the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 [2005] of City of N.Y.), the City Council rejected an approach that treated the City HRL as equivalent to its State and federal counterparts (*see Williams*, 61 A.D.3d at 67-68, 872 N.Y.S.2d 27 ["the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, and (c) cases that had failed to respect these differences were being legislatively overruled"]).

The very different conception and statutory architecture of "reasonable accommodation" under the City HRL, as set forth in Administrative Code § 8-107(15)(a), and is equally applicable to employment, housing, and public accommodations:

> 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.

We note first that no exemption from this affirmative and mandatory requirement has been granted to the City in its role as employer.[FN11]

> FN11. This point is not contested by the City on appeal. The fact that plaintiff's requests for accommodation were *automatically* rejected because Citywide regulations treat the civil service classes differently does show that defendants were not acting *randomly*, but were nonetheless acting in violation of the obligation to engage in an interactive process with a person with a disability whose need for an accommodation had become apparent, regardless of her employment status.

Unlike the State HRL, the issue of the ability to perform essential requisites of a job is not bound up in the definitions of disability or reasonable accommodation. The City HRL defines "disability" purely in terms of impairments: "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code § 8-102[16] [a]). These include:

> 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 (Administrative Code § 8-102[16][b] [1]).

There is no subset of persons with disabilities not included among the persons referenced in the affirmative obligation set out in § 8-107(15)(a).

The City HRL definition of "reasonable accommodation" (§ 8-102[18])is itself unique:

> 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.[FN12]

> FN12. "Accommodation," as distinct from "reasonable accommodation," is not a defined term, but from its use in both §§ 8-102(18) and 8-107(15), it is clear that the term is intended to connote any action, modification or forbearance that helps ameliorate *at least to some extent* a need created by a disability.

***378** Here again, there are important differences from the State HRL (as well as the ADA). First, there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation. And unlike the ADA, there are no accommodations that may be "unreasonable" if they do not cause undue hardship.[FN13]

> FN13. Under the ADA, there can be accommodations that, despite not causing undue hardship, will be "unreasonable" in the ordinary run of cases (*see U.S. Airways v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 [2002]).

In light of the New York City Council's legislative policy choice to deem all accommodations reasonable except for those a defendant proves constitute an undue hardship, general principles of statutory interpretation preclude the judicial importation of other exceptions. "When one or more exceptions are expressly made in a statute, it is a fair inference that the Legislature intended that no other exceptions should be attached to the act by implication, that is, an exception in a statute amounts to an affirmation of the application of its provisions to all other cases which are not excepted" (McKinney's Statutes § 213, at 373).[FN14]

> FN14. This principle takes on even more force in light of the City Council's passage of the Restoration Act.

The accommodations sought by plaintiff here were not excluded by the definition of reasonable accommodation, and were accommodations that "can" be made, i.e., actions that-independent of any question of hardship-are capable of being made. At this stage of the proceeding, where plaintiff is entitled to every favorable inference and in the absence of any factual record to show undue hardship, the conclusions of the IAS court were erroneous in respect to an evaluation of plaintiff's pleading.

[4] The City Council dealt explicitly with the question of whether an employee, with reasonable accommodation, would be able to perform the essential requisites of the job by placing the burden of proof not on the plaintiff, but squarely on the defendant. The Administrative Code provides only one exception to the reasonable accommodation rule, in § 8-107(15)(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.

The plain language of the text could not be clearer: it is defendants who had the obligation to prove that plaintiff could not, with reasonable accommodation, "satisfy the essential requisites" of the job. As such, the pleading obligation in relation to this element was on defendants, not plaintiff.[FN15] Defendants have neither pleaded ***379** nor produced any evidence that plaintiff could not, with reasonable accommodation, satisfy the essential requisites of the job.

> FN15. There is a reference in *Pimentel,* 29 A.D.3d at 149, 811 N.Y.S.2d 381 to the effect that the plaintiff seeking reassignment as an accommodation had the burden of showing "that she could perform a particular job." While the plaintiff there had brought both State and City HRL claims, it is clear from the decision that the Court was only discussing State HRL claims, and we read the case as opining only on State HRL standards. That this Court did not there engage in an independent analysis is not surprising in view of the fact that the case was briefed prior to passage of the Restoration Act, at a time when State and City HRL equivalence was often assumed. As *Williams* later made clear, all provisions of the City HRL must be viewed independently of their federal and State counterparts, in light of the specific and distinctive language of the City HRL, and in view of the City HRL's uniquely broad and remedial purposes.

V. The Dissent

The dissent is fundamentally mistaken in two crucial areas: (a) it treats the City HRL as a carbon copy of its State and federal counterparts, and (b) it construes the right to reasonable accommodation in an unreasonably narrow manner.

Initially and contrary to the dissent's repeated assertions, the action below was not simply converted to

an Article 78 proceeding. Defendants' request to convert was granted only "to the extent that the Court will treat the Complaint *as a hybrid action in law and* as a proceeding pursuant to Article 78" (emphasis added). Consistent with the existence of causes of action in law for failure to reasonably accommodate the plaintiff, defendants' brief on appeal has not simply argued the Article 78 "arbitrary and capricious" standard, but has also addressed the violations of the State and City HRLs. The question of how to interpret the various disability provisions of those laws is properly before us on this appeal. Moreover, even assuming the action was converted exclusively to an Article 78 proceeding, it is clear that the trial court "affected an error of law" in its application of the State and City HRLs, warranting our review.

[5] Most striking about the dissent is its refusal to examine the text of the City HRL.[FN16] The dissent, for example, refers with approval to the lower court's finding that "the fact that one suffers from breast cancer, in and of itself, does not establish that [one] has a 'disability' " under the City HRL. The statement itself is incorrect as a matter of law. Unlike Executive Law § 292(21), the existence of a "disability" for City HRL purposes is fully and conclusively established by nothing more than the existence of "any physical, medical, mental or psychological impairment" (Administrative Code § 8-102[16][a]), which includes "an impairment of any system of the body" (§ 8-102[16][a][1]). Contrary to the dissent's extended discussion about the federal concept of substantial limitations on major life activities, the "New York State Executive Law and the New York City Administrative Code have a broader definition of 'disability' than does the ADA; neither statute requires any showing that the disability substantially limits any major life activity" (*Reilly v. Revlon Inc.*, 620 F.Supp.2d 524, 541 [S.D.N.Y.2009], citing *Giordano v. City of New York*, 274 F.3d 740, 753 [2d Cir.2001]).

> FN16. This, unfortunately, was the only way our colleague could remain unconvinced that "the reasonable accommodation required by Administrative Code § 8-107(15)(a) ... is, in any meaningful way, different from the reasonable accommodation requirement of Executive Law § 292(21-e)."

When the dissent turns to whether plaintiff could, with reasonable accommodation, perform the essential requisites of her job, it fails to acknowledge or discuss the provision of the City HRL that deals specifically with this question, namely Administrative Code § 8-107(15)(b). As previously noted, this provision places squarely on the shoulders of a defendant the burden of persuasion to prove, *as an affirmative defense*, that even with reasonable accommodation, a plaintiff could not perform the essential requisites of a job.

When the dissent discusses the nature of what constitutes reasonable accommodation, it fails to include the fact that "reasonable accommodation" is defined differently***380** under the ADA than it is under the City HRL. Under the ADA, reasonable accommodation (42 USC § 12111[9]) is defined only by illustration, and is a different question from whether the accommodation would cause an employer "undue hardship" (§ 12112[b][5][A]). Under the City HRL, by contrast, the concepts of "reasonable accommodation" and "undue hardship" are inextricably intertwined. An accommodation under Administrative Code § 8-102(18) cannot be considered unreasonable unless the covered entity proves that the accommodation would cause undue hardship.[FN17]

> FN17. It is clear from the factors that are enumerated in the statute among those that may be considered as bearing on undue hardship in the employment context, that the inquiry required to determine undue hardship is precisely the type of case-by-case inquiry with which the dissent would prefer to dispense. *See* Admin. Code §§ 8-102(18)(a)-(d) (setting forth factors including size of workforce, financial re-

sources of covered entity, and the impact that making the accommodation would have on the entity).

Notwithstanding these and other differences between the City HRL and its State and federal counterparts, and ignoring even the EEOC Guidance on the ADA itself, referenced above in footnote 7, the dissent elects to try to narrow the available accommodation for workers with disabilities more than the Supreme Court has done in interpreting the ADA, and more than urged by defendants in their briefing to this Court.

[6] According to the dissent, the provision of additional leave time as an accommodation is *per se* unreasonable where civil service rules and regulations already set forth a leave scheme. The scope of the proposition is breathtaking. As pointed out by the Supreme Court in *US Airways v. Barnett*, 535 U.S. at 397-398, 122 S.Ct. 1516 a reasonable accommodation provision cannot fulfill its function of expanding workplace opportunities for persons with disabilities if it is trumped by "disability-neutral" rules. For example, "[n]eutral 'break-from-work' rules would automatically prevent the accommodation of an individual who needs additional breaks from work, perhaps to permit medical visits" (*id.* at 398, 122 S.Ct. 1516). In the same fashion, the dissent's draconian proposal would allow "neutral" civil service rules to prevent the provision of *any* additional leave as a reasonable accommodation, *regardless* of whether such leave imposed any hardship on an employer.[FN18] The dissent, in other words, would render the reasonable accommodation provisions of both the State and City HRLs powerless to give the added "preferential treatment" necessary to level the playing field for persons with disabilities. Such a result is inconsistent with the remedial purposes of the State HRL and the uniquely broad and remedial purposes of the City HRL.

FN18. The dissent's attempt to analogize to the seniority provisions at issue in *Barnett* is entirely inapposite. *Barnett* explained that any accommodation that would conflict with seniority provisions could "undermine the employees' expectations of consistent, uniform treatment-expectations upon which the seniority system's benefits depend" (535 U.S. at 404, 122 S.Ct. 1516). Here, of course, the provision of additional leave time as an accommodation requires nothing to be "taken away" from any other employee.

Most curious about the dissent is its attempt to reopen issues recently decided by *Williams.* Contrary to the dissent's assertion, the Court's decision in that case *necessarily* required consideration of the purpose and intent of both the 1991 amendments to the City Human Rights Law and the 2005 Local Civil Rights Restoration Act. The various statements in *Williams* about those enactments-including but not limited to those concerning the enhanced liberal construction requirements***381** of the City Human Rights Law-represented holdings of the Court, and cannot and should not be trivialized as "dicta."[FN19]

FN19. We note in this connection that our dissenting colleague has failed to point out, either in this case or in his concurrence in *Williams, any* way that the Court misconstrued either the 1991 Amendments or the Restoration Act (or their purpose or intent).

The dissent would prefer to ignore the Restoration Act, and to continue to have courts give weight to decisions that failed to respect the differences between the City's HRL and its State and federal counterparts. Studiously avoiding the fact that the Restoration Act had at its core *revisions to the text of Administrative Code § 8-130,* and ignoring that the import of that provision and of the Restoration Act of 2005 was to reject unequivocally the practice of construing City HRL provisions in tandem with their State and federal counterparts (*see Williams*, 61 A.D.3d at 66-67, 872 N.Y.S.2d 27), the dissent asserts that the City Council lacked the authority to effect its will through clarifying legisla-

tion.

That pronouncement would have come as a surprise to this Court, to our State's Court of Appeals, and to Congress.

This Court was the first to recognize (15 years ago) that the City Council had the authority to create a private right of action, even one that went beyond the remedies granted by the State HRL (*Bracker v. Cohen,* 204 A.D.2d 115, 612 N.Y.S.2d 113 [1994]).

The Court of Appeals has also recognized the City Council's authority to prohibit discrimination beyond that prohibited by the State HRL or by federal civil rights law (*see e.g. Levin v. Yeshiva Univ.,* 96 N.Y.2d 484, 493, 730 N.Y.S.2d 15, 754 N.E.2d 1099 [2001] [recognizing the City HRL's distinctly disparate impact and sexual orientation protections]; *see also McGrath v. Toys "R" Us,* 3 N.Y.3d 421, 433, 788 N.Y.S.2d 281, 821 N.E.2d 519 [2004] ["The City Council has not hesitated in other circumstances to amend the New York City Human Rights Law to clarify its disagreement with evolving Supreme Court precedent"]).[FN20]

> FN20. As noted in *Williams,* 61 A.D.3d at 73, 872 N.Y.S.2d 27, *McGrath* had assumed that, in general, the purposes of the City Human Rights Law were identical to its State and federal counterparts. "If the City Council had wanted to depart from a federal doctrine, *McGrath* stated, it should have amended the law to rebut that doctrine specifically. The City Council responded to the premise set forth in *McGrath,* legislatively overruling *McGrath* by amending the construction provision of Administrative Code § 8-130, and putting to an end this view of the City HRL as simply mimicking its federal and state counterparts" (61 A.D.3d at 73-74, 872 N.Y.S.2d 27 [citation omitted]).

Congress expects federal enactments to serve as a floor of rights below which states and localities may not fall, not a ceiling above which states and localities may not rise. This principle is contained in Title VII of the Civil Rights Act of 1964 (42 USC § 2000e-7) and in the Fair Housing Act (42 USC § 3615). The ADA explicitly makes this point as well:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or *political subdivision of any State or jurisdiction* that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter (42 USC § 12201[b], emphasis added).

In short, despite the dissent's skepticism about the City Council's authority to legislate independently in the field of civil rights, that authority clearly exists. The ***382** professed alarm about the City Council taking actions to nullify Supreme Court precedent ignores the distinction between the judicial and legislative roles. The United States Supreme Court interprets *federal* civil rights laws whereas the City Council enacts *local* law. The City Council has not and could not purport to have authority with respect to the former; a Supreme Court pronouncement as to federal law has no necessary bearing on what the City Human Rights Law says or is intended to mean.[FN21]

> FN21. *Cf.* Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 502 (1977) (state court judges should not automatically adopt federal constitutional decisions as dispositive of the scope of state constitutional guarantees, "for only if [those federal decisions] are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees").

Likewise, the City Council has the authority to legislatively overrule court interpretations of its laws with which it disagrees by amending or clarifying those laws. One crucial legislative function is to clarify the meaning and purpose of the legislature's enactments;[FN22] it is the essence of the judicial function to honor legislative intent.[FN23]

FN22. Congress has recently done precisely that in order to overcome Supreme Court decisions construing the ADA narrowly (*see* ADA Amendments Act of 2008 (P.L. 110-325, § 2[b]). Among the purposes of that Act was legislatively overruling the Supreme Court's decision in *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 [2002], a case inexplicably referred to by the dissent in the course of a discussion of "substantial impairment" of a "major life activity," concepts not part of the definition of disability under either State or City Human Rights Law).

FN23. "The Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law" (McKinney's Statutes § 193). "The courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy" (*id.* at 95). The dissent states that the majority may not refer to the preamble of the Restoration Act, arguing that reference to the language of a statutory preamble is permissible only where the body of the act is not free from ambiguity, citing *id.*, § 122. The dissent is mistaken.

> The City HRL's overarching substantive provision-Administrative Code § 8-130-demands that the rest of the law's provisions be interpreted in a way to accomplish the uniquely broad and remedial purposes of the statute. The preamble to its enactment, as well as other legislative history, is relevant to those determinations. Indeed, the very section of McKinney's Statutes cited by the dissent states that a preamble "is said to be the key which opens the mind of the lawmakers as to the mischiefs which are intended to be remedied by the statute" (§ 122, at 244).

The dissent is correct insofar as it asserts that the *State* HRL does require plaintiff ultimately to show that, with reasonable accommodation, she could perform the essential requisites of a job. But the dissent proposes that this Court do exactly the opposite of what we are required to do in reviewing the grant of a motion to dismiss. Instead of drawing all inferences in favor of the *non-moving* party, as required, the dissent would have us draw all inferences in favor of the *moving* party. Contrary to the dissent, a request for accommodation need not take a specific form,[FN24] and the allegation in the complaint that plaintiff followed up her initial request for leave by asking if *any* additional leave ***383** could be made available to her is plausibly understood as a request for *some* leave, not necessarily "a request for reconsideration of her original request."[FN25] Similarly, it is no conclusory "jump" to infer that plaintiff was claiming she would have been able to return to work where the complaint alleged that she, (a) had cancer, (b) was seeking surgical treatment, and (c) was someone who, with the requested accommodation, could perform the essential requisites of the job.[FN26]

FN24. *See e.g.* EEOC Enforcement Guidance, items 1 and 3 (requests for accommodation may be in plain English, need not mention the statute or the term "reasonable accommodation," and need not be in writing).

FN25. Note that the City HRL states explicitly that the affirmative obligation to accommodate arises when the disability "is

known or should have been known by the covered entity" Administrative Code § 8-107[15] [a].

FN26. The dissent complains that the last of the allegations was in the form of a "conclusory allegation" reciting that she was "a person with a disability as defined in Executive Law § 292(21)." In so doing, the dissent fails to appreciate that CPLR 3013 requires only that statements in a pleading be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." The complaint did so (*cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 [2002] [Title VII employment discrimination complaint need not set forth specific facts establishing a prima facie case under the *McDonnell Douglas* framework]).

Insofar as the dissent objects to the proposition that reasonable accommodation under the State and City HRLs requires an employer to engage in an interactive process, we refer to *Pimentel*, where the employee's request for an alternative position was met with the take-it-or-leave-it option of returning to her old job or being terminated. There, our colleague conceded that the employer's position "cannot be deemed, as a matter of law, to be the interactive process envisioned by both state and federal disability discrimination statutes and is insufficient to satisfy [its] statutory obligation to provide 'reasonable accommodation' " (29 A.D.3d at 152, 811 N.Y.S.2d 381 [Andrias, J., dissenting]).

The dissent resorts to disparaging the majority opinion as reflecting "judicial activism." It does no such thing. Our task is to actually read the statutes and respect the decisions that have been made by relevant legislative bodies, not to substitute our own opinion. As such, we must be faithful to the language and intent of the statutes we are interpreting, even when others, like the dissent, still construe the provisions of the Human Rights Laws "too narrowly to ensure protection of the civil rights of all persons covered by the law" (from the statement of purpose for the Restoration Act, Local Law 85, § 1).

Finally, contrary to the dissent, it is our responsibility to resolve pure questions of law for the parties and the Bar. Doing so does not require us to go beyond the record, but only to interpret the record in light of the applicable statutes.

Accordingly, the order of Supreme Court, New York County (Carol Robinson Edmead, J.), entered October 15, 2007, which, to the extent appealed from, granted defendants' motion to dismiss the complaint alleging employment discrimination based on a disability in violation of Executive Law § 296 and the Administrative Code of the City of New York § 8-107, should be reversed, on the law, without costs, and plaintiff's claims pursuant to the State and City HRLs, as alleged in the first and second causes of action, reinstated.

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered October 15, 2007, reversed, on the law, without costs, and plaintiff's claims pursuant to the State and City HRLs, as alleged ***384** in the first and second causes of action, reinstated.

All concur except ANDRIAS, J.P. who dissents in an Opinion.

ANDRIAS, J.P. (dissenting).

Because the majority's examination of the "reasonable accommodation" provisions of the State and City Human Rights Laws ignores binding precedent in this and numerous other courts, including the Court of Appeals and the United States Supreme Court, and relies instead upon dicta in this Court's majority opinion in *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 872 N.Y.S.2d 27 [2009], I dissent and would affirm the dismissal of petitioner's Article 78 proceeding.

The facts are fairly stated by the majority and are not in dispute. Briefly, the record establishes that petitioner [FN1] was employed by the City's Department of Homeless Services (DHS) since 1988 in noncompetitive civil service positions, most recently as a Community Assistant at the Powers Path Family Facility in the Bronx. At some point, petitioner was diagnosed with breast cancer and requested a three-month unpaid medical leave of absence under the Family & Medical Leave Act (FMLA) (29 USC § 2601 *et seq.)*, which was approved for the period July 31 to October 27, 2006. By letter dated August 11, 2006, plaintiff requested an additional year of medical leave under FMLA for the period through August 11, 2007. By letter dated October 16, 2006, petitioner was informed:

> FN1. Although this proceeding was originally commenced as a plenary action, it was converted to an Article 78 proceeding. Thus the verified complaint became the petition and plaintiff and defendants became petitioner and respondents.

> {Y]our request cannot be granted at this time because FMLA is for a maximum period of 12 weeks (approved for 7/31/06-10/27/06) and you are not eligible for a Medical Leave of Absence.
>
> An unpaid Medical Leave of Absence is not an option available to you because it is only granted to permanent civil service employees, per the Rules and Regulations for Employees Covered under the Career & Salary Plan. You are an employee in a non-competitive title and therefore you are not eligible for a Medical Leave of Absence.
>
> Your anticipated return to work date is October 30, 2006. Please contact your Personnel Liaison ... to facilitate your return to work. If you fail to comply with the directives of this letter you will be subject to disciplinary action.

Petitioner was thereafter notified in a letter dated October 27 that if she did not return to work by October 30 she would be subject to discharge. She then telephoned one of DHS's leave and retirement benefits analysts and asked if she could obtain any further extension of her medical leave of absence due to her breast cancer condition. Respondents' representative replied in the negative and informed petitioner that she had to return to work as scheduled or be subject to discharge. According to petitioner, after she failed to return to work on the appointed date, she was discharged on or about November 1, 2006. For purposes of this proceeding, respondents agree that the date of petitioner's scheduled return was October 30, 2006; however, they contend that taking petitioner's use of all available leave time into consideration, the date of her scheduled return was actually January 5, 2007, and she was not officially terminated until after she failed to return on that date.

Petitioner then commenced this proceeding as a plenary action on January 25, ***385** 2007, alleging that DHS, in denying her request for additional medical leave and discharging her because she was unable to report to work, discriminated against her because of her disability and her race. As pertinent to this appeal, petitioner's first cause of action alleges that by denying her "August 11, 2006 request for an approved medical leave of absence through August 11, 2007," and by discharging her, respondents discriminated against her in violation of the State Human Rights Law (Executive Law § 296[1][a], 3 [a]). Her second cause of action alleges that her request was actually for "a reasonable accommodation under Title 8, Chapter 1, § 8-102(18)" of the City's Human Rights Law (Title 8 of the NYC Administrative Code) and that respondents' denial of that request and her discharge discriminated against her in violation of § 8-107(1)(a) and (15) of that law.

In support of their motion to convert petitioner's action to an Article 78 proceeding and to dismiss it for failure to state a cause of action, respondents argued that they could not lawfully offer any more leave time, and when petitioner failed to return to work, they were left without any choice but to ter-

minate her employment. They further contended that DHS cannot be called irrational for acting in accordance with a long-standing Citywide regulation that treats the civil service classes differently. Nor, it was argued, could DHS be called irrational because it refused to unilaterally amend the federal FMLA to provide for a one-year leave of absence rather than the 12-week leave authorized by the statute. Therefore, respondents argued, where petitioner was only entitled to a 12-week unpaid leave of absence pursuant to FMLA, which guarantees eligible employees 12 weeks of leave in a one-year period following certain events (in this case a health problem), terminating an employee who did not return to work and who was ineligible for additional leave was entirely rational and must be upheld.

In opposition, petitioner argued that, contrary to respondents' argument that she was not a person with a disability within the meaning of the State and City Human Rights Laws, she states a claim that by denying her request for an unpaid medical leave of absence without even considering the feasibility of her request, based solely on its policy of denying any such leave to noncompetitive employees, and then discharging her based upon her inability to report to work, respondents discriminated against her in violation of the State and City Human Rights Laws.

Supreme Court granted respondents' motion pursuant to CPLR 103(c)and 3211(a)(7), converted the plenary action to an Article 78 proceeding, and dismissed the “complaint” for failure to state a cause of action.

In so ruling, the court, after an extensive and persuasive analysis of the applicable law, found that petitioner failed to allege facts demonstrating that her breast cancer falls within the definition of the term “disability” in that the fact that one suffers from breast cancer, in and of itself, does not establish that she has a “disability” under the State and City Human Rights Laws, and that a physical condition that prevents an employee from reporting to work and requires her to miss an unacceptably high number of workdays is not a disability within the meaning of Executive Law § 292(21). The court further found that petitioner's complaint indicated she was unable to work at the time of discharge, failed to allege she would have been capable of performing the functions of her job in a reasonable manner upon provision of reasonable accommodations, and failed to set forth factual allegations sufficient to show that upon the provision ***386** of reasonable accommodations, she could perform the essential functions of her job.

Instead, the court found, the complaint contained only conclusory assertions without factual support in that there is no allegation that respondents had any way of knowing whether petitioner would ever report to work in the future. In fact, the court found, petitioner alleged that she “was then, and remains, unable to return to work for the respondent DHS because of her medical condition of breast cancer.” Therefore, the court held, although a leave of absence may be held to constitute reasonable accommodation, petitioner failed to allege any of the factors that would support such a conclusion in this case and set forth only the untenable claim that DHS was required to accommodate her by holding her job open indefinitely, which is insufficient under both the State and City Human Rights Laws.

Finally, the court held that since it is uncontested that petitioner held a noncompetitive title at the relevant times, and since there were no allegations that DHS's determinations were based on any factor other than her noncompetitive title, her discrimination claims were insufficiently pleaded. Since DHS's determinations were based on its leave policies applicable to noncompetitive titles, the court held that petitioner failed to support a claim that respondents acted arbitrarily, capriciously, or in violation of lawful procedure.

Petitioner now appeals and, relying solely upon *Parker v. Columbia Pictures Indus.,* 204 F.3d 326 [2d Cir.2000] and District Court decisions such as *McFarlane v. Chao,* 2007 WL 1017604, 2007 U.S.

Dist. LEXIS 23446 [S.D.N.Y.2007], *Picinich v. United Parcel Serv.,* 321 F.Supp.2d 485, 516 [N.D.N.Y.2004], *Rogers v. New York Univ.,* 250 F.Supp.2d 310, 316 [S.D.N.Y.2002], and *Powers v. Polygram Holding, Inc.,* 40 F.Supp.2d 195, 199 [S.D.N.Y.1999], argues as she did below that respondents violated the State and City Human Rights Laws because DHS made no individualized assessment of the feasibility of her request for accommodation and simply applied its uniform policy based upon her noncompetitive Civil Service classification in denying her an additional leave of absence, which would have resulted in her receiving a total of approximately 13 months of unpaid medical leave to which she was otherwise not entitled.

The majority mentions *Parker,* but only in support of its conclusion that employers in every case are required to consider requested accommodations by engaging in an individualized interactive process, a requirement no one questions. It fails to mention any of the other cases relied upon by petitioner, but instead chooses, as the *Williams* majority did, to decide this appeal not on the arguments made by the parties in their briefs, but on arguments it thinks should have been presented. As I noted in my concurrence in *Williams,* 61 A.D.3d at 82-83, 872 N.Y.S.2d 27, this tendency to decide appeals on the basis of arguments not raised by the parties has recently become a recurring issue in this Court and is so unfair to the parties as to implicate due process concerns. The Court of Appeals has recently had occasion to voice similar sentiments, equally binding on this Court, when it stated: "For us now to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play. We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made" (*Misicki v. Caradonna,* 12 N.Y.3d 511, 519, 882 N.Y.S.2d 375, 909 N.E.2d 1213 [2009]). While appellate judges do not "sit as automatons" (*id.,* citing the dissenting Judge Smith's reference ***387** to Karger, Powers of the New York Court of Appeals § 17.1, at 591 [3d ed. rev.]), neither are they "freelance lawyers" (*Misicki,* at 519, 882 N.Y.S.2d 375, 909 N.E.2d 1213). As Karger points out, "This general restriction against the raising of new questions on appeal is also binding on the Appellate Division."

The majority simply ignores this admonition to decide only those issues presented by the parties in their appellate briefs. However, given the longstanding requirement of preservation of issues for appellate review, the majority's insistence on considering issues not raised by the parties and then deciding this appeal on the basis of new arguments of its own making is just plain wrong. While there are exceptions to any rule, those exceptions are very rare, and this case, as was *Williams,* is not one. On her appeal to this Court, the plaintiff in *Williams* totally abandoned any arguable claim she may have had under the City Human Rights Law. That law and its application to the facts of that case was simply never presented to this Court for review.

In any event, the majority continues to treat this Article 78 proceeding as a plenary action and seemingly anticipates further proceedings on remand to develop "a fuller factual record." However, inasmuch as petitioner does not challenge Supreme Court's conversion of this action to an Article 78 proceeding, which is summary in nature, our review is limited to whether respondents' determinations were arbitrary and capricious, an abuse of discretion, or affected by an error of law (CPLR 7803[3]), i.e., whether such determinations had a rational basis (*Matter of Pell v. Board of Educ.,* 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 [1974]). Despite the majority's suggestion that we are not limited to that standard of review because Supreme Court treated petitioner's claims "*as a hybrid action in law and* as a proceeding pursuant to Article 78," the only two claims pursued by petitioner, both in Supreme Court and on appeal, allege violations of the State and City Human Rights Laws and seek reinstatement to her former position with back pay. Thus, no matter how Supreme Court

characterized this proceeding, it is well settled that an Article 78 proceeding is the only remedy by which a dismissed public employee may seek reinstatement and back pay (*see Austin v. Board of Higher Educ. of City of N.Y.,* 5 N.Y.2d 430, 186 N.Y.S.2d 1, 158 N.E.2d 681 [1959]). Therefore, in challenging respondents' actions, it is incumbent on petitioner to present a sufficient factual basis to establish her prima facie entitlement to relief. Given that standard, Supreme Court properly determined that petitioner failed to set forth in her complaint factual allegations sufficient to show that, upon the provision of reasonable accommodations, she could perform the essential functions of her job (*McKenzie v. Meridian Capital Group, LLC,* 35 A.D.3d 676, 677, 829 N.Y.S.2d 129 [2006]). She also failed to allege sufficient facts indicating that her request for approximately 13 months of medical leave due to her breast cancer condition was reasonable (*see e.g. Powers,* 40 F.Supp.2d at 201; *Micari v. Trans World Airlines, Inc.,* 43 F.Supp.2d 275, 282 [E.D.N.Y.1999], *affd.* 205 F.3d 1323 [2d Cir.1999]).

It is well settled that a complaint, or in this case a petition, states a prima facie case of discrimination due to a disability under both the State and City Human Rights Laws if the individual demonstrates that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated (*Pimentel v. Citibank, N.A.,* 29 A.D.3d 141, 145, 811 N.Y.S.2d 381 [2006], *lv. denied* 7 N.Y.3d 707, 821 N.Y.S.2d 813, 854 N.E.2d 1277 [2006]). The term "disability" is defined***388** as "a physical, mental or medical impairment which, upon the provision of reasonable accommodations, do[es] not prevent the complainant from performing in a reasonable manner the activities involved in the job ... held" (Executive Law § 292[21]; *see also Umansky v. Masterpieces Intl.,* 276 A.D.2d 691, 692, 714 N.Y.S.2d 735 [2000]). Supreme Court correctly found that petitioner not only failed to allege sufficient facts to establish prima facie that she suffers from a disability as defined by law, but also failed to set forth factual allegations sufficient to show that upon the provision of reasonable accommodations, she could perform the essential functions of her job (*McKenzie,* 35 A.D.3d at 677, 829 N.Y.S.2d 129). In fact, petitioner failed even to specify what the essential functions of her position as a Community Assistant entailed, and which functions she was unable to perform, with or without reasonable accommodations.

Nevertheless, the majority holds that under the supposedly broader protections afforded by the State and City Human Rights Laws, the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the reasonableness of the accommodation requested. However, it offers no compelling reason for deviating from well established principles regarding discrimination suits. In determining whether an individual has alleged a cause of action for discrimination based upon disability, it would seem that the first step for this Court would be to determine whether the complainant has alleged sufficient facts to establish prima facie that he or she has a disability within the meaning of the State and City Human Rights Laws.

It is also well settled that in any claim of discrimination, whether based upon race, sex, or in this case disability, the complainant must carry the initial burden of establishing a prima facie case (*McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 [1973]). The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for its employment action, in this case respondents' denial of a further leave of absence under FMLA and the termination of petitioner's employment after she failed to return to work at the end of her sick leave. Once the employer meets this burden, the presumption of intentional discrimination disappears, and the burden again shifts to the complainant to demonstrate that the employer relied upon impermissible considerations in coming to its decision (*Koester v. New York Blood Ctr.,* 55 A.D.3d 447, 448, 866 N.Y.S.2d 87

[2008]).

In reversing and reinstating petitioner's causes of action, the majority finds that she stated causes of action for discrimination arising from respondents' failure to engage in an individualized process when considering her request for extended medical leave and their failure to reasonably accommodate her. However, not only does the majority ignore the fact that the original plenary action was converted to an Article 78 proceeding, which by its very nature is intended to be summary in nature, but it fails to deal with the threshold issue of whether petitioner has pleaded sufficient facts to establish that she is disabled within the meaning of the State and City Human Rights Laws. As previously noted, Supreme Court found that petitioner failed to allege facts demonstrating her breast cancer fell within the definition of the term "disability" in that the fact that one suffers from cancer, in and of itself, does not establish that one has a "disability" under the State and City Human Rights Laws, and a physical condition that prevents an employee from reporting to work and requires an employee to miss an unacceptably high number of workdays is ***389** not a disability within the meaning of Executive Law § 292(21).

Nevertheless, the majority, starting with petitioner's allegation that she was forced to delay her scheduled cancer surgery as a result of the termination of her health benefits and her allegation that she is a "person with a disability as defined in Executive Law § 292(21)," jumps to the conclusion that "it can reasonably be inferred that plaintiff needed the requested leave to be able to have and to recover from cancer surgery, after which time she anticipated that she would be able to return to work." The majority also faults Supreme Court for focusing exclusively on petitioner's request for a one-year leave of absence, even though respondents also denied petitioner's "modified request for 'any' additional medical leave," and finds that this fact alone requires remand because the court's decision was premised on the incorrect assumption that the only leave request was effectively "open-ended": "[A]ccording all inferences to [petitioner], [the majority] fail[s] to see how she was not asking for an extension of up to one year, and why the City could not reasonably accommodate that request."

While the foregoing are interesting conclusions, unfortunately they are not urged by petitioner on appeal and lack any support in the record. As to the majority's first conclusion, that petitioner anticipated she would be able to return to work after a reasonable period of recovery from her scheduled cancer surgery, as Supreme Court correctly found, her only allegation is that she "was then, and remains, unable to return to work ... because of her medical condition of breast cancer." Nowhere in the record does petitioner ever allege that she anticipated returning to work or, if so, when. The majority's second conclusion, that petitioner modified her request for an additional one-year leave of absence, is likewise belied by petitioner's brief, which makes no such claim of a modified request, but simply argues that, "[i]n applying such uniform policy and denying her request for an additional leave of absence which would have resulted in a total unpaid medical leave of absence of approximately 13 months for her, without making inquiry and analysis of the specific circumstances of plaintiff's request and its feasibility ... defendants violated plaintiff's rights under the state and city human rights laws." There is simply no basis in the record for the majority's conclusion, which again is not urged by petitioner, that after her formal request for additional leave was denied, her subsequent phone call to DHS's benefits specialist was a "modified" request for "any" additional medical leave. At most, it was a request for reconsideration of her original request.

This Court has recently held that federal and state disability discrimination statutes envisage an employer and employee engaged in an interactive process in arriving at a reasonable accommodation for a disabled employee; however, it is incumbent upon the disabled employee to specify the accommoda-

tions sought and to show that he or she can perform the particular job with such accommodation (*see Pimentel*, 29 A.D.3d at 149, 811 N.Y.S.2d 381). It is self evident that before reaching the question of a reasonable accommodation and an interactive process to achieve such result, there must first be a prima facie showing that the complainant is disabled within the meaning of the applicable statutes.

Adopting the majority's approach, petitioner assumes that she suffers from a disability and, citing the 2007 Southern District decision in *McFarlane v. Chao, supra*, proceeds to the next step, arguing that requests for a leave of absence for a medical reason can constitute a request for ***390** a reasonable accommodation under the State and City Human Rights Laws, including situations where, as here, the employee is unable to work because of the effects of illness. However, *McFarlane,* a case brought pursuant to the Americans with Disabilities Act of 1990(ADA) (42 USC § 12101 *et seq.*) and the Rehabilitation Act of 1973 (29 USC § 701 *et seq.*), does not help petitioner.

In *McFarlane,* the district court found that the plaintiff, who had been appointed to a temporary position that expired September 30, 2000 unless otherwise extended, failed to sustain her minimum burden of establishing a prima facie case of discrimination. Unlike petitioner, McFarlane had already undergone surgery to remove a tumor from her right breast. Thereafter, she requested a three-month leave without pay under the FMLA. In support of her August 24, 2001 request, she attached letters from her oncologist and psychologist stating she was unable to work at that time and required total rest, relaxation and therapy. By letter dated August 28, 2001, McFarlane's request was granted retroactively from August 7 through termination of her appointment on September 30, 2001. In dismissing McFarlane's subsequent suit charging discrimination based upon refusal to provide reasonable accommodation, the district court found that while the burden of establishing a prima facie case under the ADA or the Rehabilitation Act is not a heavy one (indeed, it has been characterized as "minimal" and "de minimis"), in order for her to demonstrate she had a disability as defined by the Rehabilitation Act, she had to "(1) show that she suffered from a physical ... impairment, (2) identify the activity that she claimed to be impaired and establish that it constitutes a major life activity, and (3) show that the impairment substantially limited the major life activity previously identified" (from the Report and Recommendation of Magistrate Pitman, 2007 WL 1017604, *14).

Citing federal case law holding that in order to constitute a substantial impairment, the impact of the impairment must be "permanent or long term" (quoting *Toyota Motor Mfg., Ky., v. Williams*, 534 U.S. 184, 198, 122 S.Ct. 681, 151 L.Ed.2d 615 [2002]), and that "temporary conditions do not constitute disabilities under the ADA and other statutes" (quoting *Stephens v. Thomas Publ. Co.*, Inc., 279 F.Supp.2d 279, 283 [S.D.N.Y.2003]), the Magistrate reported (2007 WL 1017604, *14-15) that while the record established the maximum period of McFarlane's claimed inability to work was seven months, an inability to work for seven months is simply not sufficiently lengthy to constitute a substantial limitation (citing *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 646 [2d Cir.1998], *cert. denied* 526 U.S. 1018, 119 S.Ct. 1253, 143 L.Ed.2d 350 [1999]). Accordingly, plaintiff McFarlane did not present sufficient evidence to show that her ability to perform her particular job functions was substantially limited, let alone her ability to perform a broad range of jobs.

In the case at bar, the majority claims that the lower court's statement that cancer, in and of itself, does not establish that one has a disability within the meaning of the City Human Rights Law is incorrect as a matter of law because a "disability" is fully and conclusively established by nothing more than "an impairment of any system of the body" (Administrative Code § 8-102 [16][b][1]). As previously noted, it also does not mention *McFarlane* or four of the other five cases relied upon by peti-

tioner in her brief, but quibbles instead with my reference to *Toyota*, a case it mistakenly dismisses as irrelevant because, in its opinion, "substantial impairment" of a "major life activity" is a concept ***391** that is not part of the definition of disability under either the State or City Human Rights Laws.

First of all, contrary to the majority's intimation that the City Council has carved out a unique definition of disability ("any physical, medical, mental or psychological impairment ... [meaning] an impairment of any system of the body"), the detailed listing of such impairments in § 8-102(16)(b)(1), upon which it relies, is virtually identical to the physical impairments defined in the Rehabilitation Act's regulations (45 CFR 84.3[j][2][i]) that the Supreme Court was dealing with in *Toyota*, 534 U.S. at 194-195, 122 S.Ct. 681. However, as the Supreme Court held there, "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity," examples of which are walking, seeing, hearing and, performing manual tasks (*id.* at 195, 122 S.Ct. 681). The claimant must further show that the limitation on the major life activity is substantial, which is defined in 29 CFR 1630.2(j)(1) as "Unable to perform a major life activity that the average person in the general population can perform," or "Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." The Supreme Court thus held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term" (534 U.S. at 198, 122 S.Ct. 681). Contrary to the majority's statement that neither the State nor the City Human Rights Law requires any showing that the disability substantially limits any major life activity, both laws require an employer to make reasonable accommodation to the needs of persons with disabilities so as to permit the employee with a disability to perform in a reasonable manner "the activities involved in the job" or occupation held (Executive Law § 292[21] and [21-e]) or to enable a person with a disability to satisfy "the essential requisites of a job" (Administrative Code § 8-107[15][a]). It goes without saying that performance of "the activities involved in the job" or "the essential requisites of a job" are without doubt major life activities within the meaning of the ADA as well. As to the majority's reliance upon the Administrative Code § 8-102(18) provision that an accommodation cannot be unreasonable unless the employer proves that it causes undue hardship, that is exactly the same standard applied by the Supreme Court in *US Airways v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 [2002], where it held that undermining a seniority system would create an undue hardship. Rather than being irrelevant to any discussion of disability under the State or City Human Rights Law, the Supreme Court's holdings in *Toyota and Barnett* are very relevant, since a complainant's ability to perform his or her job with or without reasonable accommodations is central to federal, state, as well as local disability jurisprudence. Thus, even assuming petitioner suffers from a disability within the meaning of the City law, she still has failed to allege or prove in any way that she is able to perform her job even with a reasonable accommodation.

While *McFarlane* involved a motion for summary judgment, the result should be no different in this case. The majority's conclusion that respondents have not met the City law's requirement of pleading as ***392** an affirmative defense that even with reasonable accommodation, petitioner could not have performed the essential requisites of her job, is simply incorrect. Since we are dealing with an Article 78 proceeding, respondents had the option of either filing an answer in response to the petition, in which they could raise any objection in point of

law, or moving to dismiss it for legal insufficiency on those grounds (CPLR 7804[f]). Such objections can produce a summary disposition of the proceeding (Alexander, McKinney's CPLR Practice Commentary C7804:7). That is exactly what respondents did in their motion to dismiss the petition, which was made in lieu of answer. Respondents contended that not only did petitioner not show she had proposed and was refused an objectively reasonable accommodation allowing her to fulfill the functions of her job, but she actually admitted that she could not work at all. In response, petitioner did not propose any alternative accommodation, but merely continued to make the argument, which is simply a conclusory statement of law, that by denying her request for an unpaid medical leave of absence without even considering the feasibility of her request, based solely on the policy of denying any such leave to noncompetitive employees, and then discharging her based upon her inability to report to work, respondents discriminated against her in violation of the State and City Human Rights Laws.

Applying the CPLR 3211 standard urged by the majority, Supreme Court correctly found that "even assuming the truth of the facts asserted in her Complaint, plaintiff fails to allege facts demonstrating that her cancer condition falls within the definition of the term 'disability' as contemplated by the NYSHRL and NYCHRL and, accordingly, the termination of petitioner did not constitute an unlawful discrimination on the part of defendants."

The majority heavily relies upon the Ninth Circuit's en banc decision in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116 [2000] for the premise that a good faith interactive process is "the key mechanism for facilitating the integration of disabled employees into the workplace" and notes that that decision was vacated on other grounds. However, the majority's discussion of *Barnett* is more significant for what it leaves out.

Robert Barnett was a customer service agent for U.S. Air who injured his back while working in a cargo position at San Francisco International Airport. After returning from disability leave, he discovered he could not perform all the physical requirements of handling freight, and upon his doctors' recommendation that he avoid heavy lifting and bending, etc., he used his seniority to transfer into the company's mail room. Subsequently he learned that he was about to be bumped from his mail room job by two employees with more seniority. In the ensuing suit alleging discrimination for failure to provide a reasonable accommodation, the district court granted U.S. Air summary judgment for all claims, including Barnett's claim that U.S. Air had discriminated by not participating in the interactive process mandated by EEOC's regulations implementing the ADA. As does the City's Human Rights Law, the ADA's reasonable accommodation requirement puts the burden on the employer to show that the proposed accommodation will cause undue hardship (*see* 42 USC § 12112[b][5][A]). Barnett argued that it would have been a reasonable accommodation for U.S. Air to allow him to remain in the mail room by making an exception to its seniority policy, and the key questions before the Ninth Circuit were whether a seniority system is a per ***393** se bar to reassignment as a reasonable accommodation, and whether a disabled employee seeking reasonable accommodation should have priority in reassignment.

A majority of the Ninth Circuit held that reassignment is a reasonable accommodation, and that a seniority system is not a per se bar to reassignment, and a case-by-case fact-intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer (228 F.3d at 1120). However, the United States Supreme Court granted certiorari and reversed the Ninth Circuit, holding that even assuming the employee is an "individual with a disability" and the accommodation requested would be reasonable within the meaning of the ADA were it not for one circumstance (there, the rules of a seniority system, and here, Civil Service rules and regulations), that circumstance alone supports the con-

clusion that the proposed accommodation is not a "reasonable" one and the statute does not require proof on a case-by-case basis that a seniority system should prevail (*US Airways, Inc. v. Barnett,* 535 U.S. 391, 403, 122 S.Ct. 1516, 152 L.Ed.2d 589 [2002]). Taking one sentence from the Court's decision out of context, the majority claims the Court explained that accommodation that would conflict with seniority provisions implicated "the employees' expectations of consistent, uniform treatment" (535 U.S. at 404, 122 S.Ct. 1516). Then, in true ipse dixit fashion, it goes on to say that "of course, the provision of additional leave time as an accommodation requires nothing to be 'taken away' from any other employee." What bearing that has on this case is unclear; however, a reading of the full paragraph from which the majority excerpts its quote explains the Court's rationale for concluding that "the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" (*id.* at 405, 122 S.Ct. 1516). To require more, the Court explained, might well undermine the employees' expectations of consistent, uniform treatment because such a rule would substitute a complex case-specific "accommodation" decision made by management for the more uniform impersonal operation of seniority rules. The Court could find nothing in the statute that suggests that Congress intended to undermine seniority systems in this way.

The same rationale applies with even greater force to this case. Here, unlike *Barnett,* the threshold question of whether petitioner was disabled within the meaning of the respective Human Rights Laws is disputed, whereas in *Barnett* the plaintiff's status as a disabled person was assumed. Also unlike petitioner, Mr. Barnett was able to return to work and specify what duties he was able to perform with the accommodations he was seeking. Moreover, just as the Supreme Court found in *Barnett,* there is nothing in the State or City Human Rights Laws that suggests that either the Legislature or the City Council intended to undermine their respective Civil Service systems in any way.

What is uncontested in this case is that petitioner, like all other employees in the noncompetitive class, is not protected by the Civil Service Law (*see Matter of Roberts v. City of New York,* 21 A.D.3d 329, 330, 800 N.Y.S.2d 672 [2005], *lv. denied* 6 N.Y.3d 702, 810 N.Y.S.2d 416, 843 N.E.2d 1156 [2005]), and that § 5.1 of DHS's Career and Salary Plan provides that the leave of absence requested by petitioner is available only to permanent employees and is applied uniformly to all DHS employees, whether disabled or not. Therefore, under the standard enunciated in *U.S. Airways v. Barnett,* petitioner's request for additional medical leave to which she is otherwise not entitled is, as a matter of law, not ***394** a request for a "reasonable" accommodation.

While I do not think the majority, in interpreting a similarly worded statute, would not consider itself bound to follow United States Supreme Court precedent, it nonetheless concludes that the New York City Council, in amending the City Human Rights Law in 2005, legislatively overruled cases that had failed to respect the differences between the City's local law and its State and federal counterparts. However, while a legislative body can certainly overrule court interpretations of its laws with which it disagrees by amending or clarifying those laws, the City Council, in enacting the Local Civil Rights Restoration Act of 2005, did not do so. It merely added "partnership status" to the categories of proscribed bases for discrimination, lowered the standard for a finding of an unlawful retaliatory action, and urged broad construction of the City Human Rights Law independent of a court's consideration of counterpart federal and New York State statutes. The simple answer to the majority's protestations regarding the City Council's efforts in the Restoration Act to make "core revisions" to the City Human Rights Law is that if the Council wanted to, it could have done so in plain and unequivocal directory language, just as it did in response to the Court of Appeals decision in *McGrath v. Toys "R" Us, Inc.,* 3 N.Y.3d 421, 788 N.Y.S.2d 281, 821 N.E.2d 519 [2004]. It did not change any of the provisions

relevant to this appeal, and it is not this Court's function to give its own interpretation to legislation that is plain on its face or to fill in blanks left by the legislative body, especially when there is nothing to indicate that any omissions were inadvertent. Indeed, where an amendment leaves portions of the original act unchanged, such portions are continued in effect, with the same meaning and effect as they had before the amendment (McKinney's Statutes § 193[a], at 359).

The majority also seeks to distinguish *US Airways v. Barnett* by alluding to the very different conception and statutory architecture of "reasonable accommodation" under the City Human Rights Law. In urging such distinction, however, it seemingly acknowledges sub silentio that *US Airways* bars petitioner's claim under the State Human Rights Law.

In any event, the majority's attempt to distinguish the import of the City's local law from the State statute is unconvincing since it fails to demonstrate that the reasonable accommodation required by Administrative Code § 8-107(15)(a) ("reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job") is, in any meaningful way, different from the reasonable accommodation requirement of Executive Law § 292(21-e) ("actions taken which permit an employee ... with a disability to perform in a reasonable manner the activities involved in the job").

Nevertheless, the majority concludes that unlike the State statute, the issue of the ability to perform the essential requisites of a job is not bound up in the City Human Rights Law definition of disability or in its definition of reasonable accommodation. It thus concludes that there is no subset of persons with disabilities not included in the City's requirement of "reasonable accommodation," and unlike the State Human Rights Law and the ADA, "there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation," nor any that may be "unreasonable" as long as they do not cause undue hardship. Such conclusion, however, flies in the face of the holding in *US Airways* that overriding a uniformly applied***395** seniority system-or, in this case a similar Civil Service classification system-in order to accommodate a disabled employee is per se not a reasonable accommodation.

To the extent it seeks to distinguish or ignore federal and State precedent on the issue and conclude that in New York City-and only in New York City-an employee is entitled to allege any and all physical ailments as a disability and that such employee is entitled to any and all accommodations, without regard to any seniority or Civil Service system, the majority seems to rely in great part on the City Council's statement of purpose or preamble to its Local Civil Rights Restoration Act of 2005. That statement, which included "the sense of the Council that New York City's Human Rights Law has been construed too narrowly," sought to underscore that the provisions of the City's Human Rights Law are to be construed independently from similarly worded or identical provisions of New York State or federal statutes, which were to be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (Local Law 85 [2005] § 1). However, recourse to a preamble is permissible only when ambiguity must be resolved or statutory language interpreted, and the language of a preliminary recital cannot control the enacting part of a statute that is already clear and unambiguous in its terms (McKinney's Statutes § 122, at 245). The process of judicial construction of a law or statute also presupposes doubt or ambiguity (*see generally* McKinney's Statutes § 71). Thus, inasmuch as the City Council, in enacting the local law, did not amend the clear and unambiguous definitions in the City's Human Rights Law pertinent to this appeal, its preamble is clearly precatory in nature, and courts are free to apply the law according to its plain language. Moreover, to the extent the majority's rationale depends upon the majority opinion in *Williams*, the concurring opinion in that case noted (61 A.D.3d at 82, 872 N.Y.S.2d 27) that the

plaintiff there never enunciated a specific claim under the City's Human Rights Law, and even assuming arguendo that she had raised it at nisi prius, she clearly abandoned any such claim on appeal. Therefore, the vast majority of the majority opinion in *Williams* is simply dictum, which is not binding on this or any other court and has no stare decisis effect (McKinney's Statutes § 72 at 141-142). Contrary to the majority's assertion that the majority opinion in *Williams* "*necessarily*" required consideration of the City Human Rights Law, even if it could be argued that the petitioner had raised a City Human Rights Law issue in the court of first instance, she clearly had not pursued it on appeal. As to the validity of the majority's reasoning in *Williams*, it would serve no purpose then or now to address an issue that was not before us. I would simply note, that the author of *A Return to Eyes on the Prize* (33 Fordham Urb. L.J. 255 [2006]), upon which the majority relied so heavily in *Williams*, admitted that in enacting the Restoration Act, the City Council did not specifically address many issues, but he suggested nonetheless that any failure to address a specific issue in the amendments should be overcome by "judicial activism" (*id.* at 290-291). My colleagues seem to have taken the bait.

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