



# The Association of the Bar of the City of New York

## Department of Public Affairs

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

August 1, 2005

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

Dear Speaker Miller,

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

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

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

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

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

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

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

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

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

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

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

<sup>3</sup> Cal. Fed. Savings and Loan Ass’n v. Guerra, 479 U.S. 272, 282-83 (1987).

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

<sup>5</sup> People v. P.J. Video, Inc., 68 N.Y.2d 296, 508 N.Y.S.2d 907 (1986)

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

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

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

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

<sup>6</sup> 532 U.S. 598 (2001).

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

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

<sup>9</sup> Buckhannon, 532 U.S. at 603.

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

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

that “[t]he law deliberately does not take a ‘laundry list’ approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.”<sup>12</sup>

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

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

Very truly yours,



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

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<sup>12</sup> Knox v. State of Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996).

<sup>13</sup> Fairbrother v. Morrison, No. 03 Civ. 9242, 2005 WL 1389894 (2d Cir. June 14, 2005).

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

<sup>15</sup> Levin, 730 N.Y.S.2d at 26 (Kaye, C.J., concurring in part and dissenting in part).