BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Statement of the Brennan Center for Justice at New York University School of Law

in support of the Local Civil Rights Restoration Act (Intro 22)

July 8, 2005

Introduction

The Brennan Center is a not-for-profit organization that works to develop and implement an innovative, non-partisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. We support the passage of Intro 22, the Local Civil Rights Restoration Act, because it is important that New York City defend the vigor of its local civil rights law at a time when federal and state civil rights protections are being eroded.

Intro 22 would both make certain specific restorations to New York City's Human Rights Law,[1] and would require judges to interpret the local law independently of any limitations that may have been imposed on its federal and state counterparts. In so doing, the legislation would give renewed life to the existing, but frequently ignored, judicial obligation to construe the Human Rights Law liberally in order to accomplish its purposes.[2]

---

[1] Restricting evasions of the anti-retaliation provisions, providing protections for domestic partners, restoring the availability of attorney's fees in catalyst (policy changing) cases, increasing civil penalties for cases brought administratively, and requiring administrative investigations to be conducted thoroughly.

[2] Administrative Code of the City of New York ("Admin. Code") §8-130.

New York City's Historic Role as a Leader in Civil Rights

Reaffirming explicitly New York City's intent that its Human Rights Law be construed generously and independently of federal and state law is increasingly important to ensure that erosion of federal and state protections do not undermine the city's law. Throughout its history, one of the fundamental purposes of New York City's Human Rights Law has been to provide stronger protection for civil rights than that afforded under state or federal law. For example, in 1958, New York City's Human Rights Law was the first in the nation to protect against discrimination in private housing. And in 1986, it forbade discrimination based on sexual orientation -- protections which were not added to state law until 2003 and which still do not exist at the federal level.

The Growing Tension Between City and Federal Protections

Over the past twenty years, however, the federal courts have become more restrictive in interpreting the federal civil rights laws. This trend has posed a substantial threat to New York City's Human Rights Law, as courts have been tempted to follow restrictive federal and state law interpretations in applying the city law. The New York City Council was already forced to act once in 1991 to amend the City's Human Rights Law to expressly reject a variety of inappropriately restrictive federal interpretations from being applied in the city. As then-Mayor Dinkins explained at the time, it was the intention of the 1991 amendments that "judges interpreting the City's Human Rights Law are not to be bound by restrictive state and federal

rulings and are to take seriously the requirement that this law be liberally and independently construed."[3]

Without an Independent Construction Requirement

New York City Protections Will Continue to Erode

But despite this legislative intervention by the City Council in the past, courts have continued to fall into the trap of importing restrictive federal and state civil rights interpretations into New York City's Human Rights Law without engaging in an independent and liberal construction of New York City's own protections. The predictable result has been that the City Human Rights Law has not been interpreted as robustly as is necessary to protect victims of discrimination.

For example, this past fall, in the case of *McGrath v. Toys "R" Us*, the Court of Appeals restricted the ability of people who have proved that they have been discriminated against under the City Human Rights Law to be able to get attorney's fees where the victim winds up not being awarded damages.[4] This principle effectively denies civil rights protection in a range of important settings where significant offenses have occurred, but the plaintiff is not monetarily damaged. For example, all New Yorkers should be free from discriminatory harassment in stores, restaurants, and other public accommodations -- regardless of whether the harassment harms them in a way that results in money damages. But this ruling seriously impairs the ability of such victims to get lawyers to take on these meritorious cases.

[3] Remarks by Mayor David N. Dinkins at Public Hearing on Local Laws, June 18, 1991 ("Mayor's Remarks"), p. 2.

[4] *McGrath v. Toys "R" Us*, 788 N.Y.S.2d 281 (N.Y. 2004).

In adopting this rule, the Court of Appeals imported a restrictive federal civil rights ruling into the local law, even though that rule did not exist when the City law's attorney fee provision was adopted. In doing so, the court explained that it generally interprets local civil rights law the same as equivalently worded federal law and that federal and local civil rights law have the same purpose.

However, this ruling was incorrect in each of its crucial premises. First, even if it were the case that local and federal civil rights law have the same purpose, the court was wrong to assume that the federal decision relied on had considered whether the restrictive rule furthered the purposes of federal civil rights law. In fact, the decision did not. Because the Court of Appeals failed itself to assess whether the restrictive rule furthered the purposes of local civil rights law, the Court wound up adopting the rule without *any* court having considered whether the rule furthered the broad remedial purposes of any civil rights statute.

Second, it is clear that the 1991 amendments to the City Human Rights Law created a local law substantially more protective of plaintiffs than its state and federal counterparts. Given the stronger law enforcement focus provided by the local law,[5] it would be incorrect to assume that the purposes of the City's Human Rights Law are identical to that of federal civil rights law.

In another example, the courts failed to engage in an independent analysis of the scope of protection afforded by the City Law when they construed the City Law's ban on discrimination

[5] For example, strict liabililty provisions not available under Title VII; uncapped punitive and compensatory damages not available under Title VII, the Americans with Disabilities Act, or the New York State Human Rights Law; reasonable modification and reasonable accommodation obligations on housing providers stronger than that of the federal Fair Housing Act; and a broader definition of public accommodations than that of either the Civil Rights Act of 1964 or the State Human Rights Law, among many others.

based on marital status as not forbidding discrimination against unmarried couples.[6] Likewise, without any consideration of what standard would best further the purposes of the City Law, women who have been sexually harassed are routinely thrown out of court without getting a chance to have a jury hear their claims because a judge uses the federal standard that they have not been harassed enough (i.e., that the harassment was not "severe or pervasive").

Changing Specific Sections of the City Law Has Proven Ineffective

By amending the City Human Rights Law to expressly require independent interpretation of its protections, New York City can stem this erosion of our civil rights system and ensure that our laws are interpreted consistently with their remedial purpose. Some have suggested that a better approach would be for the Council to limit itself to specifically overruling individual interpretations that it views as unduly restrictive. However, this approach has proven ineffective in the past, as the courts have tended to construe narrowly specific Council amendments. Without an explicit instruction that the City Human Rights Law should be construed independently, courts will continue to weaken New York City's Law with restrictive federal and state doctrines.

For example, as part of its 1991 overhaul of the Human Rights Law, the Council tried to address a restrictive federal rule that only retaliation resulting in "material" harm is actionable. The Council explicitly broadened the law's anti-retaliation protections to "in any manner." But

[6] *Levin v. Yeshiva Univ.*, 730 N.Y.S.2d 15 (2001).

this change has been downplayed, and courts within the Second Circuit continue to follow the federal materiality requirement.[7]

Similarly, the Council's 1991 amendments expanded the proscription against employment discrimination beyond employers to encompass "an employee or agent thereof." But despite this textual clarification, a state appellate court has insisted that the City did not intend to do proscribe more than is proscribed by the State Human Rights Law, and therefore held that the City could not have intended to make individuals liable for their own discriminatory conduct.[8]

The City's Human Rights Law Will Continue To Be Cut Back if Intro 22 Is Not Enacted

Continued erosion of federal civil rights protections through restrictive judicial construction of Title VII and other federal civil rights laws is likely only to increase in the years ahead. Without legislative action by the City Council to make clear that the City's Human Rights Law should be interpreted independently of federal standards, this erosion is certain to continue weakening the City's law.

For example, until a 2001 U.S. Supreme Court decision,[9] it was clear that an attorney's fee award was available in cases where an organization acted as a "catalyst" to effect policy change (*e.g.*, forcing the implementation of hiring standards that did not have a disparate impact

[7] *E.g. Gurry v. Merck & Co.*, ___ F .Supp.2d ___, 2003 WL1878414 (S.D.N.Y.) (automatically treating the City law claim like a Title VII claim).

[8] *Priore v. New York Yankees*, 761 N.Y.S.2d 608 (1st Dept. 2003). *Cf.* Mayor's Remarks, p. 4 ("The new law takes the fundamental step of making all people responsible for their own discriminatory acts").

[9] *Buckhannon Board and Care Home v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001).

on Latinos). Now, the federal rule is that fees are not available unless the change is brought about after trial or by consent decree (not simply by settlement of the case). The rule gives defendants every incentive to delay, and makes the costs of bringing such cases prohibitive.

It used to be (as when the 1991 amendments to the City's Human Rights Law were enacted) that federal courts said that the obligation to obey the Fair Housing Act was "non-delegable." In 2003, the U.S. Supreme Court said that this is not the case.[10] Now there is a new line of cases that would threaten to weaken the protections of the Fair Housing Act.[11] These would limit the applicability of the act to conduct that interferes with a person's ability to rent or purchase and not to post-acquisition harassment.

The independent construction provision would provide a buffer against the application of these doctrines to the City's Human Rights Law, and would help advocates argue against any other ratcheting down of the local law based on narrowed understandings of state and federal civil rights law. Rather than being reactive -- waiting, for example, until after the Supreme Court cuts back on standing for testers and fair housing organizations, and then waiting further, for the years it frequently takes to achieve a specific legislative restoration -- Intro 22 will provide a means of preventing such dismantling of New York City's civil rights protections from occurring in the first place.

[10] *Meyer v. Holley,* 537 U.S. 280, 123 S.Ct. 824 (2003).

[11] *E.g., Halprin v. The Prairie Single Family Homes,* 388 F.3d 327 (7th Cir. 2004); *King v. Metcalf 56 Homes Assoc.,* 2004 U.S. Dist. Lexis 22726 (D. Kan. 2004).

The Principle of Independent Construction Has a Long History

And Will Not Tax Judicial Competence

This principle of independent construction should not be controversial. Indeed, more than 25 years ago, Supreme Court Justice William Brennan highlighted the importance of local vigilance in the defense of civil rights, noting particularly that Supreme Court decisions "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[12] He cited approvingly the fact that "examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, *even where the state and federal constitutions are similarly or identically phrased*" (emphasis supplied).[13]

The current habit of automatically relying on interpretations of state or federal law is exactly the opposite of the practice recommended by Justice Brennan. As he wrote in the context of state constitutional provisions, state court judges "do well *to scrutinize* constitutional decisions by federal courts, for *only if they 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*" (emphasis supplied).[14]

---

[12] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 502 (1977).

[13] *Id.* at 500.

[14] *Id*. at 502.

Any concern that independent construction would pose a new or difficult problem for the judiciary is misplaced. When Intro 22 provides that "[i]nterpretations of federal and New York State civil and human rights laws shall not be used to limit or restrict the provisions of this title from being construed more liberally than those laws to accomplish the purposes of this title,"[15] it acts consistently with a long tradition that recognized federal civil rights law as a floor below which state and local enactments cannot fall, not a ceiling above which those enactments cannot rise. There are explicit provisions disclaiming any such preempting federal law effect in the public accommodations and employment sections of the Civil Rights Act of 1964,[16] in the Fair Housing Act,[17] and in the Americans With Disabilities Act.[18] That is, Congress has anticipated over the last 40 years that federal law would co-exist with state and local laws that provided more and different coverage.

It is a fundamental task of a court to use its best judgment to determine whether plaintiff's proposed "Interpretation A," or defendant's proposed "Interpretation B," or any of a multitude of other interpretations that the court may identify, best fulfills the purpose of the statute under examination. The provision of Intro 22 in question requires a court to do nothing more than engage in that process with due regard for the underlying purposes of the law.

[15] Proposed Intro 22-A, §7.

[16] 42 U.S.C. §2000a-6(b) and 42 U.S.C. §2000e-7, respectively.

[17] 42 U.S.C. §3615.

[18] 42 U.S.C. §12201(b).

Conclusion

As civil rights retrenchment continues and deepens on the national level, Intro 22 presents an opportunity for the City Council to halt the erosion here in New York City and vindicate its history as a national civil rights leader. It draws on longstanding civil rights principles, and deserves to be passed without further delay.