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COMMITTEE ON CIVIL RIGHTS

Council Member Darlene Mealy, Chair

March 8, 2016

Proposed Int. No. 805-A: By Council Members Dromm, Lander, Chin, Johnson, Mendez, Richards, Rosenthal and Menchaca

Title: A Local Law to amend the administrative code of the city of New York, in relation to expanding the protections of the city of New York human rights law with regard to public accommodations, and making certain technical corrections.

Proposed Int. No. 814-A: By Council Members Lander, Johnson, Rosenthal and Lancman

Title: A Local Law to amend the administrative code of the city of New York, in relation to construction of the New York City human rights law.

Proposed Int. No. 818-A: By Council Members Mealy, Lander, Johnson, King, Mendez, Rosenthal and Menchaca

Title: A Local Law to amend the administrative code of the city of New York, in relation to the provision of attorney's fees under the city human rights law.

Int. No. 819: By Council Members Mendez, Lander, Chin, Johnson, Rosenthal and Menchaca

Title: A Local Law to amend the administrative code of the city of New York, in relation to the repeal of subdivision 16 of section 8-107 of such code relating to the applicability of provisions of the human rights law regarding sexual orientation.

Proposed Int. No. 832-A: By Council Members Williams, Cumbo, The Speaker (Council Member Mark-Viverito), Lander, Eugene, Gentile, Johnson, Mendez, Richards, Wills, Rosenthal and Rose

Title: A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination in housing accommodations on the basis of an individual's status as a victim of domestic violence.

I. INTRODUCTION

On Tuesday, March 8, 2016, the Committee on Civil Rights, chaired by Council Member Darlene Mealy, will hold a hearing to vote on Proposed Introductory Bill Number 805-A ("Int. No. 805-A"), a Local Law to amend the administrative code of the city of New York, in relation to expanding the protections of the city of New York human rights law with regard to public accommodations, and making certain technical corrections, Proposed Introductory Bill Number 814-A ("Int. No. 814-A"), a Local Law to amend the administrative code of the city of New York, in relation to construction of the New York City human rights law, Proposed Introductory Bill Number 818-A ("Int. No. 818-A"), a Local Law to amend the administrative code of the city of New York, in relation to the provision of attorney's fees under the city human rights law, Introductory Bill Number 819 ("Int. No. 819"), a Local Law to amend the administrative code of the city of New York, in relation to the repeal of subdivision 16 of section 8-107 of such code relating to the applicability of provisions of the human rights law regarding sexual orientation, and Proposed Introductory Bill Number 832-A ("Int. No. 832-A"), a Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination in housing accommodations on the basis of an individual's status as a victim of domestic violence. The Committee held hearings on earlier versions of the bills. During these hearings testimony was submitted and heard from the New York City Commission on Human Rights ("the Commission"), advocates, and other interested parties.

II. BACKGROUND

The New York City Human Rights Law ("HRL"), embodied in the New York City Charter and title eight of the New York City Administrative Code, is one of the most expansive and comprehensive human rights laws in the nation. The HRL protects a number of classes of

persons from discrimination in the areas of employment, housing, public accommodations, and more.[1] Protected classes covered under the HRL include race, national origin, disability, sexual orientation, alienage or citizenship status, gender, partnership status, age, and others.[2]

While the HRL is comprehensive, there is potential to strengthen it by including additional protections. Int. No. 805-A would extend the HRL's public accommodations provisions to cover franchisors, franchisees, and lessors of public accommodations, and would update the language of the law to entitle any person to full and equal enjoyment of public accommodations, on equal terms and conditions. Int. No. 805-A would also ensure that both access to, and advertisements for, public accommodations would be protected for anyone who is actually, or perceived to be, a member of a protected class. Int. No. 814-A would provide guidance for interpreting the HRL by directing that exemptions from the general provisions of the law should be interpreted narrowly and by referring to three significant court decisions that have given the law an independent construction, as required by the 2005 Restoration Act. Int. No. 818-A would expand the already existing attorney's fees provision in the HRL to apply to complaints brought before the Commission. Int. No. 818-A would also require all attorney's fees awarded by courts or the Commission to be based on an hourly market rate charged by attorneys of similar skill and experience practicing in New York County, which are the highest rates in New York City. Int. No. 819 would repeal certain limitations on the HRL's protections against discrimination on the basis of sexual orientation. Int. No. 832-A would protect an individual from discrimination in housing accommodations, based on their status as a victim of domestic violence, a sex offense, or stalking.

[1] N.Y.C. Admin. Code §8-101 *et se.q*
[2] Id.

III. ANALYSIS OF LEGISLATION

i. Int. No. 805-A

The HRL currently prohibits anyone who owns, leases, runs or manages a place of public accommodation (such as a store, restaurant, or government agency when it acts as a public accommodation), or his or her employees, from denying someone access, for discriminatory reasons, to the product or benefit being offered to the public. Int. No. 805-A would amend that law to add three types of people to that list of those who cannot engage in discriminatory conduct: anyone who buys a franchise, sells a franchise or leases space to a provider of public accommodations.

Int. No. 805-A also would update the language of the public accommodations provision to confirm that its ban on discrimination is broad. The revised language makes explicit that it is illegal to offer a person who is or is perceived to be a member of a protected class the same benefits, services, or privileges as others, but in such a way that they do not receive "the full and equal enjoyment" of those benefits on "equal terms and conditions." Int. No. 805-A also would amend the current law for consistency: Under the revised language, every person who is actually, or is perceived to be, in a protected class is protected. This is the phrase already used for most of the public accommodation protections under the current HRL, but for certain kinds of advertisements the current law instead protects any person "belonging to, purporting to be, or perceived to be" part of a protected class. Int. No. 805-A also would make a technical correction to the existing law, replacing an erroneous use of "subdivision" with the correct word "section."

Int. No. 805-A would take effect 120 days upon enactment.

ii. Int. No. 814-A

Over at least the last 25 years, the Council has sought to protect the HRL from being narrowly construed by courts, particularly through major legislation adopted in 1991 and 2005.[3] These actions have expressed a very specific vision: a Human Rights Law designed as a law enforcement tool with no tolerance for discrimination in public life. The 2005 Restoration Act[4] provided that the HRL is to be interpreted liberally and independently of similar federal and state provisions to fulfill the "uniquely broad and remedial" purposes of the law. The Act amended the HRL's liberal construction provision, Administrative Code § 8-130, to accomplish this goal. Some courts have recognized and followed this vision, but others have not, and many areas of the law remain as they were before the 2005 Restoration Act because they have not been scrutinized to determine whether they are consistent with the uniquely broad requirements of the HRL.

First, Int. No. 814-A would complement the liberal construction requirement in § 8-130 by directing that exemptions from the HRL's general provisions be construed narrowly in order to maximize deterrence of discriminatory conduct.

Second, Int. No. 814-A would cite three cases—*Albunio v. City of New York*, 16 N.Y.3d 472 (2011), *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29 (1st Dep't 2011), and the majority opinion in *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dep't 2009)—that are important for their understanding and interpretation of the Restoration Act, including its strengthening of the liberal construction provision of the HRL. Highlighting these cases (1) would reaffirm that courts must apply the liberal construction provisions in every case

[3] *See* Local Law No. 39 (1991); Local Law No. 85 (2005); *see also* Craig Gurian, "A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law," 33 Fordham Urb. L.J. 255 (2006).
[4] Local Law No. 85 (2005).

and with respect to every issue; (2) would illustrate best practices when engaging in the required analysis; (3) would endorse the legal doctrines where they were developed pursuant to liberal construction analyses; and (4) would accelerate the process by which other doctrines inconsistent with the commands of Restoration Act are abandoned.

The examples from the cases cited below are illustrative, not comprehensive.

Broad and Independent Construction

As noted, Int. No. 814-A would recognize three cases as having given the HRL the independent construction required by the Restoration Act—*Albunio*, *Bennett*, and the majority opinion in *Williams*.

In *Albunio*, the New York Court of Appeals recognized that the 2005 Restoration Act required it to interpret an anti-retaliation provision of the HRL liberally. The court quoted the Council's finding from the Restoration Act that the HRL "'has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law,'"[5] concluding that § 8-130 required that the anti-retaliation provision contained in the HRL had to be construed, "like other provisions of the City's Human Rights Law," "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[6]

In *Bennett*, the Appellate Division, First Department, reexamined the application of a federal summary judgment burden-shifting procedure, known as the *McDonnell Douglas* analysis, to claims brought under the City's HRL. Although the court ultimately concluded that a version of the *McDonnell Douglas* analysis may be applied to HRL claims, the court first

[5] *Albunio*, 16 N.Y.3d at 477, *quoting* Local Law No. 85 § 1 (2005).
[6] *Id.* at 477-78.

satisfied the requirement of the Restoration Act by evaluating the framework to ensure that it comported with the "uniquely broad and remedial purposes of the [HRL]."[7] *Bennett* provided, among other things, important reconfirmation that there are no provisions of the law or judge-made doctrines that stand outside the liberal construction requirements of § 8-130. *Bennett* found that:

> [T]he identification of the framework for evaluating the sufficiency of evidence in discrimination cases does not in any way constitute an exception to the section 8-130 rule that all aspects of the City HRL must be interpreted so as to accomplish the uniquely broad and remedial purposes of the law . . . and for [the court] to create an exemption from the sweep of the Restoration Act for the most basic provision of the City HRL—that it is unlawful "to discriminate"—would impermissibly invade the legislative province.[8]

Bennett altered the way that courts use *McDonnell Douglas* analysis for deciding summary judgment motions in discrimination cases under the HRL and provided a reminder that *McDonnell Douglas* is only one of the evidentiary routes available to plaintiffs.

Third, in the majority opinion in *Williams*, the Appellate Division, First Department, held that sexual harassment need not rise to the level of "severe and pervasive" to invoke the HRL's protections against gender discrimination, even though that would have been the federal standard for sexual harassment. The court's analysis of the HRL standard as independent of the federal standard thus fulfilled the Restoration Act's requirement that the City's HRL be interpreted independently of similar federal and state laws.[9] As the majority opinion explained,

> [T]he 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

[7] *Bennett*, 92 A.D.3d at 34-35.
[8] *Bennett*, 92 A.D.3d at 34-35.
[9] *Williams*, 61 A.D.3d at 73.

> 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.[10]

The court wrote that the liberal construction provision was envisioned as "obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law."[11] As the court further explained,

> While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, section 8-130's specific *construction* provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions."[12]

Thus, "areas of law that have been settled by virtue of interpretations of federal or state law 'will now be reopened for argument and analysis . . . . As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law . . . .'"[13] The *Williams* court found that the HRL's text and legislative history represent a legislative desire that the HRL "'meld the broadest vision of social justice with the strongest law enforcement deterrent.'"[14]

Development of Legal Doctrine Reflecting Those Principles

Having correctly understood and interpreted the Restoration Act, the cases developed legal doctrine accordingly. Some of that doctrine reflects determination of specific issues.

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[10] *Id.* at 67-68 (internal footnote omitted).
[11] *Id.* at 74.
[12] *Id.*, *quoting* Craig Gurian, "A Return to Eyes on the Prize," 33 Fordham Urb. L.J. at 280.
[13] *Id.* at 77 n.24, *quoting* Craig Gurian, "A Return to Eyes on the Prize," 33 Fordham Urb. L.J. at 258 (first alteration in *Williams*).
[14] *Id.* at 68, *quoting* Craig Gurian, "A Return to Eyes on the Prize," 33 Fordham Urb. L.J. at 262.

For example, *Albunio* held that "opposition" to discrimination under the HRL can be established on limited evidence, with a jury given broad range to infer that the plaintiff was "in substance" conveying the idea that a third party had been discriminated against.[15]

And *Williams* concluded that the question of the "severity" or "pervasiveness" of harassment is relevant only to the question of damages, not to liability under the HRL.[16] *Williams* also stated that an affirmative defense is available to a covered entity to show that the conduct complained of consisted of nothing more than petty slights and trivial inconveniences, but provided that this defense is limited to "truly insubstantial" cases.[17] *Williams* further elaborated on the uniquely broad coverage of the HRL's retaliation provision, concluding that "no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude . . . that such conduct was . . . 'reasonably likely to deter a person from engaging in protected activity.'"[18] *Williams* also rejected the U.S. Supreme Court's 2002 narrowing of the doctrine of continuing violations,[19] holding that the narrowing was inapplicable to the HRL.[20] Accordingly, all types of discriminatory conduct, including what the Supreme Court had characterized as "discrete" actions,[21] continue to be eligible to be treated as continuing violations.[22] In restoring the broad scope of the continuing violation doctrine, the *Williams* court wrote that:

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[15] *Albunio*, 16 N.Y.3d at 478-79.
[16] *Williams*, 61 A.D.3d at 76.
[17] *Id.* at 80.
[18] *Id.* at 71, *quoting* New York City Admin Code § 8-107(7).
[19] *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).
[20] *Williams*, 61 A.D.3d at 72-73.
[21] Discrete actions include actions such as a failure to promote, or a change in assignment, or a reduction in pay. *Williams* explained that different types of discrimination could combine to constitute a continuing violation—for example, an instance of harassment outside of the limitations period and a different type of gender-based discrimination within the limitations period. *Id.* at 81 n.31.
[22] *See id.* at 72-73.

> [T]he Restoration Act's uniquely remedial provisions are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period.[23]

These cases do not just establish specific ways in which the HRL differs from its federal and state counterparts; they also illustrate a correct approach to liberal construction analysis and then develop legal doctrine accordingly. It is therefore important for courts to examine the reasoning of the cases—including their extensive discussions of why the U.S. Supreme Court's analysis can be inadequate to serve the purposes of the HRL—and then for courts to employ that kind of reasoning when tackling other interpretative problems that arise under the HRL. Finally, Int. No. 814-A would remind courts that legal doctrine might need to be revised to comport with the requirements of § 8-130 of the Administrative Code.

Int. No. 814-A would take effect immediately upon enactment.

iii. Int. No. 818-A

Int. No. 818-A affects attorney's fee awards both in front of the Commission and in the courts. Regarding the Commission, currently, attorney's fees are not included in the enumerated list of awards the Commission may include in an order.[24] Int. No. 818-A would allow the Commission to include reasonable attorney's fees, expert fees and other costs in that list. If the Commission decides to award the complainant reasonable attorney's fees, the Commission may consider factors in setting the amount such as the novelty or difficulty of the issues presented, the

[23] *Id.* at 73.
[24] Pursuant to NYC Admin Code § 8-120, the awards the Commission may include in an order include, but are not limited to hiring, reinstatement or upgrading of employees; back pay and front pay; and payment of compensatory damages to the person aggrieved by such practice or act.

skill and experience of the complainant's attorney, and the hourly rate customarily charged by attorneys of similar skill and experience litigating similar cases in New York County.

As for the courts, the HRL allows courts to award reasonable attorney's fees and costs to a party that prevails in a discrimination claim brought under the HRL.[25] However, the law does not explicitly mention expert costs. Int. No. 818-A would make it explicit that expert fees may also be awarded to a prevailing party.

Moreover, currently, courts hearing cases in New York County—i.e., Manhattan—that award attorney's fees often will factor in hourly rates that are higher than those factored in by courts hearing similar cases outside of New York County. This difference both gives incentives to attorneys practicing outside of New York County to take on cases brought in New York County and discourages attorneys practicing within New York County from taking cases outside of New York County. To equalize the hourly rate discrepancy and to support cases being brought in the proper venue, Int. No. 818-A directs courts to base attorney's fee awards on the market rate charged by attorneys of similar skill and experience litigating similar cases in New York County. As noted, Int. No. 818-A similarly directs the Commission to consider the hourly rate charged by attorneys of similar skill and experience litigating similar cases in New York County when awarding attorney's fees.

Int. No. 818-A would take effect immediately upon enactment.

iv. Int. No. 819

Int. No. 819 would repeal Administrative Code § 8-107(16). That provision addresses how the HRL's protections against discrimination on the basis of sexual orientation should be construed, providing that the HRL should not be read to (a) restrict an employer's right to insist

[25] *See* NYC Admin Code § 8-502.

that an employee meet bona-fide job qualifications; (b) authorize or require affirmative action on the basis of sexual orientation; (c) limit or override any exemptions from the provisions of the HRL; (d) make lawful any act that violates the New York Penal Law; or (e) "[e]ndorse any particular behavior or way of life."[26]

These limitations single out sexual orientation; they do not apply to any other class protected by the HRL. The limitations were added in 1986 in the same local law that added protections based on sexual orientation,[27] apparently to address concerns and help gather support for the new sexual orientation protections. However, in 2016 this provision singling out sexual orientation protections is outdated and unnecessary. For instance, the Penal Law's prohibition against consensual sodomy, which was in effect when the limitations were adopted in 1986, was repealed by the State Legislature in 2000.[28] Other portions of the text that Int. No. 819 would repeal are unnecessary because they merely duplicate more general provisions in the HRL that apply without singling out sexual orientation or any other protected class.

Int. No. 819 would take effect immediately upon enactment.

v. Int. No. 832-A

Int. No. 832-A would amend the HRL to make it an unlawful discriminatory practice for landlords and other agents of real estate to refuse to sell, rent or lease, or otherwise deny or withhold an interest in a housing accommodation, because of an individual's actual or perceived status as a victim of domestic violence or as a victim of sex offenses or stalking. This protection from discrimination for victims of domestic violence, sex offenses or stalking, would not apply to housing accommodations that are not publically-assisted accommodations and are within an

[26] Administrative Code § 8-107(16).
[27] *See* Local Law No. 2 (1986).
[28] N.Y. Laws 2000, c. 1, § 6 (repealing N.Y. Penal Law § 130.38 prohibiting consensual sodomy).

owner-occupied building with only one or two units if such accommodations were not publically advertised, or to the rental of a room within a non-publically assisted accommodation that is occupied by the owner of such accommodation. This exemption would essentially cover smaller owner-occupied homes. Int. No. 832-A would not prohibit landlords or real estate agents from evicting a tenant for reasons other than such tenant's actual or perceived status as a victim of domestic violence, sex offense or stalking.

Int. No. 832-A would take effect 120 days upon enactment.