DISABILITY RIGHTS LAW
FOR
LABOR & EMPLOYMENT ATTORNEYS
IN
NEW YORK

by
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Labor and employment attorneys need to be aware of disability rights laws at the national, state, and local levels, not only to advise clients properly, but also to comply with their own obligations as employers and places of public accommodation. Those of us who have disabilities also need to be aware of our own rights and of how to assert them appropriately. This article is intended to help you meet these needs. For a broader discussion of disability rights, see my chapters and others in the Fourth Edition of the New York State Bar Association's Representing People with Disabilities, scheduled for publication during the fall of 2012.

People with disabilities are America's largest, most diverse, and fastest-growing minority group -- one anyone can join at any moment. Most discussions of human rights of this group focus on the Americans with Disabilities Act (ADA)[1], yet other laws at the federal,[2] state, and local levels sometimes recognize greater rights, and provide broader coverage and/or better remedies. The ADA explicitly does not preempt such state or local laws.[3] The United States Supreme Court has recognized that "state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress."[4] In particular, as detailed below, the New York State Human Rights Law (SHRL)[5] "provides protections broader than the ADA; and the … [New York City Human Rights Law (CHRL)[6]] is broader still."[7] The "bottom line" varies with the laws of overlapping jurisdictions. Some of these laws, from the ADA itself to local laws, have seen significant changes in recent years. This article highlights how attention to local laws throughout New York State is important both to those representing people with disabilities and to those seeking to avoid violating those laws.

While, with the exception of housing discrimination,[8] the acts prohibited by the respective federal, State, and City laws each cover a wide range of issues, from discriminatory hiring practices, to denial of access to public accommodations,[9] the relative strengths of the City, State, and federal laws are evidenced not only in their respective definitions of the term "disability" but also in substantive and procedural requirements, as well as in the availability of remedies.

The New York State Court of Appeals recognizes:

> we must be guided by the Local Civil Rights Restoration Act of 2005 (LCRRA), enacted by the City Council "to clarify the scope of New York City's Human Rights Law," which, the Council found "has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law" (Local Law No. 85 [2005] of City of NY § 1). The LCRRA, among other things, amended Administrative Code § 8-130 to read:
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> > "The provisions of this title [i.e., the New York City Human Rights Law] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."
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> The application of the LCRRA provision … is clear: we must construe … provisions of the City's Human Rights Law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.[10]

Both leading up to and in the wake of this recognition, the Appellate Division, First Department, has issued a series of significant rulings, followed as well by the Second Department; in the first of these, that First Department held that:

> it is clear that interpretations of state or federal provisions worded similarly to City HRL provisions may be used as aids in interpretation only to the extent that the counterpart provisions are 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" (§ 1), and only to the extent that those state or federal law decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law.

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The Council directs courts to the key principles that should guide the analysis of claims brought under the City HRL:

> "discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation" (Committee Report, 2005 NY City Legis Ann, at 537).[11]

Federal courts have recognized the need to analyze New York City Human Rights Law claims in this light as well.[12]

Key issues covered below are: Who has a disability? What entities have what obligations with respect to people with disabilities? What procedures and remedies apply?

Although the focus of this article is on the significance of some local and State laws, any comparative analysis must include at least a brief review of the law – the ADA – to which local laws are being compared. More detailed coverage of the ADA is provided in NYSBA's Representing People with Disabilities.

Who Has a Disability?

ADA

To be covered under the ADA, a person must have "a physical or mental impairment that substantially limits one or more major life activities of such individual;" have a "record of such an impairment;" or be "regarded as

having such an impairment".[13] Although these "prongs" of the definition have not changed,[14] the ADA Amendments Act expressly repudiated Supreme Court interpretations of some of the terms, now setting forth definitions and rules of construction in some detail in the amended ADA.[15]

> [M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The term

> also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Further,

> [a]n individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

However, with respect to the "regarded as" prong – but not as to actual disability or a record of such disability – a person regarded as having only a "transitory or minor" impairment is not covered by the ADA. "A transitory impairment is an impairment with an actual or expected duration of 6 months or less."

To make even clearer how far the Supreme Court had strayed from Congress' original intent, the ADA Amendments Act added the following rules of construction:

> The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.[16]

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)

(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph

> (I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
>
> (II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

With respect to employment, a person who currently is engaging in the use of illegal drugs is not covered and an employer may prohibit use, or being under the influence, of illegal drugs or alcohol at the place of employment.[17]

Definitions of “auxiliary aids and services” and “State” were retained, but relocated.[18]

New York State Human Rights Law

The New York State Human Rights Law (SHRL) contains a different definition of “disability”:

> 21. The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.[19]

The SHRL’s exclusive list of types of impairments “resulting from” certain conditions, use of the words “prevents” and “normal” in the phrase “prevents the exercise of a normal bodily function” and alternate requirements for clinical diagnosis may make that law less inclusive in its definition of “disability” than is the reinvigorated ADA, except, perhaps, as to “transitory and minor” impairments. With respect to employment, the SHRL’s very definition of the word “disability” is even more “limited” – requiring the person seeking relief to prove that, were reasonable

accommodations[20] provided, the condition "would not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held." The employer or prospective employer has "undue hardship" as an affirmative defense.[21] Among factors to be considered in denying an accommodation are "the 'hardships', costs, or problems it will cause for the employer, including those that may be caused for other employees."[22] The ADA Amendments Act disengaged the term "qualified individual" from the definition of "disability" and requires that only "essential functions" (as opposed to "activities" under the SHRL) be considered.[23] Contrast complainant's burdens, beyond defeating a summary dismissal motion,[24] under the SHRL with burdens under the CHRL, discussed further below.

Like the ADA, the SHRL (as interpreted by the New York State Division of Human Rights (SDHR)) does not require reasonable accommodation in the employment context for current users of illegal drugs and such individuals may be terminated;[25] the SHRL does protect a person with alcoholism if that person cam perform "in a reasonable manner the activities involved in the job or occupation sought or held."[26]

Some SHRL amendments highlighting specific types of disabilities or potentially disability related conditions,[27] by focusing on particular issues, may call into question the coverage of the basic definition quoted above.

Local Human Rights Laws – New York City

Several localities around the State prohibit disability discrimination. Most use definitions similar to those in federal or State law,[28] although, as noted below, some provide superior rights and remedies. New York City, the home, workplace, school, commercial center, and/or visitor destination for far more people than any other locality, has been aggressive in defining "disability" more broadly – and simply -- than do federal or State laws.[29] The New York City Human Rights Law (CHRL) states:

> 16. (a) The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.
>
> (b) The term "physical, medical, mental, or psychological impairment" means:

> (1) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or
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> (2) a mental or psychological impairment.
>
> (c) In the case of alcoholism, drug addiction or other substance abuse, the term "disability" shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.[30]

Section 8-102(16)(c), relating to illegal drug and alcohol abuse, is the only provision in which the CHRL is less inclusive than its federal and State counterparts.[31] The latter limit such coverage only in an employment context and, again, the SHRL does not exclude a person with alcoholism even with respect to employment, so long as the person can perform "in a reasonable manner the activities involved in the job or occupation sought or held."

Discrimination based on "perceived" membership in a suspect class (including disability) is prohibited throughout the CHRL litany of unlawful discriminatory practices.[32]

The section-by-section analysis accompanying the City Council report on the extensive 1991 CHRL amendments that included the definition above, in discussing the change from "handicap" to a new term -- "disability" -- and its definition, stated:

> The definition is amended to clarify that any person with a physical, medical, mental or psychological impairment or a history or record of such an impairment is protected by the law. Those impairments are defined broadly so as to carry out the intent that persons with disabilities of any type be protected from discrimination.[33]

This was a direct response to more restrictive language in the ADA and in federal regulations then being developed under the ADA.[34] Under the CHRL,

anyone with an impairment – substantial or not, corrected or not, transitory or not -- is covered, as are those perceived to have a disability. As with the ADA, people also are protected by the CHRL from discrimination on the basis of their relationship with someone who has or had an actual or perceived disability.[35]

As discussed in "Reasonable Accommodation" below, the burden of proof under the CHRL rests with the entity refusing an accommodation or asserting "undue hardship".

WHAT IS A COVERED ENTITY AND WHAT ARE ITS OBLIGATIONS?

The ADA, CHRL, and SHRL each prohibit discrimination in a wide array of employment contexts (from application to discipline, from evaluations to working conditions, from training opportunities to employer-sponsored social events, from physical access to reasonable accommodation), as well as in the provision of and access to goods, services and programs by both governmental and non-governmental entities.[36] While the City and State laws prohibit housing discrimination,[37] the ADA (except for public housing programs and land use planning) does not address most housing-related issues, since those matters were covered well in the Fair Housing Amendments Act of 1988 (FHAA),[38] though, even there, some CHRL requirements are stronger and remedies better.[39] The SHRL also explicitly makes unlawful employment and union related discrimination based on genetic information;[40] it similarly prohibits credit discrimination.[41]

Employment

In the employment context,[42] a "covered entity" prohibited from discriminating on the basis of disability under the ADA is "an employer, employment agency, labor organization, or joint labor-management committee,"[43] with an employer defined as one employing 15 or more people.[44] The SHRL prohibits employment discrimination in varying contexts by employers, labor organizations, employment agencies, and, in some circumstances, licensing agencies or joint labor-management committees,[45] with the term "employer" covering those employing 4 or more.[46] The CHRL prohibits employment discrimination in a wide array of

contexts by an employer, labor organization, employment agency, or joint labor-management committee -- or by an employee or agent of those entities.[47] Although employers of 4 or more are covered, independent contractors may be counted.[48] Law offices are covered as employers.[49]

Places of Public Accommodation

Law offices and other law-related venues are public accommodations under federal, State, and City law.[50] This requires both an avoidance of discrimination and action to modify policies, programs, activities, and venues, as discussed below in making distinctions from "reasonable accommodations". When facilities are being built or renovated, the ADA Accessibility Guidelines[51], as well as applicable State and local building codes must be consulted.

Local Human Rights Laws Around New York State

New York City is not the only locality recognizing rights and providing remedies independent from those in federal and State law. Each local law, like those discussed only in part here, must be reviewed in detail when it may be pertinent to a given situation. For example, the Albany City Code's Omnibus Human Rights Law[52], while incorporating by reference the SHRL definition of "place of public accommodation," does not include either the examples or the exclusions added by Chapter 394 of the 2007 Laws of New York. It also has no reference to "reasonable accommodation", subsuming that under its general nondiscrimination requirements. Westchester County's Human Rights Law[53] recognizes rights of people with disabilities similar – but not identical – to those recognized in the SHRL. For example, "reasonable accommodation" is defined only with respect to employment. The human rights provisions of Nassau County's Administrative Code[54] track the SHRL, with some differences, including a broad, but brief, treatment of public accommodations.[55] Again, each of these laws, as well as their counterparts in other localities, must be scrutinized as applicable to determine where they provide a "bottom line" different from that in federal and State law.

"Reasonable Accommodation"

The right to "reasonable accommodation" often is misconstrued as coextensive with one of multiple aspects of the right to be free from discrimination – the aspect that requires covered entities to modify their policies, practices and premises; it sometimes even is misconstrued as the only right under laws prohibiting disability discrimination. Under the ADA, "reasonable accommodation" is defined and required (as only one of several items on a non-exclusive list) only with respect to employment.[56] Private sector places of public accommodation are prohibited from discriminating against people with disabilities under Title III of the ADA.[57] That Title does not use the term "reasonable accommodation", but, after a sweeping general prohibition of disability discrimination, includes, in a non-exclusive list of specific prohibitions:

> "a failure to make reasonable modifications in policies, practices, or procedures, …. unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations;"[58]
>
> "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently … unless the entity can demonstrate" that doing so would cause a fundamental alteration "or would result in an undue burden;"[59] and
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> "a failure to remove architectural …, [structural]communication …, and transportation barriers … where such removal is readily achievable" and,
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> "where an entity can demonstrate that the removal of a barrier … is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable."[60]

Note the applicability of "undue burden" and "readily achievable" standards; the former is not defined,[61] but the latter is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[62] Contrast this with the CHRL approach to reasonable accommodation, discussed below.

The SHRL has similar provisions.[63] The SHRL defines and requires "reasonable accommodation" in an employment context[64] and, in relation to places of public accommodation, requires modifications such as those

set forth above for ADA Title III.[65] The SHRL has been amended to adopt some ADA requirements for some places of public accommodation. In so doing, the State also adopted the ADA's "readily achievable" and "undue burden" standards.[66]

Under the CHRL, "reasonable accommodation" is not limited to employment or housing[67] and is in addition to the CHRL's extensive nondiscrimination provisions recognizing rights of people with disabilities,[68] so "any person prohibited by the provisions of … section [8-107] from discriminating on the basis of disability shall make reasonable accommodation" to the needs of people with disabilities and,

> where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense [i.e., it must be pleaded and proven] 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.[69]

"Unlike the State HRL, the issue of the ability to perform essential requisites of the job is not bound up in the definitions of disability or reasonable accommodation [under the CHRL]."[70] The CHRL defines "reasonable accommodation" as meaning "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business" and continues "[t]he covered entity shall have the burden of proving undue hardship."[71] The more limited "readily achievable" standard of the ADA and SHRL is not used. Considerations for determining "undue hardship," while similar to those used in the ADA and SHRL, apply only (for disability purposes) to the prohibited activities relating to employment and apprentice training programs.[72]

Again, it is important to bear in mind that, although "reasonable accommodation" is an important aspect of avoiding disability discrimination, none of the laws prohibiting such discrimination limits its approach to a requirement for "reasonable accommodation."

> The need for individualized inquiry when making a determination of reasonable accommodation is deeply embedded in the fabric of disability rights law. … Rather than operating on generalizations about people with disabilities, employers (and others) must make a clear, fact-specific inquiry about each individual's circumstance. … This good faith process is the "key mechanism for facilitating the integration of … [people with disabilities into society]."[73]

The interactive process promotes identification of appropriate and effective reasonable accommodations. The prospect of liability for a failure to engage in such a good faith process is an incentive for cooperative dialog to diminish resolution by litigation.[74]

WHAT REMEDIES ARE AVAILABLE?

ADA

Relief under the ADA is limited not only by Supreme Court neo-Federalism (not all of which was addressed in the ADA Amendments Act), but also by the terms of the statute itself. With respect to employment discrimination (Title I), an individual may file a complaint with the Equal Employment Opportunity Commission within prescribed time limits not exceeding 300 days after the alleged discrimination, or file suit in federal or state court within three years of the allegedly discriminatory act, seeking reinstatement of employment, back pay, attorney's fees and other relief, including compensatory and punitive damages in cases of intentional (not disparate impact) discrimination.[75] The addition of compensatory and punitive damages (though not for governmental entities), in the Civil Rights Act of 1991, was on a capped sliding scale, depending on the size of the employer.[76] That Act also added provisions for attorneys fees,[77] although the Supreme Court since has limited significantly opportunities for recovering attorneys fees.[78]

With respect to public accommodations (Title III), an aggrieved individual can seek injunctive relief, court costs and attorneys fees – but no monetary damages.[79] Discrimination in the provision of public services by governmental entities (Title II) is subject to the remedies available for violation of § 504 of the Rehabilitation Act of 1973,[80] discussed above.[81] Also noted above, the Eleventh Amendment does not bar monetary suits under Title II of the ADA against state governments with respect to the "constitutional right of access to the courts", protection against actual Constitutional violations, and, potentially, some other violations of Title II.[82]

New York State and City Laws

The CHRL and, in part, the SHRL, provide some remedies superior to those of the ADA. Administrative complaints may be filed within one year after the alleged discriminatory act with the New York City Commission on Human Rights (CCHR)[83] or with the State Division of Human Rights (SDHR)[84]. The CHRL also contains a substantial private right of action under an evidentiary standard consistent with the unique remedial purpose of the CHRL, with a three year statute of limitations, in which a full range of remedies, including compensatory and punitive damages, injunctive relief, costs, and attorneys fees, may be awarded.[85] The SHRL has a similar statute of limitations, although punitive damages and attorneys fees are not available, except in cases of housing discrimination, and the evidentiary standard is not as favorable to plaintiffs as is the CHRL's.[86] Unlike the ADA, the CHRL and the SHRL have no limitation on the amount of damages that may be sought. Government agencies are not exempt from suit under the CHRL, although designated representatives of the CCHR and the City's Corporation Counsel must be served with a copy of the complaint within ten days after commencement of a suit and prompt notice of claim requirements for suits against municipalities must be kept in mind .[87] The City itself may bring a "pattern or practice" suit, seeking a wide range of relief, including civil penalties.[88]

Other Local Laws Around New York State

Other localities have varying remedies – for violations of prohibitions that often are not identical to federal and State laws[89] – that may supplement and/or be superior to those in the ADA and/or SHRL. For example, a civil suit is possible for violation of Albany's Omnibus Human Rights Law, with damages and other relief in law and equity.[90] The Westchester Human Rights Commission is empowered to award compensatory damages ("including, but not limited to, actual damages, back pay, front pay, mental anguish and emotional distress"), as well as punitive damages (not to exceed $10,000), and to assess a civil penalty of up to $50,000 ($100,000 for a willful violation).[91] The Nassau County Commission on Human Rights may assess penalties ranging from $5000 to $20,000 in employment and public accommodation cases.[92]

CONCLUSION

Considering the many millions of people who live, work, study, use public accommodations (both governmental and non-governmental) in, or otherwise pass through, New York City and State each day -- and the fact that more than one in five Americans have disabilities -- it is essential for practitioners to look not only to the ADA, but also to the New York City Human Rights Law, similar county and municipal ordinances, the State Human Rights Law, the State Civil Rights Law, and common law, for recognition of rights of people with disabilities and for "independent avenues of redress."[93]

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[1] 42 U.S.C. §§ 12101-12213. To view the current text, with highlights showing the changes made by the ADA Amendments Act of 2008, (P.L. 110-325, 122 Stat. 3553, Sept. 25, 2008); see http://www.ada.gov/pubs/adastatute08markscrdr.htm (see especially, § 2 (Findings and Purposes)). Revised Equal Employment Opportunity Commission (EEOC) regulations regarding Title I of the ADA, 29 C.F.R. Part 1630, became effective in March of 2011. Revised Department of Justice regulations concerning Titles II (28 C.F.R. Part 35) and III (28 C.F.R. Part 36) of the ADA became effective March 15, 2011; see http://www.ada.gov/regs2010/ADAregs2010.htm. Although the ADA Amendments Act was not effective until January 1, 2009, the amendments "narrow application" of Supreme Court precedents repudiated by the amendments, even in cases arising before the effective date and "raise serious questions as to the continued viability of the type of approach taken in" non-precedential cases inconsistent with the amendments but cited in cases arising before the effective date. Geoghan v. Long Island Rail Road, N.Y.L.J. April 22, 2009 (E.D.N.Y. 06 CV 1435, April 9, 2009, Pollak, J.), available at http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202503548845.

[2] § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, (Section 504) and related statutory and regulatory provisions prohibiting disability discrimination by recipients of federal funds, should not be forgotten, although they will not be discussed further in detail here.

Similarly, the federal Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq., and comparable New York State legislation, Exec. Law §§ 292(21), (21-a), (21-b); § 296 (especially § 296(19), are of note, though they will not be considered further here.

Also, in 2008, the United States Department of Labor made substantial revisions to its regulations under the Family and Medical Leave Act (FMLA) significantly affecting people with disabilities. 29 C.F.R. Part 825. The FMLA will not be addressed further here, but provisions modifying eligibility and other requirements have a significant effect on the right of people with disabilities – and of those related to them -- to leave from

employment -- under that law -- to address those disabilities. Among the modifications are requirements for (1) follow-up medical visits otherwise unnecessary for people with chronic disabilities; and (2) following now unregulated employer rules for time and manner of notice, limitations on use of simultaneous paid (or even unpaid) leave (making FMLA leave impossible for many). Confidentiality of medical information also is significantly compromised under the new regulations. See http://www.dol.gov/dol/topic/benefits-leave/fmla.htm.

The United States in 2009 joined 141 other nations in signing the United Nations Convention on the Rights of Persons with Disabilities, available at http://www.un.org/disabilities/default.asp?id=150. Although the Convention itself does not create any rights, it obligates signatory states to promote rights of people with disabilities. See also http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf. The Senate ratification process is under way as this is written.

[3] 42 U.S.C. § 12201(b)

[4] University of Alabama Board of Trustees v. Garrett, 531 U.S. 356, 374, n. 9 (2001). In that case the Court found Eleventh Amendment immunity for states under the ADA. The Court subsequently found Congress validly had abrogated states' Eleventh Amendment immunity under Title II of the ADA with respect to provision of governmental programs and services, Tennessee v. Lane, 541 U.S. 509 (2004), although the case involved a criminal defendant who had to crawl up steps in a courthouse in which the State had failed to accommodate his disability; the Supreme Court's 5-4 decision has a narrow holding:

> Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts.
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> Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment.

Id. at 530-31, 533-34. Thus, Lane might not even extend to disability discrimination in voting rights. But see United Spinal Association v. Board of Elections of the City of New York, N.Y.L.J. Aug. 9, 2012 (S.D.N.Y., Batts, J.10 Civ. 5653, Aug. 8, 2012), available at http://www.nylj.com/nylawyer/adgifs/decisions/080912batts.pdf (granting summary judgment, finding "Defendants have failed to accommodate reasonably voters with disabilities.") See Press v. State Univ. of N.Y. at Stony Brook,, N.Y.L.J. Oct. 3, 2005, 24:3 (E.D.N.Y., 03 Civ. 2070, Spatt, J.), available at http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202502454444 (right to higher education not "fundamental" nor entitled to any more than "rational basis" analysis after Lane). In United States v. Georgia, 546 U.S. 151, 126 S.Ct. 877 (2006), it was alleged inter alia that Georgia had violated the Eighth Amendment, through its violation of the Fourteenth Amendment, by confining an inmate who uses a wheelchair in a 3 foot by 12 foot cell for 23-24 hours a day, where he could not turn his wheelchair or use the toilet or shower. The Supreme Court stated "insofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that actually violates the

Fourteenth Amendment, Title II validly abrogates state sovereign immunity." Georgia, 546 U.S. at 159 (emphasis in original). The Court noted that, on remand, the lower courts might find "actual constitutional violations (under either the Eighth Amendment or some other constitutional provision)". Id. It left open for initial determination on remand the extent to which violations of Title II that do not independently violate the Constitution might support a valid abrogation of sovereign immunity. Id. Relying on Georgia, Judge Swain of the Southern District of New York has denied summary judgment sought by New York State on Eleventh Amendment grounds in a suit by an inmate whose use of a wheelchair and prosthesis had been cited as bases for denying him participation in "shock incarceration" and work release programs. Hallett v. N.Y. State Dep't of Corr. Servs., 99 Civ. 5853 (S.D.N.Y. April 7, 2006), slip op. at 7. At the same time, Judge Swain, citing Garcia v. State Univ. of N.Y. Health Sciences Center, 280 F.3d 98, 111-112 (2001), noted the Second Circuit's approach to private suits against States for damages under the ADA, which requires a showing of "discriminatory animus or ill will" against people with disabilities (a standard used in determining violations under the Fourteenth Amendment) or a "motivating-factor analysis similar to that set out in Price Waterhouse v. Hopkins, 490 U.S. 228, 252-258 … (1989)". Hallett, slip op. at 7-8; but see Gross v. FBL Financial Services, Inc., 557 U.S. 167, 129 S.Ct. 2343 (2009), discussed at n. 36, infra. While "the Eleventh Amendment does not extend its immunity to units of local government," Garrett, 531 U.S. at 369, counties and municipalities are not subject to punitive damages under ADA Title II nor under § 504 of the Rehabilitation Act (29 U.S.C. § 794), since remedies in Title VI of the Civil Rights Act of 1964, on which § 504 and Title II remedies are based, are derived from contract law. Barnes v. Gorman, 536 U.S.101 (2002). New York City is immune by common law from punitive damages under its Human Rights Law (CHRL) (N.Y.C. Admin. Code §§ 8-101 - 8-703), Katt v. City of New York, 151 F. Supp.2d 313, 337-45 (S.D.N.Y. 2001), aff'd sub nom Krohn v. N.Y.C. Police Dep't, 372 F.3d 83 (2d Cir. 2004). There is no provision for punitive damages against New York State under its Human Rights Law (SHRL) (N.Y. Exec. Law §§ 290 –301 (Exec. Law)). The Eleventh Amendment does not bar enforcement of consent decrees. Frew v. Hawkins, 540 U.S. 431 (2004). Eleventh Amendment immunity may not apply to allegations of retaliation under the ADA, Roberts v. Pa. Dep't of Pub. Welfare, 199 F. Supp.2d 249 (E.D.Pa. 2002). Municipalities, even where protected from punitive damages, are not covered by the Eleventh Amendment and may be subject to compensatory damages, not only under antidiscrimination laws, but also under State tort law. See, Sayers v. City of New York, N.Y.L.J. Apr. 2, 2007, 26:1 (EDNY CV-04-3907, Mar. 21, 2007, Sifton, J.), available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=900005477596. Where federal law may provide advantages over State law, Eleventh Amendment issues might be avoided by filing a claim under the federal law in the New York State Court of Claims, in which the State has waived its sovereign immunity under N.Y. Court of Claims Act §§ 8, 9, although that Act's procedural (§ 10) and fee (§ 27) constraints make such a course problematic.

[5] N.Y. Exec. Law § 290 et seq.

[6] N.Y.C. Admin. Code § 8-101 et seq., available at http://public.leginfo.state.ny.us/menuf.cgi and at http://24.97.137.100/nyc/AdCode/entered.htm as Administrative Code §§ 8-101 – 8-703; it

may be helpful to view the substantial amendments enacted as Local Law 39 of 1991, available at http://www.antibiaslaw.com/sites/default/files/files/LL39.pdf, and as Local Law 85 of 2005, available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=441304&GUID=79DC9B4A-845F-4BDA-AA6C-D6F63F0C8A0B&Options=ID|Text|Attachments|Other|&Search=85 and at http://www.antibiaslaw.com/sites/default/files/files/RestorationAct_0.pdf, discussed at nn. 10-12 and accompanying text, infra. Subsequent amendments may be found through http://legistar.council.nyc.gov/Legislation.aspx and through http://www.antibiaslaw.com/nyc-human-rights-law/legislative-history. Administrative decisions interpreting the CHRL are available at http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library
(search under the City Commission on Human Rights (CHR) (elsewhere herein CCHR) and Office of Administrative Trials and Hearings (OATH)).

[7] Phillips v. City of New York, 66 A.D. 3d 170, 176, 884 N.Y.S. 2d 369 (1st Dep't 2009) (footnote and citation omitted).

[8] Except for public housing programs and land use planning, most housing-related issues are beyond the scope of the ADA, but are covered in the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3631 (FHAA).

[9] 42 U.S.C. §§ 12112, 12132, 12182; Exec. Law § 296; N.Y.C. Admin. Code § 8-107; but see N.Y.C. Admin. Code S 8-107(17) (making disparate impact actionable), highlighted by the New York State Court of Appeals as going beyond the SHRL, Levin v. Yeshiva Univ., 96 N.Y. 2d 484, 493, 730 N.Y.S.2d 15, 754 N.E.2d 1099 (2001). The ADA has significant coverage of public and private transportation (42 U.S.C. § 12141 et seq.; 42 U.S.C. § 12184), as well as of telecommunications (47 U.S.C. §§ 225, 611), but those areas -- also covered under City and State antidiscrimination laws -- will not be addressed in detail here.

[10] Albunio v. City of New York, 16 N.Y.3d 472, 477-78, 922 N.Y.S.2d 244 (2011); see Zakrzewska v. The New School, 14 N.Y. 3d 469, 479-82, 928 N.E. 2d 1035 (2010). The Local Civil Rights Restoration Act was intended as a ringing repudiation of an earlier Court of Appeals decision, McGrath v. Toys "R" Us, 3 N.Y.3d 421, 788 N.Y.S.2d 281, 821 N.E.2d 519 (2004), that had rejected a recovery of attorneys fees under the CHRL under a "catalyst" theory; the Council addressed this with an explicit amendment to § 8-502(f). The LCRRA was enacted as Local Law 85 of 2005 (see n. 6, supra). The N.Y.C. Council's Committee on General Welfare's August 17, 2005, report on this bill is available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=441304&GUID=79DC9B4A-845F-4BDA-AA6C-D6F63F0C8A0B&Options=ID|Text|Attachments|Other|&Search=85 and at http://www.antibiaslaw.com/sites/default/files/files/CommitteeReport081705.pdf. Congressional rejection of Supreme Court decisions, in Section 2 of the ADA Amendments Act of 2008, was similar to the New York City Council's rejection of McGrath. In both cases, legislative bodies were reminding courts of the intent of earlier legislation. See Geoghan, discussed in n. 1, supra, with respect to the ADA Amendments Act. Going beyond Geoghan, with respect to the Local Civil Rights Restoration Act,

> to the extent … provisions [of Local Law 85/05] are intended to "clarify" the legislative intent and construction of the City's Human Rights Law as originally enacted in 1991, they do not create new rights, but are consistent with the meaning and enforcement of pre-existing rights, and as such, are entitled to retroactive application.

Yanai v. Columbia University, 118343/03, Sup. Ct. N.Y. Co., July 11, 2006, slip op. at 4-5, 2006 N.Y. Misc. LEXIS 2407, available at http://decisions.courts.state.ny.us/fcas/FCAS_docs/2006JUL/30011834320031SCIV.PDF (citations omitted). See Nelson v. HSBC Bank USA, 87 A.D. 3d 995, 997-99 (2e Dep't 2011) (affirming dismissal under the SHRL, but reversing under the CHRL). Both the CHRL and the SHRL are applicable only where there has been an impact (not merely a decision) within the respective City or State borders. Hoffman v. Parade Publs., 15 N.Y.3d 285, 907 N.Y.S.2d 145 (2010).

[11] Williams v. New York City Housing Authority, 61 A.D. 3d 62, 65-81 (here, 66-67, 68), lv den 13 N.Y. 3d 702 (2009); see Phillips v. City of New York, 66 A.D. 3d 170, 174-90, 884 N.Y.S. 2d 369 (1st Dep't 2009); Vig v. New York Hairspray Co., L.P., 67 A.D. 3d 140, 145-47, 885 N.Y.S.2d 74 (1st Dep't 2009) ("We separate the analysis because the disability provisions of the City and State HRLs are not 'equivalent,' and require distinct analyses." 67 A.D. 3d at 147 (footnote omitted)). After Albunio, discussed in n. 10 and accompanying text, supra, the Second Department issued Nelson, 87 A.D. 3d 995, and the First Department, on December 20, 2011, Bennett v. Health Mgt. Sys., Inc., 92 A.D.3d 29 (narrowing the applicability of McDonnell Douglas v. Green, 411 U.S. 792 (1973), under the CHRL, particularly in summary judgment). In Bennett, the First Department concluded with a footnote (16) significant in understanding the narrow scope of exceptions under the CHRL:

> We cannot put this holding in absolute terms - there can be limited exceptions to the rule that emerge on a case-by-case basis – but we write here to underline that the exceptions are intended to be true exceptions (compare Williams, 61 AD3d at 73-80 [the rule is that any difference in treatment reflected by harassment is actionable gender-based discrimination, with narrowly drawn affirmative defense to "narrowly target concerns about truly insubstantial cases" designed with the goal of making certain to avoid "improperly giving license to the broad range of conduct that falls between severe or pervasive' on the one hand and a petty slight or trivial inconvenience' on the other, with emphasis on the need to permit borderline situations to be heard by a jury, and with finding that one could "easily imagine a single comment that objectifies women being made in circumstances where their comment would, for example, signal views about the role of women in the workplace and be actionable"] and Wilson v N.Y.P. Holdings, Inc., 2009 WL 873206, 2009 US Dist LEXIS 28876 [SD NY 2009] [ignoring the Williams holding and finding comments like "training females is like training dogs'" and "women need to be horsewhipped" to not be actionable]; Mihalik v Credit Agricole Cheuvreux North America, Inc., 2011 WL 3586060 [SD NY 2011] [wrenching the Williams reference to a "general civility code" out of context; inaccurately portraying the case as one whose principal concern was that too many victims of harassment were having the opportunity to be heard by juries, not the opposite; and

collecting and relying on some of the many cases that nominally acknowledge Williams but ignore its teaching, including Wilson]). As with Williams, it is our intention that a limited and narrow exception is not intended to be simply the new means by which an old status quo is continued.

In Fletcher v. Dakota, Inc., NY Slip Op 05398 (July 3, 2012), available at http://www.nycourts.gov/reporter/3dseries/2012/2012_05338.htm, the First Department relying on Williams and related cases, held individual coop board members could be liable for housing discrimination under the SHRL and CHRL, using a tort law analysis and repudiating its own decision in Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1 (2006).

[12] Loeffler v. Staten Island University Hospital, 582 F. 3d 268, 278 (2d Cir. 2009). See the pre-Local Civil Rights Restoration Act and pre-ADA Amendments Act Giordano v. City of New York, 274 F.3d 740, 753-55 (2001) (citations omitted):

> [T]he definitions of disability under the New York State Executive Law and the New York City Administrative Code are broader than the ADA definition. … Neither of these [CHRL, SHRL] definitions requires Giordano to show that his disability "substantially limits a major life activity." … [T]he New York Court of Appeals, whose construction of New York State law binds this Court, … has confirmed that the definition of a disability under New York law is not coterminous with the ADA definition. … [I]n the absence of any remaining federal claims, the appropriate analytic framework to be applied to discrimination claims based on a "disability" as defined by New York state and municipal law is a question best left to the courts of the State of New York. … Should this case come before New York courts on the state and municipal claims, we do not think that those courts should be bound, or think themselves bound, by principles of collateral estoppel or otherwise, to any findings or conclusions reached by the district court in its discussion of whether, as a matter of law, Giordano was qualified to perform the essential functions of his job…. We therefore vacate the district court's judgment dismissing with prejudice the state and municipal claims and instruct the court to dismiss them without prejudice so that the state courts may adjudicate those claims in their entirety if the plaintiff chooses to pursue them in those courts.

[13] 42 U.S.C. § 12102. Failure to object to evidence of disability has been held to prove that a person in question is regarded as having a disability. In People v. Brathwaite, 11 Misc.3d 918, 816 N.Y.S.2d 331 (Crim. Ct. Kings Co. 2006), Judge Wilson, citing 42 U.S.C. § 12102(2), noted that the criminal defendants each had presented evidence of a condition that case law indicated did not meet the ADA criteria, but observed: "However, this is a question of fact to be determined by either the finder of facts (i.e., a jury) or in this instance, the Court. See, Barnes [v. Northwest Iowa Health Center], 238 F. Supp. 2d [1053] at 1077 [ND Iowa 2002], distinguishing Moore [v. J.B. Hunt Transport, Inc., 221 F.2d 944 (7th Cir. 2000)]." In the absence of any objection by the People to defendants' evidence of disability, "the Court holds that Defendants … are both considered to be disabled under the definition of 42 USC 12102(2)(C). As such, both are entitled to not be denied participation in 'state services and benefits'." Brathwaite, 11 Misc.3d at 923-25. Accordingly, if the Kings County District Attorney could not make reasonable accommodation to defendants' disabilities in the community service portion of their respective criminal sentences by a date set by the Court, those community service

obligations would be deleted from their sentences. See, Hallett, discussed at n. 4, supra, concerning possible discrimination in denial of work release and "shock incarceration" to a State inmate due to his use of a wheelchair and prosthesis.

[14] Indeed, the definition had been developed in regulations under Section 504 of the Rehabilitation Act of 1973, prohibiting disability discrimination. Prohibitions of housing discrimination originally planned for the ADA were relocated to the faster moving Fair Housing Amendments Act of 1988, where the term "handicapped" effectively had the same definition. 42 U.S.C. § 3602(h); see the federal Air Carrier Access Act of 1986, 49 U.S.C. § 41705(a).

[15] 42 U.S.C. § 12102.

[16] See P.L. 110-325, Sept. 25, 2008, 122 Stat. 3553, § 2, codified at 42 U.S.C. § 12101.

[17] 42 U.S.C. § 12114.

[18] 42 U.S.C. § 12103.

[19] Exec. Law § 292(21).

[20] See Exec. Law § 292(21-e) and 9 N.Y.Comp. R. & Regs. § 466.11 (N.Y.C.R.R.), available at http://www.dhr.state.ny.us/law_and_regulation_generalregulations_466_11.html, and its appendix, available at http://www.dhr.state.ny.us/law_and_regulation_generalregulations_466_11_appendix.html .

[21] Exec. Law § 296(3).

[22] 9 N.Y.C.R.R. § 466.11(b)(i)(iii). Although within quotations, the term "hardship" is not defined. See n. 56, infra.

[23] 42 U.S.C. §§ 12111(8), 12112(a).

[24] See Phillips, 66 A.D.3d at 177-90; Bennett, discussed in n. 11, supra.

[25] 9 N.Y.C.R.R. § 466(11) (h). No statutory language supports this interpretation. See the discussion below concerning the CHRL's limited coverage of substance abusers.

[26] Exec. Law § 292(21).

[27] Exec. Law §§ 292(21-a), 292(21-b).

[28] See, e.g., Laws of Westchester County, Chap. 700, § 700.02(4); Nassau County Administrative Code, Chap. 21, Title C, § 21-9.2(e); Buffalo uses the SHRL definition, without the employment proviso, with respect to damage to property or physical injury motivated by bias (Code of the City of Buffalo, §§ 154.9 – 154.11), and a FHAA definition in cases of housing discrimination (§§ 154.13 et seq.). The Albany City Code, while prohibiting disability discrimination and incorporating by reference the SHRL definition of "place of public accommodation" (but giving its own definitions of other terms), does not define "disability" (§ 48-23 – § 48-27). For these and other local laws in New York State, see http://www.lawsource.com/also/usa.cgi?ny#Z9Q.

[29] Phillips, 66 A.D.3d at 176, 180-83.

[30] N.Y.C. Admin. Code § 8-102(16).

[31] This anomaly was the result of a vain, but adamant, hope of those who prevailed in Mayor Dinkins' Administration in 1991 that State and federal laws applicable in New York City would be changed to reflect this limitation.

[32] N.Y.C. Admin. Code § 8-107.

[33] P. 6 .

[34] Testifying on behalf of the Mayor, in explanation and support of the bill, the author pointed out to the City Council how more progressive interpretations of the then-current CHRL could be lost unless the City's definition of "disability" were made to be substantially different from that under federal law and unless other provisions were added to the City's law (e.g., Admin. Code § 8-107(15)). The Council's concurrence is reflected not only in the amended language itself, but also in the analysis quoted in the text accompanying n. 33, supra.

[35] 42 U.S.C. §§ 12112(b)(4), 12182(b)(1)(E); N.Y.C. Admin. Code § 8-107(20).

[36] 42 U.S.C. §§ 12111, 12112, 12132, 12181, 12182; N.Y.C. Admin. Code §§ 8-102, 8-107; Exec. Law §§ 292, 296. Even a community service program operated by a district attorney to enable criminal defendants to avoid or to limit incarceration has been held to fall under the term "state services and benefits," see, Brathwaite, discussed at n. 13, supra. A covered entity's policies also must reasonably accommodate people with disabilities. A decision in Maryland found a department store located in a mall may be required under Title III of the ADA to have an emergency evacuation plan that enables a person with a mobility impairment to evacuate safely not only from the store itself, but also from the mall in which it is located; issues of failure to remove architectural barriers and of negligence also were proceeding to trial, Savage v. City Place Limited, 2004 WL 3045404 (Md. Cir. Ct.) (Montgomery County, Civil No. 240306, Dec. 28, 2004), available at http://www.washlaw.org/pdf/Opinion_12_28_04.pdf, when the case was settled on May 4, 2005, with the settlement requiring provision of an accessible means of emergency egress in all Marshall's stores nationwide.

The Supreme Court's decision in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), raises a question concerning mixed motive actions under the ADA and, perhaps, the SHRL (N.Y.C. Admin. Code § 8-101 should avoid the question with respect to the CHRL, since discrimination is prohibited "from playing any role"). In Gross, the Court ruled that, since Congress had not amended the Age Discrimination in Employment Act (ADEA) to require that age merely be a "motivating factor" (a term it had used in amending Title VII of the Civil Rights Act), in adverse action, such action is discriminatory only where, but for the person's age, the action would not have been taken. The ADA Amendments Act changed "because of" to "on the basis of" disability in the employment context (42 U.S.C. § 12112(a)), it left "by reason of … disability" in defining public sector discrimination (42 U.S.C. § 12131), and "on the basis of … disability" with respect to private sector discrimination (42 U.S.C. § 12182(a)). This language may run afoul of the Court's reasoning in Gross, thus precluding a mixed motive theory under the ADA. See Bolmer v. Oliveira, 594 F.3d 134, 148-49 (2nd Cir. 2010) ("questionable" whether ADA plaintiff could avoid "but for" requirement in light of Gross, but issue not ripe on interlocutory appeal).

[37] N.Y.C. Admin. Code § 8-107(5), Exec. Law §§ 296(5), 296(18).

[38] 42 U.S.C. §§ 3601-3631.

[39] Riverbay Corp. v. New York City Commission, 260832/10, N.Y.L.J. 1202518198460 (Sup., Ct. Bronx Co., decided September 9, 2011), available at http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202518198460 (affirming CCHR interpretation that the CHRL "require[es] that housing providers. public accommodations and employers (where applicable), make the main entrance to a building

accessible unless doing so creates an undue hardship, or is architecturally infeasible. Only then should an alternative entrance be considered."). See N.Y.C. Comm'n on Human Rights (Kass) v. United Veterans Mutual Housing No. 2, New York City Comm'n on Human Rights Compl. No. EM00877-7/27/88), Recommended Decision and Order (April 4, 1990), aff'd sub nom 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 (Sup. Ct. Queens Co.), aff'd 207 A.D.2d 551, 616 N.Y.S.2d 84 (2d Dep't 1994). When a tenant requested installation of a Building Code compliant exterior ramp and lobby lift, as well as relocation, widening and opening force adjustments to entrance doors, the landlord could not avail itself of the "tax fiction" of depreciation to avoid, or to reduce the resources from which to meet, its obligation to make reasonable accommodation to the tenant. T.K. Management, Inc. v. Gatling, N.Y.L.J. Nov. 2, 2005, 19:3 (Sup. Ct. Queens Co., Oct. 19, 2005), available at http://www.nycourts.gov/library/queens/PDF_files/tk_management-gatling.pdf.

[40] Exec. Law § 296(19).

[41] Exec. Law § 296-a. The CHRL bars lending discrimination in real estate related matters, N.Y.C. Admin. Code § 8-107(5)(d).

[42] A full review of how employers might violate these laws is beyond the scope of this chapter, but coverage of employment agencies and labor organizations deserves some discussion. Employment agencies, as screeners of prospective employees for an employer, might stray into prohibited disability-based action, either at the suggestion of an employer/client or by their own concept of who might be "right" to recommend. Unions, although active proponents of the ADA and similar laws, tend to favor seniority over reasonable accommodation (notwithstanding a duty of fair representation) and cumbersome, time-consuming grievance and arbitration procedures over more streamlined methods of reaching a reasonable accommodation. (See n. 73, infra, for further discussion of limits on the applicability of collective bargaining agreements in resolving discrimination claims.) Unions also might insist on provisions in collective bargaining agreements that may result in discrimination charges against the employer, which then must decide whether to jeopardize general labor relations by bringing the union into the case. In some cases, a union that has accepted a discriminatory policy put forward by an employer in a collective bargaining agreement may sue on behalf of employees aggrieved by that policy. Transp. Workers Union of America v. N.Y.C. Transit Auth., 341 F.Supp.2d 432 (S.D.N.Y.2004). An employer and the union(s) with which it collectively bargainns also must navigate between Scylla and Charibdys (or, more precisely, the EEOC and the NLRB) in sharing confidential information about the disability of an employee (42 U.S.C. § 12112 (d); New York State also imposes a confidentiality requirement (9 N.Y.C.R.R. § 466(11)(j)(5)) on an employer whose employee has requested a reasonable accommodation that may conflict with collectively bargained seniority rights. The EEOC has advised the NLRB that such sharing with pertinent union representatives may be permissible under the ADA to a limited extent in the context of determining whether an accommodation poses an undue hardship to the union or to its senior member who has been bypassed to accommodate a person with a disability. See EEOC-NLRB Memorandum of Understanding (Nov. 16, 1993), available at http://www.eeoc.gov/policy/docs/eeoc-nlrb-ada.html. See also letter from Ellen J. Vargyas of EEOC to Barry Kearney of NLRB (Nov. 1, 1996). The 1996 opinion was based in part on the right of pertinent inquiry to verify the

need for an accommodation requested, where both the employer and the union have obligations to make reasonable accommodations. Not addressed squarely, inter alia, is a situation in which the member with a disability has not directly invoked the union's obligation, making the request to the employer alone; the employer may want to suggest the employee involve the union or clearly authorize the employer to do so. For more concerning the balance between reasonable accommodation and seniority systems under the ADA, see U.S. Airways, Inc. v. Barnett, 535 U.S.391 (2002), discussed at n. 56, infra. Unions also may be sued for policies and practices resulting in underemployment of protected class members. See EEOC v. Local 638, 401 F.Supp. 467 (S.D.N.Y. 1975) (Werker, J.), aff'd sub nom, EEOC v. Local 638, Local 28 of Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976), and its progeny (race and national origin).

[43] 42 U.S.C. § 12111 (2).

[44] 42 U.S.C. § 12111 (5).

[45] Exec. Law § 296.

[46] Exec. Law § 292(5); but see Exec. Law § 296-b, covering employers of even a single domestic employee. Employees of related entities may be aggregated to meet the jurisdictional minimum of 4 employees. Matter of Argyle Realty Assoc. v. New York State Div. of Human Rights, 65 A.D.3d 273, 882 N.Y.S.2d 458 (2d Dep't 2009). A mother-in-law employed by a physician could not be excluded from the term "employee" as defined in Exec. Law § 292(6) for purposes of bringing the doctor's staff below the jurisdictional requirement. Goldman v. Stein, 60 A.D.3d 902, 875 N.Y.S.2d 273 (2d Dep't 2009). However, participants in a Work Experience Program (WEP) have been held not to be employees under SHRL, CHRL, nor under federal law. McGhee v. City of New York, N.Y.L.J. Aug. 27, 2002, 18:2 (Sup .Ct. N.Y. Co.). Employers of even one person are covered under Civil Rights Law Art. 4-B, that prohibits discrimination against people with disabilities who use guide, hearing or service dogs, or who are blind and use a cane as a mobility aid; see particularly §§ 47-a and 47-b; employers of all sizes also are prohibited from discrimination under Civil Rights Law § 40-c.

[47] N.Y.C. Admin. Code §§ 8-102(5), 8-107(1). Also, an employer's agent "who actually participates in the conduct giving rise to a discrimination claim may be held personally liable under the [State]]HRL." Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995); see Mendez v. City of New York Human Res. Admin., N.Y.L.J. May 23, 2005, 24:3, (04 Civ. 0559 (May 10, 2005, S.D.N.Y.), available at http://ny.findacase.com/research/wfrmDocViewer.aspx/xq/fac.20050510_0000492.SNY.htm/qx. See Zakrzewska, 14 N.Y. 3d at 479-82.

[48] N.Y.C. Admin. Code § 8-102(5), but see McGhee, discussed at n. 46, supra.

[49] See EEOC's Reasonable Accommodations for Attorneys with Disabilities, available at http://www.eeoc.gov/facts/accommodations-attorneys.html.

[50] N.Y.C. Admin. Code §§ 8-102(9), 8-107(4); Exec. Law §§ 292(9) and 296(2)(c) -(e); 42 U.S.C. § 12181 (7); State Div. of Human Rights v. Cross and Brown, 83 A.D. 2d 993, 415 N.Y.S. 2d 671 (1st Dep't 1981) (affirming without opinion a SDHR decision). A State Bar continuing legal education program is covered. Department of Justice Title III Technical Assistance Manual, 1994 Supplement, § III-1.1000, available at http://www.ada.gov/taman3up.html. A law firm may not exclude a client's service animal from its premises. See consent decree in US v. Larkin, Axelrod, Ingrassia

& Tetenbaum, LLP, and John Ingrassia, June 28, 2012, available at http://www.ada.gov/larkin-cd.htm. (The SHRL currently contains definitions of guide, hearing, and service dogs, Exec. Law § 292(31), (32), and (33), that require training that is both unavailable by their terms and inconsistent with federal law, effectively eliminating coverage under the SHRL for use of such dogs; NYSBA and the New York City Bar are collaborating to try to get the State to correct this problem; in the meanwhile, the ADA and CHRL provide coverage.) See also http://www.ada.gov/taman3.html; the Justice Department's Guide for Small Businesses, available at http://www.ada.gov/publicat.htm#Anchor-ADA-35326, ADA Best Practices Tool Kit for State and Local Governments, available at http://www.ada.gov/pcatoolkit/toolkitmain.htm, and, with respect to accessibility of web information and services provided by entities covered by the ADA**,** http://www.ada.gov/anprm2010/anprm2010.htm.

[51] Available at http://www.ada.gov/2010ADAstandards_index.htm

[52] §§ 48-23 – 48-27.

[53] Chapter 700 of the Laws of Westchester County.

[54] Nassau County Administrative Code §§ 21-9.0 –21-9.9.

[55] §§ 21-9.8(3).

[56] 42 U.S.C. §§ 12111(9), 12112(b)(5)(A); see also § 12111(10), defining "undue hardship", which is a defense to the requirement to make a reasonable accommodation. The individual seeking reasonable accommodation must be "qualified", meaning that, with or without reasonable accommodation, the person must be able to perform the essential functions of the job in question, 42 U.S.C. § 12111(8). See also 29 C.F.R. § 1630.9; EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, available at http://www.eeoc.gov/policy/docs/accommodation.html. However, interpreting the language and history of the ADA (before the 2008 amendments, that did not address this issue), the Supreme Court has held that seniority systems (whether or not part of a collective bargaining agreement) "ordinarily" will "trump" a request for job reassignment as a reasonable accommodation, unless the employee requesting the accommodation can show special circumstances (e.g., that exceptions otherwise made to the seniority system reduce expectations of its application) making the assignment contrary to the seniority system "reasonable" in a particular case. U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). SDHR's consideration of "problems … that may be caused for other employees" (9 N.Y.C.R.R. § 466.11(b)(i)(iii)) would make reasonable accommodation even less likely in a case brought solely under that law. See n. 22, supra. Barnett would not apply under CHRL § 8-102(18). Governmental entities are covered under Sec. 504 of the federal Rehabilitation Act (29 U.S.C. § 794 and by Title II of the ADA (42 U.S.C. § 12134(b)).

[57] 42 U.S.C. § 12182(a). Title II of the ADA, prohibiting governmental discrimination against people with disabilities in the full gamut of public programs, services and activities, as well as in employment, involves nondiscrimination and, as one aspect of such nondiscrimination, reasonable accommodation. In large measure, this is done by adoption of longstanding regulations developed under Sec. 504 of the Rehabilitation Act of 1973. See 42 U.S.C. § 12131 et seq.

[58] 42 U.S.C. § 12182(b)(2)(A)(ii).

[59] 42 U.S.C. § 12182(b)(2)(A)(iii). See Camarillo v. Carrols Corp., 518 F.3d 153 (2d Cir. 2008), vacating and remanding a dismissal of a complaint by a woman who is blind against a restaurant chain for failing to provide effective communication (a large print menu) as required by this section and by 28 C.F.R. § 36.303(c) – not for failing to make reasonable modifications. Plaintiff's claim under Exec. Law § 296(2)(a) also was reinstated "because the scope of the disability discrimination provisions … [under that section] are similar to those of the" ADA (internal quotations and citations omitted). (Note that this is a pre-Albunio case; see n. 10 and accompanying text, supra.)

[60] 42 U.S.C. §§ 12182(b)(1), 12182(b)(2)(A)(iv), (v); the term "readily achievable" is defined in 42 U.S.C. § 12181(9).

[61] The term "undue hardship" is defined in the employment context as "requiring significant difficulty or expense." 42 U.S.C. § 12111(10).

[62] 42 U.S.C. § 12181(9).

[63] Exec. Law §§ 296 (2-a) (b)(2) and 296 (18)(2).

[64] Exec. Law §§ 292(21-e), 292(21), 296(3); 9 N.Y.C.R.R. § 466(11) and its appendix; see n. 29, supra.

[65] Exec. Law § 296(2)(d).

[66] Exec. Law §§ 296(2)(c), (d). Exec. Law § 296(14) prohibits discrimination against some people using guide, hearing, or service dogs, whether accommodation would be "reasonable" or not; however, under Exec. Law § 292 (31), (32) and (33), such dogs effectively are defined out of existence under the SHRL. See n. 50, supra.

[82] N.Y.C. Admin. Code § 8-102(18).

[68] N.Y.C. Admin. Code § 8-107.

[69] N.Y.C. Admin. Code § 8-107(15).

[70] Phillips, 66 A.D.3d at 181; see generally 180-83.

[71] N.Y.C. Admin. Code § 8-102(18). See Comm'n on Human Rights v. 325 Cooperative Inc., OATH Index No.: 1423/98 (July 15, 1998), available through http://www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library.

[72] N.Y.C. Admin. Code § 8-102(18). See 42 U.S.C. § 12111(10); Exec. Law § 292(21-e). But see n. 22 and accompanying text, supra.

[73] Phillips, 66 A.D.3d at 175 (citations omitted). SDHR's failure to analyze whether a provider of housing accommodations had engaged in an interactive process concerning a reasonable accommodation rendered a "no probable cause" finding arbitrary and capricious. In the Matter of Valderrama v. New York State Division of Human Rights and York Ville Towers Associates, LLC, 401640/11, N.Y.L.J. 1202519960377 (S. Ct. NY Co. Decided October 6, 2011), available at http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202519960377&slreturn=1

[74] Phillips, 66 A.D.3d at 175. However, when an employee, acting through counsel, confront[ed] … [the employer] with an inflexible, categorical demand, with no room for negotiation and no suggestion of a time frame in which plaintiff would be open to revisiting the issue …. plaintiff discharged … [the employer], as a matter of law, of the obligation to continue its efforts to initiate … [a bilateral, interactive process to find a way to reconcile both parties' needs]. Romanello v. Intesa SanpauloS.p.A., 2012 NY Slip Op

05595, 1st Dep't, July 17, 2012, at 3; available at http://www.nycourts.gov/reporter/3dseries/2012/2012_05595.htm

[75] 42 U.S.C. § 12117, adopting remedies available under 29 U.S.C. § 794a for those claiming discrimination under § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); as to those remedies, see Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984); Doe v. N.Y. Univ., 666 F.2d 761, 774 (2d Cir. 1981); Martin v. N.Y.S. Dep't of Labor, 512 F. Supp. 353 (S.D.N.Y. 1981) (applying CPLR § 214(2) to establish a three year statute of limitations). Counties and municipalities are not subject to punitive damages under ADA Title II, under § 504, nor under New York State common law. See n. 4, supra. The EEOC may pursue victim-specific remedies even when the individual would be bound by agreement with the employer to proceed in arbitration. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). While the Supreme Court has found the individual's right to proceed individually in court under the ADA is subject to the preference for arbitration in the Federal Arbitration Act, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), that preference itself is subject to legal and equitable principles that would invalidate a contract (such as an arbitration agreement), for example, due to unconscionability, and courts have been ready to find unconscionability in appropriate cases. Circuit City, 279 F.3d 889 (9th Cir. 2002) (on remand); Brennan v. Bally Total Fitness, 198 F. Supp.2d 377 (S.D.N.Y. 2002). Similarly, when a collective bargaining agreement precludes an individual covered by that agreement from seeking arbitration without union approval, the individual may pursue a discrimination claim in court or in another appropriate forum. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456 (2009); Kravar v. Triangle Services Inc., N.Y.L.J. May 28, 2009, (S.D.N.Y. 1:06-cv-07858, May 12, 2009, Holwell, J.), available at http://law.justia.com/cases/federal/district-courts/new-york/nysdce/2:2006cv07858/353157/53 .

[76] 42 U.S.C. § 1981a. Front pay is not limited by the cap. Pollard v. E.I. duPont de Nemours & Co., 532 U.S. 843 (2001).

[77] 42 U.S.C. §1988.

[78] Farrar v. Hobby, 506 U.S. 103 (1992); Buckhannon Board & Care Home, Inc. v. W, Va. Dep't of Health and Human Res., 532 U.S. 598 (2001); see also McGrath (following Farrar as to attorneys fees under the CHRL), repudiated in the Local Civil Rights Restoration Act; see n. 10, supra.

[79] 42 U.S.C. §§ 12188, 2000e-5.

[80] 42 U.S.C. § 12133.

[81] N. 2, supra.

[82] See Lane and Georgia, discussed in n. 4, supra.

[83] N.Y.C. Admin. Code § 8-109.

[84] Exec. Law § 297(5).

[85] N.Y.C. Admin. Code § 8-502.

See Bennett, discussed at n. 11, supra. For example, the MdConnell Douglas test must be tailored to CHRL mandates so "considerations of severity or pervasiveness applicable in state and federal harassment cases are impermissible in determining liability in discriminatory harassment cases under the City HRL," Bennett, 92 A.D.3d at 34, citing Williams and Nelson v. HSBC.

See Jordan v. Bates Advertising Holdings, Inc., 11 Misc.3d 764, 770-71 (Sup. Ct., N.Y. Co. 2006), (upholding a jury award of $2,000,000 in compensatory and $500,000 in punitive damages, and setting a hearing on the amount of attorneys fees). But see Norris v. New York City College of Technology, N.Y.L.J. Jan. 29, 2009, 33:1 (S.D.N.Y. Jan. 14, 2009, Block, J.), available at http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202503560416 (remitting punitive damages of $425,000 to $25,000 against an individual defendant (the only one subject to punitive damages), relying primarily on U.S. Supreme Court criteria), and Riverbay, discussed at n. 39, supra (reducing damages and fines levied by CCHR). An award of compensatory damages to a person aggrieved by illegal discriminatory practice may include compensation for mental anguish, and that award may be based solely on the complainant's testimony. Matter of 119-121 E. 97th St. Corp. v. New York City Comm'n on Human Rights, 220 A.D.2d 79, 83, 642 N.Y.S.2d 638 (1st Dep't. 1996). A trial court's unexplained denial of attorneys fees to a plaintiff prevailing in a settlement under the CHRL was remanded by the Appellate Division for a hearing to determine the amount of attorneys fees to be awarded. Fornuto v. Nisi, 84 A.D.3d 617, 923 N.Y.S.2d 493 (1st Dep't 2011).

Where damages or fees are sought with respect to pendent local or State discrimination law liability in a federal action, enforcement of such an award may be sought in a motion in the federal action and does not require State court proceedings. Mitchell v. Lyons Professional Services, Inc., 727 F. Supp.2d 120 (E.D.N.Y. 2010).

Common law sovereign immunity has been held to bar punitive damages against the City itself under the CHRL. See Katt, 151 F. Supp.2d at 337-45, discussed at n. 4, supra.

New York City has repudiated an interpretation of the CHRL that attorneys fees rarely would be awarded under the CHRL "where plaintiff obtained only nominal damages unless the case served a significant public purpose:" McGrath, 3 N.Y.3d at 427-28, discussed at nn. 10 and 78, supra (in the same legislation, civil penalties under the CHRL were increased significantly, N.Y.C. Admin. Code § 8-126, although the absence of a waiver of sovereign immunity was not addressed, see Krohn, discussed at n. 4, supra).

Attorneys fees and court costs recovered by individuals in civil rights litigation (e.g., under ADA and CHRL), including those secured in settlement, are free from federal taxation to the prevailing individual. 26 U.S.C. §§ 62 (a)(20), 62(e)(18).

[86] Exec. Law §§ 297(9), (10). Attorney's fees may be available to a prevailing party in a discrimination action against the State. Kimmel v. State of N.Y., 76 A.D.3d 188, 906 N.Y.S.2d 403(4th Dep't 2010).

[87] N.Y.C. Admin. Code § 8-502(c); before enactment of Local Law 85 of 2005 (see n. 12, supra), such notice had to be given before suit was filed. Failure to comply with notice of claim time limitations (N.Y.S. General Municipal Law §§ 50-i, 50-e; N.Y.S. Civil Practice Law and Rules § 9801 (villages)) can result in dismissal. See Erlich v. Gatta, N.Y.L.J. Oct. 16, 2009, 30:1 (S.D.N.Y. Oct. 2, 2009). The SHRL does not authorize suit against the State or other governmental entities. See A10676/S7482 of 2010 and Veto Message 6720, available at http://public.leginfo.state.ny.us.

[88] N.Y.C. Admin. Code §§ 8-402, 8-404. While a civil action in the name of the City (as opposed to a private right of action (see n. 85 and accompanying text, supra)) would have

to be brought by or at the direction of the Corporation Counsel, the CCHR is empowered to initiate administrative complaints based on its own investigations, "in addition" to a referral to Corporation Counsel for court action. N.Y.C. Admin. Code § 8-105(4)(a), (b).

[89] See nn. 52 - 55 and accompanying text, supra.

[90] § 48-27(H).

[91] Laws of Westchester County §§700.11(h)(3)-(5).

[92] Nassau County Admin. Code § 21-9.9.1.

[93] Garrett, 531 U.S. at 374, n. 9.