NYSBA SPRING 2012

Perspective

A publication of the Young Lawyers Section
of the New York State Bar Association

A Message from the Section Chair

"Grab your ticket and your suitcase, thunder's rollin' down this track. Well, you don't know where you're goin' now, but you know you won't be back…People get ready, you don't need no ticket. All you gotta do is just get on board; on board this train."

—Bruce Springsteen's *Land of Hope and Dreams*

I'm writing this article one night after seeing Bruce Springsteen live in Albany. The E Street Band is back on tour supporting the Boss' latest album, *Wrecking Ball*. The evening featured a mix of old and new, both in terms of songs and musicians. The lasting impression to me, though, was the manner in which messages were delivered. The concert had a soulful feeling, almost as if Bruce was preaching from a pulpit, full of energy and passion. He lamented the struggles that many of our fellow citizens are facing today. However, every dark corner had a flicker of light. Every trouble was offset by a sense of hope. We were urged to rise up and make a difference, both for ourselves and others. Over and again, the gospel-like refrain, "…this train, carries saints and sinners; this train, carries losers and winners…." Hope. Dreams. Both are critical, but without personal and collective action, what is truly accomplished?

The theme that our Section has been working to deliver this year is "The Future is Now." Young attorneys are often thought of as the future of the profession, but are also a critical part of the present. Young attorneys need practical skills now to effectively meet the needs of clients and employers. Young attorneys need mentors, to help in navigating a winding path. Young attorneys need guidance in finding a work-life balance. Now, turn the focus in a different light. Young attorneys can utilize their talents in helping to solve problems today. Young attorneys can mentor law students, college students, and even each other. Young attorneys can certainly take action and make a difference in their communities. The Young Lawyers Section is dedicated to being a part of the solution in each case. We have hopes, and we have dreams, but we need to come together to make them a reality.

Our Section has focused this year on making membership meaningful. I have always thought that our greatest asset is the diversity of our members. We have active members in every part of the state and beyond. We have members from every walk of life who are engaged in a wide variety of substantive practices. We have many different concerns. Some of us are just getting started, while others have been part of the legal community for many years now. We need to continue to use this diversity to our collective advantage. President Doyle issued a "Diversity Challenge" to the Association at the beginning of

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his term. The theme of the Challenge was "Working together, everything fits." Our Section got involved from the outset, laying out a blueprint to assist us both now and in the future. This has helped to enhance our existing programs and to establish new initiatives to make the membership experience better for all of us. We have received great support from the leaders of the Association in helping us to carry out our goals. One goal set this year was to cross the 4,000 member mark. I am pleased to say that we have exceeded that goal. That being said, we're not finished. There are far too many potential members still out there, and we remain committed to meeting the ongoing needs of our existing members.

We have accomplished a lot this year. At the Annual Meeting held in New York City this past January, our Section was officially granted a seat on the Association's Executive Committee. This is a nod to the importance of young attorneys in the profession, and carries with it a significant responsibility. We have established a pilot mentoring program at Cardozo Law School, where young attorney mentors are paired with law student mentees. In March, our Section held its third annual Trial Academy at Cornell Law School. We had a full house on hand of young attorney attendees and veteran faculty, working together over the course of the week to enhance trial techniques and develop practical skills. We have worked to increase the number and quality of local professional development events. There are great things on the horizon as well. Michael Fox takes the helm as the Section Chair in June, and we have a strong leadership team in place to continue to carry out our mission of building bridges and fostering relationships.

I look forward to continue working with everyone on making the legal profession a better place for young attorneys, and to provide meaningful ways to make a difference in our communities. Let's focus our personal energy and passion to make our collective dreams a reality. Come on this train—people get ready!

James R. Barnes

The Development of the *Ker-Frisbie* Doctrine

By Robert J. Shoemaker

I. The *Eichmann* Trial

A. The Abduction of Ricardo Klement

It was a gentle spring afternoon in 1960, in a suburb of Buenos Aires, Argentina. Ricardo Klement was out in his yard, tending his garden. Perhaps as he stooped to trowel a mound of dirt, he noticed something peculiar out of the corner of his eye. Perhaps Klement dismissed what he thought he had seen as just one more example of his own bothersome paranoia. In truth, however, a strange man, a man whom Klement had never met before, was surreptitiously taking his picture. The man, from his hiding spot, was able to take a series of photos of Klement without being noticed.[1] It is difficult to know what would have unsettled Klement more: the fact that this man was taking his picture, or the fact that the man had recently moved into a suburban home nearby for the express purpose of tracking Klement.[2] The man was taking these photos so that he could send them back to Israel. He could then confirm what several had already come to suspect—that "Ricardo Klement" was really not who he said he was.

Klement generally took the bus home from work, disembarking at a station near his home. One evening in May 1960, at about 8 p.m., two cars were waiting between the bus station and the house. Klement emerged from the bus and began his trek home. There were most likely four men waiting for him—some of whom had arrived in Argentina only recently. Klement was "accosted by one of the men" as he reached into his pocket for a flashlight. Possibly fearing that his target possessed a firearm, the assailant "clutched the hand [Klement] held in his pocket, grabbed him with the other hand, and brought him to the ground." Resistance lasted no longer than five seconds. He was soon put into a car, which carried him away into the darkness.[3]

Klement was taken to a house where the men, all Israeli agents, began to question him. After a short while, Klement confessed his true identity: he was Adolf Eichmann, a Nazi war criminal. The Israeli agents declared that they were going to bring Eichmann back to Israel to stand trial, whereupon Eichmann professed that he was "prepared to stand trial in Argentina or in Germany."[4] Then, perhaps fearing that he would be killed then and there, Eichmann agreed to be taken to Israel. But before taking him, the Israeli agents had Eichmann sign a statement. The statement read:

> I, the undersigned, Adolf Eichmann, declare of my own free will that, since my true identity has been discovered, I realize that it is futile for me to attempt to go on evading justice. I state that I am prepared to travel to Israel to stand trial in that country before a competent court. I understand that I shall receive legal aid, and I shall endeavor to give a straightforward account of the facts of my last years of service in Germany so that a true picture of the facts may be passed on to future generations. I make this declaration of my own free will….[5]

The declaration was dated May 1960. No specific date was given because during the course of the interrogation, the clock had passed midnight. Ten days later, Eichmann was in Israel.[6]

B. The *Eichmann* Trial

A three-judge Israeli court began a preliminary hearing on April 11, 1961.[7] Allegedly, Eichmann had been a high-ranking official within the Nazi party responsible for "Jewish Affairs and Evacuations," whereby he supervised the logistics in transporting all Jews who were within the grasp of the Third Reich to their ultimate destinations: concentration camps.[8]

Robert Servatius, Eichmann's attorney, objected first and foremost to the jurisdiction of the Israeli courts, alleging, among other things, that "the defendant has been brought to Israel as a result of a violation of international law."[9] Servatius asked to call as witnesses one of the kidnappers, Zvi Tohar, and the pilot of the plane, Jack Shimoni.[10]

Gideon Hausner, the Israeli Attorney General and head prosecutor at Eichmann's trial, replied, "The circumstances of his arrest, of his apprehension, and of his transfer are not relevant to the jurisdiction of the Court."[11] Over the next few days, Hausner cited case after case (from mostly British and American courts) showing that "a court does not inquire into the circumstances under which a person has been brought before it; once he is physically present, the court will proceed to try him. Abduction across frontiers may become a political issue between the countries involved, but it is not a consideration for the court."[12]

After Hausner finished citing case law, the court determined that the abductors likely violated Argentina's sovereignty by abducting Eichmann without permission. Violating Argentina's sovereignty, however, was a matter to be taken up between Israel and Argentina, "without having any effect on the

jurisdiction of the Israeli courts to try Eichmann."[13] Under diplomatic pressure, on August 3, 1960 Argentina and Israel released a joint statement considering the matter closed.[14] During subsequent trial and appeal, the Israeli courts avoided the issue of the legality of Eichmann's capture, relying instead on legal precedents that the circumstances of his capture had no bearing on the legality of his trial. Eichmann was executed by hanging on May 31, 1962, at a prison in Israel.

II. Development of the *Ker-Frisbie* Doctrine

The *Ker-Frisbie* doctrine encapsulates the policy set forth in *Eichmann*, *supra*, in which an individual defendant taken by force may not advocate on behalf of a state whose sovereignty was violated by the taking. Only the violated state may do so.[15]

A. *Ker v. Illinois*

In *Ker v. Illinois*, 119 U.S. 436 (1886), Frederick Ker was indicted in Illinois for larceny.[16] After fleeing to Peru, he was captured and returned to the United States. Ker entered a plea in abatement, arguing that he had been brought into the United States against his will.[17]

The court refused Ker's plea and he was found guilty at trial.[18] Ker appealed to the Illinois Supreme Court, which affirmed his conviction. His case then went before the Supreme Court of the United States. His primary argument was that his abduction was a violation of an extradition treaty between the United States and Peru ratified in 1874.[19] "The main proposition insisted on by counsel…in this court is that, by virtue of the treaty of extradition with Peru, the defendant acquired by his residence in that country a right of asylum," that is, that he could only be removed from Peru in accordance with the procedures set down in the treaty.[20] Thus, Ker argued, he could assert this right of asylum in a United States court.

The Supreme Court disagreed. It noted that the treaty did not provide for a fleeing fugitive to automatically receive the asylum claimed by Ker. Justice Miller, writing for a unanimous Court, stated, "The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon security in such an asylum."[21] Further, "[t]here are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court."[22] Accordingly, the fact that Ker was abducted did not impact the court's right to hear his case.

The holding of the *Ker* Court—that the manner of arrest, whether international, illegal, or both, is immaterial once the defendant is brought before a court—remains virtually uneroded today. For example, in *Pettibone v. Nichols*,[23] Justice Harlan expanded *Ker* to domestic arrests, remarking:

> If Ker, by virtue of the treaty of Peru, and because of his forcible and illegal abduction from that country, did not acquire an exemption from the criminal process of the courts of Illinois, whose laws he had violated, it is difficult to see how Pettibone acquired, by virtue of the Constitution and laws of the United States, an exemption from prosecution by the state of Idaho, which has custody of his person.[24]

Thus, Pettibone's forcible seizure in Colorado did not affect Idaho's jurisdiction. The Court held that whether the arresting actors are operating under the authority of a state's government "is not, we think, of any consequence as to the principle involved."[25]

B. *Frisbie v. Collins*

In *Frisbie v. Collins*,[26] Collins was serving a life sentence for murder.[27] He appealed, alleging that "while he was living in Chicago, Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan."[28] In a habeas corpus action, the District Court denied the writ without a hearing on the ground that the state court had the power to try respondent "regardless of how his presence was procured."[29] The Sixth Circuit reversed. It held that the Federal Kidnapping Act had changed the prior rule that "a state could constitutionally try and convict a defendant after acquiring jurisdiction by force."[30] However, the Sixth Circuit was overturned by the U.S. Supreme Court. Rebuking the Circuit Court, Justice Black wrote,

> This Court has never departed from the rule announced in *Ker v. Illinois*…, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.[31]

Congress, reasoned Black, determined that it was preferable to convict criminals apprehended via illegal arrests, than to bar conviction due to a fear of police misconduct. "We think the [Federal Kidnapping] Act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction. We cannot."[32]

III. Developments to *Ker-Frisbie*

A. The *Toscanino* Exception

On January 6, 1973, Francisco Toscanino received a phone call at his home in Montevideo, Uruguay. The call was from a local police officer, although, unbeknownst to Toscanino, the officer was also a paid agent of the U.S. government.[33] Toscanino and his wife, who was seven months pregnant, were lured to an abandoned bowling alley, where the officer and six of his associates abducted Toscanino.[34] "This was accomplished in full view of Toscanino's terrified wife by knocking him unconscious with a gun and throwing him into the rear seat of [the officer's] car. Thereupon Toscanino, bound and blindfolded, was driven to the Uruguayan-Brazilian border by a circuitous route."[35] Once in Brazil, he was denied counsel, communication with the Italian consulate, or communication with his family. He was also denied food and water. Later on, Toscanino further alleged, he was tortured for seventeen days, a torture of which the United States Government was aware.[36] He was then flown from Rio de Janeiro to the United States to stand trial on narcotics charges.

The government prosecutor "neither affirmed nor denied these allegations but claimed they were immaterial to the district court's power to proceed."[37] Francisco Toscanino was eventually sentenced to twenty years in prison and fined $20,000.[38]

The Eastern District of New York denied Toscanino's post-trial motion to vacate the verdict, citing *Ker* and *Frisbie*.[39] On appeal to the Second Circuit:

> [Toscanino's] principal argument, which he voiced prior to trial and again after the jury verdict was returned, is that the entire proceedings in the district court against him were void because his presence within the territorial jurisdiction of the court had been illegally obtained. He alleged that he had been kidnapped from his home in Montevideo, Uruguay, and brought into the Eastern District only after he had been detained for three weeks of interrogation accompanied by physical torture in Brazil.[40]

Though *Ker* and *Frisbie* appeared unshakable, the Second Circuit felt obligated to act. It viewed Toscanino's case as exceptional because of the alleged torture, and because agents of the U.S. government allegedly directed or knew of the torture. Judge Mansfield, writing for the three-judge panel, began his attack on *Ker-Frisbie* by noting developments in Fourth, Fifth and Fourteenth Amendment jurisprudence. "For years these two cases [*Ker* and *Frisbie*] have been the mainstay of a doctrine to the effect that the government's power to prosecute a defendant is not impaired by the illegality of the method by which it acquires control over him."[41] Since *Frisbie*, however, the Supreme Court had expanded the understanding of "due process" to "bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial."[42] Because "[s]ociety is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law … due process principles might be invoked to bar prosecution altogether where it resulted from flagrantly illegal law enforcement practices."[43] Thus, "[i]n light of these developments we are satisfied that the *Ker-Frisbie* rule *cannot* be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part."[44]

Upon remand, the district court was directed to hold an evidentiary hearing where Toscanino would be given the opportunity to provide credible evidence that he was tortured, and that United States agents were involved in the torture.[45] However, Toscanino was unable to support his claims. The District Judge noted that, while Toscanino may have been tortured, he had not "submitted any credible evidence which would indicate any participation on the part of the United States officials prior to the time the defendant arrived in this country. Nor [was] there any evidence which show[ed] that the abduction was carried out at the direction of United States officials."[46] Accordingly, the court declined to hold an evidentiary hearing.

B. *Lujan* Narrows the *Toscanino* Exception

The Second Circuit's erosion of *Ker-Frisbie* in *Toscanino* did not last. In *U.S. ex rel. Lujan v. Gengler*,[47] decided a year after *Toscanino*, the Second Circuit severely narrowed this exception.[48]

In *Lujan*, the U.S. government sought to clarify the parameters of *Toscanino*. Thus, it requested the District Court to grant petitioner's motion to dismiss in order to appeal to the Second Circuit.[49] In deciding the case, the appeals court stated, "It requires little argument to show that the government conduct of which [Lujan] complains pales by comparison with that alleged by To-

scanino."[50] Moreover, "Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction"; therefore, he could not claim protection under the U.N. Charter, which was meant only to protect offended states.[51] Furthermore, the court held that if the state which rights were offended "acquiesces or agrees…, there is no element of illegality…. For example, in the Eichmann trial…, the Supreme Court of Israel permitted the execution to proceed because Argentina, in a joint communiqué with Israel, had waived its objections and thereby cured any violation of international law."[52]

Because Lujan failed to allege offense by Argentina or Bolivia, and because he failed to allege truly shocking behavior—or even knowledge—on the part of the United States Government, "there is no justification for ordering the district court to divest itself of jurisdiction over him."[53] Judge Anderson concurred, reiterating that here there was "no claim of cruel, brutal and inhumane treatment."[54] Thus, the Second Circuit "obviously interpreted *Toscanino* as resting solely and exclusively upon the use of torture and other cruel and inhumane treatment of Toscanino in effecting his kidnapping…. This interpretation of *Toscanino* has become the law of this Circuit."[55] In this way, the *Toscanino* exception to the *Ker-Frisbie* doctrine was limited to only those cases in which the abduction of the defendant was truly "shocking."[56]

IV. Conclusion

Ker-Frisbie remains good law in the United States. Although *Toscanino* set forth an exception to the doctrine, *Lujan* limited that exception to circumstances that were truly "shocking."

Endnotes

1. Gideon Hausner, *Justice in Jerusalem* 274 (1966).
2. *Id.*
3. *Id.* at 275.
4. *Id.*
5. *Id.*
6. *Id.*
7. *6,000,000 Accusers* 178 (Shabtai Rosenne ed., 1961).
8. Peter Papadatos, *The Eichmann Trial* 26 (1964).
9. *Id.* at 53.
10. Rosenne, *supra*, at 185.
11. *Id.* at 197.
12. Hausner, *supra*, at 312.
13. Papadatos, *supra*, at 59.
14. *Id.* at 60.
15. Papadatos, *supra*, at 54.
16. *Ker v. Illinois*, 119 U.S. 436, 437 (1886).
17. *Id.* at 438.
18. *Ker v. People*, 110 Ill. 627, 634 (1884).
19. *Ker v. Illinois*, 119 U.S. at 439.
20. *Id.* at 441.
21. *Id.* at 442.
22. *Id.* at 444 (citing *Ex Parte Scott*, 109 E.R. 106 (1829); *State v. Smith*, 1 Bail. 283 (S.C. App. 1829); *State v. Brewster*, 7 Vt. 118 (1835)).
23. 203 U.S. 192 (1906).
24. *Id.* at 209.
25. *Id.* at 215.
26. 342 U.S 519 (1952).
27. *Id.* at 519.
28. *Id.* at 520.
29. *Id.* at 519.
30. *Id.* at 520.
31. *Id.* at 522.
32. *Id.* at 523.
33. *U.S. v. Toscanino*, 500 F.2d 267, 269 (2d Cir. 1974).
34. *Id.*
35. *Id.*
36. *Id.* at 270.
37. *Id.*
38. *Id.* at 268.
39. *Id.* at 271.
40. *Id.* at 269.
41. *Id.* at 271.
42. *Id.* at 272 (referring to *Mapp v. Ohio*, 367 U.S. 643 (1961)).
43. *Toscanino*, 500 F.2d at 274.
44. *Id.* at 275 (emphasis added).
45. *Id.* at 277.
46. *U.S. v. Toscanino*, 398 F.Supp 916, 916 (E.D.N.Y. 1975) (opinion of Mishler, C.J.).
47. *U.S. ex rel. Lujan v. Gengler*, 510 F.2d 62, *cert. denied*, 421 U.S. 1001 (2d Cir. 1975).
48. Jacqueline A. Weisman, Comment, *Extraordinary Rendition: A One-Way Ticket to the U.S.…Or Is It?*, 41 CATH. U. L. REV. 149, 156 (Fall 1991).
49. *Lujan*, 510 F.2d at 63 n.2.
50. *Id.* at 66.
51. *Id.* at 67.
52. *Id.*
53. *Id.* at 68.
54. *Id.* (Anderson, J., concurring).
55. *Id.* at 69 (Anderson, J., concurring).
56. *Id.* at 66.

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New Educational Requirements for Law School Graduates Emphasize Clinical Education

By Brian Lusignan

Changes to the rules for attorney admissions, announced by the New York Board of Law Examiners in January, sent a clear message to law school students: take advantage of out-of-classroom practice opportunities. The changes permit law school graduates who wish to sit for the New York bar examination to receive more credit for time spent in clinics, field placement courses and externships.

The amendments, adopted by the Court of Appeals,[1] modified the instructional requirements that must be met by graduates of U.S. law schools seeking to sit for the New York bar exam.[2] The new rules increase the number of credits that a graduate may receive from a law school clinic, field placement program or externship from twenty to thirty.[3] Study in a law school clinic may also now be counted towards the 64 credits that a graduate must obtain in "regularly scheduled classroom courses."[4] Clinical study may be counted towards this total if it "includes adequate classroom meetings or seminars," is supervised by a member of the law school's faculty and "the time and effort required and anticipated educational benefit are commensurate with the credit awarded."[5]

According to the Board, the "changes are intended to address the growing concern that graduates of law schools are insufficiently prepared to enter practice."[6] Indeed, recent studies have noted the shortcomings of traditional legal education, which focuses on imparting critical legal thinking skills on students without necessarily preparing them for the day-to-day complexities of legal practice.[7] Driven in part by these studies, the American Law Institute (ALI) and American Bar Association (ABA) set forth a joint statement which read, "[a]ll members of the legal community share responsibilities to initiate and maintain the continuum of educational resources necessary to assure that lawyers provide competent legal services throughout their careers."[8] Further, the statement urged "[l]aw schools, the bar, and the bench" to "develop and encourage transitional training programs," including "[e]xperiential learning opportunities" such as clinics and internships.[9] The amended rules pursue just such a goal and, in the Board's words, "will hopefully lead to the expansion of practice opportunities for law students."[10]

The changes also responded to recommendations of the New York State Bar Association (NYSBA) set forth in a 2011 report:

> At a time when the bench and bar have been decrying the lack of training and preparedness of law graduates for the competent and ethical practice of law, it is surprising that the state with the largest bar in the country still imposes significant legal restrictions on clinical and practical skill training for law graduates seeking admission to its bar.[11]

The NYSBA task force compared New York's twenty-credit cap to the ABA's accreditation standards, which do not cap the number of credits a student can receive in a qualifying clinical program.[12] The new thirty-credit cap is still more restrictive than this ABA standard and falls short of the task force's recommendation that the Court of Appeals "eliminate the hourly restriction governing hours spent by law students 'outside the classroom[.]'"[13] Nonetheless, the new rules promote greater integration of clinical programs with the traditional classroom experience.

Although these changes affect current law students, the need for transitional programs to teach practical skills and develop lawyer competency also applies to recent law graduates and newly admitted attorneys. The NYSBA task force reported that "[t]he linkage of continued development for all new lawyers with continued learning through experiential opportunities after admission to the bar should be axiomatic for experienced members of today's legal community."[14] The ALI-ABA summit report recommended an increased focus on "[p]ost-admission supervised apprenticeships…or other practice experiences[.]"[15] Both bodies noted the potential value of mandatory mentoring programs for new attorneys, such as those already enacted in several states.[16] Although these recommendations have yet to be adopted, they may be viewed as aspirational goals for the full spectrum of attorneys, from newly-admitted to long-experienced.

In addition to the changes regarding clinical studies, the amended rules expressly permit law students to count twelve credits earned in distance-learning classes towards their classroom credits for the first time.[17] However, the effect of this modification is unclear as the amended rules still do not permit students to receive credit for correspondence courses "where students and the instructor are separated in time as well as in place."[18]

Finally, the new rules liberalize the scheduling requirements for law schools. The current rules require full-time law students to attend class four days a week.[19] Recognizing "the realities of modern day legal

education,"[20] the amended rules require that a "law school's academic year must consist of no fewer than 130 days on which classes are regularly scheduled, during no fewer than eight calendar months."[21] The Board observed that "[m]ore options should be available for students who want to pursue non-traditional class schedules because they need to work in order to pay for the increasing tuition costs."[22]

The amended rules, announced January 12, 2012, will become effective April 1, 2012, or as soon thereafter as they can be published in the State Register.[23]

Endnotes

1. *See generally* Judiciary Law § 53.
2. *See* Order Amending the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, at 1-7 (Jan. 10, 2012) (hereinafter "Order Amending Rules"), *available at* http://www.nybarexam.org/Press/PressReleasOrder_Section50RuleChanges.pdf (amending 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 520.3 [N.Y.C.R.R.], effective April 1, 2012).
3. *Compare* 22 N.Y.C.R.R. § 520.3 (c) (1) (i); (c) (4), *with* Order Amending Rules, at 5 (amending 22 N.Y.C.R.R. § 520.3 (c) (4)).
4. Order Amending Rules, at 4 (amending 22 N.Y.C.R.R. § 520.3 (c) (2)).
5. *Id.*
6. Press Release, N.Y. State Board of Law Examiners (Jan. 12, 2012), at 2, *available at* http://www.nybarexam.org/Press/PressReleasOrder_Section50RuleChanges.pdf.
7. *See generally* Stuckey et al., *Best Practices for Legal Education* (2007); Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (2006).
8. ALI-ABA, *Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century—Final Report*, at 6-8 (Charles C. Bingamen ed., 2009), http://www.equippingourlawyers.org/documents/final_report.pdf.
9. *Id.*
10. N.Y. State Board of Law Examiners, Press Release, January 12, 2012, at 2.
11. NYSBA: Report of the Task Force on the Future of the Legal Profession, at 47 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&template=/CM/ContentDisplay.cfm&ContentID=58722.
12. *Id.* at 47-48. Under Standard 304 (b) of the ABA Standard s for Approved Law Schools, students must obtain roughly 77% of their credits in "regularly scheduled class sessions," but Interpretation 304-3 (e) of that Standard provides that clinical studies may be counted towards classroom requirements, without limit, as long as "(i) the clinical course includes a classroom instructional component, (ii) the clinical work is done under the direct supervision of a member of the law school faculty…, and (iii) the time and effort required and anticipated educational benefit are commensurate with the credit awarded."
13. NYSBA: Report of the Task Force on the Future of the Legal Profession, at 68 (2011).
14. *Id.* at 57.
15. ALI-ABA, *Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century—Final Report*, at 6-8.
16. *Id.* at 8; NYSBA: *Report of the Task Force on the Future of the Legal Profession*, at 58-62.
17. Order Amending Rules, at 5 (amending 22 N.Y.C.R.R. § 520.3 (c) (6) (i)).
18. *Id.* (amending 22 N.Y.C.R.R. § 520.3 (c) (6) (ii), (iii)).
19. An approved law school must require "completion of either a full-time or part-time program" (22 N.Y.C.R.R. § 520.3 (c) (1)). A full-time program must include between 75 and 105 "calendar weeks," each of which "must include four days of scheduled classes" except that "three three-day weeks per semester may be counted" (22 N.Y.C.R.R. § 520.3 (d)).
20. N.Y. State Board of Law Examiners, Press Release, January 12, 2012, at 3.
21. Order Amending Rules at 6 (amending 22 N.Y.C.R.R. § 520.3 (d)).
22. N.Y. State Board of Law Examiners, Press Release, January 12, 2012, at 3.
23. Order Amending Rules at 1. *See also* Judiciary Law § 52.

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Recent Developments in New York City Human Rights Law: Why Cases Suggest That It May Actually Be Living Up to the Hype

By Marisa Warren

I. Introduction

Prior to 2005, the New York City Human Rights Law ("NYCHRL"),[1] was interpreted to be "coextensive with [its] state and federal counterparts."[2] However, in 2005 the New York City Council passed the Local Civil Rights Restoration Act ("Restoration Act")[3] which "confirm[ed] the legislative intent to abolish 'parallelism' between the City HRL and federal and state anti-discrimination law."[4] Specifically, the Restoration Act stated that the NYCHRL should be examined "independently from similar or identical provisions of New York state or federal statutes"[5] and "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."[6] In the years following the Restoration Act, the NYCHRL has been interpreted to provide greater protections for employees than previously available.

Although cases decided immediately after the passage of the Restoration Act acknowledged that the NYCHRL had been expanded,[7] it was not until 2009 that a case fully examined the scope of the Act. This case, *Williams v. New York City Housing Authority*,[8] is an influential example of the reach of the new legislation. In *Williams*, the court found that the NYCHRL "explicitly requires an independent liberal construction analysis in *all circumstances*, even where State and federal civil rights laws have comparable language."[9] Further, the Restoration Act "formally and unequivocally rejected the assumption that the City HRL's purposes were identical to that of the counterpart civil rights statutes."[10]

I. Recent Developments in the NYCHRL

a. Post-*Williams* Hostile Work Environment Claims under NYCHRL

In *Meritor Savings Bank v. Vinson*, the Supreme Court found that the broad language of Title VII forbids not only discriminatory hiring, firing and promotion, but also forbids "creating a working environment heavily charged with…discrimination."[11] To prove a hostile work environment under Title VII, an employee must show that the discriminatory conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[12] The *Williams* court found that this standard was inappropriate under the NYCHRL in light of the Restoration Act. As a result, the Court concluded that the proper standard under the NYCHRL was "whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender…regardless of whether the conduct is 'tangible' (like hiring or firing) or not."[13] Although the Court of Appeals has yet to speak to the issue, the First Department's "less well" standard has recently been adopted by the Second Department, establishing that this is the uniform standard for proving a hostile work environment for all five boroughs.[14]

b. The Court of Appeals Adopted a Broad Reading of the NYCHRL Retaliation Statute

Under the NYCHRL, it is an unlawful discriminatory practice "to retaliate or discriminate in any manner against any person because such person has…opposed any practice forbidden under this chapter."[15] The phrase "in any manner" was added to the law in 1991,[16] causing the NYCHRL to depart from the federal standard which required manifestations of retaliation be material.[17] In *Williams*, the First Department also evaluated retaliation claims under the Restoration Act.[18] The court found that when retaliation claims involved neither tangible employment actions,[19] nor materially adverse changes in terms of employment, the retaliation claim should not be dismissed, but rather should be examined "with a keen sense of workplace realities, of the fact that the 'chilling effect' of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliator conduct in light of those realities."[20] The court stated that the analysis must focus on whether the conduct would be "reasonably likely to deter a person from engaging in protected activity."[21] Although *Williams* acknowledged that retaliation claims should be analyzed with the broad remedial purposes of the Restoration Act in mind, the Court of Appeals, in *Albunio v. City of New York*,[22] elaborated on what this broad reading might entail.

In *Albunio*, a jury found that two New York City Police Officers, Captain Lori Albunio and Lieutenant Thomas Connors, were subjected to retaliation under NYCHRL because they opposed discrimination against a third member of the Department, Sergeant Robert Sorrenti, based on his perceived sexual orientation. In 2002, Sorrenti applied for a transfer

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to the Department's Youth Services Section. When a position opened up in the Youth Services' DARE program, a program that educates children about drug and substance abuse, Albunio interviewed Sorrenti and, based on this interview and his prior performance record, requested that he be chosen to fill the vacancy.[23] Albunio's recommendation was submitted to her immediate supervisor, Inspector James Hall.[24] Hall conducted his own interview of Sorrenti (with Albunio present), where he asked Sorrenti if he was married or had any children and questioned Sorrenti about his relationship with another male officer, suggesting that they were "more than just friends."[25] After the interview, Hall told Albunio that he had "found out some f***ed up s**t about Sorrenti and…wouldn't want him around children."[26] About a month later, Hall called Thomas Connors (an officer who reported to Albunio) into his office where he proceeded to say that he "wouldn't be able to sleep at night knowing that Sorrenti is going to be working around kids."[27] Connors replied that he believed Sorrenti would be qualified to work with kids and stated that Sorrenti had received positive evaluations on his work performance in the past.[28]

Following her recommendation of Sorrenti, Albunio began to hear rumors that she would be removed from her command. In light of these rumors, she asked for a meeting with Deputy Commissioner Frederick Patrick. During the meeting (which Hall attended), Patrick confirmed that he and Hall were considering moving Albunio due to the fact she "utilized poor judgment when requesting personnel" and cited Sorrenti as the primary example.[29] Albunio replied that she still believed Sorrenti to be the better candidate and "[i]f I had to do it all again, I would [] recommend[] him again."[30] Albunio was then told that it would be in her best interest to find another assignment, which she did, although it was less desirable.

Albunio told Connors that she had been directed to go elsewhere. Connors subsequently filed a complaint with the Police Department's Office of Equal Employment Opportunity alleging that Hall had discriminated against Sorrenti because of Sorrenti's perceived sexual orientation.[31] After the complaint was filed, Connors was contacted by someone from Hall's office, indicating to Connors that Hall knew of the complaint. Connors then put in for a transfer, believing that after Albunio was asked to move, "the writing was on the wall."[32] In the subsequent weeks, before his transfer went through, Connors suffered several adverse employment actions including changes in his geographic assignments and hours. When Connors's transfer came through, he was placed in a less desirable position as well.[33]

Albunio and Connors brought an action alleging that they were subjected to retaliation in violation of § 8-107(7) of the NYCHRL. The jury agreed and entered a verdict in their favor, and the First Department affirmed.[34] The Court of Appeals upheld the jury's verdict as to Connors, finding that the evidence on the record clearly established that he had "opposed" discriminatory conduct and was subjected to adverse employment action as a result.[35]

The Court of Appeals also upheld the jury's verdict as to Albunio, although the case was closer because she had neither filed a discrimination complaint nor explicitly accused anyone of discrimination before she was ousted as commanding officer of the Youth Services Section. The record only showed that Albunio had observed Hall's mistreatment of, and unfavorable remarks about, Sorrenti, but uttered no word of protest before her meeting with Patrick and Hall.

However, the Court found that the jury could have found that Albunio constructively "opposed" discriminatory conduct when she told Commissioner Patrick and Inspector Hall "[i]f I had to do it all again, I would have recommended Sorrenti again."[36] Although Albunio never explicitly alleged discrimination against Sorrenti by the department, the Court found that by making such statement, Albunio made clear her disapproval of that discrimination and that she thought Hall's treatment of Sorrenti was wrong.[37] Explaining its reasoning, the Court of Appeals specifically stated that this decision was made "[b]earing in mind the broad reading that we must give to the New York City Human Rights Law."[38]

c. The Court of Appeals Held That *Faragher/Ellerth* Affirmative Defenses Do Not Apply to the New York City Human Rights Law

Under federal law, an employer is not liable under Title VII for sexual harassment committed by a supervisory employee if it sustains the burden of proving that:

> (1) no tangible employment action such as discharge, demotion, or undesirable reassignment was taken as part of the alleged harassment,
>
> (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
>
> (3) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided

by the employer to avoid harm otherwise.[39]

Prior to the passage of the Restoration Act, courts found that this defense, known as the *Faragher-Ellerth* defense, extended to the NYCHRL.[40] However, in *Zakrzewska v. New School*,[41] the Second Circuit certified this question for the Court of Appeals, asking for a definitive answer on whether these defenses could be used under the NYCHRL.[42] The Court of Appeals concluded that based on the language of the statute, the *Faragher-Ellerth* defenses did not apply to the NYCHRL, and therefore employers are strictly liable for a supervisory employee's sexual harassment.

Section 8-107(1)(a) of the NYCHRL prohibits discrimination on the basis of gender. Section 8-107(13)(b) states that an employer will be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent only where:

> (1) the employee or agent *exercised managerial or supervisory responsibility*; or
>
> (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
>
> (3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct (emphasis added).

This provision was adopted as part of the 1991 amendments to the NYCHRL. The Court noted that the legislative history of this provision provided for "[s]trict liability in employment context for acts of managers and supervisors."[43]

The Court also found that this interpretation of the NYCHRL was consistent with New York State law. Article IX § 2(c) of the New York Constitution provided each local government with the "power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government," including labor, and the health and well-being of state residents.[44] The Court found that the NYCHRL was consistent with New York State Human Rights law because it merely created a higher penalty for unlawful discrimination.[45]

d. Amendment to NYCHRL Places a Higher Burden on Employers Who Claim That an Employee's Religious Observance Constitutes an "Undue Hardship"

On August 30, 2011, Mayor Bloomberg signed the Workplace Religious Freedom Act.[46] This law amends § 8-102 of the N.Y.C. Admin. Code to define undue hardship to mean "an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)."[47] The amendment also lists various factors that will be considered in determining what constitutes an economic hardship. These factors include:

> (i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;
>
> (ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and
>
> (iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the employer's facilities (for employers with multiple facilities) will make the accommodation more difficult or expensive.[48]

Under the new law, an employee seeking a religious accommodation must still be able to demonstrate that he or she will be able to perform the essential functions of the position.[49]

Prior to the passage of Workplace Religious Freedom Act, because the NYCHRL did not specify a definition of "undue hardship," some courts used the federal standard set forth in the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*,[50] which held that "an accommodation causes 'undue hardship' whenever that accommodation results in 'more than a *de minimis* cost' to the employer."[51] Under this standard, according to City Councilman Mark Weperin, who co-sponsored the proposed law, religious discrimination was permitted to continue, even under New York City's liberal law.[52] The City Law definition now mimics that set forth in the New York State Human Rights Law.[53]

II. Conclusion

The cases in this article illustrate the trajectory of the post-Restoration Act NYCHRL and demonstrate the new protections available for employees who are victims of discrimination. Although these recent decisions provide additional guid-

ance with respect to the scope of the NYCHRL, many issues remain outstanding.[54] In the meantime, decided cases provide a valuable basis by which plaintiffs' lawyers may argue that a broad range of rights are protected by the legislation.

Endnotes

1. N.Y.C. Admin. Code § 8-107.
2. *Costello v. New York State Nurses Ass'n*, 10 Civ. 3245, 2011 WL 1560971, at *10 (S.D.N.Y. Apr. 25, 2011); *see also Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000) ("The identical standards apply to employment discrimination claims brought under Title VII, Title IX, New York Executive Law § 296, and the Administrative Code of the City of New York."); *Forrest v. Jewish Guild for the Blind*, 309 A.D.2d 546, 765 N.Y.S.2d 326, 332-33 (1st Dep't 2003). ("[T]he standard for recovery under [the State Human Rights Law] is in accord with the federal standards under [Title VII], and the human rights provisions of New York City's Administrative Code mirror the provisions of the Executive Law.").
3. N.Y.C. Local Law No. 85 (2005).
4. *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009).
5. N.Y.C. Local Law No. 85 § 1.
6. N.Y.C. Local Law No. 85 § 7, N.Y.C. Admin. Code § 8-130. Further, the Committee Report accompanying the legislation stated that the intent of the Restoration Act was to "ensure construction of the City's human rights law in line with the purposes of the fundamental amendments to the law enacted in 1991," and to reverse the pattern of judicial decisions that had improvidently "narrowed the scope of the law's protections" (Report of Committee on General Welfare**,** 2005 N.Y**.** City Legis**.** Ann., at 536).
7. *See, e.g.*, *Jordan v. Bates Advertising, Inc.*, 816 N.Y.S.2d 310, 317 (Sup. Ct. New York County 2006) ("[I]n enacting the more protective Human Rights Law, the New York City Council has exercised a clear policy choice which this Court is bound to honor."); *Farrugia v. N. Shore Univ. Hosp.*, 820 N.Y.S.2d 718, 724 (Sup. Ct. New York County 2006) ("The Administrative Code's legislative history clearly contemplates that the New York City Human Rights Law be liberally and independently construed with the aim of making it the most progressive in the nation. Thus, the case law that has developed in interpreting both the State Human Rights Law and Title VII should merely serve as a base for the New York City Human Rights Law, not its ceiling."). However, this was often disregarded. *See Ferraro v. Kellwood Co.*, 440 F.3d 96, 99 (2d Cir. 2006) ("The standards for liability under these [state and city] laws are the same as those under the equivalent federal antidiscrimination laws."); *Conway v. Microsoft Corp.*, 414 F. Supp. 2d 450, 458 (S.D.N.Y. 2006) ("The plaintiff also brings discrimination claims under New York state and city law, which are also subjected to the same analysis as claims under Title VII, and are therefore analyzed in tandem below.").
8. 872 N.Y.S.2d 27 (1st Dep't 2009). *Williams* has been cited by 130 cases including cases before the Second Circuit and the Southern and Eastern Districts.
9. *Williams*, 872 N.Y.S.2d at 31 (emphasis added).
10. *Williams*, 872 N.Y.S.2d at 36. The Court went on to cite the Committee Report accompanying the Restoration Act and hearing testimony from the legislative debates surrounding the Restoration Act. The opinion cited the testimony of the New York State Chapter President of the National Organization for Women, Kathryn Lake Mazierski, who testified that the "severe or pervasive" doctrine "continuously hurts women" and "means that many victims of sexual harassment may never step forward." *Id.* at 36 n.24.
11. 477 U.S. 57 (1986).
12. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993).
13. *Williams*, 872 N.Y.S.2d at 39-40. Although *Williams* takes a broad view of the NYCHRL following the Restoration Act, it is important to note that the court made a point of reiterating the fact that the law is not a "general civility code." *Id.*
14. *Nelson v. HSBC Bank USA*, 2011 N.Y. Slip Op. 06481, 2011 WL 4090027 (2d Dep't Sept. 13, 2011). *Williams*' standard has also been adopted by the Southern and Eastern Districts. *See Price v. Cushman & Wakefield, Inc.*, 08 Civ. 8900, 2011 WL 3962652 (S.D.N.Y. Sept. 7, 2011); *Copantitla v. Fiskardo Estiatorio, Inc.*, 09 Civ. 1608, 2011 WL 2127808 (S.D.N.Y. May 27, 2011); *Bermudez v. City of New York*, 10 Civ. 1162, 2011 WL 1218406 (S.D.N.Y. Mar. 25, 2011); *Fleming v. MaxMara USA, Inc.*, 644 F. Supp. 2d 247, 268 (E.D.N.Y. 2009), *aff'd*, 371 F. App'x. 115 (2d Cir. 2010).
15. N.Y.C. Admin. Code § 8-107(7).
16. N.Y.C. Admin. Code § 8-107(7), Local Law 39 (1991).
17. An action only amounts to retaliation if "a reasonable employee would have found the challenged action materially adverse." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).
18. In 1991, the anti-retaliation provision of the NYCHRL was amended to cover retaliation "in any manner" (8-107(7), Local Law 39 (1991)). This departed from the Second Circuit's requirement that an action may only amount to retaliation if "a reasonable employee would have found the challenged action materially adverse" as was adopted by the Supreme Court in *Burlington*.
19. Tangible employment actions include a significant change in employment status, such as hiring, firing, failing to promote, or reassigning with significantly different responsibilities; or a decision causing a significant change in benefits, such as a significant reduction in pay or loss of health benefits. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998) (A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").
20. *Williams*, 872 N.Y.S.2d at 34.
21. *Id.* at 34 (quoting N.Y.C. Admin. Code § 8-107). Regardless of this liberal interpretation, *Williams*' retaliation claim was ultimately unsuccessful because she "failed to provide a link between her complained-of assignment to a retaliatory motivation since other employees who did not complain were also assigned to do the same task." *Id.*
22. 16 N.Y.3d 472 (2011).
23. *Id.* at 475.
24. The Court noted that after this point, the facts of the case became "sharply disputed." *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 476.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. 67 A.D.3d 407, 889 N.Y.S.2d 4 (1st Dep't 2009).
35. 16 N.Y.3d at 478.
36. *Id.* at 479.
37. *Id.*
38. *Id.*
39. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998);

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270 (1998).

40. *See Zakrzewska v. New School*, 598 F. Supp. 2d 426, 435 n.4 (S.D.N.Y. 2009), *judgment aff'd sub nom., Zakrzewska v. New School*, 620 F.3d 168 (2d Cir. 2010), citing *Sardina v. UPS, Inc.*, 254 Fed. Appx. 108 (2d Cir. 2007) (affirming summary judgment for employer dismissing, *inter alia,* NYCHRL claim under *Faragher-Ellerth*); *Ferraro v. Kellwood Co.*, 440 F.3d 96 (2d Cir. 2006) (same); *Eichler v. Am. Int'l Group, Inc.*, 05 Civ. 5167, 2007 WL 963279 (S.D.N.Y. Mar. 30, 2007) (granting summary judgment for employer dismissing, *inter alia,* NYCHRL claim under *Faragher-Ellerth*); *Randall v. Tod-Nik Audiology, Inc.*, 270 A.D.2d 38, 704 N.Y.S.2d 228 (1st Dep't 2000) (assuming but not deciding that *Faragher-Ellerth* applied under NYCHRL).

41. 14 N.Y.3d 469 (2010).

42. The Second Circuit may certify questions to the Court of Appeals pursuant to 22 N.Y.C.R.R. § 500.27 when "determinative questions of New York law are involved in a case pending before [the Court] for which no controlling precedent of the Court of Appeals exists"; *see also* Second Circuit Rule 27 ("Where authorized by state law, this Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court.").

43. *Zakrzewska*, 14 N.Y. at 480 (quoting the 1991 N.Y. City Legis. Ann. at 187).

44. *Id.* at 480.

45. *Id.* at 481.

46. Local Law Int. No. 632-A, *available at* http://legistar.council.nyc.gov/Legislation.aspx.

47. Workplace Religious Freedom Act § 2; N.Y.C. Admin. Code § 8-107(3).

48. *Id.*

49. *Id.*

50. 432 U.S. 63 (1977).

51. *Ansonia Board of Ed. v. Philbrook*, 479 U.S. 60, 67 (quoting *Hardison*, 432 U.S. at 84). *See also* Statements of Councilman Mark Weperin, July 1, 2011 Hearing of the N.Y.C. Council on the Workplace Religion Act, *available at* http://www.youtube.com/watch?v=5XQim4h9USA.

52. *See* Statements of Councilman Weperin, Hearing of the N.Y.C. Council, July 1, 2011.

53. N.Y. Exec. L. § 296(10)(d) states that, with respect to religious accommodations, undue hardship "means an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)." Further, a similar version of the Workplace Religious Freedom Act was introduced in the United States Senate (S. 4046) and House of Representatives (H.R. 1431). The proposed bill would define "undue hardship" as "an accommodation requiring significant difficulty or expense." Like the New York City amendment, the bills list specific factors to help determine whether an accommodation would pose an "undue hardship" including the identifiable cost of the accommodation; costs associated with loss of productivity; costs associated with retraining or hiring employees or transferring employees from one facility to another; the overall financial resources and size of the employer involved, relative to the number of employees; and for an employer with multiple facilities, the geographic separateness or administrative or fiscal relationship of the facilities. *See* Workplace Religious Freedom Act of 2010, 111th Cong. (2d Sess. 2010), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s111-4046.

54. *See e.g., Spiegel v. Schulmann*, 604 F.3d 72, 83 (2d Cir. 2010) (reinstating the plaintiff's NYCHRL claim, but suggesting that the district court might appropriately decline to exercise supplemental jurisdiction and dismiss the NYCHRL claim without prejudice, leaving it to New York state courts to answer the question of whether obesity alone constitutes a disability under the NYCHRL); *Guzman v. City of New York*, No. 06-5832, 2010 WL 4174622 (E.D.N.Y. Sept. 30, 2010) (declining to extend supplemental jurisdiction over plaintiff's NYCHRL claims because "the court believes that State courts are better suited to address these new and complex questions of City law," which involved the question of whether a denial of transfer to a pregnant employee constituted gender discrimination under NYCHRL).

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St. Patrick's Day Celebrated at a Diversity Event

By Michael Raymond Hernandez



"Let us celebrate diversity," said a jubilant David J. Hernandez, Chairman of the Diversity Subcommittee of the General Practice Section of the New York State Bar Association (NYSBA). "Everybody is Irish on St. Patrick's Day."

On Wednesday, March 14, 2012, the NYSBA General Practice and Young Lawyers sections together with the Brooklyn Bar Association Young Lawyers Section and the Brooklyn Law School Latin American Law Students Association sponsored a networking event at Brooklyn Borough Hall to celebrate and encourage diversity within the bar.

Hernandez encouraged attendees to join bar associations and to get involved on the local, state and federal levels. He emphasized the importance of attorneys of various backgrounds being active and representing the needs of a diverse bar.

"Often people may become isolated into their own groups of friends and colleagues," said Jimmy Lathrop, Co-Chair of the Brooklyn Bar Association Young Lawyers Section. "We wanted to provide a forum where different groups of individuals could meet up, have a beer and make new connections."










The event started at 6:00 p.m. and was held in the lobby of Brooklyn Borough Hall. The organizers provided Irish fare such as potatoes, corned beef and cabbage for the attendees. There were approximately 85 attendees who represented a diverse group of individuals. "I enjoyed networking with such a wide cross-section of practice areas and levels of experience," said Norma Ortiz, Chair of the Bankruptcy Law Committee of NYSBA. "It was great to see the NYSBA organizing events here in Brooklyn. I haven't attended an NYSBA event in Brooklyn for a while and can't wait for the next event."

"Tonight, I joined the General Practice Section of NYSBA," said Adam Kalish, a practicing attorney in Brooklyn. "I definitely agree that it is so important to get involved with the different bar associations and I'm glad they had this event so I could join up, meet new attorneys and get involved."

Large groups of young attorneys were meeting each other and talking with judges and veteran attorneys. Judges in attendance included the Hon. Kenneth P. Sherman, Hon. Ingrid Joseph, Hon. Margarita Lopez-Torres, Hon. Carolyn E. Wade and Hon. Larry D. Martin.

"I had a blast," said Sam Collin, a 2009 Brooklyn Law School graduate. "I really enjoyed meeting new people and networking, so I've decided to join the NYSBA to get more involved."

Michael Raymond Hernandez is an associate at David J. Hernandez & Associates and the NYSBA Young Lawyers Section 2nd district representative.



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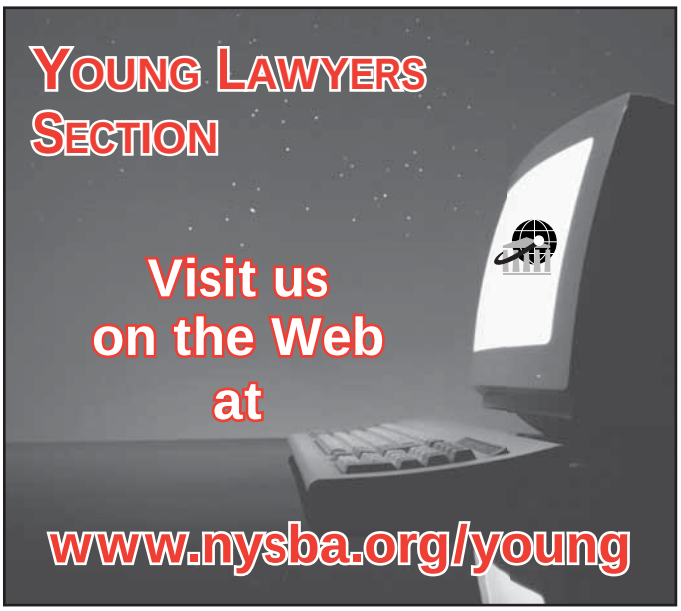

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ISSN 0743-6475 (print) ISSN 1933-8511 (online)

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