

**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; the text provides a substantial overview, while the endnotes permit deep dives into detail and nuance. For a broader discussion of disability rights, see my chapters and others in the third volume of the New York State Bar Association's Disability Law and Practice: Civil Rights of People with Disabilities: Law, Litigation and Attorneys Fees, scheduled for publication early in 2016.

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 (in some respects) "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 covers 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:

"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."

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 concerning the need for special attention to the language and legislative history of local and State human rights laws, these have been followed as well by the Court of

Appeals and 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.

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 (evaluated on an individualized, case-by-case basis) 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 will be provided in NYSBA's forthcoming volume 3 of Disability Law and Practice: Civil Rights of People with Disabilities: Law, Litigation and Attorneys Fees.

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, and now sets forth definitions and rules of construction in some detail in the amended ADA that are explicated even further in regulations.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 accommodations²⁰ 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 can 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

(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 a rare 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, but for §8-102(16)(c), 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 (contrasted with that under the SHRL) rests with the entity refusing an accommodation or asserting “undue hardship”.

Pregnancy, which for decades before 2013 was a per se disability under the CHRL, no longer is; pregnant women now have lesser rights under the CHRL.³⁶

WHAT IS A COVERED ENTITY AND WHAT ARE ITS OBLIGATIONS?

The ADA, CHRL, and SHRL each prohibit discrimination (1) 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 (2) in the provision of and access to goods, services and programs by both governmental and non-governmental entities (including effective communication).³⁷ While the City and State laws prohibit housing discrimination,³⁸ 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),³⁹ though, even there, some CHRL requirements are stronger and remedies better.⁴⁰ The SHRL also explicitly makes unlawful employment and union related discrimination based on genetic information;⁴¹ it similarly prohibits credit discrimination.⁴²

Employment

In the employment context,⁴³ 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,”⁴⁴ with an employer defined as one employing 15 or more people.⁴⁵ 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,⁴⁶ with the term “employer” covering those employing 4 or more.⁴⁷ 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.⁴⁸ Although employers of 4 or more are covered, independent contractors may be counted.⁴⁹ Law offices are covered as employers.⁵⁰

Public Accommodations

Law offices and other law-related venues and activities are public accommodations under federal, State, and City law.⁵¹ 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 Guidelines⁵², 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 they may be pertinent to a given situation. For example, the Albany City Code’s Omnibus Human Rights Law, 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.⁵³ It also has no reference to “reasonable accommodation”, subsuming that under its general nondiscrimination requirements. Westchester County’s Human Rights Law⁵⁴ 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 Code⁵⁵ track the SHRL, with some differences, including a broad, but brief, treatment of public accommodations.⁵⁶ 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.⁵⁷ Private sector places of public accommodation are prohibited from discriminating against people with disabilities under Title III of the ADA.⁵⁸ 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;”⁵⁹
- “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;”⁶⁰ and
- “a failure to remove architectural ..., [structural]communication ..., and transportation barriers ... where such removal is readily achievable” and,
- “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.”⁶¹

Note the applicability of “undue burden” and “readily achievable” standards; the former is not defined,⁶² but the latter is defined as “easily accomplishable and able to be carried out without much difficulty or expense.”⁶³ Contrast this with the CHRL approach to reasonable accommodation, discussed below.

The SHRL has similar provisions.⁶⁴ The SHRL defines and requires “reasonable accommodation” in an employment context⁶⁵ and, in relation to places of public accommodation, requires modifications such as those set forth above for ADA Title III.⁶⁶ As discussed above, 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.⁶⁷

Under the CHRL, “reasonable accommodation” is not limited to employment or housing⁶⁸ and is in addition to the CHRL’s extensive nondiscrimination provisions recognizing rights of people with disabilities,⁶⁹ 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.⁷⁰

“Unlike the State HRL, [under the CHRL,] the issue of the ability to perform essential requisites of the job is not bound up in the definitions of disability or reasonable accommodation” and the burden is on the one from whom the accommodation is sought to plead and prove that the accommodation sought could not help the party seeking it perform the tasks or enjoy the benefits desired (while the SHRL puts the burden on the one seeking the accommodation of proving the accommodation sought would enable them to do a job in a reasonable manner.)⁷¹ 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.”⁷² The more limited “readily achievable” standard of the ADA and SHRL is not used. Considerations for determining “undue hardship,” while somewhat 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.⁷³

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].”⁷⁴

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. However, a good faith interactive process is not an “independent element of the disability discrimination analysis under either the State or City HRL which, if lacking, automatically compels a grant of summary judgment to the employee or a verdict in the employee's favor.”⁷⁵

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.⁷⁶ 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.⁷⁷ That Act also added provisions for attorneys fees,⁷⁸ although the

Supreme Court since has limited significantly opportunities for recovering attorneys fees.⁷⁹

With respect to public accommodations (Title III), an aggrieved individual can seek injunctive relief, court costs and attorneys fees – but no monetary damages.⁸⁰ 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 1973,⁸¹ discussed above.⁸² 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.⁸³

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)⁸⁴ or with the State Division of Human Rights (SDHR)⁸⁵. 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.⁸⁶ 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.⁸⁷ 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 (against a City agency or otherwise) within ten days after commencement of a suit and the possible application of notice of claim provisions for suits against municipalities must be considered.⁸⁸ The City itself may bring a “pattern or practice” suit, seeking a wide range of relief, including civil penalties.⁸⁹ Government action inconsistent with antidiscrimination laws may be overturned (as part of exhaustion of remedies or otherwise) as arbitrary and capricious under Article 78 of the New York State Civil Practice Law and Rules.⁹⁰ “[P]articipation of an individual director in a corporation’s tort is sufficient to give rise to

individual liability” in the context of claims of coop discrimination under housing and retaliation provisions of the SHRL and CHRL.⁹¹

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 laws⁹² – 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.⁹³ 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).⁹⁴ The Nassau County Commission on Human Rights may assess penalties ranging from \$5000 to \$20,000 in employment and public accommodation cases.⁹⁵

Tort Law Considerations

Beyond statutory law, such as human rights laws and building codes, common law tort principles should not be overlooked. Difficulties in asserting vicarious liability may be overcome by use of negligent training or negligent supervision theories, even when an anti-discrimination law does not present a cause of action.⁹⁶ A building code may contain a standard that may (or may not) have been included to promote access for people with disabilities, but that provides guidance to a court in determining whether an employer, public accommodation, or other entity was negligent, regardless of whether the entity had an obligation under the building code itself to bring its facilities up to that standard.⁹⁷

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.”⁹⁸

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) (ADAAA), see <http://www.ada.gov/pubs/adastatute08marksdr.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>. The Justice Department regulations are being updated further to enhance conformity with the EEOC regulations. see 2014 Notice of Proposed Rule Making, available at http://www.ada.gov/nprm_adaaa/nprm_adaaa.htm. It is important to consult the Justice Department’s ADA website, <http://www.ada.gov/>, frequently to stay current with myriad regulatory refinements on aspects of the ADA.

Although the ADA AA 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>. But see Widomski v. State University of New York at Orange, 748 F.3d 471 (2nd Cir. 2014) (the definition in the ADAAA is not read retroactively).

² § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, (Section 504, prohibiting disability discrimination by recipients of federal funds), 29 U.S.C. §791 (Section 501, prohibiting disability discrimination by federal agencies), 29 U.S.C. §793 (Section 503, requiring affirmative action by federal contractors); Jobs for Veterans Act, 38 U.S.C. §4211 et. seq.; and related statutory and regulatory provisions prohibiting disability discrimination -- especially substantial regulations under § 504 that are referenced (directly or indirectly) in the ADA -- 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., (see also EEOC GINA regulations, 29 C.F.R. Part 1635) 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 federal Affordable Health Care Act encourages wellness programs, to the possible disadvantage of people with disabilities; the Internal Revenue Service has addressed this issue in regulations at 26 C.F.R. §§54.9802-1 et seq.; see also proposed EEOC regulations at 80 F.R. 21659.

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 did not ratify the convention on its first presentation.

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.

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 Disabled in Action v. Board of Elections in New York, 752 F.3d 189 (2d Cir. 2014) (affirming findings of violation of ADA and Rehabilitation Act); see also The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities (Department of Justice, September 2014) available at http://www.ada.gov/ada_voting/ada_voting_ta.htm. 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](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 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. 37, infra. See also Leitner v. Westchester Community College, 14-1042-cv (2d Cir. Feb. 25, 2015) (discussing factors relating to lack of Eleventh Amendment immunity), [available at http://www.ca2.uscourts.gov/decisions/isysquery/5906250c-3a4b-4c51-bb15-64049e7020dc/7/doc/14-1042_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/5906250c-3a4b-4c51-bb15-64049e7020dc/7/doc/14-1042_opn.pdf). 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); but see Deadwiley v. New York State Office of Children & Family Services, 13-cv-1977, N.Y.L.J.

1202723152516, at n.1 (E.D.N.Y., Decided April 2, 2015), available at <http://www.newyorklawjournal.com/printerfriendly/id=1202723152516#> ("district courts within this Circuit have consistently extended [sovereign immunity] to ADA Title I retaliation claims — at least to the extent that those claims are predicated on ADA Title I discrimination claims.' Quadir v. N.Y. State Dep't of Labor, 13-CV-3327, 2014 WL 4086296, at *3 (S.D.N.Y. Aug. 19, 2014) (Oetken, J.)"). 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 (E.D.N.Y. CV-04-3907, Mar. 21, 2007, Sifton, J.), available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=900005477596>. See also Williams v. City of New York, 12-CV-6805, NYLJ 1202734428588 (decided August 5, 2015), available at <http://www.newyorklawjournal.com/id=1202734428588>. A §1983 action may relate, *inter alia*, to a failure to train its employees to respect Constitutional or statutory rights of people with disabilities, as well as for the entity's intentional or negligent disregard of such rights. 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 through <http://lawsof nyc.com> 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/article/comprehensive-1991-amendments>, 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/article/local-civil-rights-restoration-act-2005>, 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>. Administrative decisions interpreting the CHRL are available at <http://www.nyls.edu/cityadmin/> (search under the City Commission on Human Rights (CHR) (elsewhere herein CCHR) and Office of Administrative Trials and Hearings (OATH)), but be sure you find the latest decision in the case (and the decision from the date cited, if different from the latest decision, since OATH's recommended decisions sometimes are modified by CCHR).

NB: As this is being written, a bill to reorganize the CHRL, relocating (although in most instances, not substantively amending) its provisions, has been introduced by the Speaker of the New York City Council; if enacted, it would be effective late in 2016 or in 2017. See Int. 1012 of 2015 at

<http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2524277&GUID=95BD1BC8-BC4F-4320-9130-E6705CE17161&Options=ID|Text|&Search=1012>. **This and other proposed amendments underscore the need to stay current. New York City Council legislation may be followed at <http://legistar.council.nyc.gov/Legislation.aspx>; current laws of New York City and State may be found at <http://public.leginfo.state.ny.us/navigate.cgi>.**

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) (see especially § 3604).

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 § 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 (to a lesser extent) 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); *Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y. 3d 881 (2013); *Jacobsen v. New York City Health and Hospitals Corporation*, 22 N.Y.3d 824, 11 N.E.3d 159, 988 N.Y.S. 2d 86 (2014). 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>.

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 Pubs., 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, Bennett v. Health Mgt. Sys., Inc., 92 A.D.3d 29 (2011), lv. den. 18 N.Y.3d 811 (2012) (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.

Bennett itself was clarified, and the unique nature of the CHRL was further emphasized, in Cadet-Legros v. New York Univ. Hosp. Ctr. 2015 NY Slip Op 08984 (1st Dept December 8, 2015), available at

http://www.courts.state.ny.us/reporter/3dseries/2015/2015_08984.htm (even the slightest evidence of pretext as to any one of defendant's bona fide reasons for termination would have supported denial of summary judgment, but plaintiff failed to adduce even that). Cadet-Legos also notes that the CHRL "does not set forth a requirement that an adverse action be 'materially' adverse" and something may be adverse under the CHRL "even where one's salary and many job responsibilities remain the same", id. at n. 4). It goes on to state that discrimination can be shown where the action "(at least in part) because of protected class status and operated to the disadvantage of the plaintiff." This can occur even when the action involves "misguided benevolence" toward a member of a protected class or one perceived to be in such a class. Id., at n. 5. "Even if ... a comment is a 'stray' remark, it can provide a window into what is motivating the speaker and thus create an issue of fact for a jury" Id. at n.6.

See also Hernandez v. Kaisman, 103 A.D.3d 106 (1st Dep't 2012). In Fletcher v. Dakota, Inc., 99 A.D.3d 43, 948 N.Y.S.2d 263 (2012), 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); Velazco v. Columbus Citizens Foundation, 14-842, (2d Cir. Feb. 13, 2015) available through <http://www.ca2.uscourts.gov/decisions.html>. ("We write here to reiterate that district courts who exercise pendant jurisdiction over NYCHRL claims are required by the Local Civil Rights Restoration Act of 2005 ("Restoration Act"), N.Y.C. Local L. No. 85, to analyze those claims under a different standard from that applied to parallel federal and state law claims."). 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.

But see Hernandez v. International Shoppes, LLC, 13-CV-6615, N.Y.L.J. 1202725368681, at *1 (E.D.N.Y., Decided April 23, 2015), available at http://scholar.google.com/scholar_case?case=5911205877590224129&q=Hernandez+v.+International+Shoppes&hl=en&as_sdt=6,33&as_vis=1. (Weinstein, J., after extensive review of ADA Title I, and some discussion of SHRL and CHRL, granted summary judgment for defendant, dismissed SHRL and CHRL claims without prejudice – and then requested magistrate to assist parties in settlement talks to try to spare State courts from a need to address the State and City law claims.) Federal courts still may apply an ADA analysis to SHRL claims. Alford v. Turbine Airfoil Coating & Repair LLC, 12 Civ.7539, N.Y.L.J. 1202652401818, at n. 5 (S.D.N.Y. Decided April 17, 2014), available at <http://www.newyorklawjournal.com/id=1202652256008/Alford-v-Turbine-Airfoil-Coating--Repair-LLC?slreturn=20140929124909>; Cain v. Atelier Esthetique Institute of Esthetics, Inc., 13 Civ. 7834, N.Y.L.J. 1202675955495, at *1 (S.D.N.Y., Decided October 29, 2014)(making clear distinction among ADA, SHRL and CHRL), available at <http://www.newyorklawjournal.com/printerfriendly/id=1202675955495#>.

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. The definition in the ADAAA is not read retroactively. Widomski, discussed at n. 1, supra. Some conditions might be viewed as presumptive disabilities. See 29 C.F.R. § 1630.2(j). However, an employer must make an individualized assessment of the employee or prospective employee’s condition before concluding that the individual

cannot perform the essential functions of a job. See Statement of Interest of the United States of America in Pesce v. New York City Police Department, 12 Civ. 8663, S.D.N.Y., June 23, 2015, available through <http://www.ada.gov>.

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). This definition also is incorporated by reference in State Civil Rights Law (SCRL) § 40-c (prohibiting discrimination (inter alia, in employment, public accommodations, and housing, on the basis of disability or other classifications)) and Art. 4-B (§ 47-b(5)) (prohibiting discrimination against people with disabilities accompanied by guide, hearing, or service dogs). Penalties for violation of § 40-c range from \$100 to \$500 payable to the person aggrieved, as well as conviction of a misdemeanor. SCRL § 40-d. Violation of Art. 4-B is a violation subject to a fine (payable to the State) of \$1000. § 47-c.

²⁰ See Exec. Law § 292(21-e) and 9 N.Y.Comp. R. & Regs (N.Y.C.R.R.). § 466.11 and its appendix, available at <http://www.dhr.ny.gov/general-regulations>.

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. 57, infra.

²³ 42 U.S.C. §§ 12111(8), 12112(a).

²⁴ See Jacobsen, 22 N.Y.3d at 833-45; Phillips, 66 A.D.3d at 177-90; Bennett, and Cadet-Legros, 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 prohibits disability discrimination and incorporates by reference the SHRL definitions of “disability” and “place of public accommodation” (but gives its own definitions of other terms) (§ 48-23 – § 48-27). For these and other local laws in New York State, see <http://www.lawsources.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.

See MacShane v. The City of New York, 05-CV-06021, N.Y.L.J. 1202721567966, at *1, *29-32 (E.D.N.Y., Decided March 23, 2015), available at <http://www.newyorklawjournal.com/id=1202721567966?keywords=macshane&publicatio=New+York+Law+Journal>, both noting the CHRL limitation and, under the ADA,

discussing how alcohol-related misconduct and the particular demands of law enforcement work may justify employer action that might be inappropriate in other contexts.

³² N.Y.C. Admin. Code § 8-107.

³³ P. 6 . Further, “the degree and frequency of impairment is not defined” in the CHRL, that also “does not impose a minimum degree of severity below which its mandates do not apply.” N.Y.C. Comm’n on Human Rights ex rel. Glaude v. New York Downtown Hospital, OATH Index. Nos. 7069/13 &1770/14, Comm’n Dec. & Order, Sept. 10, 2014, available through .

http://www.nyls.edu/cityadmin/?q=disability+hospital&site=new_chr%7Cnew_oath&filter=0&Search=Search&sort=relevancy (CCHR reversing OATH recommendation of summary judgment for respondent in case involving strep throat and persistent absenteeism); citing Comm’n on Human Rights ex rel L.D. v. Riverbay Corp., OATH Index No. 1300/11 (Aug. 26, 2011), adopted, Comm’n Dec. & Order (Jan. 9, 2012), available at http://archive.citylaw.org/oath/11_Cases/11-1300.pdf and 2012 NYC HRC LEXIS.

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 Until the ill-conceived enactment of Local Law 78 of 2013, pregnancy was a per se disability under the CHRL. Willis v. New York City Police Department, NYCCHR Complaint No. EM01566-01-11-88-E, Amended Decision and Order, July 31-1992, 2-4, available through <http://www.nyls.edu/cityadmin/>. Until Local Law 78, discrimination on the basis of pregnancy also violated gender discrimination prohibitions under the CHRL. Colon v. Del Business Systems, Inc., NYCCHR Complaint No. E91-0215/16F-91-0293, Recommended Decision and Order, November 2, 1996, 10, available through <http://www.nyls.edu/cityadmin/>. The legislative history of Local Law 78 ignored such coverage, that had included not only employment, but also other forms of discrimination. In place of such coverage, Local Law 78 enacted Admin. Code § 8-107(22), that covers pregnancy only with respect to employment discrimination and, even there, provides lesser rights than such pregnant women had had under disability provisions (contrast Admin. Code § 8-107(22), with § 8-107(15); subd. (22) refutes a vague purported “savings clause”, since the recitation of lesser rights would be superfluous at best had subd. (15) remained in effect as to pregnancy). Local Law 78 did add a requirement that employers notify employees of their (diminished) rights, but only with respect to pregnancy and related conditions. The SHRL treats pregnancy separately from disability and prohibits an employer from requiring an employee to take a pregnancy leave unless the pregnancy prevents the employee from performing the activities of the job in a reasonable manner. Exec. Law § 296 (g). The Supreme Court ruled in 2015 that a plaintiff may reach a jury under the federal Pregnancy Discrimination Act (PDA) by showing she was pregnant, sought an accommodation, but was denied it while her employer made similar

accommodations for others with similar limitations who were not pregnant; if the employer asserts an apparently legitimate non-discriminatory reason for denying plaintiff the accommodation (“that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (‘similar in their ability or inability to work’) whom the employer accommodates”), the plaintiff may show such reason to be a pretext for intentional discrimination by demonstrating the employer, for example, frequently waives a lifting requirement in cases other than pregnancy (circumstantial evidence that the “requirement” is not such an essential job function), while the burden on pregnant women of denying the accommodation is substantial. Young v. United Parcel Services, Inc., 575 U.S. ____ (Docket No. [12-1226](#), decided March 25, 2015), [slip op](#) at 20-21, [available through](#) <http://www.supremecourt.gov/opinions/opinions.aspx>. In Young, the Court found unpersuasive the Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), [available at](#) http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm). The Court noted that EEOC had issued this Guidance after certiorari had been granted in Young and that the Guidance was inconsistent with previous federal pronouncements on the same issue. [Slip op](#) at 15-17. The Court does “note that statutory changes made after the time of Young’s pregnancy may limit the future significance of our interpretation of the Act.” [Slip op](#) at 10.

³⁷ 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*. *See* Statement of Interest of the United States of America in Williams v. City of New York, 12 Civ. 6805 (S.D.N.Y. Feb. 25, 2015) (arrest without sign language interpreter during investigation), [available through](#) <http://www.ada.gov>; in denying summary judgment in this case, the court noted that disability discrimination in connection with a police arrest or preliminary investigation could result, *inter alia*, from wrongful arrest (e.g., misinterpreting disability-related conduct as criminal activity) or a failure to make reasonable accommodation to the person with a disability (with the circumstances in each case to be evaluated in determining reasonableness). Williams v. City of New York, 12-CV-6805, NYLJ 1202734428588 (decided August 5, 2015), [available at](#) <http://www.newyorklawjournal.com/id=1202734428588>. The case was settled for \$750,000 on October 23, 2015. <http://www.newyorklawjournal.com/printerfriendly/id=1202741096138> . A covered entity’s policies also must reasonably accommodate people with disabilities. Brooklyn Center for Independence of the Disabled v. Bloomberg, 980 F. Supp.2d 588 (E.D.N.Y. 2013) (New York City emergency management plans). On October 19, 2015, a few days before settling the Williams arrest case, the City also reached settlements concerning services for people who are deaf in homeless shelters, with the Justice Department (E.D.N.Y. 15-cv-5986) and with Grace Inetu (E.D.N.Y. 13-cv-01732), paying Ms. Inetu \$117,500 and agreeing to provide qualified sign language interpreters upon request, to install visual alarm appliances in numerous shelter units, and to train shelter staff members in effective communication with people who are deaf. *See* [26](http://www.justice.gov/usao-edny/pr/united-states-enters-consent-judgment-new-york-city-ensure-individuals-city-s-</p></div><div data-bbox=)

homeless in City shelter, and <http://www.newyorklawjournal.com/id=1202740192202/NYC-Reaches-Settlement-for-Deaf-Services-in-Shelters>. 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.

Covered entities must ensure that their oral and written communication with people who have disabilities is as clear and understandable to them as such communication is with people without disabilities, unless they can show that so providing would fundamentally alter their program or would present an undue economic and administrative burden. See Justice Department "Best Practices Tool Kit for State and Local Governments" under Title II of the ADA, Chapter 3 of which addresses effective communication, <http://www.ada.gov/pcatoolkit/chap3toolkit.htm> (Chapter 5 of the "Tool Kit" relates to required website accessibility, <http://www.ada.gov/pcatoolkit/chap5toolkit.htm>). See also updated regulations at http://www.ada.gov/regs2010/titleII_2010/titleII_2010_withbold.htm#anchor3508; "Effective Communication", Justice Department, January 31, 2014, available at <http://www.ada.gov/effective-comm.htm>. See also Settlement Agreement between the United States of America and Ahold U.S.A., Inc. and Peapod LLC. (November 2014), available at http://www.ada.gov/peapod_sa.htm; ADA Title III Settlement between United States of America and edX, Inc, (April 2, 2015), available at http://www.ada.gov/edx_sa.htm; Statement of Interest of the United States of America in National Association of the Deaf v. Massachusetts Institute of Technology Civil Action No. 3:15-cv-300024 (D. Mass. June 25, 2015), available through <http://www.ada.gov>; Statement of Interest of the United States of America in National Association of the Deaf v. Harvard University, Civil Action No. 3:15-cv-300023 (D. Mass. June 25, 2015), available through <http://www.ada.gov>. Touch screens are not a means of effective communication with people who have reading impairments, even though current ADA regulations do not address such devices directly. April 20, 2014, Statement of Interest of the United States of America in New v. Lucky Brand Discounts Stores, Inc., 14-CV-20574, (S.D. Fla. 2014), available through http://www.ada.gov/enforce_activities.htm#luckybrand. But see West v. Moe's Franchisor, LLC, 15cv2846 (S.D.N.Y., Decided December 9, 2015)(NYLJDecember 15, 2015) (failure of one employee during one visit to one food service establishment in a national chain to assist blind patron with touch screen soda selection did not establish chain's violation of ADA Title III obligation to train employees to provide effective communication); but 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), and further discussion at n. 60, *infra*. With respect to the CHRL, see § 8-107(4)(a). See Department of Justice and Department of Education joint technical guidance, “[Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools](#)”, November 12, 2014, available at http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm; and Complaint in *United States of America v. University of Miami*, Case Number: 1:14-cv-038. (S.D. Ohio, Western Div Sept. 2015), available at http://www.ada.gov/miami_univ/miami_complaint.html. See also Settlement Agreement Between United States and School District of the City of Detroit, DJ0 20437-342, Sept. 16, 2015, available at http://www.ada.gov/detroit_sa.html (ADA Title II (§ 504 and IDEA not covered in settlement) requires school district to provide effective communication to, *inter alia*, deaf parent of student to ensure communication to enable effective participation in school programs for developmentally disabled children).

A hospital’s refusal to allow a patient with severe communication impairments to use her laptop computer to communicate while at the hospital was a possible ADA Title III violation. *Reed v. Columbia St. Mary’s Hospital*, 782 F.3d 331 (7th Cir. March 30, 2015), available at <http://www.leagle.com/decision/In%20FCO%2020150330124/REED%20v.%20COLUMBIA%20ST.%20MARY'S%20HOSP>.

Courts must make reasonable accommodation to litigants (and to other participants in adjudication) to enable them to participate in the proceedings in such a way that their disabilities will interfere as little as possible with a fair hearing. See *Reed v. Illinois*, 7th Cir., No. 141745, decided Oct. 30, 2015, available through <http://media.ca7.uscourts.gov/opinion.html>, in which Judge Posner, writing for the majority, found State court (and federal district court) application of collateral estoppel had resulted in unfairness to a pro se plaintiff whose substantial disabilities had not been adequately accommodated. The majority and dissenting opinions present differing views as to the State trial court’s conduct with respect to Ms. Reed’s disabilities at trial. (This is the same pro se Ms. Reed as in the case last cited.)

Sometimes, effective communication may be impossible, but due process considerations still remain. See *People v. Sanchez*, 2013BX016341, N.Y.L.J. 1202660934965, at *1 (Crim. BX, Decided June 20, 2014) (deaf defendant with no language communication skills accused of sexual attack), available at <http://www.newyorklawjournal.com/id=1202660934965/The-People-of-the-State-of-New-York-Plaintiff-v-Yenser-Sanchez-Defendant-2013BX016341#ixzz3HIKshxTh>. See also *United States v. Crandall*, 748 F.3d 476 (2nd Cir. 2014) (“the Sixth Amendment requires reasonable accommodations for hearing-impaired criminal defendants during judicial proceedings and that such accommodations must be commensurate with the severity of the hearing impairment. Where a criminal defendant does not notify the District Court of the impairment, however, he is only entitled to accommodations commensurate with the degree of difficulty that was, or reasonably should have been, clear or obvious to the District Judge.”) See also *Matter of P.M.*, 213-932, N.Y.L.J. 1202652593075 (Surr. Ct., Dutchess Co., Decided April 18, 2014), available at <http://www.newyorklawjournal.com/id=1202652593075/In-the-Matter-of-the-Estate-of->

[PM-Deceased-2013932](#) (considering a wide array of requests). See also [551 Hudson Street Property LLC v. Rios](#), L&T 91743/13, N.Y.L.J. 1202713072149, at *1 (Civ., NY, Decided December 5, 2014), available at <http://www.newyorklawjournal.com/home/id=1202713072149?kw=551%20Hudson%20Street%20Property%20LLC%2C%20Petitioner-Landlord%20v.%20Antonio%20Rios%2C%20et%20al.%2C%20Respondents-Tenants%2C%20L%26amp%3BT%2091743%2F13&et=editorial&bu=New%20York%20Law%20Journal&cn=20141224&src=EMC-Email&pt=Daily%20Decisions> (mental condition may make oral deposition impracticable, requiring reliance on other forms of discovery). A tenant's stipulation to vacate her apartment and the judgment based on that stipulation were vacated when it became apparent the tenant was so developmentally disabled that a guardian ad litem should have been appointed to protect her interests. [SG 455 LLC v. Green](#), L&T 054084/15, Civil Court, Kings Co., Housing Part D, decided Oct. 13, 2015, available at <http://www.newyorklawjournal.com/id=1202740678954/SG-455-LLC-v-Green-LT-05408415>.

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 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) ; but see [Whalen v. City of Syracuse](#), 5:11-CV-0794 (LEK/TWD), N.Y.L.J. 1202665951764, at *15 (N.D.N.Y., Decided July 15, 2014), available at <http://www.newyorklawjournal.com/id=1202665951764/William-Whalen-Plaintiff-v-City-of-Syracuse-Defendant-511CV0794-LEKTWD#ixzz3HfLv6Cbd> :

The ADA prohibits employment discrimination "against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). A plaintiff must demonstrate that her disability was, in the very least, "a motivating factor" for the adverse employment action, if not a "but-for" cause of such an action. See [Parker v. Columbia Pictures Indus.](#), 204 F.3d 326, 336-37 (2d Cir. 2000); [Mines v. City of New York/DHS](#), No. 11 CV 7886, 2013 WL 5904067, at *9 n.2 (S.D.N.Y. Nov. 4, 2013) (noting the continued applicability of the mixed-motive standard to ADA claims); [Siring v. Oregon State Bd. of Higher Educ.](#), 977 F. Supp. 2d 1058, 1062-63 (D. Or. 2013) (discussing legislative history of ADAAA in applying "motivating factor" standard).

Recall that the federal government, federal contractors, and recipients of federal funds are covered by the Rehabilitation Act of 1973. See n. 2, *supra*.

³⁸ N.Y.C. Admin. Code § 8-107(5), Exec. Law §§ 296(5), 296(18).

³⁹ 42 U.S.C. §§ 3601-3631. For an excellent discussion of the FHAA and its place in the array of potential federal, state, and local laws prohibiting housing discrimination, see *U.S. v. East River Housing Corp.*, 13 Civ. 8650 (S.D.N.Y., Decided March 2, 2015), available through <http://www.justice.gov/crt/about/hce/caselist.php>.

⁴⁰ *Riverbay Corp. v. New York City Commission*, 260832/10, 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](http://www.nycourts.gov/library/queens/PDF_files/tk_management-gatling.pdf). See also *L.D.*, at 13, cited at n. 33, *supra*, n. 72, *infra*, and elsewhere (emotional comfort animal for person with severe depression).

⁴¹ Exec. Law § 296(19).

⁴² Exec. Law § 296-a. The CHRL bars lending discrimination in real estate related matters, N.Y.C. Admin. Code § 8-107(5)(d).

⁴³ A full review of how employers might violate these laws is beyond the scope of this article, 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 (limited in New York courts, *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140 (2014)) and cumbersome, time-consuming grievance and arbitration procedures over more streamlined methods of reaching a reasonable accommodation. (See n. 57, *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 bargains 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-nlr-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. 57, 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). As to the duty of fair representation in the context of a complaint of disability discrimination, see Woldeselassie American Eagle Airlines, No. 12 Civ. 07703 (S.D.N.Y. Feb. 2, 2015), available at http://scholar.google.com/scholar_case?case=12257732026119861431&q=woldeselassie+v.+american+eagle&hl=en&as_sdt=6,33&as_vis=1.

⁴⁴ 42 U.S.C. § 12111 (2). However, a non-employer entity may be liable under the ADA for its acts if it controls and interferes with the plaintiff's access to employment opportunities with a third party. Ehrlich v. New York Leadership Academy, 12 Civ. 2565, N.Y.L.J.1202658095881, at nn. 5, 6 (S.D.N.Y., Decided May 29, 2014), available at <http://www.newyorklawjournal.com/id=1202658095881>.

⁴⁵ 42 U.S.C. § 12111 (5).

⁴⁶ Exec. Law § 296.

⁴⁷ 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). Participants in a Work Experience Program (WEP) now have been held to be

employees under federal antidiscrimination laws. Matter of Carver v. State, Number 139, N.Y. Court of Appeals, Decided November 19, 2015, available at <http://www.newyorklawjournal.com/printerfriendly/id=1202742901418#>. But see McGhee v. City of New York, N.Y.L.J. Aug. 27, 2002, 18:2 (Sup .Ct. N.Y. Co.) , available at <http://www.employee-leasing.org/DisplayCaseLawDetail.aspx?CaseLaw=43663&PrintPage=1>. 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 State Civil Rights Law (SCRL) § 40-c.

⁴⁸ N.Y.C. Admin. Code §§ 8-102(5), 8-107(1). See Zakrzewska, 14 N.Y. 3d at 479-82, and N.Y.C. Admin. Code § 8-107(13). See also 9 N.Y.C.R.R. § 466(11) (h), discussed at n. 22 and accompanying text, supra. (allowing consideration of a “problem” a proposed reasonable accommodation might cause an employer or another employee. An employer might be found in violation of State tort law for negligent training or supervision of its employees. Adler v. WestJet Airlines, Ltd., No. 13-62824-CIV-COHN/SELTZER (S.D. Fla July 8, 2014), (settled confidentially August 11, 2014), available at http://scholar.google.com/scholar_case?case=8390064714165442702&q=adler+v.+westjet&hl=en&as_sdt=6,33&as_vis=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] JHRL.” 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. An employer also may be held liable for harassment of employees by a non-employee. Summa v. Hofstra University, 708 F.3d 115 (2nd Cir. 2013). An ill-conceived amendment to the CHRL, passed over the Mayor’s veto, Local Law 14 of 2013, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102958&GUID=9B3B9F98-4E30-475C-A813-F9E1C99F1D99&Options=ID|Text|&Search=unemployment>, (N.Y.C. Admin. Code § 8-107(21)), relating to discrimination based on “unemployment” status, muddies the waters concerning permissibility of certain possibly disability-related inquiries and is likely to require years of litigation in efforts to clarify its parameters.

⁴⁹ N.Y.C. Admin. Code § 8-102(5).

⁵⁰ See EEOC’s Reasonable Accommodations for Attorneys with Disabilities, available at <http://www.eeoc.gov/facts/accommodations-attorneys.html>.

⁵¹ N.Y.C. Admin. Code §§ 8-102(9), 8-107(4); Exec. Law §§ 292(9) and 296(2)(c) -(e); N.Y.S. Civil Rights Law (SCRL) Arts. 4 and 4-B, 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>. 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/pcautookit/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>. See n. 37, *supra*. Chapter 394 of the Laws of 2007 of the State of New York adopted some definitions from the ADA relating to places of public accommodation that were consistent with pre-existing New York State law, but at the same time, exempted from SHRL coverage many facilities that had been covered under the SHRL.

Use of guide, hearing and service dogs is covered under federal, State, and local law and has been subject to much confusion that, with recent legislation, hopefully, can be resolved. This issue is dealt with in greater detail in this author's chapters in the third volume of the New York State Bar Association's Disability Law and Practice: Civil Rights of People with Disabilities: Law, Litigation and Attorneys Fees, scheduled for publication early in 2016. Suffice to say here, for three decades, the CHRL has recognized the right of a person with a disability to use a service animal (not limited in species or breed) anywhere in New York City, with training of the animal by anyone, and with (with a limited exception with respect to housing), merely the credible verbal assurance of the person with the animal as to the disability and the fact of training to alleviate any aspect of the person's disability; trainers of such animals are covered by their relationship with the person with the disability. See Tartaglia v. Jack LaLanne Fitness Ctrs., Inc., N.Y.C. Comm'n on Human Rights, Complaint No. 04153182-PA, Decision and Order (June 12, 1986), available at 1986 NYC HRC LEXIS 2; Stamm v. E & E Bagels, Inc., OATH Index No. 803/14 (Mar. 21, 2014), available at http://archive.citylaw.org/wp-content/uploads/sites/17/oath/00_Cases/14-803.pdf; Comm'n on Human Rights ex rel L.D. v. Riverbay Corp., OATH Index No. 1300/11 (Aug. 26, 2011), adopted, Comm'n Dec. & Order (Jan. 9, 2012), available at http://archive.citylaw.org/oath/11_Cases/11-1300.pdf and 2012 NYC HRC LEXIS. Recall that federal and State laws are a floor, rather than a ceiling, for rights under the CHRL. See nn. 10-12, *supra*. Since 2011, the Justice Department – with respect to private and public sector public accommodations – has limited service animals to dogs (with a similar provision for miniature horses), excluded emotional support and physical protection functions as qualifying for service animal status, severely limited inquiries concerning service animal status, and made clear training need not be done by any “professional” trainer. 28 C.F.R. § 36.302(c); 28 C.F.R. § 35.136; 28 C.F.R. § 36.302 (c) (6); § 35.136 (f); “Section-by-Section Analysis and Response to Public Comments” regarding amendments to ADA regulations 75 F.R. 56163, *et seq.* (September 15, 2010); 75 F.R. 56236 *et seq.* (September 15, 2010); 28 C.F.R. § 36.302 (c) (6), available at http://www.ada.gov/regs2010/titleIII_2010/reg3_2010.html; 28 C.F.R. § 35.136 (f), available at http://www.ada.gov/regs2010/titleII_2010/reg2_2010.html. See, as to the Bush Administration, Notice of Proposed Rulemaking to amend 28 CFR Part 36: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities. 73 F.R. 34473 (June 17, 2008). The EEOC, enforcing ADA Title I's “reasonable accommodation” requirement, has no direct equivalent to service animal provisions of the Justice Department covering both public and private sector places of public accommodation. The United States Department of Transportation's (DOT) ADA

regulations require ground and water vehicles and facilities to accept all forms of service animals on a credible verbal assurance by the individual accompanied by the animal. See 49 C.F.R. § 37.167 and 49 C.F.R. § 37.5 App. D (discussing 49 C.F.R. § 37.167); Federal Transit Administration Office for Civil Rights, “Transit and the ADA: Frequently Asked Questions”, Answer to Question 22, available at http://www.fta.dot.gov/12325_5110.html. See also under the Air Carrier Access Act, 49 U.S.C. § 41705, requiring acceptance of virtually all species of potential service animals (snakes, other reptiles, spiders, and ferrets may be declined) in most situations; “Nondiscrimination on the Basis of Disability in Air Travel”, 14 C.F.R. Part 382 (DOT 2014), available at <http://www.ecfr.gov/cgi-bin/text-idx?SID=aa072804eed9a56532223335f92e6b87&node=pt14.4.382&rgn=div5>.

See Department of Housing and Urban Development (HUD) “Notice on Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-funded Programs” [under both the federal Fair Housing Act and § 504 of the federal Rehabilitation Act] (April 25, 2013) available at

http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf .

SCRL Art. 4-B and SHRL § 296 now are consistent with Justice Department regulations relating to guide, hearing, and service dogs (but without any provision for miniature horses); SHRL § 296(14) should be read to give effect to the repeal of definitions that required “recognized” or “professional” training for guide, hearing, or service dogs (especially since SHRL § 296(14) contains a remedy relating to professionally trained dogs “in addition to” other rights under the section, the fact that the Justice Department regulations make that additional cause of action difficult to maintain in many circumstances (places of public accommodation) does not entirely vitiate the additional right). See Chapter 536 of the Laws of 2014 and 141 of the Laws of 2015, available through <http://public.leginfo.state.ny.us/navigate.cgi>. It should be noted that the SCRL is enforced by the State Attorney General, while the SHRL is under the jurisdiction of the SDHR. As discussed in the “Remedies” portion of this article, there is a private right of action under the SHRL (as of mid December 2015, SDHR still has neither Chapter 536 nor Chapter 141 (both effective more than eleven months earlier) reflected in the SHRL as set forth on its web site).

⁵² Available at http://www.ada.gov/2010ADASTandards_index.htm

⁵³ Albany City Code §§ 48-23 – 48-27. .

⁵⁴ Chapter 700 of the Laws of Westchester County.

⁵⁵ Nassau County Administrative Code §§ 21-9.0 –21-9.9.

⁵⁶ §§ 21-9.8(3).

⁵⁷ 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>.; see also Collective Bargaining and NLRA Issues Raised by the Americans with Disabilities Act, available at <http://www.americanbar.org/content/dam/aba/migrated/labor/basics/nlra/papers/collective>

[bargaining.authcheckdam.pdf](#). An excellent resource for information about accommodations (in employment and elsewhere) is the Job Accommodation Network (JAN), <https://askjan.org/>. Interpreting the language and history of the ADA (before the 2008 amendments, that did not address this issue), the Supreme Court 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). Both the EEOC Guidance and the American Bar Association analysis address Barnett, but neither Barnett nor these analyses address more stringent reasonable accommodation requirements such as those under the CHRL; Barnett might not apply under CHRL § 8-102(18), but see CHRL § 8-107(21)(c)(1)(d). See n. 71, infra. 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. Governmental entities are covered under Title V of the federal Rehabilitation Act (29 U.S.C. § 794 and by Title II of the ADA (42 U.S.C. § 12134(b)).

⁵⁸ 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. See also, Spinella v. Paris Zoning Bd., 194 Misc.2d 232 (S.Ct. Oneida Co. 2002) (blind attorney granted extension to file papers), and discussion of effective communication in. n. 36, supra.

⁵⁹ 42 U.S.C. § 12182(b)(2)(A)(ii).

⁶⁰ 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.) But see West v. Moe’s Franchisor, LLC, 15cv2846 (S.D.N.Y., Decided December 9, 2015)(NYLJDecember 15, 2015) (failure of one employee during one visit to one food service establishment in a national chain to assist blind patron with touch screen soda selection did not establish chain’s violation of ADA Title III obligation to train employees to provide effective communication), discussed further at n.37, supra.

⁶¹ 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). A court may stay an action alleging architectural inaccessibility during the term of a voluntary compliance agreement between a facility owner and the Department of Justice requiring architectural modifications that may affect

conditions pertinent to the private suit. Gropper v. Fine Arts Housing Inc., S.D.N.Y. 13 Civ. 2820, N.Y.L.J. 1202650574433, at *1 (Decided March 3, 2014), available at <http://www.newyorklawjournal.com/id=1202650574433>, and May 14, 2014, decision in the same matter, available through https://www.docketalarm.com/cases/New_York_Southern_District_Court/1--13-cv-02820/Gropper_v._Fine_Arts_Housing_Inc._et_al/4/.

⁶² The term “undue hardship” is defined in the employment context as “requiring significant difficulty or expense.” 42 U.S.C. § 12111(10). But see McMillan v. City of New York, 711 F.3d 120 (2d Cir. 2013) (presence of employee at workplace at particular time or with regularity not always an essential function; “This case highlights the importance of a penetrating analysis.”).

⁶³ 42 U.S.C. § 12181(9). For examples of how this standard is applied by the Department of Justice, see its September 30, 2014, press release, available at <http://www.justice.gov/opa/pr/department-justice-enters-five-agreements-ensure-small-businesses-provide-people-disabilities>, as well as the settlement agreements linked to that site.

⁶⁴ Exec. Law §§ 296 (2-a) (d)(2) and 296 (18)(2). With respect to publically-assisted housing, see Exec. Law §§ 296 (2-a) (d)(2).

⁶⁵ Exec. Law §§ 292(21-e), 292(21), 296(3); 9 N.Y.C.R.R. § 466(11) and its appendix; see n. 29, supra.

⁶⁶ Exec. Law § 296(2)(c).

⁶⁷ Exec. Law §§ 296(2)(c), (d); but see Exec. Law §§ 296(2)(e) (eliminating SHRL coverage in some places of public accommodation). Exec. Law § 296(14) prohibits discrimination against some people using guide, hearing, or service dogs, whether accommodation would be “reasonable” or not.

⁶⁷ N.Y.C. Admin. Code § 8-102(18). With respect to pregnancy, now limited to employment, see n. 36, supra, and Admin. Code § 8-107(22).

⁶⁹ N.Y.C. Admin. Code § 8-107.

⁷⁰ N.Y.C. Admin. Code § 8-107(15).

⁷¹ Phillips, 66 A.D.3d at 181; see generally 180-83; see Romanello, 22 N.Y.3d at 889: Unlike the State HRL, the City HRL’s definition of “disability” does not include “reasonable accommodation” or the ability to perform a job in a reasonable manner. Rather, the City HRL defines “disability” solely in terms of impairments (Administrative Code of City of NY § 8-102 [16]). The City HRL requires that an employer “make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job . . . provided that the disability is known or should have been known by the [employer]” (id. § 8-107 [15] [a]). Contrary to the State HRL, it is the employer’s burden to prove undue hardship (Phillips, 66 AD3d at 183). And, the City HRL provides employers an affirmative defense if the employee cannot, with reasonable accommodation, “satisfy the essential requisites of the job” (Administrative Code § 8-107 [15] [b]). Thus, the employer, not the employee, has the “pleading obligation” to prove that the employee “could not, with reasonable accommodation, satisfy the essential requisites of the job” (Phillips, 66 AD3d at 183 [internal quotation marks omitted]).

For an example of how an employer “should have known” of an employee’s disability and of the employer’s obligation to initiate an interactive process regarding reasonable accommodation, based on what the employrr should have known, see Duckett v. New York Presbyterian Hospital, 114004/2010, N.Y.L.J. 1202677620468, at *31-*33 (S.CT., N.Y. Co., Decided October 21, 2014), available at <http://www.newyorklawjournal.com/printerfriendly/id=1202677620468#>.

⁷² 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/cityadmin/>. The City Human Rights Law definition of “reasonable accommodation”

unlike the state Human Rights Law and the ...ADA ..., allows no category of accommodation to be “excluded from the universe of reasonable accommodation” and, unlike the ADA, there are no accommodations that may be unreasonable under the city Human Rights Law if they do not create undue hardship. Phillips, 66 A.D. at 182. Thus, the term “accommodation,” though undefined in the law, is “intended to connote any action, modification or forbearance that helps ameliorate at least to some extent a need caused by a disability.” Phillips, 66 A.ID.3d at 182, n. 12 (original emphasis).

Comm’n on Human Rights ex rel L.D. v. Riverbay Corp., OATH Index No. 1300/11 (Aug. 26, 2011), adopted, Comm’n Dec. & Order (Jan. 9, 2012), at 13, available at http://archive.citylaw.org/oath/11_Cases/11-1300.pdf.

⁷³ 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.

⁷⁴ 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>. Under the ADA, “a penetrating analysis” was crucial in concluding that “[p]hysical presence at or by a specified time is not, as a matter of law, an essential function of all employment.” McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013).

⁷⁵ 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., 97 A.D.3d 449, 949 N.Y.S.2d 345 (1st Dep’t 2012), mod (to reinstate CHRL cause of action) and, as mod, aff’d, 22 N.Y.3d 881 (2013). The New York Court of Appeals discussed the interactive process extensively in Jacobsen, 22 NY3d 824 (2014) and was careful to limit its agreement with prior case law in one respect:

Our conclusion that, in all but the most extreme cases, the lack of a good

faith interactive process forecloses summary judgment in favor of the employer should not be construed too broadly. At a trial on a State HRL claim, the plaintiff employee still bears the burden of proving the existence of a reasonable accommodation that would have enabled the employee to perform the essential functions of his or her position (see Executive Law § 292 [21]; Romanello, 22 N.Y.3d at 884). Furthermore, to the extent the Appellate Division's decision in Phillips can be interpreted as implying that a good faith interactive process is an independent element of the disability discrimination analysis under either the State or City HRL which, if lacking, automatically compels a grant of summary judgment to the employee or a verdict in the employee's favor (cf. 66 AD3d at 175-176), we reject that notion.

Id. at 838. But see New York City Council Int. No. 804 of 2015, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2352223&GUID=04039CC5-37D8-4366-A5AF-8B93F6D9717E&Options=&Search=>, directed at reversing this limitation with respect to the New York City Human Rights Law.

Under the ADA and SHRL, an interactive process may not be necessary when an employee who is offered sign language interpreter services he finds effective for meetings rejects the same accommodation when viewing videos maintained by employer for employees. Noll v. International Business Machines Corporation, 13-4096-cv, (2d Cir., decided May 21, 2015), available at http://www.ca2.uscourts.gov/decisions/isysquery/4c191a8d-202d-4e60-939d-0c991779e0f8/1/doc/13-4096_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/4c191a8d-202d-4e60-939d-0c991779e0f8/1/hilite/ (affirming grant of summary judgment for employer; majority held no interactive process needed since effective accommodation available; dissent stated such a conclusion was not appropriate in summary judgment under the circumstances).

It is important to keep McMillan (see n. 73), Phillips, Romanello, and Jacobsen in mind to avoid poorly reasoned decisions such as that in Williams v. New York City Health & Hospitals Corp., 300055/13N.Y.L.J. 1202672226295 (S.Ct. Bronx Co. decided September 12, 2014; published October 6, 2014), available at <http://www.newyorklawjournal.com/home/id=1202672226295?kw=Wayne%20Williams%2C%20Plaintiff%28s%29%20v.%20New%20York%20City%20Health%20%26amp%3B%20Hospitals%20Corporation%20and%20Jacobi%20Medical%20Center%2C%20Defendant%28s%29%2C%20300055%2F13&et=editorial&bu=New%20York%20Law%20Journal&src=EMC-Email&pt=Daily%20Decisions>. There, inter alia, the Court ignored the different ADA and SHRL issues involved in th assessing the interactive process to explore the possibility of a reasonable accommodation and found a federal district court's dismissal of CHRL claims without prejudice to constitute collateral estoppel in the State court action.

⁷⁶ 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). Claims under ADA, SHRL, and CHRL have been found subject to an arbitration clause in an individual's employment agreement. *Bulkenstein v. Taptu, Inc.*, 14 Civ. 1812, N.Y.L.J. 1202673556797, at *1 (S.D.N.Y., Decided October 9, 2014), available at <http://www.newyorklawjournal.com/printerfriendly/id=1202673556797>.

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>. Encouragement of alternative dispute resolution in the ADA (42 U.S.C. § 12212) and the absence of such a provision from the CHRL, together with the language and history of the Local Civil Rights Restoration Act might make State Court a better forum, without reliance on the ADA, when an arbitration agreement otherwise might be problematic. *C.f. Whitt v. Prosper Funding LLC*, 1:15-cv-136, NYLJ 1202732403755, at *1 (SDNY, Decided July 14, 2015). *But see* CHRL § 8-107(21)(c)(1)(d). A judicially unreviewed State administrative determination is not preclusive in a subsequent suit under the ADA, although a binding arbitration award may be. *Cortes v. MTA New York City Transit*, 14-713-cv, NYLJ 1202736928393, at *1 (2d Cir., Decided September 4, 2015).

⁷⁷ 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).

⁷⁸ 42 U.S.C. § 1988.

⁷⁹ *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*. For discussion of how and why attorneys fees were reduced in an ADA/CHRL case, *see Muñoz v. The Manhattan Club Timeshare Assoc., Inc.*, 11-CV-7037, N.Y.L.J. 1202671152086, at *1 (S.D.N.Y., Decided September 18, 2014), available at <http://www.newyorklawjournal.com/id=1202671152086?>.

⁷⁹ 42 U.S.C. §§ 12188, 2000e-5. Civil penalties may be sought in actions by the Justice Department. On March 28, 2014, the Department of Justice issued a Final Rule that adjusts for inflation the civil monetary penalties assessed or enforced by the Civil Rights Division, including civil penalties available under title III of the Americans with

Disabilities Act of 1990 (ADA). For the ADA, this adjustment increases the maximum civil penalty for a first violation under title III from \$55,000 to \$75,000; for a subsequent violation the new maximum is \$150,000. The new maximums apply only to violations occurring on or after April 28, 2014.

<http://www.gpo.gov/fdsys/pkg/FR-2014-03-28/html/2014-06979.htm>.

⁸¹ 42 U.S.C. § 12133.

⁸² N. 2, *supra*.

⁸³ See Lane and Georgia, discussed in n. 4, *supra*.

⁸⁴ N.Y.C. Admin. Code § 8-109. Filing of an administrative complaint generally constitutes an election of remedies precluding a private suit. N.Y.C. Admin. Code § 8-502.

⁸⁵ Exec. Law § 297(5). Filing of an administrative complaint generally constitutes an election of remedies precluding a private suit. Exec. Law § 297(9), Hernandez v. Edison Properties, 103762/12, N.Y.L.J. 1202653474336 at 1 (S.Ct. NY Co. Decided March 31, 2014; published May 2, 2014), available at <http://www.newyorklawjournal.com/id=1202653474336/Juan-Hernandez-Plaintiff-v-Edison-Properties-Defendant-10376212?slreturn=20141003164541>.

⁸⁶ N.Y.C. Admin. Code § 8-502.

See Bennett, discussed at n. 11, *supra*. For example, the McDnnell 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 (E.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. 40, *supra* (reducing damages and fines levied by CCHR); see L.D., discussed at n. 72, *supra*. 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 79, 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).

Injunctive relief under the CHRL (N.Y.C. Admin. Code § 8-502) is much more readily available than it is under the SHRL (Exec. Law § 297(9)). Wilson v. Phoenix House, 42 Misc.3d 677, 703-708 (S. Ct. Kings Co. 2013).

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).

As this is written, the New York City Council is giving favorable consideration to Int. 818 of 2015, available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2352255&GUID=85F82A07-2CB1-4A6A-B4B0-665A1C4A16D4&Options=&Search=>, that would provide attorneys fees in connection with proceedings at the CCHR itself and would make attorneys fees more substantial in judicial proceedings.

⁸⁷ 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). As to comparative evidentiary burdens, see nn. 10-12, supra; see also Cadet-Legros, discussed in n. 11, supra.

⁸⁸ N.Y.C. Admin. Code § 8-502(c); before enactment of Local Law 85 of 2005, 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)) has been held in federal court to warrant dismissal. Erllich v. Gatta, N.Y.L.J. Oct. 16, 2009, 30:1 (S.D.N.Y. Oct. 2, 2009), available at <https://casetext.com/case/ehrllich-v-gatta>. However, that SHRL case was based on non-SHRL state precedent; the better precedent is that SHRL claims against a municipality are not subject to General Municipal Law or CPLR notice of claim requirements. See Rose v. NYC Health and Hospitals Corp., 122 A.D.3d 76, 79 (1st Dept 2014). Even when suit against a governmental entity is barred procedurally, a suit might proceed against an employee of that entity for aiding and abetting the entity’s human rights law violation. Johnson v. County of Nassau, 10-CV-6061, N.Y.L.J. 1202717065006, at *1 (E.D.N.Y., Decided January 30, 2015; published February 6, 2015), available at <http://www.newyorklawjournal.com/id=1202717065006>. 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>.

⁸⁹ 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).

⁹⁰ O’Brien v. NYC Civil Service Commission, 100043/2014 (S.Ct. N.Y. Co. Oct. 24, 2014) (applicant for police officer position may not be rejected on the basis of generalized conclusions about Multiple Sclerosis). See also nn. 73-74 and accompanying text.

⁹¹ Fletcher, 99 A.D.3d at 47.

⁹² See nn. 52 - 56 and accompanying text, supra.

⁹³ § 48-27(H).

⁹⁴ Laws of Westchester County §§700.11(h)(3)-(5).

⁹⁵ Nassau County Admin. Code § 21-9.9.1.

⁹⁶ See WestJet, discussed at n. 48, supra. Filing of an EEOC charge does not toll a state tort law statute of limitations. Castagna v. Luceno, 744 F.3d 254, 255 (2d Cir. 2014). See N.Y.C. Admin. Code § 8-502.

[W]hen ... [a] common carrier is aware that a passenger has limitations, the duty of care is heightened, requiring that the common carrier exercise “special care and attention beyond that given to the ordinary passenger [and] which reasonable prudence and care demand[] for his exemption from injury” Fagan v. Atlantic Coast Line R.R. Co., 220 NY 301, 307 [1917]; Kasper v. Metropolitan Transp. Authority Long Island Bus, 90 AD3d 998, 999 (2d Dept [2011])] [“To a disabled passenger, a common carrier has a duty to use such additional care or to render such aid for his or her safety and welfare as is reasonably required by the passenger’s disability and the existing circumstances, provided that the common carrier’s employees knew or should reasonably have known of the passenger’s disability.”]; Kelleher v F.M.E. Auto Leasing Corp., 192 AD2d 581, 582 [2d Dept 1993]....

Ramirez v. City of New York, 350312/08, 2014 NY Slip Op 50910(U) (S. Ct. Bronx Co. 2014).

⁹⁷ See Carter v. State, 2014 Slip Op. 05394 (3d Dep’t July 17, 2014), available at <http://caselaw.findlaw.com/ny-supreme-court/1673100.html>. “[P]articipation of an individual director in a corporation’s tort is sufficient to give rise to individual liability” in the context of claims of coop discrimination under housing and retaliation provisions of the SHRL and CHRL. Fletcher, 99 A.D.3d at 47.

In Lugo v. St. Nicholas Associates, 2 Misc. 3d 212, 772 N.Y.S. 2d 449 (Sup. Ct. NY Co. 2003), modified, 18 A.D.3d 341, 341, 795 N.Y.S.2d 1227 (1st Dep’t 2005), plaintiff, a home health care aide, was injured while lowering her client, using a wheelchair, down the two steps leading to the street from the office of a physician in a Manhattan building. Plaintiff sued the building owner, building management company, and physician for negligence – not claiming any defect in or negligent maintenance of the steps, but, rather, asserting that the failure to provide a ramp violates a standard of care owed to an individual with a disability and to one associated with such an individual; plaintiff further argued that both the standard of care and the cause of action implicitly were created or evidenced by the ADA, the SHRL and the New York City Building Code. The motion court held that the ADA’s requirements that places of public accommodation remove architectural barriers and not discriminate against those associated with people with disabilities evidence a standard of care on which plaintiff had standing to sue for negligence. Since neither the SHRL nor the City Building Code created a standard of care

applicable to one associated with a person having a disability, plaintiff could not prevail under those laws. While plaintiff's reliance on the ADA sufficed in the motion court's opinion, that court's reasoning indicates plaintiff also might have relied on the CHRL, rather than on the SHRL, since, unlike the SHRL, the CHRL both requires reasonable accommodation (N.Y.C. Admin Code §§ 8-102(18), 8-107(15)) and protects those associated with a person with a disability (N.Y.C. Admin. Code § 8-107(20)). See Bartman v. Shenker, 5 Misc. 3d 856, 786 N.Y.S. 2d 696 (Sup.Ct. N.Y. Co. 2004) (discussing Bartman's claims under both SHRL and CHRL). Although the First Department disagreed with that part of the motion court's decision that the ADA could provide a standard for tort liability, the Appellate Division did so on the bases that: (1) in the ADA, "Congress did not include a private right of action even for direct and intentional discrimination"; thus, (2) "there is no discernible reason why ... ADA [should be used] as a safety standard"; (3) "[n]or has the New York State Legislature seen fit to expand the scope of a building owner's duty beyond that of common law in this respect". In Lugo, however, only the ADA and the SHRL had been relied upon by plaintiff. Arguably, reliance on the CHRL might have brought a different result. The latter does provide a substantial private right of action, with monetary relief, for people who have or are perceived to have a disability, as well as for those associated with such a person. N.Y.C. Admin. Code §§ 8-102(16), 8-102(18), 8-107(4), 8-107(15), 8-107(20), 8-502. The New York City Commission on Human Rights (CCHR) may look to Building Code accessibility provisions to determine what architectural modifications may be necessary to accommodate people with disabilities. Moreover, the CHRL requires as affirmative action expenditure of a property owner's funds to provide accessibility. United Veterans, discussed at n. 39, supra. 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., discussed at n. 39, supra. See also Riverbay, discussed at n. 39, supra (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."). The New York City Building Code provisions relied upon in Lugo were (N.Y.C. Admin. Code §§ 27-292.1 - 27-292.20) -- the principal provisions of the Building Code Accessibility Amendments of 1987 (Local Law 58) (subsequently replaced by the weaker Chapter 11 of the current N.Y.C. Building Code, Administrative Code § 28-701.2C11, §1101 et seq., including substantial amendments effective December 31, 2014, available at http://www.nyc.gov/html/dob/html/codes_and_reference_materials/reference.shtml).

New York City is not the only locality with an architectural standard supporting a policy for facilitating integration of people with mobility impairments. See, e.g., Local Law #1 of Suffolk County, adding Suffolk County Admin. Code §A36-3 (visitability). Lugo is not the only tort case indicating a failure to take action consistent with statutory policy to provide a safe, non-discriminatory environment for people with disabilities may result in liability for negligence. See Hernandez v. Kaisman, 103 A.D.3d 106 (1st Dep't

2012), and Sayers v. City of New York, N.Y.L.J. Apr. 2, 2007, 26:1 (E.D.N.Y. CV-04-3907, Mar. 21, 2007, Sifton, J.), available at
<http://www.newyorklawjournal.com/PubArticleNY.jsp?id=900005477596> (denying summary judgment on state tort claims).

⁹⁸ Garrett, 531 U.S. at 374, n. 9.