



REPORT ON LEGISLATION

**A.609
S.3662**

**M. of A. Dinowitz
Senator DeFrancisco**

**A.2575
S.1013**

**M. of A Jacobs
Senator Kruger**

S.4794 (2006)

Senator Duane

A.7438 (2006)

M. of A. Gottfried

A.4603

M. of A Espailat

**A.5916
S.3072**

**M of A Destito
Senator Robach**

S.3052

Senator Robach

A.1222

M. of A. Paulin

ACTS to expand the monetary relief available under the Human Rights Law, and to expand the class protected under the Human Rights Law

THESE BILLS ARE APPROVED

The Association's membership includes attorneys from state and local government agencies, law firms, not-for-profit organizations, and law school faculty. The Association has a strong interest through its committees -- including the Committees on Civil Rights, Legal Issues Affecting People With Disabilities, Sex and the Law, and Lesbian, Gay, Bisexual and Transgender Rights - - in the promotion and preservation of civil rights and the elimination of arbitrary discrimination. In this vein, we strongly support steps to update and modernize the State Human Rights Law in the following ways:

- Expand the monetary relief available under the Human Rights Law, including attorney's fees, punitive damages, and civil penalties.
- Expand the classes protected under the Human Rights Law to prohibit discrimination on the basis of gender identity or expression, citizenship or immigration status, domestic violence victim status, and source of income.

These reforms, many of which are already in place in New York City, would enable the State of New York -- the birthplace of modern civil rights legislation -- to remain a true leader in the field of civil rights.

Monetary Relief Under the Human Rights Law

Under the existing terms of the State Human Rights Law, punitive damages, attorney's fees, and penalties can be awarded only in cases of housing discrimination. *See* N.Y. Exec. L. § 297(9) & 297(10).¹ As such, in the majority of cases, whether brought administratively or in court, victims of discrimination can obtain, and perpetrators of discrimination must pay, only compensatory damages. The statutory scheme thereby provides too little deterrent to discriminatory conduct, imposes substantial burdens on victims (who must either pay for private counsel or cope with administrative delays), and fails to acknowledge the independent harm that discrimination imposes on the State and its residents.

These flaws could be addressed in part by a number of proposed amendments to the Human Rights Law that have recently been considered by the New York State Legislature. One bill currently before the Assembly, A.609, would allow attorney's fees, costs, and exemplary damages to be awarded in court actions when discrimination is found. (A version of this bill passed the Assembly as A.1235 in 2005 but died in the Senate). In addition, A.2575 and S.1013,

¹ Additional relief is available in housing discrimination cases because the Human Rights Law was revised previously to make it substantially equivalent to the federal Fair Housing Act.

which were introduced but not passed during the prior legislative session, would have allowed punitive damages to be awarded in all cases under the Human Rights Law.²

The availability of fee awards would ease the financial burden on meritorious plaintiffs and increase their access to competent counsel. The availability of punitive damages in appropriate cases would more fully punish those who engage in gross misconduct and dissuade others from similar behavior.

In addition to the above proposed amendments, the Human Rights Law should also be revised to allow for penalties to be paid to the State. Some types of discrimination cause relatively little compensable harm to direct victims, but significant harm to society as a whole -- for example, a store's exclusion or disparate treatment of persons of a particular race, or an employer's use of discriminatory job advertisements. The availability of penalties would further deter discriminatory conduct and acknowledge (and compensate for) the societal harm caused by discrimination.³

These changes would bring the Human Rights Law more into line with progressive civil rights statutes nationwide. Attorney's fees, punitive damages, and/or penalties are already available in non-housing-related civil rights matters under federal law⁴ and the laws of a number of states and localities, including jurisdictions within New York State.⁵

² Similarly, A.2993 would have allowed attorney's fees, costs -- including the fees of experts and investigators -- and punitive damages to be awarded in court actions under the Human Rights Law. We would note, however, that punitive damages should also be available to complainants before the State Division of Human Rights. (By contrast, the availability of attorney's fees is somewhat less important in the administrative setting because the State Division prosecutes actions on behalf of complainants upon a finding of probable cause.)

³ While the New York Civil Rights Law provides for penalties of \$100 to \$500 for each act of discrimination, these penalties must be paid to identified victims or their assignees, not to the State. *See* N.Y. Civ. Rights L. § 40-d. Substantial penalties are payable to the State under the Human Rights Law only in cases of housing discrimination. *See* N.Y. Exec. L. § 297(4) & 297(9) (permitting assessment of up to \$100,000 in civil fines and penalties).

⁴ Successful plaintiffs under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, for example, may receive punitive damages; 42 U.S.C. § 1988 allows for awards of reasonable attorney's fees and costs in certain federal civil rights actions.

⁵ Both the City of New York and a number of states allow all three types of relief under appropriate circumstances. *See* N.Y.C. Admin. Code §§ 8-126 & 8-502; *see also, e.g.,* Fla. Stat. §§ 760.021 & 760.11; Me. Rev. Stat. tit. 5, §§ 4613 & 4614; Mass. Gen. Laws, ch. 151B, §§ 5 & 9; Minn. Stat. §§ 363A.29 & .33; N.J. Stat. Ann. §§ 10:5-13, -14.1a, & -27.1; Vt. Stat. tit. 21, § 495b. Other state and local laws permit: (1) attorney's fees and punitive damages, *see, e.g.,* Ill. Comp. Stat., ch. 775, § 5/10-102; Ore. Rev. Stat. § 659A.885; R.I. Gen. Laws §§ 28-5-24 & -29.1; (2) attorney's fees and penalties, *see, e.g.,* Ariz. Rev. Stat. §§ 1472 & 1481; Cal. Gov. Code §§ 12965 & 12970; Phila., Pa., Code & Charter §§ 9-1109 & -1110; (3)

Protected Classes Under the Human Rights Law

In addition to supporting an increase in the monetary relief available under the Human Rights Law, we also encourage you to support legislative proposals to extend the protections of the Law to other vulnerable classes of persons. Expansions of the Human Rights Law's protections are not unusual. Indeed, in recent years, New York has generously extended protection to the following types of status: religious observances and practices; sexual orientation; military status; and genetic predisposition or carrier status. New York should now join other states in taking further steps to protect vulnerable citizens from discrimination. Specifically, we urge that strong consideration be given to a number of legislative proposals.

First, the Human Rights Law should be amended to prohibit discrimination on the basis of *gender identity and expression* -- an individual's identification as male or female and associated "masculine" or "feminine" behaviors or attributes. Although the Human Rights Law currently prohibits discrimination based on sex and sexual orientation, those categories do not explicitly and adequately protect many individuals who are discriminated against because of their actual or perceived gender identity or expression, such as transgendered persons. While a number of trial courts have found that such persons are already protected by the Law's prohibition on sex discrimination -- since discrimination on the basis of transgender status is necessarily based on failure to adhere to sex stereotypes -- it is important to clarify these protections by explicitly including gender identity or expression as a prohibited basis for discrimination, as New York City has already done.⁶ Bills that would have accomplished this clarification, A.7438 and S.4794, were introduced but not passed during the prior legislative session.

Second, the Human Rights Law should be amended to prohibit discrimination on the basis of *citizenship or immigration status*. New York State has long been the destination of choice for immigrants from around the world seeking a better life. But non-citizens, even those who are here lawfully -- such as permanent residents, refugees, and asylees -- often face discrimination, especially after the tragic events of September 11 and in light of the national debate concerning immigration reform. Adding citizenship or immigration status as a protected characteristic would fill gaps in the current protection offered by federal civil rights laws and the Human Rights Law, which prohibit discrimination on the basis of national origin, and the federal Immigration and Nationality Act, which prohibits discrimination based on

attorney's fees alone, *see, e.g.*, Conn. Gen. Stat. § 46a-104; Hawaii Rev. Stat. § 378-5; 43 Pa. Cons. Stat. § 962; Westchester County, N.Y., Laws § 700.11; or (4) civil penalties or fines alone, *see, e.g.*, Mun. Code of Chicago, Ill., § 2-160-120; Nassau County, N.Y., Admin. Code § 21-9.9.1; N.H. Rev. Stat. § 354-A:21; S.F. Admin. Code § 12B.2.

⁶ The New York City Human Rights Law was amended in 2002 to clarify that the protected class "gender" includes "a person's gender identity, self-image, appearance, behavior or expression." N.Y.C. Admin. Code § 8-102(23). Many other states and localities have also extended anti-discrimination protection to gender identity, including most recently New Jersey. *See, e.g.*, N.J. P.L. 2006, c.100 (Dec. 19, 2006).

citizenship or immigration status in *employment only*. New York City has already extended this protection.⁷ A bill that would have accomplished this change, A.5005, was introduced but not passed during the prior legislative session. It has been reintroduced as A.4603 of 2007.

Third, the Human Rights Law should be amended to prohibit discrimination in employment and housing against *victims of domestic violence, sexual assault, and stalking*. Victims of domestic violence, sexual assault, and stalking often lose jobs and housing due to discrimination. Employers and landlords fear that the victim's presence in the workplace or housing complex will attract further violence by the abuser and harm to third parties. However, the economic security provided by a job and/or housing is critical to allowing a victim of violence (and her children) to leave a dangerous situation in a safe manner. Recognizing this, several states and localities (including New York City and Westchester County) have already enacted laws protecting victims of such violence from employment and/or housing discrimination.⁸ Significantly, bills such as A.6282 and S.4112, introduced in the previous legislative session, would also fill a gap in the recently-reauthorized federal Violence Against Women Act, which protects domestic violence and stalking victims from discrimination in access to public and subsidized (Section 8) housing, as well as providing a defense to eviction, but does not address *private* housing.⁹ Bills to enhance protections in employment (A.4611 and S.2271) were introduced in the prior legislative session, but only the Senate bill was passed. A.4611 was recently reintroduced as A.1222, and S.2271 as S.3052. With regard to the housing bills, only A.6282 was passed by the Assembly in the prior session, while S.4112 died in the Senate. We strongly encourage you to support A.1222 and the 2007 edition of A6282/S2271, A5916/S3072.

Fourth, and finally, the Human Rights Law should be amended to prohibit discrimination in housing on the basis of *lawful source of income*. As the cost of housing continues to rise, individuals with limited or fixed incomes are constantly faced with the challenge of finding safe, affordable housing. They are often denied access to housing or evicted from housing on the basis of lawful sources of income, in particular where that income comes from public sources

⁷ See N.Y.C. Admin. Code § 8-102(21) ("the term 'alienage or citizenship status' means...[t]he citizenship status of any person or...[t]he immigration status of any person who is not a citizen or national of the United States").

⁸ See 320 Ill. Comp. Stat. 180/1-180/45 (prohibiting employment discrimination and providing for reasonable accommodations such as leave); N.Y.C. Admin. Code § 8-107.1 (prohibiting employment discrimination and providing for reasonable accommodations); Westchester County, N.Y., Laws §§ 700.03 - .05 (prohibiting discrimination in places of public accommodation, and housing). North Carolina, Rhode Island, and Washington state have enacted laws prohibiting housing discrimination against victims of domestic violence. See N.C. Gen. Stat. §§ 42-40, 42-42.2 42-42.3 & 42-45.1; R.I. Gen. Laws §§ 34-37-1, -2, -2.4, -3 & -4; Wash. Rev. Code Ann. §§ 59.18.570, 575, 580 & 585.

⁹ See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960, amending 42 U.S.C. § 1437f(c)(9) (Section 8 housing) and 42 U.S.C. § 1437d(c) (public housing).

such as Section 8 vouchers. Such discrimination by landlords reduces the already limited availability of housing for some of the most vulnerable members of New York's population, especially the elderly and disabled who live on fixed incomes. Such discrimination also makes it difficult for individuals attempting to transition from public assistance to self-sustaining employment, and for low-income working families struggling to find decent, affordable housing. New York state should join two of its own cities, West Seneca and Hamburg¹⁰, and several other states such as California¹¹, Connecticut¹², Minnesota¹³, New Jersey¹⁴, North Dakota¹⁵,

¹⁰ See West Seneca Codes, Sec. 71-3 (landlord may not discriminate against a potential tenant because of the tenant's source of income); Hamburg Codes, Chapter 109-3 (landlord may not discriminate against a tenant because of the tenant's lawful source of income where tenant has sufficient income to cover monthly rent).

¹¹ See Cal. Gov. Code § 12955 (providing protections against discrimination in housing rentals and sales based on source of income). However, the availability of this protection to Section 8 voucher holders is in dispute. The statute states that "for the purposes of this section, 'source of income' means lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant. For the purposes of this section, a landlord is not considered a representative of a tenant."

¹² See Conn. Gen. Stat. § 46a-63(3) (prohibiting discrimination in housing rental or sales based on lawful source of income). "Lawful source of income" is defined to include "social security [SSI], housing assistance, child support, alimony or public or general assistance." The statute was upheld by the Connecticut State Supreme Court in *Commission on Human Rights & Opportunities v. Sullivan Associates*, 739 A.2d 238 (Conn. 1999).

¹³ See Minn. Stat. §§ 363.01(42) & 363.0A.02 (prohibiting discrimination in housing and real property based on "status with regard to public assistance"). "Status with regard to public assistance" is defined to mean "the condition of being a recipient of federal, state or local assistance, including medical assistance, or of being a tenant receiving federal, state or local subsidies, including rental assistance or rent supplements." However, in an unpublished opinion, a Minnesota appeals court found that the law does not extend to Section 8 voucher-holders. See *Babcock v. BBY Chestnut Limited Partnership*, No. CX-90-30, 2003 WL 21743771 (Minn. App. July 29, 2003).

¹⁴ See N.J. Stat. Ann. §§ 10:5-4 & 10:5-12 (prohibiting discrimination in housing rentals based on lawful sources of income "or the source of lawful income used for rental or mortgage payments"). In *Franklin Tower One v. N.M.*, 157 N.J. 602 (1999), the New Jersey Supreme Court upheld an earlier version of the statute, N.J. Stat. Ann. § 2A:41-100 (since repealed), finding that Section 8 vouchers were covered because the statute prohibits discrimination not only against source of income but also against the source of a lawful rent payment.

¹⁵ See N.D. Cent. Code § 14-02.5-02 (prohibiting discrimination in the rental or sale of housing based on "public assistance").

Oklahoma¹⁶, Oregon¹⁷, Utah¹⁸, Vermont¹⁹, and Wisconsin²⁰, in prohibiting housing discrimination based on source of income. A bill that would have accomplished this purpose, A.4622, was introduced but not passed during the prior legislative session.

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For the above reasons, we look forward to working with you to assure the passage of these bills in the 2007 legislative session.

¹⁶ See Okla. Stat. tit. 25, § 1452 (public assistance must be considered a valid source of income for housing; failure to consider it a valid source of income, if based on race, disability, gender or other protected categories, is unlawful).

¹⁷ See Or. Rev. Stat. § 659A.421(1) (prohibiting discrimination in real estate transactions based on source of income, but specifically excluding federal rent subsidy payments under 42 U.S.C. §1437f from its definition of source of income).

¹⁸ See Utah Code Ann. §§ 57-21-2(11) & 57-21-5 (prohibiting discrimination in housing rentals or sales based on "source of income," defined to include "federal, state, or local subsidies, including rental assistance or rent supplements").

¹⁹ See Vt. Stat. Ann. tit. 9, §§ 4501(6) & 4503 (prohibiting discrimination in housing rentals or sales based upon receipt of "public assistance," defined to include assistance "provided by federal, state or local government, including housing assistance").

²⁰ See Wis. Stat. Ann. § 106.50 (prohibiting discrimination in housing sales and rentals based on lawful source of income). However, a federal court found that Section 8 vouchers are not clearly encompassed by the term "source of income," and that participation in the Section 8 program is voluntary. *Knapp v. Eagle Property Mgm't*, 54 F.3d 1272 (7th Cir. 1995).