

COMMITTEE ON CIVIL RIGHTS

BRIAN J. KREISWIRTH

CHAIR

200 VESEY STREET

NEW YORK, NEW YORK 10285 Phone: (212) 640-3392

Fax: (212) 640-9232

Brian.J.Kreiswirth@aexp.com

Via Facsimile and Regular Mail

July 20, 2011

KATHERINE A. ROCCO

SECRETARY 825 EIGHTH AVENUE

ROOM 3944

NEW YORK, NEW YORK 10019 Phone: (212) 474-1255

Fax: (212) 474-3700 KRocco@cravath.com

Hon. Mark Weprin New York City Council

250 Broadway **Suite 1807**

New York, NY 10007

Re: Int. No. 632 - A Local Law to amend the administrative code of the city of New York, in relation to unlawful discriminatory practices.

Dear Council Member Weprin:

I am writing on behalf of the Civil Rights Committee of the New York City Bar in order to express our concerns about segments III and IV of the Council's June 30, 2011 Report regarding Int. No. 632 of 2011. Those segments, left without clarification that would amount to correction, would undermine seriously one of the Council's most notable achievements of recent years – the Local Civil Rights Restoration Act of 2005. We therefore urge correction of certain Report language, perhaps in a report issued before the current bill's passage, as discussed further below and as reflected in Appendix A. We further believe some clarification is needed in the bill itself to avoid confusion between reasonable accommodations in a religious context as distinct from such accommodations in a disability context; this also is discussed below and reflected in Appendix B.

The Report (pages 3-5) correctly points out that the term "undue hardship" (1) has no definition in the City Human Rights Law (CHRL) provision permitting an employer such a defense in declining to make reasonable accommodation to religious beliefs or practices; (2) has a de minimis standard under a similar provision in Title VII of the federal Civil Rights Act of 1964 (Title VII)²; and (3) has a "significant expense or difficulty" standard under the New York State Human Rights Law (SHRL) provision the bill proposes to adopt.

However, the Report further states: "Because the City Human Rights Law does not define 'undue hardship,' the Title VII definition applies, triggering a lower standard of proof for

¹ Local Law 85 of 2005

employers and fewer protections for employees [than under the SHRL]." We do not believe that is an accurate statement of current law with respect to use of the term "undue hardship" in the CHRL. Worse, it may be used to weaken, rather than to strengthen, human rights in New York City, particularly with respect to religion.

Local Civil Rights Restoration Act

Under the Local Civil Rights Restoration Act of 2005, the SHRL provision is "a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." The Title VII definition does not apply, but, rather, is a basement compared to the potential "floor" of the SHRL in this instance. Moreover, the Restoration Act amended the "Construction" provision of the CHRL⁴ as follows (additions underscored; deletions in brackets):

Construction. The provisions of this [chapter] <u>title</u> shall be construed liberally for the accomplishment of the <u>uniquely broad and remedial</u> 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 Council's Report on what became the Restoration Act stated:

Prop. Int. 22-A expressly instructs decision makers assessing claims asserted under the City's human rights law to construe the human rights law independent of similarly worded provisions of state and federal law.

Under the bill's provisions, a number of principles should guide decision makers when they analyze claims asserting violations of rights protected under the City's human rights law: 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.⁵

The Council's clarion call has been heeded in New York State and federal appellate courts. 6 Reiteration of, rather than retreat from, the higher standards of the CHRL is necessary

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http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=441304&GUID=79DC9B4A-845F-4BDA-AA6C-D6F63F0C8A0B&Options=ID|Text|Attachments|Other|&Search=85 and at http://www.antibiaslaw.com/sites/default/files/files/CommitteeReport081705.pdf

³ Local Law 85, § 1

⁴ Local Law 85, § 7, amending NYC Admin. Code § 8-130

⁵ NYC Council's Committee on General Welfare's August 17, 2005, report on this bill (pp. 2, 3-4; footnotes omitted), <u>available at</u>

Albunio v. City of New York, 16 N.Y.3d 472, 477-78, 922 N.Y.S.2d 244 (2011); Zakrzewska v. The New School, 14 N.Y. 3d 469, 479-82, 928 N.E. 2d 1035 (2010); Williams v. New York City Housing Authority, 61 A.D. 3d 62, 65-81, 872 N.Y.S. 2d 27 (1st Dep't 2009); Phillips v. City of New York, 66 A.D. 3d 170, 174-90, 884 N.Y.S. 2d

to educate those who have not gotten the message. Creating legislative history in the present Report on Int. No. 632 stating that the lowest standard "applies" significantly weakens the intended objectives of the Local Civil Rights Restoration Act. At the same time, providing guidance such as that proposed in Int. No. 632 itself – when placed in the context of the Restoration Act – could be helpful.⁷

Reasonable Accommodation: Religion and Disability

Reasonable accommodation of both religious beliefs and practices, on the one hand, and the integration of people with disabilities, on the other hand, are important to both the individual directly affected and to society at large. However, the natures of disability and of religion, as well as the natures of accommodations necessary for each are quite distinct. Appropriate differences are reflected in federal State and City anti-discrimination laws. While it appears that Int. No. 632 respects these distinctions, those differences should be made clearer to those who will have to interpret the language of the bill if it is enacted.

Thus, in the definition of "undue hardship" proposed for addition to CHRL § 8-107(3)(b), the words "as used in this subdivision" should be inserted before the words "shall mean" (new matter underscored):⁸

"Undue hardship" as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

The problem is pronounced particularly in the closing proviso, which uses the phrase "inability of an employee to perform the essential functions of the position in which he or she is employed." The terms "inability" and "essential functions" generally are associated more with disability than with religion. To clarify that this proviso would apply only to religious accommodation, it should be revised as follows (new matter underscored):

Provided, however, an accommodation shall be considered to constitute an undue hardship <u>for purposes of this subdivision</u> if it will result in the inability of an employee <u>who is seeking a religious accommodation pursuant to this subdivision</u> to perform the essential functions of the position in which he or she is employed.

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^{369 (1&}lt;sup>st</sup> Dep't 2009); <u>Vig v. New York Hairspray Co., L.P.,</u> 67 A.D. 3d 140, 145-47, 885 N.Y.S.2d 74 (1st Dep't 2009); Loeffler v. Staten Island University Hospital, 582 F. 3d 268, 278 (2d Cir. 2009).

⁷ Although not the prime focus of this comment, it should be noted that the present Report, at p. 6, n. 19, overlooks another feature of Local Law 85 of 2005, <u>viz.</u> the maximum penalty under CHRL § 8-126(a) no longer is \$100,000, but now is \$125,000 and, if the violation was willful, \$250,000.

⁸ Compare NYC Admin. Code § 8-102(18)

Our proposed amended bill text appears in Appendix B. Again, for the reasons stated above, we also urge revisions to the text of segments III and IV of the Report on Int. No. 632, as reflected in Appendix A.

Thank you very much for your consideration. Should you have any questions concerning this letter, please do not hesitate to contact me.

Respectfully,

Brian J. Kreiswirth

Chair, Committee on Civil Rights

<u>Appendix A</u>: proposed revisions to segments III and IV of the Council's June 30, 2011 Report regarding Int. No. 632 of 2011

Appendix B: proposed amendments to Int. No. 632 of 2011

Cc: Council Member Deborah L. Rose, Chair, Civil Rights Committee (*Via facsimile*)
Julene Beckford, Counsel to the Civil Rights Committee (*Via Email*)
Antonio J. Whitaker, Director of Legislative and Budget Affairs, Council Member Rose (*Via Email*)



Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

APPENDIX A

NEW YORK CITY BAR ASSOCIATION COMMITTEE ON CIVIL RIGHTS

SUGGESTED REVISED TEXT FOR SEGMENTS III AND IV OF REPORT ON INT. NO. 632 OF 2011

Additions underscored; deletions in brackets:

III. Protections from Religious Discrimination in the Workplace

Under the City Human Rights Law, an employer cannot require an employee to violate a religious belief as a condition of obtaining or retaining employment. An employer must provide a reasonable accommodation to an employee's religious observance, so long as it does not cause an undue hardship for the employer. A "reasonable accommodation" is any accommodation to an employee's religious observance that does not cause undue hardship in the conduct of the employer's business. If denying an employee an accommodation for religious observance, the burden is on the employer to establish the hardship. The City Human Rights Law does not, however, provide a definition for "undue hardship," nor does it set forth factors to be considered by those who seek to use the defense. Such vague language [often] sometimes results in employers and adjudicators mistakenly referring to the definition of undue hardship found in Title VII of the Civil

¹ See Admin. Code §8-107(2)(b).

² See Admin. Code §8-107(3).

³ Admin. Code §8-107(3)(b).

⁴ Id.

Rights Act of 1964 ("Title VII").⁵ Like the City Human Rights Law, Title VII requires an employer to provide a reasonable accommodation to an employee so long as such accommodation does not impose an undue hardship on the employer. Under Title VII, a religious accommodation that results in an undue hardship is one that creates more than a "de minimis cost or burden" to the employer. [Because t] The "de minimis cost or burden" standard is a lower standard of proof for employers than the "significant difficulty or expense" standard, set forth by New York State's Human Rights Law"). [, it ultimately limits the protections for employees.]

The State Human Rights Law also protects employees from religious discrimination. Under State law, an employer may be excused from providing an employee a reasonable accommodation only if, after a genuine effort, the employer demonstrates that it is unable to reasonably accommodate an employee's sincerely held religious observance or practice without undue hardship on the conduct of the business. The State Human Rights Law defines an "undue hardship" as "an accommodation requiring significant expense or difficulty. The State Human Rights Law sets forth factors to be considered when determining whether an undue hardship exists. As a result of this definition, employers are held to a higher standard of proof under the State Human Rights Law than under Title VII. Because the City Human Rights Law does not define "undue hardship," the Title VII definition applies, triggering a lower standard of proof for employers and fewer protections for employees.

Under the Local Civil Rights Restoration Act of 2005 ("Local Law 85"), the State Human Rights Law provides "a floor below which the City's Human Rights law cannot fall rather than a ceiling above which it may not rise." (§ 1). Section 7 of Local Law 85 also dramatically

⁵ Title VII prohibits employment discrimination on the basis of one's race, color, religion, sex and national origin. 42 USCA §2000e-2(a). Title VII only applies when an employer has 15 or more employees. 42 USCA §2000e(b).

⁶ U.S. Equal Employment Opportunity Commission, *Questions and Answers: Religious Discrimination in the Workplace*, last modified Jan. 31, 2011, at http://eeoc.gov/policy/docs/qanda_religion.html (last visited June 27, 2011).

⁷ N.Y. Executive Law §296(10)(a).

⁸ N.Y. Exec. Law §296(10)(d)(1).

⁹ Id.

strengthened the "Construction" provision (Admin. Code § 8-130) of the City Human Rights Law, so it now states:

The provisions of this title 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.

Thus, adoption of language akin to that in the State Human Rights Law, while providing some guidance to employers and adjudicators, imports language that still must be read in the context of "the uniquely broad and remedial purposes" of the City Human Rights Law.

IV. <u>Int. No. 632</u>

Int. No. 632 would amend the City Human Rights Law by defining "undue hardship" as an "accommodation requiring significant expense or difficulty" and provide factors for an adjudicator to consider when determining whether an employer has met his or her duty to provide a reasonable accommodation for religious observance. Int. No. 632 seeks to ensure that workers are protected from religious discrimination in the workplace, by defining "undue hardship" and clarifying the Council's intentions to provide greater protection to workers under the City Human Rights Law than the federal, and even the State, human rights provisions provide.



Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

APPENDIX B

NEW YORK CITY BAR ASSOCIATION COMMITTEE ON CIVIL RIGHTS

PROPOSED AMENDMENTS TO INT. NO. 632 OF 2011

Additions underscored and bolded:

Int. No. 632

By Council Members Weprin, Chin, Fidler, James, Koslowitz, Van Bramer and Rose

A Local Law to amend the administrative code of the city of New York, in relation to unlawful discriminatory practices.

Be it enacted by the Council as follows:

Section 1. Paragraph b of subdivision 3 of section 8-107 of the administrative code of the city of New York, as amended by Local Law 39 of 1991, is amended to read as follows:

(b) "Reasonable accommodation", as used in this subdivision, shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employer shall have the burden of proof to show such hardship. "Undue hardship" as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system).

Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

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

Provided, however, an accommodation shall be considered to constitute an undue hardship, for purposes of this subdivision, if it will result in the inability of an employee who is seeking a religious accommodation pursuant to this subdivision to perform the essential functions of the position in which he or she is employed.

§2. This local law shall take effect immediately.