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Disability & Employment Law in New York State: Analysis and Recommendations

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The unemployment rate for people with disabilities is substantially higher than for people without disabilities, both nationally and in New York. The general unemployment rate nationwide as of May 2010 is 9.1%.[2] The unemployment rate for people with disabilities nationwide as of May 2010 is 14.7% – over 60% higher.[3] The current recession has disproportionately impacted employment of people with disabilities, whose employment levels dropped at three times the rate of nondisabled workers.[4] This disproportionate impact may indicate the influence of disability-based discrimination in employment.

The state of New York has passed laws intended to safeguard workers with disabilities from employment discrimination. New York State Human Rights Law ("NYSHRL"), [5] provides a legal definition of disability,[6] and details when the behavior of an employer may constitute an "unlawful discriminatory practice."[7] It also establishes procedures that allow workers who experience unlawful discrimination by employers to get various forms of relief, such as financial compensation or reinstatement.[8] Further, it enables the state to fine employers who have engaged in unlawful discriminatory practices.[9]

The NYSHRL is the primary civil rights statute that protects workers with disabilities in New York. There are also state laws that bear on the rights and experiences of state government workers with disabilities in New York, such as Title 4 of the New York Code of Rules and Regulations,[10] and Civil Service Law sections 72-73,[11] both of which apply to state employees who have or develop disabilities that may require medical leave.

To better understand the relevant laws, it is helpful to review how courts interpret the laws and make sense of workers' disability discrimination claims. Part I of this paper briefly reviews some concepts significant in disability civil rights law, at state and federal

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[2] U.S. Dept. of Labor, Bureau of Labor Statistics, *The Employment Situation*, tbl.A6, (May 7, 2010), http://www.bls.gov/news.release/pdf/empsit.pdf. The general unemployment rate in New York as of February 2010 is 8.8%. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Regional and State Employment and Unemployment,* tbl.A, (May 21, 2010), http://www.bls.gov/news.release/pdf/laus.pdf.

[3] http://www.bls.gov/news.release/pdf/empsit.pd, Table A-6.

[4] H.S. Kaye, Institute for Health and Aging, *The Disproportionate Impact of the Great Recession on Workers with Disabilities*, http://www.disabilityfunders.org/webfm_send/111.

[5] N.Y. Exec. Law §§ 290-301, http://www.dhr.state.ny.us/doc/hrl.pdf.

[6] *Id.* § 292(21).

[7] *Id.* § 296(1).

[8] *Id.* § 297(4)(c).

[9] *Id.*

[10] N.Y. Comp. Codes R. & Regs. tit. 4, http://www.dos.state.ny.us/info/nycrr.html (follow the NYCRR link).

[11] N.Y. Civ. Serv. Law §§ 71-73. For a summary of these sections, see New York State Department of Civil Service, *Summary of New York State Civil Service Law,* http://www.cs.state.ny.us/pio/publications/summofcsl.pdf .

levels. Part II draws on relevant statutes and court decisions in order to review the fundamentals of disability discrimination claims, and advance a comparison between state and federal law. Part III reviews laws specific to state government employees (i.e. civil servants). Part IV looks at the law specific to New York City, which expands on the protections available under the state law. Although New York City law does not apply to the rest of the state outside of its borders, it has some influence and provides a useful comparison. Part V briefly compares New York to other states, to consider differing approaches to disability civil rights at the state level. Finally, Part VI summarizes comparative advantages between using city, state, and federal law to combat disability discrimination, and makes recommendations for using and improving the laws, in order to increase employment of people with disabilities.

I A Brief Introduction to Disability Civil Rights

Disability civil rights laws build upon the legacy and principles of race and gender civil rights laws. However, there are important differences. Whether under Constitutional equal protection standards, or civil rights models grounded in a Constitutional conception of equality, race or sex discrimination are often found to be legally present when persons are treated differently based on the demographic category. Because every person has a race and a gender, civil rights approaches to race and sex do not require great attention to definitions of protected categories, nor do they necessarily limit protections only to particular racial or gender groups. Thus, so-called "reverse-discrimination" claims by members of majority race or gender groups are possible. Race and gender discrimination laws generally call for race- or gender-neutral approaches to achieve equality. These civil rights laws generally do not call for affirmative race- or gender-specific remedies.

In contrast, disability is commonly understood to be more than a social, or socially constructed, difference. Disability civil rights laws recognize that barriers facing people with disabilities are not merely attitudinal, but are incorporated into the built environment, communication mechanisms, and otherwise neutral policies. Our legal system presumes that equality based on disability cannot be achieved through identical treatment. Thus, disability rights laws often require disability-specific responses, such as reasonable accommodations, policy modifications, auxiliary aids, and physical changes to facilities. Therefore, in order to avoid creating rights to "special" or "preferential" treatment for people who do not need it, disability civil rights protections have generally been limited to people who fall within the legal definition of persons with disabilities; the coverage is always for a discrete class of persons. The definition of disability has, therefore, been the subject of much litigation and debate.

However, more recently, policymakers have begun to re-examine the need for a narrow definition of the protected group, recognizing that unfair discrimination on the basis of disability should be prohibited, not just for people with severe disabilities, but for people with all levels of disabilities. Thus, both individuals with severe disabilities, such as blindness, and individuals with less severe disabilities, such as near-sightedness, should be protected from impairment-based exclusion or other discriminatory treatment. Moreover, because the disability-specific remedies (e.g. accommodation, auxiliary aids) envisioned are limited by "reasonableness" and "effectiveness," the eligible group does

not need to be limited. The "reasonable" or "effective" response to a minor impairment will, by definition, be minor. As a result, federal disability law has been amended effective in 2009 to de-emphasize the importance of the definition of disability.

Another difference from race and sex civil rights laws is the level of emphasis on qualification. Women and/or people of color rarely have to demonstrate that their sex or race does not make them unqualified to perform a particular job. However, there is less of a presumption with disability that differential treatment is inherently discriminatory. Therefore, disability civil rights statutes generally require individuals with disabilities to demonstrate that they are qualified for the position at issue. That is, where disability discrimination in employment is at stake, plaintiffs typically need to do more than demonstrate that they were treated differently based on disability. They must also establish that the disability does not, in fact, make them unqualified or incapable of performing the work in question. Disability civil rights litigation, therefore, can require fairly complex assessments of the relationship between the limits and skills of a person with a disability, and the particular nature and structure of a position or workplace.

In addition to the definitions of disability and qualification, the concept of "reasonable accommodation" is particularly critical to disability civil rights, as it indicates that in order for equality to be achieved, institutions will often need to offer people with disabilities different options or resources, in order to arrive at like outcomes. Not all disabilities require accommodation; disability discrimination can also occur based on particular discriminatory or negative treatment. However, the failure to accommodate is often a primary area of contestation in disability civil rights claims. As a result, in drafting or implementing disability civil rights laws, policymakers must consider how to define what constitutes an accommodation and what is reasonable or an undue burden (as well as which party must prove reasonableness or burden).

The next part reviews a number of core elements of disability civil rights law, including both the definitions and frameworks that allow individuals to prospectively secure legal protection as persons with disabilities, and the thresholds and processes individuals must meet in order to demonstrate that they are qualified or capable of performing as employees, and that any needed accommodations are in fact "reasonable."

II Disability Human Rights in New York: An Overview and State/Federal Comparison

The NYSHRL provides:

> 1. *It shall be an unlawful discriminatory practice:*
>
> *(a) For an employer or licensing agency, because of an individual's … disability, [or] predisposing genetic characteristics, … to refuse to hire or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.*[12]
>
> *. . . .*

[12] N.Y. Exec. Law § 296(1)(a).

> 3. *(a) It shall be an unlawful discriminatory practice for an employer … to refuse to provide reasonable accommodations to the known disabilities of an employee, prospective employee or member in connection with a job or occupation sought or held or participation in a training program.*[13]

The NYSHRL covers "employers" with as few as four employees.[14] Small businesses with three or fewer employees are not subject to the legal requirements discussed in this paper. By contrast, the federal ADA only covers employers with 15 or more employees.[15] Coverage of small employers is important, because businesses with fewer than 20 employees employ nearly 22 million Americans (18% of the workforce).[16] Very small businesses (with fewer than 10 employees) employed 15.9 million people in 2003.[17] Over half of all employers in the United States (3.9 million) in 2003 had fewer than 5 employees.[18] 73% of employers (5.3 million) had fewer than 10 employees.[19] New York's employment picture is similar, with nearly 60% of businesses having fewer than 5 employees and 77% having fewer than 10 employees.[20] The state legislature is currently considering bill A4648[21], which would apply the NYSHRL to all employers, rather than to those with at least 4 employees, excepting those businesses where at least 2/3 of those employed are family members.

NYSHRL, unlike the ADA, does not go into detail in its definition of employer or employee, except to state that an individual employed by his or her parents is not considered an "employee."[22] NYSHRL also covers licensing agencies, employment agencies, and labor organizations.

New York's conceptions of disability, discrimination, and reasonable accommodation are, in many respects, similar to federal disability law, as represented by the Americans with Disabilities Act (ADA).[23] However, there are differences as well. The following sub-sections review the definitions of disability (i.e. which individuals are protected), reasonable accommodation, and the related concept of "undue hardship," discriminatory actions, defenses to the charge of discrimination, burdens of proof, complaint procedures, and forms of relief available.

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[13] *Id.* § 296(3)(a).
[14] *Id.* § 292(5).
[15] 42 U.S.C. § 12111(5).
[16] U.S. Small Business Administration, Office of Advocacy, *Frequently Asked Questions*, http://www.sba.gov/advo/stats/sbfaq.pdf (2008).
[17] U.S. Census Bureau, *Facts for Features Special Edition: Small Business Week*, http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006601.html (2006).
[18] *Id.*
[19] *Id.*
[20] U.S. Census Bureau, *County Business Patterns*, http://www.census.gov/prod/2005pubs/03cbp/cbp03-1.pdf (2005).
[21] A4648/S1377, Applies the Provisions of the Human Rights Law to all Employers Regardless of the Number of Persons in Their Employ Excluding Certain Family Operated Businesses.
[22] N.Y. Exec. Law. § 292(6).
[23] Americans with Disabilities Act [hereinafter ADA], 42 U.S.C. §§ 12101 *et seq.*, http://www.ada.gov/pubs/ada.htm.

A) Individuals Protected

a) Disability

The NYSHRL defines disability in this way:

> *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.*[24]

There are several points worth noting about this definition of disability. First, for the purposes of qualifying for legal protection, "disability" can mean any one three things:

- Having an actual impairment;
- Having a history of an impairment, for instance a prior history of mental disability or illness, which though no longer present, is the reason for current discrimination;[25]
- Being perceived as a person with a disability, based on some existing condition or difference that may not actually be an impairment.

In other words, a person can qualify for disability legal protections based on actually having a disability, having had a disability in the past, or being perceived to have a disability by others. This is the approach taken by the federal disability rights laws, as well as numerous states that have disability rights laws.

For purposes of civil rights, disability can be defined either through a medical model (based on medical diagnosis) or through a functional model (based on actual effect of the impairment on a person's life) or through a combination of the two. The disability rights community has questioned the validity of medical approaches, which have traditionally empowered health care providers to make decisions for people with disabilities and have traditionally been used in public benefits programs as a means to limit eligibility. Advocates have argued, successfully, that restrictive medical definitions used as gatekeepers for benefits are inappropriate for use in determining civil rights

[24] N.Y. Exec. Law § 292(21).

[25] The statute does not clearly indicate whether a history of being mis-perceived as having an impairment in the past (e.g., mis-diagnosis of mental illness) will constitute a "record" of impairment, but that situation would appear to constitute either a "record" or a "regarded as" claim. *Id.*

protections.[26] The NYSHRL protects individuals with actual impairments that either (1) prevent a normal bodily function or (2) are medically diagnosable. Thus, it offers coverage based on either a functional or a medical approach. The federal ADA has taken a primarily functional approach, focusing on whether the person's impairment "substantially limits" one or more "major life activities."[27] Prior to 2009, courts interpreted the ADA to set a challenging standard that people with disabilities must meet in order to qualify for legal protection. Therefore, under federal law, it is not sufficient to have an impairment, even if that impairment is a basis for discriminatory treatment. A person must still prove that the impairment is "substantial" enough that it inhibits a major life activity.

However, the ADA Amendments Act of 2008 (ADAAA) adds a medical element by adding "major bodily functions" to the category of major life activities.[28] The ADAAA has also expanded the federal definition of disability to reduce the "substantial limitation" standard and provide broader protection. This makes the amended federal law more similar to the NYSHRL's protection for people who have an impairment that "prevents the exercise of a normal bodily function." The Equal Employment Opportunity Commission and the federal courts have not yet established the boundaries of the ADAAA definition of disability. However, the ADAAA provides that "substantial limitation" should be interpreted to provide broad protection, thus rejecting previous judicial interpretations, and that courts should focus on whether discrimination occurred, rather than on whether the plaintiff meets the legal definition of disability.

In contrast, to access legal protection in New York, the minimum standard is simply to have an impairment that can be medically diagnosed, or that prevents some "normal" bodily function.[29] Even if the impairment does not limit a "major" life activity, a person can still qualify for legal protection in the state of New York. Under the ADA, prior to the 2008 amendments, bodily functions were not considered to be major life activities. Courts applying NYSHRL have been willing to recognizing diagnosed medical conditions as disabilities, even where employers attempt to argue that the medical condition does not constitute a significant impairment.[30] For instance, when employers have attempted to assert standards grounded in the ADA, such as "substantial" limitations on "major" life activities, courts have affirmed that these definitions are stricter than New York legal requirements, and do not apply under the NYSHRL .[31] In addition, courts have found that where a plaintiff has established a disability under the

[26] *See generally* Harlan Hahn, *Alternative Views of Empowerment: Social Services and Civil Rights*, 57 J. of Rehabilitation (1991); Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 Ind. L.J. 181 (2008).
[27] 42 U.S.C. §12102(1).
[28] Pub. L. 110-325, §4(a)(3)(2) (2008).
[29] N.Y. Exec. Law § 292(21).
[30] *See, e.g.*, Horgan v. Whitaker, 871 N.Y.S.2d 443 (3d Dept. 2008) (holding that where defendant/employer refused to recognize an emergent medical condition as a disability, claiming it was a side effect of job stress, it was enough that the condition had been vetted by established medical techniques); State Div. of Human Rights v. Xerox Corp., 480 N.E.2d 695, 698 (N.Y. 1985) (holding that obesity is a disability because it impairs bodily integrity and can lead to future more serious conditions, even though it currently did not limit major life activities).
[31] *See, e.g.*, Reilly v. Revlon, Inc., 620 F.Supp.2d 524, 541 (S.D.N.Y., 2009).

ADA, this presumptively meets the less strict standards present under the NYSHRL.[32] Thus, the NYSHRL still appears more inclusive than the ADAAA, as it allows for any "normal" bodily function, without the need to demonstrate that it is "major."

However, in applying the definition of an actual impairment based on a medically diagnosable condition, courts applying the NYSHRL sometimes require an explicit medical diagnosis underlying the impairment, even where it is not disputed that an individual is having difficulty participating in some physical action or activity, but the specific medical reason for the impairment has not yet been diagnosed.[33] This demonstrates one of the drawbacks of a medical approach to the definition. In practice, this means that access to legal protection may in some instances be dependent on access to an adequate quality of medical care. This poses a particular barrier for some people with disabilities, because people with disabilities have disproportionately limited economic resources, and corresponding limitations in access to adequate quality of healthcare.[34] In addition, some health care insurance policies (including pre-existing condition exclusions) have traditionally limited access to health care for people with disabilities.

b) Genetic Conditions

NYSHRL explicitly acknowledges that genetic conditions can be disabilities, and creates a related protection based on a "predisposing genetic characteristic."[35] This references a condition that may not be a disability or disease as yet, but is believed to be associated with a risk of developing either a physical or mental disability or disease.[36] A genetic predisposition can be demonstrated by genetic testing or "inferred from information derived from an individual or family member that is scientifically or medically believed to predispose an individual or the offspring of that individual to a disease or disability, or to be associated with a statistically significant increased risk of development of a physical or mental disease or disability."[37] For instance, if a person were to be discriminated against based on a family history of schizophrenia that is medically believed to be genetic, he or she would qualify for legal protection, even without any existing illness or impairment. In other words, in addition to recognizing current impairments, past impairments, or being perceived by others to be impaired, New York also offers protection to people who may develop a future disability, based on a genetic characteristic. In this regard, New York goes beyond federal disability civil rights law, as embodied in the ADA. However, it is comparable to the more recently

[32] *See, e.g.*, Franklin v. Consol. Edison Co., No. 98 Civ. 2286, 1999 WL 796170, at14 (S.D.N.Y. 1999).
[33] Tibbets v. Verizon New York, Inc., 836 N.Y.S.2d 727 (3d Dept. 2007) (holding as valid an employer's denial of employee's reasonable accommodations request for a voice recognition system or light typing load to accommodate employee's undiagnosed but demonstrable inability to type without discomfort).
[34] *See generally* Gerben Dejong et al., *The Organization and Financing of Health Services for Persons with Disabilities*, 80(2) Milbank Quarterly 261 (2002); Jessica Scheer et al., *Access Barriers for Persons with Disabilities*, 13(4) Journal of Disability Studies Quarterly 221 (2003).
[35] N.Y. Exec. Law § 292(21-a).
[36] *Id.*
[37] *Id.*

passed Genetic Information Nondiscrimination Act of 2008 (GINA), which provides federal legal protection for unmanifested genetic conditions.[38]

c) Qualification

While New York is more inclusive in its definition of disabilities than the federal law, New York has a special limitation in the employment context. As the statute notes: "the term [disability] 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."[39] In other words, legally a disability is only a disability for the purposes of an employment discrimination claim if a person is able to perform the job with any needed reasonable accommodations. The ADA has no such exclusion; whether a disability is recognized as a disability does not depend on whether a person can do a given job. However, the ADA accomplishes essentially the same outcome, by requiring plaintiffs to establish that they are qualified to do the job, with or without reasonable accommodation.[40] Although the federal and state laws are different in their definition, in practice, the result is likely to be the same: people with disabilities must demonstrate that they are qualified to do a job with reasonable accommodations, or a discrimination claim will be unsuccessful.

It should still be acknowledged that there is at least a technical difference between the two. If a person cannot demonstrate that he or she is qualified to do a job, once accommodated reasonably, under federal law this means the person with a disability did not experience unlawful discrimination. Under the NYSHRL, this means a person is, at least in the employment context, not a person with a disability.

The NYSHRL requires a person with a disability to be qualified to perform "the activities involved in the job" "in a reasonable manner." [41] The NYSHRL does not provide specific guidance for determining when a person is qualified to perform a given job, beyond indicating that an employee should be able to perform a job in a reasonable manner, either without or without reasonable accommodations.[42] In contrast, the ADA bases qualification on whether a person can perform the "essential functions" of a job with or without accommodation.[43] The ADA provides some deference to employers in defining what the essential functions are, for instance, based on a published job description.[44] While the language varies, there is no indication in this instance that either standard or framing is, in practice, more or less protective of workers with disabilities.

d) Association

The ADA recognizes that family members, caregivers, and other associates of people with disabilities are often subjected to discrimination because of their relationships. For example, employers may be unwilling to hire a parent or spouse of a person with a

[38] *See* Public Law 110-233, 122 Stat. 881 (2008).
[39] N.Y. Exec. Law § 292(21).
[40] ADA, 42 U.S.C. § 12113(a).
[41] N.Y. Exec. Law § 292(21-e).
[42] N.Y. Exec. Law § 292 (21-3).
[43] 42 U.S.C. § 12111(8).
[44] *Id.*

disability because of assumptions that the parent or spouse will take too much time off to care for the person with a disability.[45] Therefore, the ADA protects people from discrimination on the basis of association with a person with a disability.[46] The NYSHRL currently does not provide for protection based on association with a person with a disability, meaning that if an employee is discriminated against based on a relationship to a person with a disability (such as a family member), there is no basis to pursue a discrimination claim.[47]

Bill A6333 would amend the NYSHRL to add "family responsibilities" as a protected class, such that the law would prohibit discrimination based on: "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, family responsibilities, predisposing genetic characteristics, or marital status."[48] The definition of family responsibilities, however, is limited only to "the legal responsibility to care for a child."[49] Therefore, even the prospective amended NYSHRL would provide no protection for other family relationships, such as individuals caring for spouses or aging parents. Nor would it protect people from discrimination on the basis of non-family or non-caregiving relationships. Thus, the roommate of a person with HIV would not be protected when turned down for a job because the employer is afraid of infection. Although the federal Family and Medical Leave Act provides rights to unpaid job-protected time off for employees of companies with 50 or more employees,[50] neither federal nor New York (current or proposed) law provides rights to employment accommodations to support caregivers, such as flexible scheduling to meet family medical appointments, or tele-commuting/tele-work,[51]

B) Reasonable Accommodation

The NYSHRL requires employers to provide reasonable accommodations for the known disabilities of employees and applicants.[52] The NYSHRL has a definition of "reasonable accommodation:"

> *The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules;*

[45] See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Example 17, http://eeoc.gov/policy/docs/caregiving.html#ada.
[46] 42 U.S.C. § 12112(b)(4).
[47] Bartman v. Shenker, 786 N.Y.S.2d (Supp. 2004)
[48] A6333: Prohibits Discrimination Based on Family Responsibilities
[49] *Id.*
[50] 29 C.F.R. § 825.
[51] *Id.;* N.Y. Exec. Law §290-301.
[52] N.Y. Exec. Law § 296(3).

> *provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.*[53]

The definition is intentionally broad, in acknowledging a few common examples, but not trying to create a comprehensive list of what accommodations are reasonable. This is important, because given the wide variation of disabilities in existence, even a very thoughtful or lengthy list of possible accommodations likely would fail to anticipate what individuals with disabilities may need.

In order to be considered reasonable under the NYSHRL, the accommodation must be effective, meaning that it should enable the employee to accomplish needed tasks, and should be appropriate to the disability.[54] Where an employee develops or discloses a disability, and the employer terminates an employee before allowing the employee to pursue or secure an accommodation, the employer may prevail, if it can demonstrate that, had the accommodation been provided, it would not have been effective.[55] There is no consistent standard among the New York courts for determining what a "reasonable manner" entails; however, some courts have resorted to the ADA, suggesting that the standard should be the same.[56]

Under the ADA, if an employee can perform a job with or without reasonable accommodation, then s/he is "qualified" to do the job. If an employee develops a disability which interferes with performance of essential job functions, even with accommodation, then the employer may not be liable for taking an adverse action such as termination, because the employee is no longer qualified. However, the ADA also provides that when an employee becomes unable to perform at a job s/he was previously able to manage, the duty to accommodate also includes reassignment of the employee to a vacant position that the employee is qualified for, before considering termination.[57] As yet, the NYSHRL is silent on to what extent reassignment is required.

A recent, influential appellate court decision, *Phillips v. City of New York*, interpreted the requirement of reasonable accommodation to allow up to a year of medical leave, even if an employee is unable to perform job tasks during that period, as long as the medical leave will enable the employee to work in the future.[58] In addition, the *Phillips* court asserted that it is the employer's responsibility under the NYSHRL to make an

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[53] N.Y. Exec. Law § 292(21-e).
[54] *Id.*
[55] Gill v. Maul, 876 N.Y.S.2d 751 (3rd Dept. 2009)
[56] Gill, 876 N.Y.S.2d at 753; Pimentel v. Citibank, N.A., 811 N.Y.S.2d 381, 386 (1st Dept. 2007); Engelman v. Girl Scouts-Indian Hills Council, Inc., 791 N.Y.S.2d 735, 736-37 (3d Dept. 2005); Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir.1991); Pembroke v. New York State Off. of Ct. Admin., 761 N.Y.S.2d 214, 215 (1st Dept 2003); Rappo v. New York State Div. of Human Rights, 868 N.Y.S.2d 59 (1st Dept. 2008).
[57] *See* http://www.eeoc.gov/policy/docs/accommodation.html#reassignment. *See also, e.g.*, U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Prilliman v. United Airlines, Inc., 62 Cal Rptr.2d 142 (Cal. Ct. App. 1997); Blanton v. Inco Alloys International, Inc., 108 F.3d 104 (6th Cir. 1997).
[58] Phillips v. City of New York, 884 N.Y.S.2d 369, 380 (1st Dept. 2009).

individualized inquiry and tailor the accommodation to the employee's needs.[59] Previously there had been no consistent expectation that employers have a duty to engage in an "interactive process" under the NYSHRL. The interactive process has become a normal expectation that federal courts apply to discrimination claims under the ADA.[60] The interactive process places a shared responsibility on employers and employees, once an employee requests an accommodation, to collectively assess the interaction between employee limitations and job requirements, identify a range of possible reasonable accommodations and assess their functionality and effectiveness, and find a mutually agreeable option. [61] The interactive process, therefore, creates an obligation for employers to be pro-active and collaborative in attempting to find a working solution.

According to the *Phillips* court, failure to engage in the interactive process is a violation of the NYSHRL. [62] As under the ADA, that violation will prevent an employer from succeeding on a motion to dismiss or for summary judgment. However, whether an additional remedy will be available depends on whether the court finds that a reasonable accommodation was available.[63]

C) Discriminatory Actions

The definitions of "unlawful discriminatory acts" contained in the NYSHRL are largely comparable to the ADA. The NYSHRL indicates that an unlawful discriminatory practice occurs when an individual employee is subjected to any of the following on the basis of disability:

- Denial of Work: Firing, laying off, or refusal to hire;[64]
- On-the-Job Discrimination: Different/negative treatment compared to other employees relative to salary or compensation, benefits, or other "conditions or privileges of employment" (such as opportunities for advancement);[65]
- Retaliation: Discharging or in any way discriminating against an employee who opposes an unlawful discriminatory practice, or who files a complaint under the NYSHRL;[66]
- Failure to Accommodate: Refusing to provide a reasonable accommodation.[67]

[59] Phillips, 884 N.Y.S.2d at 378-9.
[60] Naomi Schreur et al., *Workplace Accommodations: Occupational Therapists as mediators in the interactive process*, 33 Work 1 (2009).
[61] *Id.* at 3-4.
[62] Phillips, 884 N.Y.S.2d at 369.
[63] Id. at 374-75,
[64] N.Y. Exec. Law § 296(1)(a). *See also* Matter of State Div. of Human Rights v. Averill Park Cent. School Dist., 59 A.D.2d 449 (3rd Dept 1977).
[65] N.Y. Exec. Law § 296(1)(a).
[66] *Id.* § 296(1)(e).
[67] *Id.* § 296(3)(a). *See also* New Venture Gear Inc. v. New York State Div. of Human Rights, 41 A.D.3d 1265 (4th Dept. 2007).

Additionally, employers, labor organizations and employment agencies may be held responsible for discrimination in access or admission to training or apprenticeship programs, or if reasonable accommodations are denied within those programs.[68]

D) Defenses

NYSHRL provides an "undue hardship" defense to the requirement to provide reasonable accommodations:

> *(b) Nothing contained in this subdivision shall be construed to require provision of accommodations which can be demonstrated to impose an undue hardship on the operation of an employer's … business, program or enterprise. In making such a determination with regard to undue hardship the factors to be considered include:*
>
> *(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget;*
>
> *(ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and*
>
> *(iii) The nature and cost of the accommodation needed.*[69]

The meaning of undue hardship under the NYSHRL is similar to federal disability law, focusing on the nature and cost of the accommodation, the type and nature of the work the employer performs, and the size and organizational budget of the employer.[70] For instance, accommodations are less likely to be considered reasonable if they are very costly relative to the organizational budget, or require drastic changes to the organizational structure or purpose. Accommodations that alter specific policies or norms for individuals with disabilities, but which do not significantly affect the whole structure of the workplace or its purpose, likely will be found reasonable.[71]

While the ADA contains explicit statutory language establishing what defenses will excuse an employer from liability for discriminatory action, the NYSHRL is not similarly constructed. The ADA provides that denying a job or benefit to a person with a disability based on qualification standards can be found lawful where it is "job-related and consistent with business necessity."[72] Although the NYSHRL does not discuss defenses as such, relatively similar outcomes are achieved, in that a plaintiff has the burden of establishing that s/he can perform the normal job functions, with or without accommodation.

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[68] N.Y. Exec. Law §§ 296(1)-a).
[69] N.Y. Exec. Law § 296(3)(b).
[70] *Id.*
[71] *See, e.g.,* Krikelis v. Vassar College, 581 F.Supp.2d 476 (S.D.N.Y. 2008) (holding that a policy about the structure of employee breaks should be modified to accommodate the needs of a diabetic employee who needed to eat more frequently).
[72] ADA, 42 U.S.C. § 12113(a).

The ADA further provides that qualification standards may include being able to work without posing a "direct threat" to health or safety of others.[73] This has been interpreted by the EEOC and the U.S. Supreme Court to disqualify individuals for whom performing a particular job poses a direct threat to himself or herself.[74] The NYSHRL does not have explicit language comparable to the ADA, on the issue of posing a direct threat to health and safety.[75] The NYSHRL provides that evaluation of the performance of work in a "reasonable manner" is contingent on employees receiving any needed reasonable accommodations.[76] New York courts have held that where an employee may pose a safety or health risk, employer action, such as terminating the employee, may not violate the NYSHRL.[77]

E) Burdens of Proof

Plaintiffs bear the burden of proving that they are protected under NYSHRL.[78] Plaintiffs also bear the burden of demonstrating that they are able to perform in a given position, in a reasonable manner with accommodations as necessary. In this regard, New York operates similarly to the ADA.[79]

When pursuing a claim for disability discrimination under the NYSHRL, plaintiffs also bear the burden of demonstrating that negative or discriminatory treatment occurred *because of* the plaintiff's disability. Elements of this burden include:

- Demonstrating that the employer was aware of the disability's existence
- Demonstrating that a discriminatory reaction to disability, rather than legitimate non-discriminatory reasons, motivated the employer's behavior.[80]

Where an employer asserts that a legitimate non-discriminatory reason for its behavior exists, the plaintiff must demonstrate that this assertion is a pretext.[81] For instance, the employee must demonstrate that disability was the primary or controlling reason why the employer refused to hire, retain, promote, or otherwise treat the employee fairly.

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[73] *Id.* § 12113(b).

[74] 14 C.F.R. § 1630.15(b)(2); Echazabal v. Chevron, 536 U.S. 73 (2002) (holding that employer did not have to hire a qualified employee with hepatitis C for a job in refinery because employer believed employee's health would be in danger).

[75] N.Y. Exec. Law §§ 290-301.

[76] *Id.* § 292.

[77] *See, e.g.*, Shannen v. Verizon N.Y., Inc., 2009 WL 1514478, 1, 6 (N.D.N.Y. 2009) (holding that an employer was not in violation of the NYSHRL or the ADA, where it required the employee to submit to a psychiatric evaluation, after the employee stated: "if someone was bothering me, I would go postal.")

[78] *See* Phillips v. City of New York, 884 N.Y.S.2d 369 (1st Dept. 2009) (establishing that unlike federal and state laws, the New York City Human Rights Law made both undue hardship, and the employee's incapability of performing essential job functions an affirmative defense). For analysis, see A. Michael Weber & Bruce R. Millman, *Responding to the Expanding City and State Human Rights Laws*, 243-19 N.Y.L.J. 1 (Jan. 2010).

[79] *Id.*

[80] *See, e.g.*, Harrison v. Chestnut Donuts, Inc., 874 N.Y.S.2d 609 (N.Y. App. Div. 2009); Nande v. JP Morgan Chase & Co., 869 N.Y.S.2d 83 (N.Y. App. Div. 2008); Koester v. N.Y. Blood Center, 866 N.Y.S.2d 87 (N.Y. App. Div. 2008).

[81] *See, e.g.* N.Y. State Office of Mental Health v. N.Y. State Div. of Human Rights, 861 N.Y.S.2d 223 (N.Y. App. Div. 2008); Chestnut Donuts, 874 N.Y.S.2d. at 611; Nande, 869 N.Y.S.2d. at 85.

When the charge of discrimination involves retaliation, whether for resisting discriminatory treatment, or for pursuing a complaint under the NYSHRL, the employee must demonstrate that the employer's action was motivated primarily by a negative reaction to the employee's exercise of his or her human rights.[82] Finally, when the form of discrimination is the failure to provide reasonable accommodation, a plaintiff can demonstrate that the employer engaged in discrimination by establishing that the accommodation was requested, that it was reasonable and/or that the employer refused or failed to engage in the interactive process.

F) Administrative Enforcement

The NYSHRL established a state-wide Division of Human Rights.[83] When an individual experiences discrimination, s/he has the option to file a written complaint with the Division in order to begin a state investigation of the complaint.[84] Although the Division has jurisdiction over non-employment cases, employment discrimination cases constitute the majority (83.4% in 2007-2008) of cases brought before the Division.[85] In 2007-2008, 27.6% of the approximately 7000 complaints heard by the Division involved a disability discrimination claim.[86]

a) Division Process

Complaints with the Division must be filed within one year of the alleged discriminatory practice.[87] Once the complaint is filed, whether by the person who has experienced the discrimination, or by an attorney acting on his or her behalf, the following process begins.

1. Notification and Investigation: The Division will communicate promptly with the person or employer accused of disability discrimination and with any parties witnesses, and proceed with an investigation of the charges in the complaint.[88]

2. Dismissal or Proceeding: Within 180 days after the complaint is filed, the statute indicates that the Division will complete its initial investigation, and decide whether to dismiss the complaint. The complaint will be dismissed if 1) the Division does not have jurisdiction to hear it, or 2) the investigation does not find that an unlawful discriminatory practice has occurred.[89] The Division might not have jurisdiction to hear a complaint, for instance, if the complainant is a New York resident, but the discriminatory act did not take place in the State of New

[82] N.Y. Exec. Law § 296(1)(e). *See also* Forrest v. Jewish Guild for the Blind, 786 N.Y.S.2d 382 (2004)); Feliciano v. Alpha Sector, Inc., 2002 WL 1492139,12 (S.D.N.Y. 2002).
[83] *Id*. § 293.
[84] *Id.* § 297(1); *See* New York State Division of Human Rights*, How to File a Complaint*, http://www.dhr.state.ny.us/how_to_file_a_complaint.html (last visited Feb. 19, 2010).
[85] New York State Division of Human Rights, 2007-2008 Annual Report, http://www.dhr.state.ny.us/pdf/annualreport_2007-08.pdf (last visited May 4, 2010).
[86] *Id.*
[87] N.Y. Exec. Law § 297(5).
[88] *Id*. § 297(2)(a).
[89] *Id.*

York. However, it should be noted that a recent decision in *Hoffman v. Parade Publications* has expanded the scope of the Division and the NYSHRL to cover out-of-state employees of New York employers.[90]

3. Conflict Resolution: The Division may attempt to resolve the problem by conciliation.[91] While this step will usually proceed after the investigation phase is completed, the Division may commence a conciliation process at any point after the complaint is filed. Conciliation is generally conducted by a division investigator or prosecutor, rather than by a distinct mediation program. If an agreement is reached through conciliation, it must include a commitment from the employer to cease engaging in the discriminatory acts.[92] It may include other agreements between the parties designed to remedy the harm caused by discrimination.[93] If an agreement is reached, the Division will provide the parties with a written order confirming the terms that must be met.[94] Within one year of the written order, the Division will investigate to make sure that the terms of the order are being met, and can take action to enforce compliance if they are not, including imposing up to one year of jail time and/or a $500 fine.[95]

4. Hearing: If conciliation has not been attempted, or has been unsuccessful, the Division usually will proceed to a hearing at the Division offices within 270 days after the complaint was filed.[96] In the hearing, complainants may generally be represented by their own attorney or if they do not have an attorney, a Division-appointed prosecutor will advance the claim.[97] However, in the latter instance, the prosecutor represents the state, not the complainant.

5. If a complaint was dismissed by the Division either for lack of jurisdiction, or for lack of cause, the complainant can appeal this decision through the New York state court system. The court can overrule the Division and order a hearing.[98] If this occurs, the Division must proceed to a hearing within 120 days of the court order.[99]

6. Resolution: Based on the findings of the Division at its hearing, the Division may order a variety of remedies, discussed further in the next section.

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[90] Hoffman v. Parade Publications, 878 N.Y.S.2d 320 (1st Dept. 2009).
[91] N.Y. Exec. Law § 297(3)(a).
[92] *Id.* § 297 (3)(a).
[93] *Id.*
[94] N.Y. Exec. Law § 297(3)(b).
[95] *Id.* §§ 297(7), 299.
[96] *Id.* § 297(4)(a).
[97] *Id.*
[98] *Id.*
[99] *Id.*

7. Appeal: Decisions of the Division may be appealed in court.[100]

Some states and the ADA make the administrative complaint process a gate-keeping function. Under the ADA, a legal claim cannot proceed in court until the Equal Employment Opportunity Commission (EEOC) issues a "right to sue letter" or until the agency has completed its internal processes, at which point a person can appeal that decision in court.[101] Workers in New York, however, have the benefit of access to either the state courts or the Division of Human Rights. It is possible to bypass the Division entirely if a trial is preferred. The only limitation is that a person cannot pursue both options simultaneously – it is not possible to go to trial, while also awaiting a hearing or entering conciliation through the Division of Human Rights.[102]

There are some reasons why pursuing a complaint through an administrative process may be preferable to a judicial filing. For instance, it generally is easier to represent oneself through administrative complaint processes than to proceed without an attorney in court. In addition, the agency bears the cost of investigation and hearing, whereas going to court involves court costs and attorneys' fees, which cannot be recovered from the losing party in NYSHRL employment claims.[103]

On the other hand, filing a complaint with the Division of Human Rights must be accomplished within one year,[104] whereas the statute of limitations to file an employment discrimination claim in a state court is three years from the originating incident.[105] In contrast, the EEOC requires that a complaint first be filed within 180 days of the discriminatory incident, although that deadline can be extended to 300 days where a claim is based on violations of both federal and state disability civil rights laws.[106] Regardless, the NYSHRL allows for more time than that available for ADA claims, both for Division complaints and lawsuits.

Division investigators, prosecutors and hearing officer staff receive initial training on requirements for reasonable accommodation and interactive process, and have options

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[100] *Id.* § 298.
[101] ADA, 42 U.S.C. §§ 2000(e)(5)(c), 12117(a).
[102] N.Y. Exec. Law § 297(9). If an individual has filed a complaint with the Division, and decides to go to court, (s)he may voluntarily dismiss the complaint with the Division in order to move forward in the state court system.
[103] *See id.* § 297(9)-(10).
[104] *Id.* § 297(5).
[105] *See* Edgar De Leon, *Basic New York State Employment Law*, http://www.deleonlawyers.com/CM/Articles/article-ny-employment-law.asp (last visited Feb. 19, 2010). Where discriminatory actions are continuing, courts have sometimes allowed related events that took place more than three years ago to be treated as "timely" under the NYSHRL. Gangemi Law Firm, P.C., *Primer on the New York State Human Rights Law,* http://www.newyorkemploymentattorneyblog.com/2008/06/primer_on_the_new_york_state_h.html (last visited February 19, 2010).
[106] *See* Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, http://www.eeoc.gov/facts/qanda.html (last visited March 24, 2010).

to receive ongoing continuing legal education on disability.[107] However, the Division does not otherwise allocate or orient staff as disability specialists.[108]

b) Division Results

Although the statutory deadline for completing investigations is 180 days, in practice, the median time for investigation and determination is 244 days.[109] Currently, 11% of disability complaints receive a probable cause determination, allowing the complainant to proceed further. Relative to disability employment discrimination claims, this indicates that roughly 200 claims per year are resolved by the Division, and 1700-1800 are dismissed.[110] Probable cause determinations for disability complaints in the investigation phase are slightly higher than for other forms of discrimination (11% as compared to 9% for all complaints).[111]The majority (63%) of those disability cases with probable cause determinations are settled before or during the hearing process.[112] 25% of disability cases with a probable cause determination result in a completed trial. Of those that do proceed through trial, 12% of disability claims result in a favorable result for the complainant, as compared to approximately 20% of all complaints.[113] In comparison, at the national level, the Equal Employment Opportunity Commission is substantially less likely to find "reasonable cause" in disability investigations (5.1% in 2009 as compared to 11% at the state level).[114] But for those complainants who are able to proceed to hearing, the win rate is much higher (over 40%, as compared to 12%).

The approximately 200 disability employment cases pursued by the Division in fiscal year 2009-2010 resulted in $358,683 in monetary awards to complainants ($254, 450 via settlement during the investigation phase, and an additional $54, 233 via hearings).[115] In 50 cases, complainants received a benefit.[116] In 31 instances, complainants received an offer of employment, and another 23 received improved employment conditions.[117] In 2 instances, complainants received a disability accommodation. Remedies provided by the Employment Opportunity Commission are largely comparable, with the exception that monetary awards through the EEOC are on average, substantially higher than those awarded through the Division; of 4,244 complainants who received a merit resolution, the EEOC awarded $67.8 million in fiscal

[107] Interview with John Herrion, Director of Disability Rights, New York Human Rights Division, April 23, 2010.
[108] *Id.* One exception is the Director of Disability Rights.
[109] Correspondence with Division of Human Rights, August 3, 2010, on file with authors.
[110] *Id.*
[111] Correspondence with Division of Human Rights, September 2, 2010, on file with authors.
[112] *Id.*
[113] *Id.*
[114] *Id*; Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges, FY 1997-FY 2009
[115] Correspondence with Division of Human Rights, September 14, 2010, on file with authors.
[116] *Id.*
[117] *Id.*

year 2009-2010.[118] Specifically, damages at the national level were on average, 9 times higher when weighed proportionate to the number of complainants.

The Division is empowered similarly to the federal EEOC, to engage in pro-active/impact litigation, where the discriminatory practices of a particular employer merit state intervention. Since about 2008, the Division has had a Deputy Commissioner for Division Initiated Investigations. The Division has used this power approximately 13 times since 2008 against private and local government employers, but not in the context of disability.[119]

G) Forms of Relief

Forms of relief available through the Division of Human Rights, and through the state courts are the same.[120] They include:

- Ordering the cessation of the unlawful discriminatory practice;[121]
- Requiring that the employer take actions to remedy the harm, such as hiring or reinstating a worker, or providing a promotion, back pay, admission to a training or apprenticeship program, requested accommodations, and access to advantages, privileges, rights, or resources enjoyed by other employees. Other actions to remedy the harm may be granted as deemed appropriate by the court or the Division;[122]
- Awarding compensatory damages to the person with a disability to cover any losses suffered as the result of discrimination. Note that the NYSHRL allows compensatory damages, but not additional punitive damages (i.e., damages beyond the losses suffered, as punishment for the discrimination) in employment discrimination cases;[123]
- Monitoring employer compliance with any of the above remedies.[124]

In addition to the relief available to individual people with disabilities who experience discrimination, the court or the Division may require that an employer, who has financially gained from the discriminatory action, turn those profits over to the state.[125] The court or the Division may assess additional fines to be paid to the state, up to $50,000, and up to $100,000 in cases where the discriminatory behavior is found to be particularly extreme or malicious.[126]

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[118] Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges, FY 1997-FY 2009
[119] Correspondence with Division of Human Rights, September 1, 2010, on file with authors.
[120] N.Y. Exec. Law §§ 297(4)(c), 297(9).
[121] *Id.* § 297(4)(c).
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*

The NYSHRL differs from the ADA, in that it does not establish caps on damages, meaning that there is no statutory maximum amount provided for compensatory damages.[127] In contrast, the ADA limits damages to between $50,000 and $300,000 depending on the size of the employer.[128] However, unlike the NYSHRL, the ADA allows punitive damages (subject to the caps on damages).[129] In addition, the NYSHRL currently does not allow recovery of attorney's fees for the prevailing party.[130]

H) Alternate Procedures Available to Employees of State Agencies

The New York State Department of Civil Service provides for an additional resource for employees with disabilities, where the employer is a state agency. If a state agency employer denies a request for disability accommodation, an employee may request external review by a Compliance Review Board.[131] Compliance Review Boards are composed of heads or authoritative representatives of other state agencies. The Boards have no enforcement powers; they may not order any action or provide remedies. Their sole function is to review the accommodation request, and make a recommendation to the specific state employer in question.[132] However, should a state employer choose to ignore a recommendation in favor of the employee, the finding by the Compliance Review Board may be useful to the employee, as part of the evidentiary basis presented to the Human Rights Division, or in litigation. The decision to access the Compliance Review Board is optional, and does not preclude simultaneously pursuing a complaint under the NYSHRL. However, it may be of particular use to employees who wish to attempt to resolve an accommodation dispute, before pursuing other legal action.

III Disability Medical Leave and Civil Service in New York

Employees who are civil servants of the State of New York, including a variety of government employees, and for instance, public school teachers, are subject to special laws related to disability and the right to work. The New York Comprehensive Codes of Rules and Regulations (NYCRR) establishes procedures related to employees who take voluntary sick leave.[133] The NYCRR provides that if an employee takes sick leave based on disability or illness, an employer may prevent that employee from returning to work until the employee submits to an examination by a physician designated by the employer.[134] The examination must determine both whether the employee is fit to perform job responsibilities, and whether the employee poses any health or safety

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[127] *Id.*

[128] The remedies and procedures explicated in sections 705, 706, 707, 709, and 710 of Title VII of the Civil Rights Act of 1964 are incorporated by reference. *See* 42 U.S.C. §2000-e et seq.

[129] *See* E.E.O.C. v. Wal-mart Stores, Inc., 187 F.3d 1241 (affirming an award of punitive damages under the ADA).

[130] For advocacy on this issue, see The Empire Justice Center, Michael Mule*, New York State Human Rights Law Offers Few Protections Without Attorney's Fees* (2010), http://www.empirejustice.org/issue-areas/civil-rights/ada/new-york-state-human-rights.html.

[131] New York State Department of Civil Service, *Procedures for Implementing Reasonable Accommodation in New York State Agencies*, sec. II.9, http://www.cs.state.ny.us/dpm/reasonaccom/tocsummofreason.htm.

[132] *Id.*

[133] N.Y. Comp. Codes R. & Regs. tit. 4, § 21.3, http://www.dos.state.ny.us/info/nycrr.html (follow the NYCRR link).

[134] *Id.* at § 21.3(e).

threat to others.[135] It should be noted that requiring medical evidence of fitness to work in these circumstances is not necessarily a precluded activity under the ADA, which permits employers to require medical examinations of employees if they are job related and consistent with business necessity, [136] including when the employer has a reasonable belief based on objective evidence that the employee is unable to perform the essential functions of the job or may pose a direct threat.[137] The more unusual facet of the civil service statute is the exclusive right, accorded to the state, to determine the choice of examining physician.[138] There is a potential for abuse of these laws where the employer has exclusive discretion over the choice of medical evaluators. In other words, if a state employer were invested in terminating an employee who had a legitimate right to reasonable accommodation, misuse of the forced medical evaluation requirement may serve as a pretext for disability discrimination.[139]

Section 72 of the New York Civil Service Law ("Civil Service Law") establishes procedures to allow state employers to place employees on involuntary leave, on the basis of medical condition that could affect fitness to work.[140] This can be accomplished in one of two ways: a) if a medical examination with a physician of the employer's choosing certifies that the employee cannot perform the job duties,[141] or b) an employer may place employees on involuntary leave without an examination, upon finding cause to believe that the employee poses a threat to the health and safety of others.[142] The Civil Service Law establishes an exemption for employees whose disability was caused by an occupational injury or disease under the workers compensation laws.[143] Employees may access an appeal process within one year of placement on involuntary leave, in which they may request a new medical examination, again with a physician of the employer's choice.[144] If the employee is found to be physically and mentally fit, s/he has the right to be reinstated.[145]

Civil Service Law Section 73 establishes that once an employee has been placed on involuntary leave under Section 72 for at least one year and not re-instated, the

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[135] *Id.*
[136] ADA, 42 U.S.C. §12112(d)(4)(A).
[137] See EEOC Enforcement Guidance: Disability Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Question 5, http://www.eeoc.gov/policy/docs/guidance-inquiries.html#8.
[138] N.Y. Comp. Codes R. & Regs. tit. 4 § 21.3.
[139] In multiple cases, given that the laws privilege employers' choice of physicians, courts have upheld terminations where employees' personal physician or multiple physicians found them fit to work, but the physician chosen by the employer found the employee unfit. *See, e.g.*, Cooperman v. Commissioner, Dept. of Correctional Services, 394 N.Y.S.2d 324 (N.Y. App. Div. 3rd Dept. 1977); Sheeran v. New York State Dept. of Transp., 68 A.D.3d 1199 (N.Y.A.D. 3 Dept. 2009).
[140] N. Y. Civil Service Law § 72(1). For a summary, see New York State Department of Civil Service, *Summary of New York State Civil Service Law*, http://www.cs.state.ny.us/pio/publications/summofcsl.pdf (last visited March 9, 2010).
[141] *Id.*
[142] *Id.* § 72(5).
[143] *Id.* § 72(1).
[144] *Id.* § 72(2).
[145] *Id.*

employer may terminate the employee permanently.[146] Within one year of termination based on disability, the former employee has the right to request a new medical examination, with a physician of the employer's choice.[147] If the former employee is found fit to return to work, s/he may be reinstated if the position is vacant, or to a similar or lower-level vacant position, or else will be put on a "preferred list" for future vacancies.[148]

The NYCRR and the Civil Service Laws may operate together, in that once a person has been denied return to work under the NYCRR, following voluntary medical leave, courts have determined that he/she can then be placed on de facto involuntary leave, and the Civil Service Laws then apply, meaning that under Section 73, the employee can be permanently terminated one year later.[149] However, in another instance, a state court found that when an employee was terminated after being found unfit to return to work following voluntary leave under the NYCRR, the employee did not have the right to appeal the physician's finding before he was terminated, as he would have under Civil Service Law Section 72, despite the fact that his leave had become involuntary.[150] While the relationship between the laws is not always consistently interpreted by the courts, either can be a basis for termination based on disability.

There have been limited attempts to use federal or state civil rights laws to challenge disability-based terminations under the Civil Service Law.[151] However, it is not clear that the New York Civil Service system complies with the ADA or NYSHRL, both of which provide for leave time as a reasonable accommodation and both of which would appear to require reinstatement upon return to work.

In sum, the Civil Service Laws give government employers a high level of discretion in determining whether employees are fit to work with disabilities or medical limitations. There is some concern that, because the state agencies are "repeat customers," such employer-chosen medical providers may be more inclined to find employees unfit for work than necessary. It should be acknowledged that in practice in some, though not all, civil service sectors, the employer who orders a medical examination may be a smaller

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[146] N. Y. Civil Service Law § 73.

[147] *Id.*

[148] *Id.*

[149] *See, e.g.*, Wells v. Johnson, 856 N.Y.S.2d 292 (N.Y.A.D. 3rd Dept. 2008); Cooperman v. Commissioner, Dept. of Correctional Services, 394 N.Y.S.2d 324(N.Y. App. Div. 3rd Dept. 1977).

[150] *See, e.g*., Sheeran v. New York State Dept. of Transp. 68 A.D.3d 1199 (N.Y.A.D. 3 Dept. 2009).

[151] *See, e.g.*, Brady v. Dammer, 573 F.Supp.2d 712 (N.D.N.Y. 2008) (examination under Section 72 is not an adverse employment action subject to the ADA); Jones v. New York City Housing Authority, 104 F.3d 350 (2d Cir. 1996) (employee who made threats was not qualified); Baum v. Rockland County, 161 Fed App'x 62 (2nd Cir. 2005) (requiring a medical examination is not an adverse employment action); Mair-Headley v. County of Westchester, 41 A.D. 3d 600 (N.Y. App. Div. 2nd Dept 2007) (employer not required to create a new light-duty position as a reasonable accommodation under the ADA). Courts have found in favor of plaintiffs following termination, where the plaintiff's disability was caused by a workplace injury covered by workers' compensation, Ross v. Town Bd. of Town of Ramapo, 78 A.D.2d 656 (N.Y. App. Div. 3rd Dept. 1980), or when the employer terminated an employee who had been found fit to return to work by the employer's chosen physician, Bodnar v. New York State Thruway Authority, 52 A.D.2d 345 (N.Y. App. Div. 3rd Dept 1976).

part of a larger state agency. In these instances, the choice of physician will not actually be up to the employee's direct supervisor, and will be determined by a regional or umbrella entity, such as Civil Service Department Health Services.[152] This organizational distance may reduce the likelihood that an immediate supervisor or employer would be able to bias or exploit the medical examination process unfairly. However, in the event that an employee believes an employer's decision is unfair or a medical review is not accurate, the statutes provide limited prospects for appeal. Employees may introduce external medical evidence in appeals processes before a court, but as noted above, courts have repeatedly found for employers, even where employees presented their own medical evidence.

As a point of comparison, it is notable that worker's compensation processes in New York do, in contrast, allow workers to qualify for benefits, based on their own choice of physician.[153] An insurance carrier may also order an independent medical review, but the worker's self-selected physician is not presumptively less credible in any appeals or hearings. According to the EEOC, under the ADA, an employer may only require an employee to submit to an employer-chosen medical review if the employee provides insufficient documentation of disability for a reasonable accommodation.[154] However, an employer may insist on its own choice of physician for purposes of determining whether an employee poses a direct threat.[155]

IV New York City

New York City's Human Rights Law[156] provides:

> *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.*

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[152] *See, e.g.*, Sheeran v. New York State Dept. of Transp., 68 A.D.3d 1199 (N.Y.A.D. 3rd Dept. 2009) (where Department of Transportation employee was examined by medical professionals selected by the Civil Service Department Employee Health Physician).
[153] *See* New York State Workers Compensation Board, *Workers' Compensation: On the Job Injury or Illness*, http://www.wcb.state.ny.us/content/main/Workers/Workers.jsp (last visited March 25, 2010).
[154] See EEOC Enforcement Guidance: Disability Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Question 11, http://www.eeoc.gov/policy/docs/guidance-inquiries.html#8.
[155] Id. Question 12.
[156] New York City Administration Code § 8, http://www.nyc.gov/html/cchr/html/hrlaw.html.

(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.[157]

. . . .

The City law is similar to the NYSHRL in multiple respects. Like the NYSHRL, the City law covers employers with as few as four employees.[158]

However, it differs in several significant ways. First, unlike the state law, the City law acknowledges any physical, medical, mental or psychological impairment; it does not contain a requirement that a disability be demonstrable by "medically accepted techniques," or affect a normal bodily function.[159] Like the NYSHRL, the City law also acknowledges past history of impairments, although it is not explicit on the issue of perception of impairment. The City law is more inclusive than the NYSHRL (or the ADA or ADAAA) because it does not make medical diagnosis or functional limitation a pre-requisite for legal protection. In interpreting the City law, the New York City Supreme Court has recognized gender identity disorder as a disability,[160] which is not covered under the ADA.[161] In each of these respects, New York City Law is comparatively expansive in its inclusion of a range of disabilities, and its presumptions in favor of plaintiffs with disabilities, as compared to state and federal disability civil rights laws.

The New York City Law, as interpreted by the court, also differs in that it places the burden on employers to prove that the employee is not qualified to perform the job, as compared to the NYSHRL, which places the burden on an employee to prove that s/he is qualified with or without reasonable accommodation.[162] This placement of the burden of proof recognizes that the employer is in the best position to know the real needs of the job and to know what accommodations are possible and reasonable. An applicant or employee presumably will have less knowledge of the details of the position and the reasons for its existence, as well as of what technologies and other accommodations are available.

Like NYSHRL, the City Law creates a Commission and procedures for complaint investigation, mediation, and administrative enforcement, as well as judicial enforcement.[163] In addition to similar functions to those performed by the State Human Rights Division, the City Commission has a testing program to detect employment discrimination, based on race and gender, though not disability as yet.[164] The program

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[157] *Id.* § 8-102(16).
[158] *Id*. § 8-102(5).
[159] *Id.* § 8-102(16).
[160] Hispanic Aids Forum v. Bruno, 16 Misc.3d 960 (N.Y. Sup. Ct. 2007).
[161] ADA, 42 U.S.C. § 12211.
[162] *See* Phillips v. City of New York, 884 N.Y.S.2d 369 (1st Dept. 2009).
[163] New York City Administration Code § 8-103.
[164] New York City Human Rights Commission Annual Report, 2009, available at: http://www.nyc.gov/html/cchr/html/annreport.html#2009

uses pairs of applicants with matching qualifications but differing racial or gender characteristics, in order to determine whether employers are less likely to hire based on a demographic difference. Because employers generally do not give applicants with disabilities a reason for not hiring them, discrimination in hiring is very difficult to prove. Therefore, testing programs like these are essential to identify and prove discrimination in hiring of people with disabilities. Disability rights testing programs have successfully been conducted in the context of housing.[165]

Like the ADA, but unlike the state law, the New York City Law allows for recovery of attorney's fees.[166] Like the state law, it allows for unlimited recovery of compensatory damages, but unlike the state law, it also provides for punitive damages.[167] Unlike the ADA, the City Law does not place any caps on recovery of compensatory or punitive damages. The City Law also provides for civil penalties up to $125,000 as needed in the public interest, or up to $250,000 for willful, wanton, or malicious discrimination.[168]

V Comparisons and Variations

Numerous states share with New York a commitment to a more expansive definition of disability than the standard of a "substantial limitation of a major life activity" posited in the ADA. Minnesota, for instance, defines disabilities as conditions which "materially limit" a "major life activity."[169] Like the ADA requires that an impairment affect a "major" life activity. However, the "materially limit" standard is less stringent than the ADA,[170] making it, in practice, more comparable to the New York standard. Similarly, the California Fair Employment and Housing Act,[171] is significantly more expansive than the definition in the ADA, as it eliminates the standard of a "substantial" limitation, focusing instead on whether discrimination is occurring, and/or reasonable accommodations exist and have been provided.[172] In addition, an alternate state statutory model, as embodied in the Maine Human Rights Act, combines a broad definition of disability comparable to the ADA (involving a substantial limitation standard), with an additional category of coverage based on a per se list of specific disabilities which enjoy protection, regardless of the severity.[173]

While New York is among the states providing wider coverage in terms of its definition of disability, some state statutes go further in protecting individuals with disabilities, in

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[165] Fair Housing Institute, http://www.fairhouse.net/library/article.php?id=35.
[166] New York City Administration Code § 8-502(f).
[167] *Id.* § 8-502(a).
[168] *Id.* §8-126.
[169] *See* Minn. Stat. § 363A.03(12).
[170] *See* Kammueller v. Loomis, Fargo & Co., 383 F.3d 779 (8th Cir. 2004).
[171] *See* Cal. Gov't Code §§ 12900-12996 (2003).
[172] See Colmenares v. Braemar Country Club, Inc., 29 Cal.4th 1019 (2003).
[173] Maine Revised Statutes Tit. 5, Ch. 337, § 4553-A ("absent, artificial or replacement limbs, hands, feet or vital organs; alcoholism; amyotrophic lateral sclerosis; bipolar disorder; blindness or abnormal vision loss; cancer; cerebral palsy; chronic obstructive pulmonary disease; Crohn's disease; cystic fibrosis; deafness or abnormal hearing loss; diabetes; substantial disfigurement; epilepsy; heart disease; HIV or AIDS; kidney or renal diseases; lupus; major depressive disorder; mastectomy; mental retardation; multiple sclerosis; muscular dystrophy; paralysis; Parkinson's disease; pervasive developmental disorders; rheumatoid arthritis; schizophrenia; and acquired brain injury").

other regards. For instance, Colorado, Hawaii and Michigan differ from both the ADA and New York State, in that there is no minimum number of employees an employer must have, in order to be covered.[174] In addition, the range of liable parties is extended in some states. Whereas it has been difficult under the ADA to hold individuals other than the employer entity accountable, meaning that managers and supervisors are usually not personally liable, some states – notably New Jersey, Tennessee, and Pennsylvania – apply liability to individual employees who aid or facilitate violations of the respective state statutes.[175]

New York City is unusual in its placement of the burden of proof of whether an employee is qualified on the employer. However, some state statutes have been interpreted to make the burden of proof for plaintiffs comparatively lighter than it is under the ADA or the NYSHRL. Massachusetts, for instance, eases the burden for plaintiffs of demonstrating that an adverse employment action was motivated by disability discrimination.[176] Under the Massachusetts state statute, it is adequate to prove that disability discrimination was simply a factor, rather than a primary motivator.[177]

In addition to state statutory models, some useful bases for comparison exist in international law, and other national models. The United Nations Convention on the Rights of Persons with Disabilities, for instance, emphasizes that "disability is an evolving concept and that disability results from the interaction between persons with attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others."[178] This conception avoids an emphasis on measuring the severity or substantive impact of an impairment, and focuses instead on the social consequences of discriminatory treatment – as critical to legal recognition of disability. The Australian Disability Discrimination Act of 1992 also provides a very expansive definition of disability, including components comparable to all those covered categories within the ADA, but without a severity requirement, and with additional protection for anyone who may acquire a disability in future, whether based on genetic predisposition, or any other reason.[179]

VI Recommendations for Upholding Human Rights and Increasing Employment of People with Disabilities in New York State

While the state of New York has a number of laws and policies intended to eliminate employment discrimination against, and increase employment of, people with disabilities, coordinated efforts to address gaps in the existing resources and to reform problem areas remain a pressing concern and opportunity for action.

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[174] *See* Jeffrey A. Van Detta & Charles M. Rice, The Mice That Roar: *How State Disability Discrimination Laws Have Become a Force to be Reckoned With*, 25:3 Employment Relations Today 109 (2007).
[175] *Id.*
[176] *See* Dichner v. Liberty Travel, 141 F.3d 24 (1st Cir. 1998).
[177] *Id.*
[178] United Nations, *Convention on the Rights of Persons with Disabilities*, Preamble (e), http://www.un.org/disabilities/convention/conventionfull.shtml.
[179] Disability Discrimination Act of 1992, § 4 (Austl.), http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/s4.html.

Improve Government Enforcement: To improve enforcement of the Human Rights Law through the Division of Human Rights, funding and resources provided to the Division need to be increased. Timely investigation and resolution of complaints serves both the employer and employee communities, by ensuring evidence and memories regarding the allegations are still available. In order to better achieve deadlines and goals provided for in the Human Rights Law (such as bringing the current median of 244 days for investigation down to the statutory guideline of 180 days). Division investigative staffing should be increased overall. Further, auditing and empirical study is needed to evaluate the effectiveness of the Division in handling disability complaints. Careful tracking and publication of data is needed regarding the Division's dismissal rate, as well as its outcomes and relief. Evaluation should include comparative data for disability, race, and gender discrimination claims. The State Assembly is currently considering legislation which would amend the NYSHRL and establish plans to increase timeliness of complaint processing, identify requisite staffing to achieve that goal, and provide for a grievance process if complaints are not handled appropriately, and a review process in cases where probable cause is not found.[180] If passed, this legislation could actualize several of these recommendations, provided implementation is thorough, and includes a clear commitment to adhere to statutory maximum timing for investigation and resolution of complaints.

In addition, because disability discrimination cases often involve theories and concepts of discrimination that differ from traditional race and gender discrimination claims, more intensive, specialized training on disability for all involved staff should be provided regularly. In order to ensure consistency of approach to disability enforcement and policy, the Division should consider creation of a unit specifically focused on disability discrimination or hiring an expert in disability rights law to consult and guide disability cases handled by generalists. The Division should have a strong mandate to engage in pro-active enforcement, and to initiate impact litigation, directed towards both private and state employers. The Division should also be encouraged to pursue significant monetary remedies, as well as fines, for disability-based discrimination, in order to discourage employers from discriminating, to encourage individuals with disabilities to pursue claims when they encounter discrimination, and to emphasize the state's commitment to preventing disability discrimination.

The low employment numbers for people with disabilities indicates significant discrimination occurs at the application and hiring stage. Yet, because applicants with disabilities are not given a reason for non-selection, discrimination at the hiring stage is very difficult to identify and prove. The most effective approach to prove, and to prospectively discourage, such discrimination is through matched-pair testing programs, such as those used in the fair housing context. The Division should implement a matched-pair testing program as modeled by the New York City Commission, with the addition of a disability-specific matched pair testing program.

Facilitate Private Enforcement: There are currently proposals in the New York State Legislature which, if adopted, would allow for the awarding of attorney's fees and expert

[180] Bill No. 5293, New York State Assembly, Feb. 11, 2009.

witness fees, and will allow for punitive damages up to $10,000.[181] As the U.S. Supreme Court has noted, fee shifting is very important to encourage civil rights plaintiffs to act "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees-not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II."[182] The New York Division of Human Rights has limited resources and cannot be expected to address all instances of disability-based employment discrimination. Individuals with disabilities who have experienced employment discrimination - particularly termination - are unlikely to have the resources to pursue litigation and discriminating employers are incentivized to retaliate against complaining employees by terminating them in order to undermine their ability to pursue claims. The inability to secure attorney's fees is currently a primary limitation in the NYSHRL, as compared to the ADA, and discourages plaintiffs from pursuing relief under the state, as compared to the federal law. While the NYSHRL has advantages relative to the ADA in other regards, these advantages are likely to be under-utilized, as long as the ADA is the only basis for pursuing punitive damages, or off-setting the cost of litigation.

Increase Public Education and Dissemination of Information: Without access to information about New York disability rights law and how it differs from better-known federal law, both employers and employees are at risk. At the federal level, ADA Centers (formerly known as Disability & Business Technical Assistance Centers) provide substantial resources, information and education to employers, employees, and other stakeholders regarding compliance with and actualization of the ADA.[183] There is no state-level equivalent, assisting concerned parties in comprehending the meaning of disability discrimination in New York State employment and law. Whether through expanded funding channeled to the Human Rights Division, or through another state body or contractor, the provision of adequate public education and technical consultation will strengthen the efficacy and impact of existing state law and resources.

Expand Individuals Protected: Proposed legislation which would provide protection for parents of children with disabilities will assist in filling a serious gap in current

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[181] *See* Chadbourne & Park LLP, *Recent Developments in New York Employment Law* (2009), http://www.chadbourne.com/files/Publication/f25ee43f-61e3-4615-9cad-12cdbdb5caf7/Presentation/PublicationAttachment/0d07d2b3-ff8d-46eb-8db6-1a0548d93d20/NY%20Employee.pdf (last visited March 22, 2010). *See* Bill No. A00443, New York State Assembly, Jan. 7, 2009; Bill No. A05293, New York State Assembly, Feb. 11, 2009

[182] Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968). *See also* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Probs. 233, 241 (1984) ("Congress generally authorizes fee shifting where private actions serve to effectuate important public policy objectives and where private plaintiffs cannot ordinarily be expected to bring such actions on their own. Fee shifting is designed to remove some of the disincentives facing public interest litigants, thus increasing access to the courts for groups who otherwise might be unrepresented or underrepresented.").

[183] DBTAC National Network of ADA Centers, http://www.adata.org/.

protection in New York. However, the current proposal is too limited (covering only parents caring for children with disabilities) to prevent discrimination against the family members and loved ones of people with disabilities. Employers may discriminate on the basis of many types of relationships with individuals with disabilities (both caregivers and non-caregivers, as well as spouses, children, and other associates). All such discrimination is improper and antithetical to the purposes of New York's antidiscrimination policies. Any employment discrimination based on association with a person with a disability should be prohibited. Further, family caregivers should receive additional protected rights to workplace accommodations, where it does not create an undue burden for employers, including flexible scheduling where appropriate. The definition of "family" should include spouses or domestic partners, siblings, and parents or grandparents.

Policy reform should also expand the protections under the NYSHRL, using the more inclusive definition of disability modeled in the New York City Human Rights Law. Experiences under the federal ADA have demonstrated that a narrow definition of disability is unnecessary, and even antithetical, to appropriate civil rights protection for people with disabilities. Strict definitions of the protected group have served to unnecessarily focus employers, employees, and courts on definitional issues to the detriment of substantive questions of whether actions were discriminatory. As a result, people for whom policymakers intended to provide protection have been excluded without consideration of whether discrimination occurred. Many individuals with disabilities live below the poverty line and have inadequate access to health care. If NYSHRL continues to require a medical diagnosis, some individuals will be excluded from legal protection based on lack of essential medical diagnoses. In this regard, disability intersects not only with class, but with ethnicity, race, gender and age, and therefore is part of a set of inter-related concerns regarding human rights and social inequality in New York. Failure to cover all individuals with disabilities under the NYSHRL decreases economic autonomy and increases dependence on state and municipal social welfare and charitable resources.[184] Related problems associated with entrenched poverty include increased homelessness, escalating health problems, crime, and increased mortality.

Expand Employers Covered: Because small businesses constitute a large percentage of the employers in the United States and in New York, expansion of coverage to cover all employers would significantly improve opportunities for employment for people with disabilities. Small employers should not be entitled to terminate or mistreat employees with disabilities because of disability-, race-, or gender-based prejudices. Moreover, because the reasonable accommodation requirements of the NYSHRL are limited by the undue burden defense, which takes into consideration the resources of the business, it is also likely that extending the accommodation requirement to very small

[184] For discussion of the interplay between disability civil rights law and reduction of welfare dependency, see generally, Mike Oliver, *Disability & Dependency: a Creation of Industrial Societies?*, In Len Barton, ed., Disability & Dependency,6-22 (1989); Mark Weber, *Welfare and the Civil Rights Model of Disability*, unpublished (2009); Ruth O'Brien, *Crippled Justice: The History of Modern Disability Rights Policy in the Workplace*, University of Chi. Press (2001).

businesses would do no significant harm to those businesses. Any accommodation costs may be further reduced by their access to federal and state tax credits.[185] Therefore, current proposals to extend non-discrimination requirements to all employers should be adopted.

However, extension of reasonable accommodation requirements to very small businesses raises concerns about vexatious litigation that very small businesses may not have the resources to defend and about litigation over accommodations where reasonableness and undue burden are legitimately at issue. However, given the unavailability of attorneys' fees for prevailing parties under New York law, it is less likely under New York law than under the ADA that a small business could be forced to make unduly large payments in litigation. A conservative approach would balance the equities and subject small businesses to the nondiscrimination requirements (e.g., for terminating an employee because of a disability) while immunizing them from reasonable accommodation requirements, either through complete exemption, through a limitation on the size of small businesses required to provide accommodations, or through an explicit proportionality requirement balancing the cost of an accommodation against the small business' annual budget.

Clarify Reasonable Accommodation and Interactive Process Requirements: An interactive process, such as that required by the ADA, is a cornerstone of the individualized approach to reasonable accommodations. Through this process, both the employer and employee have a say in determining what accommodations will be effective and appropriate. Neither the employer nor the employee should be encouraged to unilaterally make accommodation decisions. Moreover, such decisions should generally not be decided by courts or legislatures, but should be determined based on the individual circumstances. While recent common law developments have enhanced the employer duty to engage in the interactive process, this obligation is not explicitly codified in the NYSHRL. Amending the state statute to specify that failure to engage in interactive process is a violation of the law will substantially strengthen the imperative to accommodate employees with disabilities. Given that the "interactive process" is a relatively recent development in New York State law, public/legal education geared towards employers, employment agencies, labor unions, disability organizations, vocational and educational resources, and social service workers, is needed to make certain new legal developments benefit workers with disabilities.

In addition, helping individuals remain at work or return to work after developing a disability provides important benefits to employers, employees and the State. In order to achieve those benefits and make the NYSHRL equivalent to the ADA, New York State should more explicitly require employers to offer reassignment to alternative positions,

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[185] U.S. Department of Justice, *Expanding Your Market: Tax Incentives for Businesses*, http://www.ada.gov/taxincent.htm. Examples of federal and state tax credits include: Work Opportunity Tax Credit; Internal Revenue Code § 44 (small business tax credit – up to $5,000); Internal Revenue Code § 190 (disability access tax deduction – up to $15,000); New York State Tax Credit for Employment of Persons with Disabilities, http://www.tax.state.ny.us/pdf/memos/multitax/m98_3c_1i.pdf (up to 35% of first $6,000 wages).

where vacant and appropriate, to individuals with disabilities who become unable to perform in a particular job.

Adopt Reasonable Standards of Proof: Recognizing that employers have greater access to information about job requirements and accommodation possibilities, the NYSHRL should adopt the burden of proof expectations modeled in the New York City Human Rights Law, requiring employers to prove an applicant or employee is unqualified. In addition, as in some other states, the standard for establishing a discriminatory act should ideally be that disability discrimination was a factor, rather than the primary motivation. This latter measure is important in ensuring that in "mixed-motive" cases, where disability is not an isolated or sole factor engendering discrimination (but is primarily at issue), that plaintiffs will still have legal protection.[186]

Strengthen Commitments of State Agencies: State government employers are under the same obligations applied to private employers to avoid disability discrimination. However, government agencies also have additional affirmative action obligations (e.g., Executive Order 6; Civil Service Laws 55b/c). In light of the large size of the state workforce, committing to uphold a higher standard of inclusion and equity in New York State agencies, will strengthen the full inclusion of people with disabilities in the state workforce. Areas for intervention include a commitment to publicize and provide education to workers about disability and accommodation policies, training for human resources and middle management on the interactive process, and obligations to monitor recruitment, retention, and advancement rates attentive to the proportionate inclusion of people with disabilities.

The Civil Services Laws' exclusive reliance on employer-appointed physicians as a basis for termination should be revised, or more closely monitored, in order to ensure that there is adequate recourse, in instances where the employer-appointed physician may have a conflict of interest, and/or where additional medical testimony supports fitness to work. In addition, the Civil Service Laws regarding leave time should be examined to ensure consistency with the ADA and NYSHRL, both of which require leave as a reasonable accommodation and both of which require reinstatement when an employee is able to return to work following leave. The Civil Service Laws' current one-year cap on leave may violate the ADA and NYSHRL to the extent that leave of more than one year is reasonable and necessary.

[186] In the 7th circuit, the court of appeals recently held that the ADA does not provide protection in such cases. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957 (7th cir, 2010). While this decision is not binding in New York State, it highlights the importance of establishing clear protections under state law, in order to ensure protections not explicitly guaranteed under the ADA.

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