A GUIDE TO THE USE OF

# SERVICE ANIMALS

IN NEW YORK STATE

NEW YORK CITY BAR

NYSBA

# A GUIDE TO THE USE OF SERVICE ANIMALS IN NEW YORK STATE

## MAY 2017

People with disabilities may rely on dogs and other service animals to assist them at their homes and workplaces, schools, retail stores, restaurants, theaters and when traveling. However, there has been confusion both for those who use service animals and those who must accommodate them. The New York City Bar Association and the New York State Bar Association have released this guide jointly to help clarify the legal rights and obligations involving the use of service animals in the state. The associations encourage the downloading, copying and distribution of the Guide throughout the state.

Please note that this guide provides general information only. The information in this guide should not be used or taken as legal advice for a specific situation. For legal advice about your rights or obligations in a particular situation, please speak to a lawyer.

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# I. INTRODUCTION

People with disabilities living, working, going to school, shopping, visiting, enjoying entertainment, traveling, or doing virtually anything else in New York State, may be accompanied by a service animal, as may a person training such an animal. Depending on the context and the location – i.e., in housing, transportation, employment or places of public accommodation, in or outside of New York City – the definition of "service animal" may be different; it may be limited to a dog or a miniature horse, or it may not be limited at all.[1] Unlike federal and state laws, the New York City Human Rights Law does not provide a definition of service animal; however, there is ample support to construe New York City's Human Rights Law more broadly than federal and state laws in this area. These differing and shifting definitions and judicial interpretations of service animals under the various laws invariably has created confusion.[2] However, in most instances, the "bottom line" is determined by whether one is in New York City or elsewhere in the State.[3]

Likewise, the definition of the term "disability" varies among pertinent laws,[4] but, in most instances, such distinctions usually are not the central issue with respect to service animals. In some situations, the nature of the person's disability and the role of the service animal will be readily apparent. Where they are not so apparent, the credible verbal assurance of the person with the animal that the person has a disability and a description of the service performed by the animal to alleviate some aspect of the disability are all that an entity covered by the relevant laws legally may ask in determining whether it must accept the person and the animal; a request for documentation would be illegal, except to limited extents in housing, air transportation, and employment.

This publication is the latest effort by the New York City Bar Association and New York State Bar Association to clarify the rights in question for those who train or use service animals, for those who must accommodate use and training of such animals, for law enforcement personnel, lawyers and judges who must interpret, enforce, and apply the pertinent laws, as well as for legislators and others seeking to be consistent with and/or to extend existing rights.

## II. RIGHTS BY LOCATION AND CONTEXT

### A. Places of Public Accommodation

A person with a disability may use his/her service animal in "services, programs, and activities provided or made available by public entities" and in private sector places of public accommodation, "in all areas … where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go."[5]

Since 2011, United States Department of Justice (DOJ) Americans with Disabilities Act (ADA) regulations have limited "service animals" in such locations to dogs (without so limiting the applicability of laws not having such limitations, as discussed further below). DOJ accords a similar status to miniature horses.[6] DOJ no longer accepts emotional support and crime deterrence as tasks that could qualify an animal as a service animal[7] (again, without limiting other laws recognizing broader rights). The Justice Department also added a requirement that a service dog under Titles II and III be under the control of its handler. Although this generally requires a harness or tether of some type, it permits substitution of other effective means of control (for example, voice commands) when physical restraints "would interfere with the service animal's safe, effective performance of work or tasks" or when the person using the dog is not capable of exerting physical control.[8]

Under DOJ's ADA regulations, as well as New York State Human Rights Law (State HRL) and State Civil Rights Law (State CRL) provisions incorporating "control" aspects of those regulations, a covered entity may ask that the dog or miniature horse be removed if its handler cannot control it or if it is not housebroken.[9] But, while a "public accommodation is not responsible for the care or supervision of a service animal,"[10] it must make reasonable modifications of its policies and practices to facilitate a service animal user's use of that animal, including provision of aids and services.[11] Covered entities are limited in the inquiries they might make and are forbidden from requesting documentation.[12] Indeed, both the Bush and Obama Justice Departments firmly rejected proposals that formal training be required for service animals.[13]

Notably, the ADA, State HRL, and State CRL constitute a floor, rather than a ceiling, for the City Human Rights Law (City HRL) and do not preempt

broader rights under the City HRL. Accordingly, since the City HRL does not provide limitations or definitions concerning service animals, a covered entity in New York City would have to plead and prove that the presence of the particular service animal was an undue hardship.[14]

## B. Transportation

Among public accommodations covered by the ADA, beyond DOJ regulations, is transportation. Under United States Department of Transportation (DOT) ADA regulations, a transportation provider must accept the credible verbal assurance of a passenger or prospective passenger as to disability and service animal status.[15]

### 1. Public and Private Bus, Rail, Ferry, and Other Ground Transportation Vehicles and Facilities

> Service animals shall always be permitted to accompany their users in any private or public transportation vehicle or facility. One of the most common misunderstandings about service animals is that they are limited to being guide dogs for persons with visual impairments. Dogs are trained to assist people with a wide variety of disabilities, including individuals with hearing and mobility impairments. Other animals (e.g., monkeys) are sometimes used as service animals as well. In any of these situations, the entity must permit the service animal to accompany its user.[16]

These DOT requirements preempt local regulations that recognize lesser rights for people with disabilities using service animals.[17] At the same time, rights provided by the City HRL beyond those in the DOT's ADA regulations are not preempted.[18]

### 2. Airlines

The federal Air Carrier Access Act (ACAA) prohibits discrimination against people with disabilities in the provision of air transportation and requires acceptance of virtually all species of potential service animals.[19] Carriers are required to permit dogs and, in the case of domestic carriers, other

service animals to travel with a passenger with a disability, with the animal occupying the same seat, unless such an arrangement would obstruct an aisle or emergency evacuation, in which case the carrier must offer the passenger alternative seating with the service animal. Although snakes, other reptiles, and some other species need not be accepted as service animals, even on domestic carriers, others (such as monkeys, pigs, and miniature horses) must be accepted unless certain specified conditions prevail.

Other requirements include: on flights of over 8 hours, the passenger must present documentation a day in advance of the first leg of the trip attesting that the animal either will not need to relieve itself or can do so without disrupting others; emotional support animals need only be accepted if accompanied by specific documentation from a treating health care provider presented at least a day in advance of the first leg of the trip;[20] passengers with both severe vision and hearing impairments also must advise the carrier a day in advance of the flight and must check in an hour before general boarding.[21] The carrier must provide accommodations even if advance notice and check-in requirements are not met, if such accommodations can be made without delaying the flight.[22] No additional charges may be made for services required under the ACAA, including carriage of a service animal.[23] The carrier may not restrict the movement of passengers with disabilities around terminals.[24] The carrier must accept any of several evidences of the service animal's status, including "the credible verbal assurances of the qualified individual with a disability using the animal."[25] There is no limit to the number of service animals that can be on any flight.[26] A person travelling with a service animal generally must be accommodated with either a bulkhead or non-bulkhead seat, as requested.[27] Adjacent seating must be provided for someone who will be assisting a person with a vision impairment during a flight.[28]

### 3. Taxis

Taxis are prohibited from discrimination under the ADA. The Justice Department pursued a taxi driver for refusal to transport a blind would-be customer accompanied by a service dog, finding a violation of the ADA[29] and reaching a settlement including $1,000 in compensatory damages and an additional $1,000 civil penalty.[30] In New York City, the Taxi and Limousine Commission has rules and fines enforcing nondiscrimination against people with disabilities using service animals.[31]

## C. Employment

Under the State CRL, employers of even one person throughout the State may not discriminate against an otherwise qualified employee or prospective employee with a disability accompanied by a guide, hearing, or service dog, “[u]nless it can be clearly shown that a person's disability would prevent such person from performing the particular job,” and must permit the person to have such dog in his or her immediate custody at all times.[32] There is no “reasonable accommodation” limitation on this requirement, so an employer may not challenge such rights under the State CRL by an assertion of undue hardship for the employer or others (for example, even a coworker’s allergy to dogs; the allergic coworker would have to be accommodated reasonably without limiting the rights of the person using a guide, hearing, or service dog).

Under the ADA, employers of 15 or more employees[33] are prohibited from discrimination and must make reasonable accommodation for employees and prospective employees with disabilities using service animals (for example, permitting “toileting” breaks with the service animal and time off to engage in training in the use of the service animal). EEOC guidance does not limit service animals to dogs.[34] EEOC states that, if more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."[35]

Similarly, the State HRL recognizes a right to “the use of an animal as a reasonable accommodation.” The statute does not limit the “animal” to a dog, nor does it contain any other limitation.[36] “Reasonable accommodation” is defined as “actions taken which permit an employee, prospective employee or member with a disability, or a pregnancy-related condition, to perform in a reasonable manner the activities involved in the job or occupation sought or held.” An accommodation may not be considered reasonable under the State HRL if it presents a “problem” (an undefined term) for an employer or for another employee.[37] The State HRL covers employers of four or more.[38]

The process of reaching a reasonable accommodation must be interactive, prompt, and in good faith.[39]

The City HRL covers employers of four or more, but the City HRL is interpreted more liberally than is the State HRL (for example, it includes protections for independent contractors).[40] The requirement to make reasonable accommodation also is broader than that under the ADA and State HRL.[41] Moreover, the City HRL prohibits discrimination separately from a requirement for reasonable accommodation; as with the State CRL, the City HRL non-discrimination requirement is not limited by a need for the person using the service animal to prove that the use of the animal is "reasonable."[42]

## D. Housing

For purposes of reasonable accommodation requests, neither the Fair Housing Act (FHA) nor Section 504 of the federal Rehabilitation Act of 1973 requires an assistance animal to be individually trained or certified. While dogs are the most common type of assistance animal, other animals can also be assistance animals. Although basic medical confirmation of disability and of the need for an assistance animal to ameliorate at least one aspect of such disability may be requested by a housing provider that is not part of a governmental program covered by Title II of the ADA, access to medical care providers and records is not permitted; if housing is provided as part of a governmental program (e.g., housing authority, shelter), the provider is limited by Justice Department regulations to requesting a credible verbal assurance from the person with the animal (under DOJ regulations, a dog) as to disability and the nature of the service the animal performs for the person with a disability.[43] No more could be sought under the City HRL. Emotional support animals and animals used by a person with a disability seeking physical protection are among those covered by the FHA and, therefore, by the City HRL.[44] The State CRL prohibits discrimination against a person with a disability, accompanied by a guide, hearing, or service dog, in the use or enjoyment of public or private housing, whether temporary or permanent.[45]

## E. Service Animal Trainers

The State CRL provides the same right of access to the trainer of a guide, hearing, or service dog as it provides to a person with a disability using such a dog.[46] Discrimination against a person without a disability who is training a service animal of any species for a person with a disability might

be prohibited under provisions covering relationship or association with a person in a protected class.[47] "Professional" guide, hearing, and service dog trainers are protected from discrimination while training such a dog, whether or not the person for whom the dog is being trained is present.[48]

## III. REMEDIES

Significant remedies are available for violating laws that recognize the rights of people to use service animals.

### A. Claims under the ADA

With respect to employment discrimination (ADA Title I), an individual may file a complaint with the EEOC within prescribed time limits not exceeding 300 days after the alleged discrimination, or may file suit in federal or state court, within three years of the allegedly discriminatory act, seeking reinstatement of employment, back pay, attorney's fees and other relief, including compensatory and punitive damages in cases of intentional (not disparate impact) discrimination.[49] The Civil Rights Act of 1991 added compensatory and punitive damages (though not for governmental entities) on a capped sliding scale based on the size of the employer.[50] That Act also added provisions for attorneys' fees,[51] although the Supreme Court has significantly limited the recovery of such fees in the ensuing years.[52]

With respect to private sector public accommodations (ADA Title III), an aggrieved individual can seek injunctive relief, court costs and attorneys fees – but no monetary damages.[53] Discrimination in the provision of public services by governmental entities (ADA Title II) is subject to the remedies available for violation of § 504 of the Rehabilitation Act of 1973,[54] discussed above. Also noted above, the Eleventh Amendment does not bar monetary suits under Title II of the ADA against state governments with respect to the "constitutional right of access to the courts," protection against actual Constitutional violations and, potentially, some other violations of Title II.[55]

Pursuit of remedies through governmental enforcement agencies such as the EEOC, DOJ, or HUD, rather than through private litigation in court, may be attractive for those who prefer government management of their case, although private attorneys often can include causes of action from a variety of applicable statutes (including federal, State, and local, rather than only

the one within the purview of an agency) and secure a broader array of remedies.

## B. Claims under New York State and City Laws

The City HRL and, in part, the State HRL, provide some remedies superior to those of the ADA. Administrative complaints may be filed within one year after the alleged discriminatory act with the City Commission on Human Rights (CCHR)[56] or with the State Division of Human Rights (SDHR).[57]

Filing a complaint with the CCHR or, alternatively, a private suit in court under the City HRL, provides a complainant, under a plaintiff-friendly evidentiary standard consistent with the unique remedial purpose of the City HRL, with a full range of potential remedies, including compensatory and punitive damages, injunctive relief, costs, attorneys and expert fees.[58] If the complaint is filed in court, rather than with the CCHR, there is a three year statute of limitations.[59]

The State HRL has a similar court statute of limitations, although punitive damages and attorneys' fees are not available except in cases of housing discrimination, or sex-related employment or credit discrimination, and the evidentiary standard is not as favorable to plaintiffs as it is under the City HRL.[60]

Unlike the ADA, the City HRL and the State HRL have no limitation on the amount of damages that may be sought.

Government agencies are not exempt from suit under the City HRL, although designated representatives of the CCHR and the City's Corporation Counsel must be served with a copy of the complaint (against a City agency or otherwise) within ten days after commencement of a suit and the possible application of notice of claim provisions for suits against municipalities must be considered.[61]

The City itself may bring a "pattern or practice" suit, seeking a wide range of relief, including civil penalties.[62]

Government action inconsistent with antidiscrimination laws may be overturned (as part of exhaustion of remedies or otherwise) as arbitrary and capricious under Article 78 of the New York State Civil Practice Law

and Rules.[63] "[P]articipation of an individual director in a corporation's tort is sufficient to give rise to individual liability" in the context of claims of coop discrimination under housing and retaliation provisions of the State HRL and City HRL.[64]

Remedies under the State CRL are limited,[65] and so might best be sought in coordination with causes of action under other applicable laws.

## IV. OTHER LOCAL LAWS AROUND NEW YORK STATE

Other localities have varying remedies – for violations of prohibitions that often are not identical to federal and State laws[66] – that may supplement and/or be superior to those in the ADA, FHAA, State HRL and/or State CRL.

For example, Buffalo's Fair Housing Officer is empowered, among other things, to request Buffalo's Corporation Counsel to sue for a fine not exceeding $1,500 for each incident of discrimination – and "[r]evocation or suspension of any license or permit issued by the City of Buffalo necessary to the operations of the housing accommodation(s) in question …."[67] Also in the context of housing discrimination, the complainant may bring a civil suit "for injunctive relief, damages, and other appropriate relief in law or equity" and the court may award attorneys fees to a prevailing plaintiff as part of the costs.[68]

A civil suit also is possible for violation of Albany's Omnibus Human Rights Law, with damages and other relief in law and equity.[69]

The Westchester Human Rights Commission is empowered to award compensatory damages ("including, but not limited to, actual damages, back pay, front pay, mental anguish and emotional distress"), as well as punitive damages (not to exceed $10,000), and to assess a civil penalty of up to $50,000 ($100,000 for a willful violation).[70]

The Nassau County Commission on Human Rights may assess penalties ranging from $5,000 to $20,000 in employment and public accommodation cases.[71] In a housing case, the Commission may award compensatory damages and attorneys' fees;[72] the County Attorney may bring a civil suit for injunctive relief, compensatory and punitive damages, attorneys fees and civil penalties;[73] and an aggrieved party may bring a civil suit within

three years, seeking compensatory and punitive damages, injunctive relief, and other appropriate remedies.[74]

## V. CONCLUSION

Better and more widespread understanding of laws regarding use of service animals by people with disabilities in New York State should promote respect for both the laws and the people whose rights are recognized by those laws. It also should facilitate integration of such people into an improved society.

## CITATIONS

Wherever possible, this guide includes hyperlinks to publicly available source material, including case law. In some instances, the hyperlink will lead the reader to a website that is available to subscribers only, such as the New York Law Journal. Copies of all cases are maintained in the files of the New York City Bar Association and can be viewed, but not copied, at the Bar Association building. In the alternative, individuals can find court decisions at each county's Public Access Law Library. State law provides that each county have a court law library with access to the general public. The majority of these libraries have case law, statutes and secondary source materials with regard to New York State law. Several have additional information. Materials are provided in print as well as online formats. For more information, see https://www.nycourts.gov/lawlibraries/publicaccess.shtml.

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[1] See United States Department of Justice (DOJ) regulations under public accommodation provisions of the Americans with Disabilities Act (ADA) at 28 C.F.R. § 35.104 (2016) and 28 C.F.R. § 36.104 (2016). DOJ's ADA regulations make similar provisions for miniature horses, 28 C.F.R. § 35.136(i) (2016) and 28 C.F.R. § 36.302(c)(9) (2016); and, as discussed below, other species may be service animals under the transportation and employment provisions of the ADA, the federal Fair Housing Act (FHA), the Air Carrier Access Act (ACAA) and New York City Human Rights Law (City HRL). New York State recognizes only dogs as service animals in places of public accommodation, but recognizes that other species may be service animals in a reasonable accommodation context in employment. State Human Rights Law (State HRL), N.Y. Exec. Law § 296(14); N.Y. Civ. Rights Law (State CRL) Art. 4-B § 47-a.

[2] As discussed more fully below, at present,

- for purposes of governmental and private sector places of public accommodation (other than transportation providers and facilities) under DOJ ADA regulations, service animals are limited to dogs performing functions other than emotional support (sometimes called "comfort") or deterrence of criminal threat, with a similar provision for miniature horses;

- for public accommodation and housing purposes under the State HRL and State CRL, service animals are limited to guide, hearing and service dogs;

- for transportation purposes under the ADA and the federal ACAA, service animals are not limited to dogs;

- for reasonable accommodation in employment purposes, service animals are not limited to dogs;

- for housing purposes, service animals (called "assistance animals" by the federal Department of Housing and Urban Development (HUD) to differentiate them from more limited DOJ public accommodation service animals), are not limited in species or function; and

- under the City HRL, service animals are neither defined nor limited as to species or function in places of public accommodation, employment, housing, or otherwise.

The term "therapy dog" (or animal) sometimes is confused with a service animal; it is not. Instead, it is an animal owned by an individual (often without a disability related to the animal) or entity that takes it to hospitals, nursing homes, and/or other facilities where it is used by medical personnel or the animal's handler to provide constructive interaction with patients or other residents. Although some argue that handlers/trainers of therapy dogs should enjoy rights such as those of service animal trainers, that issue is not addressed further here.

[3] Although State and Federal laws are applicable in New York City as well as elsewhere throughout the State, their application is not the "bottom line" in New York City; instead, they constitute "a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." Local Civil Rights Restoration Act of 2005, No. 85 § 1, available at https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/amend2005.pdf and http://www.antibiaslaw.com/article/local-civil-rights-restoration-act-2005.

The New York State Court of Appeals recognizes:

> we must be guided by the Local Civil Rights Restoration Act of 2005 (LCRRA), enacted by the City Council "to clarify the scope of New York City's Human Rights Law," which the Council found "has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law" (Local Law No. 85 [2005] of City of NY § 1). The LCRRA, among other things, amended Administrative Code § 8-130 to read:
>
> > "The provisions of this title [i.e., the New York City Human Rights Law] shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."
>
> The application of the LCRRA provision … is clear: we must construe … provisions of the City's Human Rights Law … broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.

Albunio v. City of New York, 16 N.Y.3d 472, 477-78, 922 N.Y.S.2d 244 (2011); see also Zakrzewska v. The New School,14 N.Y.3d 469, 479-82 928 N.E.2d 1035 (2010); Romanello v. Intesa Sanpaolo, S.p.A., 22 N.Y.3d 881 (2013); Jacobsen v. N.Y.C. Health and Hosps. Corp., 22 N.Y.3d 824, 11 N.E.3d 159, 988 N.Y.S.2d 86 (2014).

As with other aspects of the City HRL, limitations concerning service animals found in Federal and State laws cannot be read to limit rights of people under the City HRL to use service animals. Such other laws may be used as aids in interpretation only to the extent that the counterpart provisions are viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (§ 1[of New York City Local Law 85 of 2005; Local Civil Rights Restoration Act]), and only to the extent that those state or federal law decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law (§ 7[of New York City Local Law 85 of 2005; Local Civil Rights Restoration Act]).

Williams v. N.Y.C. Hous. Auth., 61 A.D.3d 62, 65-81, 66-67 (1st Dep't App. Div. 2009), lv den 13 N.Y.3d 702 (2009); see also N.Y.C. Admin. Code § 8-130 and 42 U.S.C. § 12201(b). See also, Albunio, 16 N.Y.3d at 477-78; Zakrzewska, 14 N.Y.3d at 479-82; Phillips v. City of New York, 66 A.D.3d 170, 174-90, 884 N.Y.S.2d 369 (1st Dep't App. Div. 2009); Vig v. The N.Y. Hairspray Co., L.P., 67 A.D.3d 140, 145-47, 885 N.Y.S.2d 74 (1st Dep't App. Div. 2009); Cadet-Legros v. N.Y. Univ. Hosp. Ctr., 135 A.D.3d 196, 21 N.Y.S.3d 221 (1st Dept App. Div. 2015); Loeffler v. Staten Island Univ. Hosp., 582 F. 3d 268, 278 (2d Cir. 2009).

The City HRL also places the burden on an entity wishing to exclude a service animal to prove that the person using one could not benefit from its use (N.Y.C. Admin. Code § 8-107 (15)) or that permitting use of the service animal would meet the City's high "undue hardship" test (N.Y.C. Admin. Code § 8-102 (18)). The City HRL definition of "reasonable accommodation":

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

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

The history and approach of the City HRL with respect to discrimination against people with disabilities using service animals were well explained in the 1986 case of Tartaglia v. Jack LaLanne Fitness Ctrs., Inc., N.Y.C. Comm'n on Human Rights, Complaint No. 04153182-PA, Decision and Order (June12, 1986), available at 1986 NYC HRC LEXIS 2, in which a health spa was required to permit a blind patron to use his guide dog

throughout its facilities, rather than a human companion of his choice. There, the City Commission on Human Rights (CCHR) wrote:

> Under Section B1-7.1 of the [New York City Administrative] Code, as amended in 1981, it is unlawful to discriminate against an otherwise qualified individual who is physically or mentally handicapped. Prior to 1981, however, this provision was strictly and expressly limited to protect only those who fell under the more strict definition of "physically handicapped". The 1981 change not only added the general class of mentally handicapped as a protected class, but also led to a radical alteration of the definition of "physically handicapped" under the Code.
>
> Whereas the pre-1981 code expressly referred to persons who depended on a seeing eye dog as being physically handicapped, the present Code does not contain references to any devices or appliances which had been specifically mentioned in the pre-1981 definition. … [T]he decision to amend the law to exclude an express listing of devices was not designed to exclude those who prior to 1981 were considered "physically handicapped", but rather to expand the protected class to include, among others, the physically handicapped who may not depend on such devices. Thus, the present law has its very roots in the express protection of individuals utilizing devices (including guide dogs) in order to perform essential daily responsibilities.
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> ***
>
> [The City HRL] requires places of public accommodation to recognize the unitary nature of a handicapped individual and the means s/he chooses to adapt to such handicap. Whenever possible, the place of public accommodation must make any and all such accommodations so as to allow the handicapped individual to function normally, unless the accommodation causes an undue burden or economic hardship ….
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> [I]t is not the prerogative of one who operates a place of public accommodation to substitute a means by which a handicapped

person will compensate for his/her impairment.

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[W]hen such means of accommodation are necessary to overcome the handicap, it would be both unlawful and absurd to withhold such form of assistance from the individual person who wishes and needs to rely on it.

This approach is both reflected in and extended by the current City HRL in the 2014 case of Comm'n on Human Rights ex rel. Stamm v. E & E Bagels, Inc., OATH Index No. 803/14 (Mar. 21, 2014), available at http://archive.citylaw.org/wp-content/uploads/sites/17/oath/00_Cases/14-803.pdf. There, a food service establishment that denied service to a woman whose disability was evidenced, among other things, by the presence of a service animal, was found to have violated both City HRL § 8-107(4) (making it unlawful to refuse, withhold or deny services to a person based on the person's disability, to declare that such services would be withheld on that basis, or to state that the patronage of such a person was unwelcome) and City HRL § 8-107(15) (requiring that such an entity make reasonable accommodation (as defined in City HRL § 8-102(18)) to such person).

The respondent's alleged concerns about possible Health Code violations as a non-discriminatory basis for excluding Ms. Stamm and her service animal were termed "unpersuasive". In Tartaglia, an expert from the New York City Health Department testified there was no health-related reason a guide dog should be excluded from any area of the spa (including the pool). To the extent current State or local health codes might seem to provide a potential argument for exclusion, the State CRL Art. 4-B and DOJ ADA regulations (28 C.F.R. § 35.136 (2016); 28 C.F.R. § 36.302(c) (2016)) preempt them. Such preemption is clear from the language of both the State CRL (see especially §§47 and 47-b(6)) and DOJ's own cited regulations.

Confusingly, however, DOJ from time to time issues informal guidance concerning its regulations that suggests exceptions that appear neither in the ADA nor in its own adopted regulations. See, e.g., "Frequently Asked Questions about Service Animals and the ADA" (July 13, 2015), available at http://www.ada.gov/regs2010/service_animal_qa.html. There, in the

answer to question 13, DOJ states that an individual with a disability may be accompanied by more than one service dog, but then opines that, for example, in a small, crowded restaurant, only one service animal might be permitted to remain (effectively excluding the person with a disability and arguably leading to the exclusion of a second person using a single service animal, from such a restaurant). DOJ's regulations (see n. 1, supra) do not permit such exclusions; in contrast, while there is no such exclusionary provision for service animals (when based on disability or use of a service animal, as opposed to legal occupancy limits routinely observed by a covered entity), a place of public accommodation, with respect to miniature horses, may consider "The type, size, and weight of the miniature horse and whether the facility can accommodate these features; … [and] [w]hether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation." As a general matter, DOJ regulations and informal guidance should be read in conjunction with statutory language so that a determination can be made, in cases of variance, as to whether DOJ language accurately represents what the ADA requires or permits. Likewise, DOJ regulations and informal guidance should not be read so as to disregard or override the applicable regulations of other federal agencies that may recognize greater rights of the individual using the service animal, see nn. 15-17 (U.S. Department of Transportation ADA regulations), n. 19 (Air Carrier Access Act), n. 34 (EEOC, ADA Title I), n. 43 (Fair Housing Act) and accompanying text, infra. On this point, the ADA clearly states:

> Relationship to other laws.
>
> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. § 12201(b). The State CRL and City HRL are such local laws recognizing more extensive rights for people with disabilities than those otherwise recognized under the ADA.

Indeed, when federal rights of food service employees who have disabilities and use service animals collide with federal Food Code health provisions, the Food Code must yield**.** See "How to Comply with the Americans with

Disabilities Act: A Guide for Restaurants and Other Food Service Employers," Equal Employment Opportunity Commission (EEOC), response to question 25, available at http://www.eeoc.gov/facts/restaurant_guide.html.

The FDA Food Code has special rules for service animals.

> **Special rule for service animals:** FDA Food Code Section 2-403.11 prohibits handling of animals, but allows employees to use service animals. Section 6- 501.115 states that service animals may be permitted in areas not used for food preparation. Employees may handle their service animals if, after handling a service animal, the employee washes his hands for at least 20 seconds using soap, water, and vigorous friction on surfaces of the hands, followed by rinsing and drying as per Section 2-301.12.
>
> You also have to figure out if the service animal would be an "undue hardship" on your business, or whether the service animal would pose a direct threat to the health or safety of your other employees or the public. …
>
> An employee with a disability is permitted to handle his service animal at work unless the employer demonstrates that it would cause an undue hardship or pose a direct threat.

Under City HRL §§ 8-107(1) and 8-107(15), even this separation of the employee from his/her service animal may not be permissible. Also, the "direct threat" standard used in the ADA does not appear in the City HRL, which requires the entity asserting "undue hardship" to plead and prove that hardship. City HRL § 8-102(18); see also City HRL § 8-107(15). Note that the FDA "special rule" is not limited to dogs. See also New York City Health Code §81.25, barring most live animals from food service establishments – except service animals – and New York State Public Health Law § 1352-e, recognizing that service animals are not covered by restrictions applicable to pets.

[4] See:

Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213: To be covered under the ADA, a person must have "a physical or mental impairment that substantially limits one or more major life activities of such individual;" have a "record of such an impairment;" or be "regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1)(A)-(C). The ADA Amendments Act of 2008, (P.L. 110-325, 122 Stat. 3553, Sept. 25, 2008) (ADAAA) expressly repudiated limiting Supreme Court interpretations of some of the terms, and now sets forth definitions and rules of construction in some detail in the amended ADA that are explicated even further in regulations. To view the current text, with highlights showing the changes made by the ADAAA, see http://www.ada.gov/pubs/adastatute08markscrdr.htm (see especially, Section 2 (Findings and Purposes) codified at 42 U.S.C. § 12101). Revised Equal Employment Opportunity Commission (EEOC) regulations regarding Title I (employment) of the ADA, 29 C.F.R. Part 1630, became effective in March of 2011. Revised DOJ regulations concerning Titles II (28 C.F.R. Part 35) (governmental entities and programs) and III (28 C.F.R. Part 36) (private sector public accommodations) of the ADA became effective March 15, 2011; see http://www.ada.gov/regs2010/ADAregs2010.htm. The DOJ regulations have been updated further to enhance conformity with the EEOC regulations and to further clarify the definition of "disability" (though not relating to service animals). Final Rule Implementing the ADA Amendments Act of 2008, with respect to Titles II and III of the ADA, 53204 Federal Register / Vol. 81, No. 155 / p. 53204 et seq., issued Aug. 11, 2016, effective Oct. 11, 2016, available through https://www.ada.gov/regs2016/adaaa.html. It generally is helpful to consult DOJ's ADA website, http://www.ada.gov/, frequently to stay current with myriad regulatory refinements on aspects of the ADA. However, as discussed below, other federal agencies, such as the Department of Transportation (DOT) and Department of Housing and Urban Development (HUD), also have pertinent regulations under the ADA and other laws, some of which recognize significantly stronger rights of people using service animals.

Federal Rehabilitation Act of 1973: The Rehabilitation Act of 1973 (often just called the "Rehab Act" or § 504), 29 U.S.C. §§ 790 et seq., prohibits discrimination on the basis of disability in programs run by federal agencies; programs that receive federal financial assistance; in federal

employment; and in the employment practices of federal contractors. The standards for deciding if employment discrimination exists under the Rehabilitation Act are the same as those used in Title I of the ADA. Like the ADA, the Rehab Act has several sections to it. Available at https://www.access-board.gov/the-board/laws/rehabilitation-act-of-1973

Federal Fair Housing Act (FHA), 42 U.S.C. §§ 3601-3631: Enacted before the ADA, this contained provisions originally intended for the ADA; the older term "handicap" was used, though its definition mirrors that for "disability" in the ADA. 42 U.S.C. § 3602(h).

New York State Civil Rights Law (State CRL): Art. 4-B, which recognizes broad rights for use of service animals, incorporates by reference the definition of disability from N.Y. Executive Law § 292(21) and defines guide, hearing and service dogs to incorporate "control"-related provisions of the ADA.

New York State Human Rights Law (State HRL): New York State Executive Law (of which the State HRL is part) defines disability in § 292(21):

> The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

New York City Human Rights Law (City HRL): The definition of disability in the City HRL appears at N.Y.C. Admin. Code § 8-102(16):

> (a) The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.

(b) The term "physical, medical, mental, or psychological impairment" means:

(1) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or

(2) a mental or psychological impairment.

(c) In the case of alcoholism, drug addiction or other substance abuse, the term "disability" shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse, and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

With the exception of the City HRL, each of these laws applies throughout New York State. Other than geographically, the City HRL has the broadest and most straightforward application.

[5] 28 C.F.R. § 35.102(b) (2016), e.g., government programs, services, offices and facilities. 28 C.F.R. § 36.104 (2016), e.g., stores, restaurants, theaters, medical facilities and offices. See also 28 C.F.R. § 36.302(c)(7)(2016)and 28 C.F.R. § 35.136(g) (2016).

The State HRL (N.Y. Exec. Law § 292(9)) is more limited in its coverage of public and private sector places of public accommodation, especially with respect to disability rights (see § 296(2)(e), added by Chapter 394 of the Laws of 2007, eliminating coverage that had been in place before that law). State HRL § 296(2)(d)(iv) and § 296(14) incorporate by reference DOJ's provision for private sector public accommodation with respect to control of service animals. State CRL §§ 47 and 47-b(1) recognize a virtually unlimited range for people with disabilities using guide, service, or hearing dogs in both public and private sector places. However, remedies under these State CRL provisions are de minimis (see Degregorio v. Richmond

Italian Pavilion, Inc., 99 A.D.3d 807, 935 N.Y.S.2d 70 (2nd Dep't App. Div. 2011); but see implied right of action, discussed in n. 32, infra) and the State CRL has been subject to limiting interpretations that do not limit the ADA or other laws. See Albert v. Solomin, 252 A.D.2d 139, 684 N.Y.S.2d 375 (4th Dept App. Div. 1998), aff'd 94 N.Y.2d 771, 721 N.E.2d 17 (1999) (examining room of orthopedic surgeon); Perino v. St. Vincent's Med. Ctr. of Staten Island, 132 Misc. 2d 20, 502 N.Y.S.2d 921 (N.Y. S. Ct. 1986) (hospital labor and delivery rooms). While the New York State Hospital Code generally purports to prohibit animals in medical facilities, with the exception that "Guide dogs may accompany sightless persons" (10 N.Y.C.R.R. § 702.6(a)), State CRL Art. 4-B supersedes the purported prohibition. State CRL § 47-b(6) and ADA Titles II and III would preempt such limitations. See Disability Rights Section, U.S. Dep't of Justice, The ADA and City Governments: Common Problems, available at http://www.usdoj.gov/crt/ada/comprob.htm:

> City governments are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability. Reasonable modifications can include modifications to local laws, ordinances, and regulations that adversely impact people with disabilities …. For example, a municipal ordinance banning animals from city health clinics may need to be modified to allow a blind individual who uses a service animal to bring the animal to a mental health counseling session. (citation omitted)

City HRL §8-102(9) and §8-107(2) cover a broader array of places of public accommodation. Use of service animals is covered without the need of specific reference. See n. 3, supra.

[6] 28 C.F.R. § 35.136(i) and 28 C.F.R. § 36.302(c)(9).

[7] 28 C.F.R. § 35.104 and § 36.104:

> Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed

> by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

Note that this definition relates only to places of public accommodations under Titles II and III of the ADA. See n. 3, supra.

[8] 28 C.F.R. § 36.302(c)(4); see also 28 C.F.R. § 35.136(d). 28 C.F.R. § 36.302(c) (regarding control of service animals) has been incorporated by reference into State CRL Art. 4-B, which includes, but is not limited to, places of public accommodation.

[9] 28 C.F.R. § 36.302(c) (regarding control of service animals); see also 28 C.F.R. § 35.136(d); 28 C.F.R. § 36.302(c) has been incorporated by reference into State CRL Art. 4-B.

[10] 28 C.F.R. § 36.302(c)(2), (5); 28 C.F.R. § 35.136(b), (e).

[11] See Statement of Interest of the United States of America in Alboniga v. Sch. Bd. of Broward Cnty, Fla., 87 F.Supp.3d 1319 (S.D. Fla. 2015), available through http://www.ada.gov/, and court's subsequent decision, including a thoughtful analysis of this and other issues, finding record sufficiently established that aid in assisting child with disabilities to take his dog out to relieve itself was a reasonable accommodation to the child, rather than care of the dog). See U.S. v. Gates-Chili Cent. Sch. Dist., 198 F. Supp. 3d 228, 229 (W.D.N.Y. 2016) (denying school's summary judgment motion), and United States Memorandum of Opposition to

Defendant's Motion for Summary Judgment in U.S. v. Gates-Chili Cent. Sch. Dist., No. 15-CV-6583, ECF No. 15 (W.D.N.Y. Feb. 2, 2016), available at https://www.ada.gov/gateschili/gates-chili_msj.docx.

In February 2017, the Supreme Court cited Alboniga's application of federal ADA regulations to require a school to accept a student's service animal to comply with the school's obligation not to discriminate under the ADA, stating:

> Of particular relevance to this case are two antidiscrimination laws -Title II of the Americans with Disabilities Act (ADA), 42 U. S. C. §12131 et seq., and §504 of the Rehabilitation Act, 29 U. S. C. §794 - which cover both adults and children with disabilities, in both public schools and other settings. Title II forbids any "public entity" from discriminating based on disability; Section 504 applies the same prohibition to any federally funded "program or activity." 42 U. S. C. §§12131-12132; 29 U. S.C. §794(a). A regulation implementing Title II requires a public entity to make "reasonable modifications" to its "policies, practices, or procedures" when necessary to avoid such discrimination. 28 CFR §35.130(b)(7) (2016); see, e.g., Alboniga v. School Bd. of Broward Cty., 87 F. Supp. 3d 1319, 1345 (SD Fla. 2015) (requiring an accommodation to permit use of a service animal under Title II). In similar vein, courts have interpreted §504 as demanding certain "reasonable" modifications to existing practices in order to "accommodate" persons with disabilities. Alexander v. Choate, 469 U. S. 287, 299 - 300 (1985); see, e.g., Sullivan v. Vallejo City Unified School Dist., 731 F. Supp. 947, 961 - 962 (ED Cal. 1990) (requiring an accommodation to permit use of a service animal under §504). And both statutes authorize individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages. See 29 U.S.C. §794a(a)(2); 42 U.S.C. §12133.

*Fry v. Napoleon Community Schools*, 580 U.S. ___ (2017), *slip op*. at 3-4 (clarifying extent to which administrative exhaustion is required under the Individuals with Disabilities Education Act (IDEA)).

[12] 28 C.F.R. § 36.302(c)(6). See, for governmental entities, § 35.136(f).

> Inquiries. A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability.)

[13] Both the Obama and George W. Bush Administration Justice Departments have stated:

> Training requirement. Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability. A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.

"Section-by-Section Analysis and Response to Public Comments" regarding amendments to ADA regulations 75 F.R. 56163, et seq. (September 15, 2010); 75 F.R. 56236 et seq. (September 15, 2010); 28 C.F.R. § 36.302 (c) (6), available at

http://www.ada.gov/regs2010/titleIII_2010/reg3_2010.html; 28 C.F.R. § 35.136 (f), available at https://www.ada.gov/regs2010/titleII_2010/titleII_2010_fr.pdf. See, as to the Bush Administration, Notice of Proposed Rulemaking to amend 28 CFR Part 36: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities. 73 F.R. 34473 (June 17, 2008). State CRL Art. 4-B's requirement for training by a "qualified" person is not inconsistent with DOJ's conclusion, since DOJ finds that people who use service animals may be qualified to train their own service animals. While of interest predominantly for historical context, New York State's treatment of service animals in recent years has added significant confusion. Before 2008, the State HRL contained no definition of guide, hearing or service dogs, but did prohibit disability discrimination based on being accompanied by such a dog. The definitions were left to State CRL Art. 4-B, which required such dogs to be "trained" by a "qualified" person, though those terms were not defined. Under Chapter 133 of the Laws of 2007 (available through http://public.leginfo.state.ny.us/), definitions of such animals (inconsistent with State CRL definitions) were added to the State HRL, requiring that, in order to qualify, such dogs had to be trained by "recognized" "training centers" in the training of each type of dog, or by a "professional" in the training of the respective type of dog; no such "training centers" were "recognized" by the State, nor did the State license such "professionals". Effectively, no dog could qualify. Under DOJ's 2011 regulations, it became unlawful even to inquire about how the dog had been trained. The Legislature unanimously passed a bill to bring State law at least into harmony with the DOJ public accommodation regulations. This became Chapter 536 of the Laws of 2014, effective December 29, 2014. The Governor, as a condition for signing Ch. 536, required a "chapter amendment" that adds a State HRL cause of action for discrimination against someone using or training a guide, hearing or service dog trained by a "professional" trainer or training center (now in State HRL § 296(14); again, "professional" is not defined). The new cause of action is "[i]n addition to [State HRL requirements for] reasonable modifications in policies, practices, or procedures … or reasonable accommodations for persons with disabilities as otherwise provided in this section, including the use of an animal as a reasonable accommodation …." State HRL § 296(14). Since there still is no professional license in the training of guide, hearing or service dogs in New York State and it still is illegal under the ADA even to inquire about how such a dog was trained, a person

wishing to avail themselves of this additional cause of action would have to affirmatively and voluntarily present to a covered entity evidence that the guide, hearing or service dog had been trained by a "professional" and the entity nonetheless would have to exclude the person using or training the dog. Even without this additional cause of action, discrimination against a person with a disability (or a trainer) based on the presence of a service animal (as variously defined by the different laws, and without "professional" training) would violate Federal and City law, the State CRL – and, now, the State HRL.

[14] See n. 3, supra.

[15] Section 37.3 of the DOT's ADA regulations defines a service animal as any guide dog, signal dog, or other animal individually trained to work or perform tasks for an individual with a disability. Any animal meeting this definition is considered to be a service animal under the ADA, regardless of whether they are identified by special collars or harnesses or licenses or certifications. The Federal Transit Administration (FTA) does not consider "comfort" animals to be service animals since they do not meet the training-based definition of the latter. Transit authorities are required to permit service animals aboard their vehicles. A transit operator may ask a person who has a disability what specific functions his service animal performs, but the person is not required to have either a certificate or a license for a service animal, and a transit operator cannot compel a person with a service animal to produce documentation that the animal has been trained to help the person with a disability. FTA Frequently Asked Questions, "Passenger Accompaniment", available at https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/frequently-asked-questions.

[16] DOT regulations, 49 C.F.R. § 37.5 App. D (discussing 49 C.F.R. § 37.167); see also 49 C.F.R. § 37.167.

[17] The New York City Transit Authority (NYCTA) and its parent Metropolitan Transportation Authority (MTA) add to confusion by maintaining rules inconsistent with the ADA and with State CRL Art. 4-B and the City HRL concerning the use of service animals in its facilities. NYCT seemed to soften its position early in 2001, when it issued a pamphlet, "Service Animals in Transit: An Employee Guide," setting forth an approach much closer to legal requirements. Late in 2004, the MTA

promulgated and posted for comment amendments to the regulations of NYCT and of the MTA's other constituent entities that seemed to be in legal compliance. The MTA's reason for the proposed change to 21 N.Y.C.R.R. 1050.9(h) was:

> The provisions regarding use of service animals are revised so as to conform the language of the rules to current FTA interpretation of requirements under the ADA. Most important is a provision which would supersede any requirement of licensure or written documentation for the animal, if the individual bringing the animal into the system can credibly explain how the animal is needed to perform a task that the person is unable to perform due to his or her disability. Both NYCTA and New York City Police Department have previously issued bulletins incorporating the FTA standards and this amendment serves simply to formally codify current practices.

Similar to federal regulations, the MTA proposed to permit a person with a service animal to present "credible verbal assurances" as to one or more tasks the animal performs as acceptable evidence the animal indeed is a service animal. However, when rules for some of the MTA's constituent units actually were revised, effective December 5, 2005, although some were better, the rules remained in conflict with controlling law.

NYCT, the Manhattan and Bronx Surface Transit Operating Authority, as well as the Staten Island Rapid Transit Operating Authority, added a compliant alternative to their respective rules for identifying a service animal (albeit buried in a list of prohibited license, identification card, and other documentary alternatives). That alternative is:

> the credible verbal assurance of the person with a disability using the service animal or animal being trained as such. For purposes of this paragraph, credible verbal assurance may include a description of one or more tasks that the animal performs or is being trained to perform for the benefit of the person with a disability.

Each entity also still is inconsistent with the ADA and the State CRL in requiring that any trainer be a "professional" and must display proof of affiliation with a professional training school and that the animal is a

licensed service animal or" a service animal in training. See 21 N.Y.C.R.R. 1050.9(8)(3); 21 N.Y.C.R.R. 1040.8(c). As discussed above, the Justice Department explicitly rejected imposition of a requirement for professional training of service animals, noting that that would pose an economic burden on some in need of service animals and that people with disabilities sometimes train their own animals. DOT states "It should be noted that virtually all public and private entities covered by this [DOT] regulation are also covered by DOJ regulations, which have more detailed statements of general nondiscrimination obligations." Appendix D to 49 C.F.R. § 37.5 (Nondiscrimination). The Justice Department's 2011 amendments to its regulations are consistent with the "credible verbal assurance" standard contained in DOT regulations. However, differing with the Justice Department in one important respect, Appendix D goes on to state, in discussing 49 C.F.R. § 37.167, that service animals are not limited to dogs.

The MTA's Long Island Rail Road's ban on animals in its terminals, stations, and trains exempts only "a seeing eye or a hearing ear dog". 21 N.Y.C.R.R. 1097.10 (ignoring the broader DOT definition of service animal). Its Metro-North Commuter Railroad Company exempts only "a seeing eye or a hearing ear dog or an animal en route to or from a train [thus, presumably, not one on a train or accompanying a person otherwise in its facilities] and under the direct control of the individual the animal is accompanying such as by leash, container or other device" (thus not including voice commands) from its ban on animals in its terminals, stations, and trains. 21 N.Y.C.R.R. 1085.10. The Metropolitan Suburban Bus Authority exempts only "a service guide dog" from its ban on animals in its buses or transit center. 21 N.Y.C.R.R. 1045.10. Such limited exceptions fail to cure violations of controlling law. In addition to the ADA the State CRL remains fully applicable throughout the State; although the State CRL is limited to guide, hearing and service dogs and incorporates by reference DOJ provisions concerning control of such dogs, it does not adopt DOJ's limitations on the functions of a service animal (e.g., DOJ's exclusion of emotional support).

[18] See n. 3, supra. Although the State HRL's coverage of transportation facilities was limited by Chapter 394 of 2007 (see n. 5, supra), the City HRL definition of public accommodation remains robust. § 8-102(9); § 8-107(2).

[19] 49 U.S.C. § 41705; see "Nondiscrimination on the Basis of Disability in Air Travel," 14 C.F.R. Part 382 (United States Department of

Transportation 2014), available at http://www.ecfr.gov/cgi-bin/text-idx?SID=aa072804eed9a56532223335f92e6b87&node=pt14.4.382&rgn=div5. Even when violation of the ACAA is not pleaded, an airline's failure to train its personnel adequately concerning the requirements of the ACAA may support a state law tort claim. Adler v. WestJet Airlines, Ltd., 31 F. Supp. 3d 1381 (S.D. Fla. 2014) (settled confidentially August 11, 2014).

[20] 14 C.F.R. §§ 382.117, 382.27.

[21] 14 C.F.R. § 382.27. If these disabilities are severe, the carrier may request that the individual be accompanied by a safety assistant. 14 C.F.R. §§ 382.29(b)(4).

[22] 14 C.F.R. § 382.27.

[23] 14 C.F.R. § 382.31.

[24] 14 C.F.R. § 382.33.

[25] 14 C.F.R. § 382.117(d).

[26] 14 C.F.R. § 17.

[27] 14 C.F.R. § 382.83(c).

[28] 14 C.F.R. § 382.81(b)(2).

[29] 42 U.S.C. § 12184(a); 49 C.F.R. § 37.29(c); 49 C.F.R. § 37.167(d).

[30] Settlement Agreement under the Americans with Disabilities Act between the United States of America and Altagracia Roumou, DJ No. 202-90-32, May 15, 2014. See https://www.justice.gov/usao-vi/pr/us-attorney-s-office-resolves-complaint-against-taxi-driver-refusing-service-visually. See also United States Department of Justice Statement of Interest in National Federation of the Blind of California v. Uber Technologies, Inc., 3:14-cv-04086-NC (posted 12/23/14 at http://www.ada.gov/).

[31] See http://www.nyc.gov/html/tlc/html/rules/rules.shtml. Taxis also are public accommodations covered by the City HRL. § 8-102(9); § 8-107(2).

[32] State CRL §§ 47-a and 47-b(1). Although the dog must be trained by a "qualified" person, that term is not defined to be inconsistent with the DOJ

finding that that owners/users of such dogs are qualified to train their service animals. See n. 13, supra, and accompanying text. While State CRL § 47-b requires that the dogs be under the control of their users consistent with DOJ regulation 28 C.F.R. § 36.302(c), the State CRL does not adopt the functional limitations of service animals under DOJ's regulations (e.g., excluding emotional support and physical protection). The State CRL is enforced by the State Attorney General, not by the State Division of Human Rights (SDHR). A private right of action is implied. See Sheehy v. Big Flats Cmty. Day, Inc., 73 N.Y.2d 629, 623 (1989); Pietra v. Poly Prep Country Day Sch., Index. No. 506586/2015, at *1, *5 (Sup. Ct. Oct. 1, 2016; published N.Y. Law Journal October 28, 2016), available at http://nylawyer.nylj.com/adgifs/decisions16/102616bailyschiffman.pdf.

[33] The ADA covers employers of 15 or more (42 U.S.C. §§ 12111(5), § 12112); the State HRL and City HRL generally cover employers of four or more (§ 292 (5); § 8-102(5), respectively).

[34] The EEOC has no definition of a service animal and does not apply DOJ's public accommodations provisions (ADA Titles II and III) to employment (Title I). See, e.g., EEOC's "How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers", available at http://www.eeoc.gov/facts/restaurant_guide.html. While Title I of the ADA prohibits discrimination against people with disabilities, it includes a specific prohibition of discrimination against a person with a disability due to the need to make a reasonable accommodation to such a person. 42 U.S.C. § 121012112(b)(5)(B); that provision would apply particularly with respect to use of a service animal.

[35] 29 C.F.R. pt. 1630 app. §1630.9 (1997). See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), available at http://www.eeoc.gov/policy/docs/accommodation.html#N_36_. See also, with respect to the City HRL, n. 3, supra, especially the discussion of Tartaglia.

[36] State HRL § 296(14). While the portion of this section that requires modification of policies references State HRL § 296 (2)(d)(iv) (which incorporates by reference the DOJ public accommodation provisions under the ADA), the "reasonable accommodation" provision of State HRL § 296

(14) does not have such limitations. Moreover, the prohibition of discrimination in policies, practices, and procedures "include[s]," but expressly is not limited to discrimination in places of public accommodation under the State HRL and thus is applicable to employment discrimination as well, beyond State HRL reasonable accommodation requirements. State HRL § 296(14).

[37] State HRL § 292(21-e).

Under the State HRL, the term "disability", with respect to employment, is limited to conditions that, with the provision of reasonable accommodation, would not prevent the individual from performing the work in a reasonable fashion (State HRL § 292(21)). An accommodation might not be considered reasonable if it might present a "problem" (an undefined term), for an employer or for another employee (perhaps including a preference not to be near an animal) (9 N.Y.C.R.R. § 466.11(b)(i)(iii)). However, in a case (albeit non-employment related) where the presence of a student's hearing dog led to hospitalization and severe allergic reaction among faculty and students in a junior high school, the SDHR found the presence of the dog not to create a sufficient problem to exclude the dog. A federal court found the school not to be a covered public accommodation, although its opinion was vacated for lack of jurisdiction, and the Appellate Division, Second Department, declined to enforce the SDHR decision, since the court found SDHR without jurisdiction over public schools (i.e., not a public accommodation). See East Meadow Union Free Sch. Dist. v. N.Y.S. Div. of Human Rights, 65 A.D.3d 1342 (Sup. Ct. 2009), leave to appeal denied, 14 N.Y.3d 710 (2010) available at http://www.dhr.ny.gov/sites/default/files/pdf/Commissioners-Orders/nysdhr_v_east_meadow_union_free_school_district.pdf; and the federal decisions cited by SDHR based on the same facts.

[38] State HRL § 292(5).

[39] "The need for individualized inquiry when making a determination of reasonable accommodation is deeply embedded in the fabric of disability rights law. … Rather than operating on generalizations about people with disabilities, employers (and others) must make a clear, fact-specific inquiry about each individual's circumstance. … This good faith process is the "key mechanism for facilitating the integration of … [people with disabilities into society]." Phillips v. City of New York, 66 A.D.3d 170, 175, 884 N.Y.S.2d

369 (App. Div. 2009) (citations omitted). SDHR's failure to analyze whether a provider of housing accommodations had engaged in an interactive process concerning a reasonable accommodation rendered a "no probable cause" finding arbitrary and capricious. In the Matter of Valderrama v. New York State Division of Human Rights and York Ville Towers Associates, LLC, 401640/11, N.Y.L.J. 1202519960377 (S. Ct. NY Co. Decided Oct. 6, 2011), available at http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202519960377&slreturn=1.

The interactive process promotes identification of appropriate and effective reasonable accommodations. The prospect of liability for a failure to engage in such a good faith process is an incentive for cooperative dialog to diminish resolution by litigation. Phillips, 66 A.D.3d at 175. However, a good faith interactive process is not an "independent element of the disability discrimination analysis under either the State or City HRL which, if lacking, automatically compels a grant of summary judgment to the employee or a verdict in the employee's favor." Id. at 838. However, when an employee, acting through counsel, confront[ed] … [the employer] with an inflexible, categorical demand, with no room for negotiation and no suggestion of a time frame in which plaintiff would be open to revisiting the issue …. plaintiff discharged … [the employer], as a matter of law, of the obligation to continue its efforts to initiate … [a bilateral, interactive process to find a way to reconcile both parties' needs]. Romanello v. Intesa Sanpaulo S.p.A., 97 A.D.3d 449, 949 N.Y.S.2d 345 (1st App. Div. 2012), mod (to reinstate City HRL cause of action) and aff'd, 22 N.Y.3d 881 (2013). The New York Court of Appeals discussed the interactive process extensively in Jacobsen, 22 N.Y.3d 824 (2014), and was careful to limit its agreement with prior case law in one respect:

> Our conclusion that, in all but the most extreme cases, the lack of a good faith interactive process forecloses summary judgment in favor of the employer should not be construed too broadly. At a trial on a State HRL claim, the plaintiff employee still bears the burden of proving the existence of a reasonable accommodation that would have enabled the employee to perform the essential functions of his or her position (see Executive Law § 292 [21]; Romanello, 22 N.Y.3d at 884). Furthermore, to the extent the Appellate Division's decision in

> Phillips can be interpreted as implying that a good faith interactive process is an independent element of the disability discrimination analysis under either the State or City HRL which, if lacking, automatically compels a grant of summary judgment to the employee or a verdict in the employee's favor (cf. 66 AD3d at 175-176), we reject that notion.

Id. at 838. The New York City Council has introduced legislation aimed at reversing this limitation with respect to the City HRL. See Int. No. 804 of 2015, available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2352223&GUID=04039CC5-37D8-4366-A5AF-8B93F6D9717E&Options=&Search.

[40] N.Y.C. Admin. Code § 8-102(5); see n. 3, supra.

[41] Contrast City HRL §§ 8-102(16), (18), and 8-107(15) with State HRL §§ 292(21) and (21-e), 9 N.Y.C.R.R. § 466.11(b)(i)(iii), and § 296(4), and with ADA Title I.

[42] § 8-107(1), in addition to reasonable accommodation, § 8-107(15). See n. 3, supra, and accompanying text.

[43] Department of Housing and Urban Development "Notice on Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-funded Programs" [under both the FHA and § 504 of the federal Rehabilitation Act] (April 25, 2013) available at http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf. The term "assistance animal" is used by HUD ("an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability") to emphasize the broader scope in housing in species and function beyond that of DOJ's public accommodations service dogs. DOJ also recognizes that animals other than dogs, including animals providing emotional support, are covered under the FHA. Final Rule Implementing the ADA Amendments Act of 2008, with respect to Titles II and III of the ADA, 53204 Federal Register / Vol. 81, No. 155 / at 53211, n. 12 and accompanying text, cited at n. 4, supra. Under State CRL § 47, no person with a disability may "be denied admittance to and/or the equal use of … [any] form … of public … [or] private housing accommodations whether permanent or temporary"

because they are using a guide, hearing, or service dog; this provision is not limited by any requirement for documentation.

[44] See L.D. (discussed at n. 3, supra) and City HRL § 8-107(5). While L.D. recognized and discussed the need to read the City HRL more liberally than Federal or State law, the HUD guidance (see n. 43, supra), illustrates standards in situations less egregious than those in L.D.. State HRL § 296(18)(2) "imposes a requirement that a person with a disability requesting an accommodation must show that 'such an accommodation may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling ….'" N.Y.S. Div. of Human Rights v. 111 East 88 Partners, No. 402894/07, 2014 WL 2091141, at *18 (N.Y. Sup. Ct. June 1, 2012). While New York State courts read the State HRL restrictively in this regard, HUD interprets the same language in the FHA (42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204(a)) more favorably to people with disabilities seeking an assistance animal as a reasonable accommodation. In describing the need that will qualify for the accommodation, HUD focuses on the function performed by the animal for the individual, rather than on making that function the essential factor:

> Does the person making the request have a disability-related need for an assistance animal? In other words, does the animal work, provide assistance, perform tasks or services for the benefit of a person with a disability, or provide emotional support that alleviates one or more of the identified symptoms or effects of a person's existing disability?

See HUD Notice cited at n. 43, supra, and accompanying text. HUD's approach is mirrored in that under the City HRL; see L.D., at 11-14.

[45] State CRL § 47.

[46] State CRL § 47-b(3).

[47] ADA, 42 U.S.C. § 12182(b)(1)(E), 28 C.F.R. §§ 36.205 and 35-130(g), but see answer to question 6 of the FAQ discussed in n. 3, supra (stating that, since a service dog must be one that has been trained, a dog being trained does not qualify; it is unclear at what point in the training the dog might be considered sufficiently trained to qualify as a service dog); City HRL § 8-107(20).

[48] State HRL § 296(14); the term "professional" is not defined, but even a "non-professional" is protected; see nn.42 and 43, supra, and accompanying text.

[49] 42 U.S.C. § 12117, adopting remedies available under 29 U.S.C. § 794a for those claiming discrimination under § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); as to those remedies, see Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984); Doe v. N.Y. Univ., 666 F.2d 761, 774 (2d Cir. 1981); Martin v. N.Y.S. Dep't of Labor, 512 F. Supp. 353 (S.D.N.Y. 1981) (applying CPLR § 214(2) to establish a three year statute of limitations). Counties and municipalities are not subject to punitive damages under ADA Title II, under § 504, nor under New York State common law. The EEOC may pursue victim-specific remedies even when the individual would be bound by agreement with the employer to proceed in arbitration. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). Claims under ADA, State HRL, and City HRL have been found subject to an arbitration clause in an individual's employment agreement. Bulkenstein v. Taptu, Inc., 2014 U.S. Dist. LEXIS 144159, at *1 (S.D.N.Y. Oct. 9, 2014), 14 Civ. 1812, N.Y.L.J. 1202673556797, at *1 (S.D.N.Y. Oct. 9, 2014), available at http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2014cv01812/424559/28/.

While the Supreme Court has found the individual's right to proceed individually in court under the ADA is subject to the preference for arbitration in the Federal Arbitration Act, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), that preference itself is subject to legal and equitable principles that would invalidate a contract (such as an arbitration agreement), for example, due to unconscionability, and courts have been ready to find unconscionability in appropriate cases. Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (on remand); Brennan v. Bally Total Fitness, 198 F.Supp.2d 377 (S.D.N.Y. 2002). Similarly, when a collective bargaining agreement precludes an individual covered by that agreement from seeking arbitration without union approval, the individual may pursue a discrimination claim in court or in another appropriate forum. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456 (2009); Kravar v. Triangle Servs. Inc., 509 F.Supp.2d 407 (S.D.N.Y. 2007).

Encouragement of alternative dispute resolution in the ADA (42 U.S.C. § 12212) and the absence of such a provision from the City HRL, together with the language and history of the Local Civil Rights Restoration Act

might make State Court a better forum, without reliance on the ADA, when an arbitration agreement otherwise might be problematic. C.f. Whitt v. Prosper Funding LLC, 2015 U.S. Dist. LEXIS 91413, at *1 (S.D.N.Y. July 14, 2015), 1:15-cv-136, NYLJ 1202732403755, at *1 (S.D.N.Y., Decided July 14, 2015), available at http://www.newyorklawjournal.com/id=1202732403755?keywords=Whitt+v.+Prosper+Funding+LLC; http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv00136/437068/48/; https://apps.fastcase.com.dbgateway.nysed.gov/Research/Pages/Document.aspx?LTID=XIqTCPR425kaQ3yiIz2%2b%2fR%2fQM%2bkaE%2bZBCOHXP4CZ2AH%2broxwQCU6cDVvHTOrxXpEXjAV1f468sEYcu4liypetIXwOpX8sB1PQv0gnPMhiWbu1RQU9nuPw7uBdCAIay%2fc4L1LyUXF7OWxyHX94TgI121aWgxzeJUQdMZvr8HcsHQ%3d.

But see City HRL § 8-107(21)(c)(1)(d). A judicially unreviewed State administrative determination is not preclusive in a subsequent suit under the ADA, although a binding arbitration award may be. Cortes v. MTA N.Y. City Transit, 802 F.3d 226, 32 A.D. Cases 1 (2d Cir. 2015).

[50] 42 U.S.C. § 1981a. Front pay is not limited by the cap. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001).

[51] See § 102 and 103 of the Civil Rights Act of 1991, available at https://www.eeoc.gov/laws/statutes/cra-1991.cfm.

[52] Farrar v. Hobby, 506 U.S. 103 (1992); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001); see also McGrath v. Toys "R" Us, Inc., 3 N.Y.3d 421, 788 N.Y.S.2d 281, 821 N.E.2d 519 (2004) (following Farrar as to attorneys fees under the City HRL), repudiated in the Local Civil Rights Restoration Act. For discussion of how and why attorneys fees were reduced in an ADA/City HRL case, see Muñoz v. Manhattan Club Timeshare Ass'n, 2014 U.S. Dist. LEXIS 132166, at *1 (S.D.N.Y. Sept. 18, 2014), available at http://www.newyorklawjournal.com/id=1202671152086?.

[53] 42 U.S.C. §§ 12188, 2000e-5. Civil penalties may be sought in actions by the Justice Department. On March 28, 2014, the Department of Justice issued a Final Rule that adjusts for inflation the civil monetary penalties assessed or enforced by the Civil Rights Division, including civil penalties available under Title III of the ADA. For the ADA, this adjustment increases

the maximum civil penalty for a first violation under Title III from $55,000 to $75,000; for a subsequent violation the new maximum is $150,000. The new *maximums* apply only to violations occurring on or after April 28, 2014. See http://www.gpo.gov/fdsys/pkg/FR-2014-03-28/html/2014-06979.htm.

[54] 42 U.S.C. § 12133. Parallel and concurrent suits may be brought under ADA Title II and 42 U.S.C. § 1983. Williams v. City of New York, 12-CV-6805, NYLJ 1202734428588 (S.D.N.Y. 2015), available at http://www.newyorklawjournal.com/id=1202734428588. A § 1983 action may relate, inter alia, to an entity's failure to train its employees to respect Constitutional or statutory rights of people with disabilities, and to the entity's intentional or negligent disregard of such rights.

[55] See Tennessee v. Lane, 541 U.S. 509 (2004) and United States v. Georgia, 546 U.S. 151, 126 S.Ct. 877 (2006).

[56] N.Y.C. Admin. Code § 8-109. Filing of an administrative complaint generally constitutes an election of remedies precluding a private suit. Exec. Law § 297(9), Hernandez v. Edison Properties, 103762/12, N.Y.L.J. 1202653474336 at 1 (S.Ct. NY Co. Decided March 31, 2014; published May 2, 2014), available at http://www.courts.state.ny.us/Reporter/pdfs/2013/2013_33620.pdf; http://www.newyorklawjournal.com/id=1202653474336/Juan-Hernandez-Plaintiff-v-Edison-Properties-Defendant-10376212?slreturn=20141003164541. The CCHR may award substantial damages, as well as costs, attorneys fees and experts fees. N.Y.C. Admin. Code § 8-120.

[57] Exec. Law § 297(5).

[58] N.Y.C. Admin. Code §§ 8-120, 8-502.

[59] N.Y.C. Admin. Code § 8-502.

See Bennett v. Health Mgmt. Sys., Inc., 92 A.D.3d 29 (N.Y. Sup. Ct. 2011). For example, the McDonnell Douglas test must be tailored to City HRL mandates so "considerations of severity or pervasiveness applicable in state and federal harassment cases are impermissible in determining liability in discriminatory harassment cases under the City HRL," Bennett, 92 A.D.3d at 34, citing Williams and Nelson v. HSBC Bank USA, 87 A.D. 3d 995, 997-99 (2nd Dep't App. Div. 2011).

See Jordan v. Bates Adver. Holdings, Inc., 11 Misc.3d 764, 770-71 (N.Y. Sup. Ct. 2006), (upholding a jury award of $2,000,000 in compensatory and $500,000 in punitive damages, and setting a hearing on the amount of attorneys fees). But see Norris v. N.Y. City College of Tech., N.Y.L.J. Jan. 29, 2009, 33:1 (S.D.N.Y. Decided Jan. 14, 2009, Block, J.), available at http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202503560416; https://casetext.com/case/norris-v-new-york-city-college-of-technology (reducing punitive damages of $425,000 to $25,000 against an individual defendant - the only one subject to punitive damages - relying primarily on U.S. Supreme Court criteria), and Riverbay Corp. v. N.Y. City Comm'n, 260832/10, N.Y.L.J. 1202518198460 (S. Ct. Bronx Co., Decided Sept. 9, 2011), available at https://cases.justia.com/new-york/other-courts/2011-ny-slip-op-34042-u.pdf?ts=1389911850; http://www.newyorklawjournal.com/CaseDecisionNY.jsp?id=1202518198460 (reducing damages and fines levied by CCHR). An award of compensatory damages to a person aggrieved by illegal discriminatory practice may include compensation for mental anguish, and that award may be based solely on the complainant's testimony. Matter of 119-121 E. 97th St. Corp. v. N.Y. City Comm'n on Human Rights, 220 A.D.2d 79, 83, 642 N.Y.S.2d 638 (Sup. Ct. 1996). A trial court's unexplained denial of attorneys fees to a plaintiff prevailing in a settlement under the City HRL was remanded by the Appellate Division for a hearing to determine the amount of attorneys fees to be awarded. Fornuto v. Nisi, 84 A.D.3d 617, 923 N.Y.S.2d 493 (Sup. Ct. 2011).

Where damages or fees are sought with respect to pendent local or State discrimination law liability in a federal action, enforcement of such an award may be sought in a motion in the federal action and does not require State court proceedings. Mitchell v. Lyons Prof'l Servs., Inc., 727 F. Supp.2d 120 (E.D.N.Y. 2010).

Common law sovereign immunity has been held to bar punitive damages against the City itself under the City HRL. See Katt v. City of N.Y., 151 F. Supp.2d 313, 337-45 (S.D.N.Y. 2001), aff'd sub nom Krohn v. N.Y.C. Police Dep't, 372 F.3d 83 (2d Cir. 2004).

In the Local Civil Rights Restoration Act (Local Law 85 of 2005), New York City repudiated an interpretation of the City HRL that attorneys fees rarely would be awarded under the City HRL "where plaintiff obtained only nominal damages unless the case served a significant public purpose."

McGrath, 3 N.Y.3d at 427-28. In the same legislation, civil penalties under the City HRL were increased significantly, N.Y.C. Admin. Code § 8-126, although the absence of a waiver of sovereign immunity was not addressed, see Krohn.

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

Attorneys fees and court costs recovered by individuals in civil rights litigation (e.g., under ADA and City HRL), including those secured in settlement, are free from federal taxation to the prevailing individual. 26 U.S.C. §§ 62 (a)(20), 62(e)(18).

[60] State HRL §§ 297(9), (10). Attorney's fees may be available to a prevailing party in a discrimination action against the State. Kimmel v. State of N.Y., 76 A.D.3d 188, 906 N.Y.S.2d 403 (Sup. Ct. 2010); see also Cadet-Legros, discussed at n. 3, supra.

[61] N.Y.C. Admin. Code § 8-502(c); before enactment of Local Law 85 of 2005, such notice had to be given before suit was filed. Failure to comply with notice of claim time limitations (N.Y.S. General Municipal Law §§ 50-i, 50-e; N.Y. Civil Practice Law and Rules § 9801 (villages)) has been held in federal court to warrant dismissal. Erlich v. Gatta, N.Y.L.J. Oct. 16, 2009, 30:1 (S.D.N.Y. Decided Oct. 2, 2009), available at https://casetext.com/case/ehrlich-v-gatta and http://www.newyorklawjournal.com/id=1202434624942.

However, that State HRL case was based on non-State HRL state precedent; the better precedent is that State HRL claims against a municipality are not subject to General Municipal Law or CPLR notice of claim requirements. See Rose v. N.Y.C. Health and Hosps. Corp., 122 A.D.3d 76, 79 (N.Y. Sup. Ct. 2014). Even when suit against a governmental entity is barred procedurally, a suit might proceed against an employee of that entity for aiding and abetting the entity's human rights law violation. Johnson v. County of Nassau, 10-CV-6061, N.Y.L.J. 1202717065006, at *1 (E.D.N.Y., Decided January 30, 2015; published February 6, 2015), available at https://www.gpo.gov/fdsys/granule/USCOURTS-nyed-2_10-cv-06061/USCOURTS-nyed-2_10-cv-06061-1. The State HRL does not authorize suit against the State or other governmental entities. See

A.10676/S.7482 of 2010 and Veto Message 6720, available at http://public.leginfo.state.ny.us/.

[62] N.Y.C. Admin. Code §§ 8-402, 8-404. While a civil action in the name of the City (as opposed to a private right of action would have to be brought by or at the direction of the Corporation Counsel, the CCHR is empowered to initiate administrative complaints based on its own investigations, "in addition" to a referral to Corporation Counsel for court action. N.Y.C. Admin. Code § 8-105(4)(a), (b).

[63] O'Brien v. NYC Civil Service Commission, 100043/2014 (S.Ct. N.Y. Co. Oct. 24, 2014) (applicant for police officer position may not be rejected on the basis of generalized conclusions).

[64] Fletcher v. Dakota, Inc., 99 A.D.3d 43, 47, 948 N.Y.S.2d 263 (Sup. Ct. 2012).

[65] § 47-c.

[66] See infra nn. 68 - 74 and accompanying text.

[67] Buffalo Code §§ 154-20(A)(1)(a), (b).

[68] Buffalo Code § 154-20(C).

[69] § 48-27(H).

[70] Laws of Westchester County §§ 700.11(h)(3)-(5).

[71] Nassau County Admin. Code § 21-9.9.1.

[72] Nassau County Admin. Code § 21-9.7(d)(1)(xiii)(A).

[73] Nassau County Admin. Code § 21-9.7(d)(2).

[74] Nassau County Admin. Code § 21-9.7(d)(3).