SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 27, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5102 The People of the State of New York, Ind. 6928/04
Respondent,

-against-

Gregory Wright,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cahill Gordon & Reindel LLP (Matthew Conaty of counsel), for appellant.

Gregory Wright, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

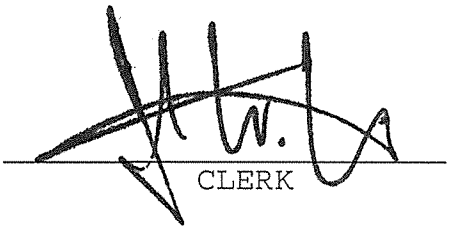
Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered March 2, 2006, convicting defendant, after a jury trial, of attempted murder in the second degree, robbery in the first degree (two counts), burglary in the first degree, robbery in the second degree (two counts), and criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's requests for missing witness charges, since defendant did not establish prima facie entitlement to such charges with respect to any of the uncalled

witnesses (*see People v Gonzalez*, 68 NY2d 424 [1986]). The victim's stepson, who told the police he was asleep in a back bedroom during the robbery, was clearly not knowledgeable about any issue. The victim's stepson's former girlfriend was not under the People's control for purposes of a missing witness charge, since she did not have any relationship with the victim or with the prosecution that would create an expectation that she would provide testimony favorable to the People (*see People v Abelson*, 27 AD3d 301 [2006]). In addition, there was no reason to believe that she had any knowledge of the identity of the assailants or any other material issue. There is no merit to defendant's pro se claims regarding other uncalled witnesses, or any of his other pro se claims, including the constitutional components of those claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5104 In re Luis L.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about January 2, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of obstructing governmental administration in the second degree and resisting arrest, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

Appellant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we conclude that the court's finding was based on legally sufficient evidence. We also conclude that it was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

The evidence established that an officer saw appellant and another boy engaged in a serious fight posing the risk of injury, as opposed to mere horseplay as claimed by appellant. When the officer appropriately broke up the fight, appellant's aggressive and combative conduct towards the officer obstructed an official police function (*see* Penal Law § 195.05; *Matter of Davan L.*, 91 NY2d 88 [1997]). Since appellant's arrest for obstructing governmental administration was authorized, his struggle to avoid being handcuffed constituted resisting arrest (*see* Penal Law § 205.30).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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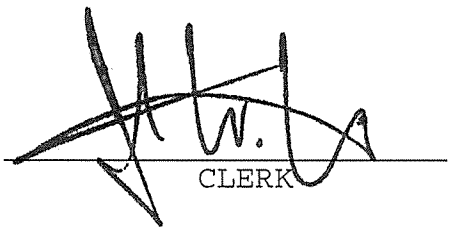


Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5106 The People of the State of New York, Ind. 290/06
Respondent,

-against-

Michael Rose,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Simpson Thacher & Bartlett LLP, New York (Michael S. Ybarra of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered July 13, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to concurrent terms of 5 years and 1 year, respectively, unanimously affirmed.

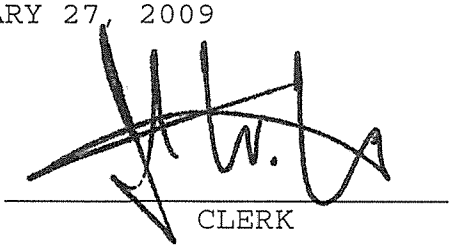
The court properly denied defendant's request for an agency charge, since there was no reasonable view of the evidence, viewed most favorably to defendant, that he acted solely on behalf of the buyer (*see People v Herring*, 83 NY2d 780 [1994]; *People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]). Contrary to defendant's argument, there was no factual issue to be resolved by the jury regarding the agency defense. Nothing in the People's evidence supported an agency

defense, and defendant's own testimony, even if fully credited, negated that defense. Under defendant's version of the transaction, what began as an alleged favor developed into an opportunity for defendant to profit by acquiring a third of the drugs. We have repeatedly held, on the basis of language in *Lam Lek Chong* as well as common sense, that "[t]he defense of agency is not intended to protect a person who arranges a drug transaction for the purpose of earning the equivalent of a finder's fee or broker's commission, in contrast to a person who performs a 'favor,' possibly rewarded by a tip or incidental benefit" (*People v Elvy*, 277 AD2d 80, 80 [2000], *lv denied* 96 NY2d 783 [2001]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5107 Florita Moreschi, Index 7795/04
Plaintiff-Respondent,

-against-

Michael DiPasquale, et al.,
Defendants-Appellants.

Mintz & Fraade, P.C., New York (Edward C. Kramer of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Donna M. Bates of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered October 1, 2007, which, insofar as appealed from in an action to impress a constructive trust upon 50% of the shares of defendant American Sirloin Meat Co., Inc. (American Sirloin), granted plaintiff's cross motion to dismiss the affirmative defense of laches, unanimously affirmed, with costs.

Plaintiff alleges that she was a co-partner of defendant DiPasquale in starting up and building American Sirloin. According to plaintiff, DiPasquale promised her many times over the years that she was a co-equal owner in the business and such promises and assurances were made as recently as 2000 and 2002. DiPasquale denies such promises were made.

The affirmative defense of laches requires a showing of undue delay by a party in asserting its rights, as well as prejudice to the opposing party as a consequence of the delay

(see generally Matter of City of New York [New York Life Ins. Co.], 21 NY2d 293, 303 [1967]; *Haberman v Haberman*, 216 AD2d 525, 527 [1995]). Here, viewing the facts in the light most favorable to defendants, who oppose the cross motion (*see generally Shannon v MTA Metro-N. R.R.*, 269 AD2d 218 [2000]), even if we were to find factual issues as to the element of undue delay, defendants have failed to show prejudice. Although DiPasquale argues that he relied on plaintiff's undue delay in asserting her claim to a 50% interest in the business predicated upon his alleged promises, inasmuch as he would not have lavished gifts and money upon plaintiff, he makes no argument that plaintiff agreed to accept the gifts and money in lieu of asserting an interest in the company. The record also indicates that the gifts were purchased with the earnings from the business in which plaintiff alleges she had a 50% interest. Regarding the compensation that plaintiff was paid, the record supports the conclusion that she earned the compensation and medical coverage for her years of service at the company, and there is no evidence that plaintiff knowingly received the compensation as an offset to her claim of an ownership right in American Sirloin.

We have considered defendants' remaining contentions,

including the assertion of laches based upon the loss of evidence due to plaintiff's undue delay, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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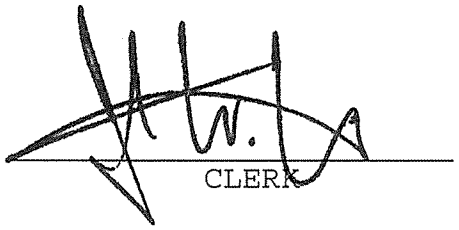

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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5108 Laurent Adamowicz, Index 109651/06
Plaintiff-Appellant,

-against-

Pierre Besnainou, et al.,
Defendants,

Fauchon, Inc. (US), et al.,
Defendants-Respondents.

Squitieri & Fearon, LLP, New York (Lee Squitieri of counsel), for appellant.

Bond, Schoeneck & King, PLLC, New York (Michael P. Collins of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 10, 2007, which granted the motion of defendants Fauchon Holding, SAS, Fauchon SAS, Groupe Fauchon, S.A., and Waldo S.A. to dismiss the complaint as against them for lack of personal jurisdiction and on the ground of forum non conveniens, and granted the motion to dismiss the complaint as against defendant Fauchon Inc. (US) on the ground of forum non conveniens on condition that defendants make themselves amenable to service of process in France and waive any statute of limitations defenses, unanimously affirmed, with costs.

While reflecting the occasional visit to New York by representatives of some of the foreign corporate defendants, the record does not show that "the corporation[s] [are] present in

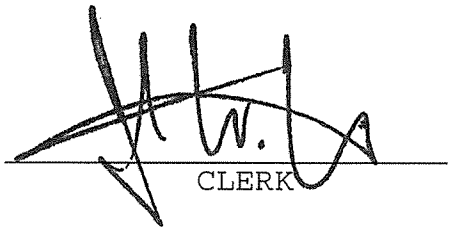
the State not occasionally or casually, but with a fair measure of permanence and continuity," and therefore are subject to in personam jurisdiction in this State (*see Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 34 [1990] [internal quotation marks and citation omitted]).

In any event, the complaint was properly dismissed on the ground of forum non conveniens (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 482 [1984], *cert denied* 469 US 1108 [1985]; *Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599 [2008]; *and see Adamowicz v Barclays Private Equity France S.A.S.*, 2006 WL 728394, 2006 US Dist LEXIS 11675 [SD NY 2006]. While one of the corporate defendants (Fauchon US) is present in New York, and plaintiff, a permanent resident of the United States, may have been in the United States when he engaged in certain negotiations with defendant Besnainou, all the corporate and individual defendants other than Fauchon US, plus the minority investors, are located in France or other European countries. Plaintiff has failed to identify a single witness other than himself who might be present in this country. The loan agreement alleged to have been breached was written in French, was executed in France, was to be performed in France, and was allegedly breached in France. Plaintiff allegedly was compelled to sell his shares in the defendant corporations as a

result of the choices presented to him by a French receiver acting under French law, and all the relevant documentary evidence is located in France or in other European countries.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5109 In re Chandel B., etc.,

A Dependent Child Under
the Age of Eighteen Years, etc.,

Chandel B., Sr.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about March 12, 2007, which, to the extent appealed from, determined that respondent father's consent was not required for the adoption of the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The consent of respondent to the adoption of his child was not required since he did not maintain "substantial and continuous or repeated contact with the child" (Domestic Relations Law § 111[d][1]). Respondent admitted to never providing financial support for the child (*see Matter of Margaret Jeanette P.*, 30 AD3d 359 [2006]), and the evidence shows that he

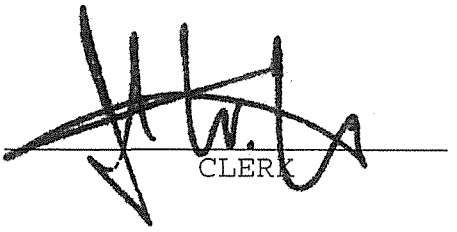
did not make any effort to visit or communicate with the child for most of the child's life, took no steps to formalize his relationship to his son, and made no attempt to participate in the neglect proceedings against him and the child's mother (*see Matter of Sharissa G.*, 51 AD3d 1019 [2008]). Furthermore, respondent's contention that he was prevented from maintaining contact with the child by the agency is belied by the record.

The court's determination that it would be in the child's best interests to free him for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). There is no indication that respondent is capable of caring for his son and the record establishes that the child is doing well in his preadoptive home, which he shares with two of his siblings.

We have considered respondent's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5110 J. Edgar Clayton, Jr., as Executor of the Estate of Margaret R. Austin, Plaintiff-Respondent, Index 110432/03

-against-

Memorial Hospital for Cancer and Allied Diseases, Defendant-Appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

Law Offices of Joseph M. Lichtenstein, Mineola (Elliot L. Lewis of counsel), for respondent.

Order, Supreme Court, New York County (Stanley L. Sklar, J.), entered April 4, 2008, which, to the extent appealed from, adhered, upon renewal, to an earlier order denying defendant's motion for summary judgment dismissing plaintiff's medical malpractice claims pertaining to advice provided during a November 1999 phone call, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint in its entirety.

In September 1999, plaintiff's decedent (plaintiff) appeared at defendant hospital complaining of severe diarrhea and rectal bleeding. She was examined by a doctor and referred to a gastroenterologist who performed a colonoscopy and an endoscopy in October 1999. The procedures revealed an anal fissure that

appeared to be healing and hemorrhoids, and the gastroenterologist considered the condition benign with no need for him to do anything further.

In November 1999, plaintiff called the gastroenterologist's office and spoke to a doctor, who may have been the gastroenterologist who performed the colonoscopy, but plaintiff was not sure. Although she complained that she was suffering from anal bleeding of "hemorrhage proportions," she was told to continue taking sitz baths. She did not call back again because she felt that she was given instructions on what to do and there was no help or recommendation available.

In January 2001, plaintiff called defendant's Patient Representative Office seeking an appointment for a colonoscopy and complaining of weakness, hemorrhoids and anal bleeding. In April 2001, she was examined by the gastroenterologist and referred to a colorectal surgeon. In May 2001, plaintiff was diagnosed with anal cancer, which resulted in her death in 2005.

The continuous treatment doctrine tolls the statute of limitations for a medical malpractice action "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*Borgia v City of New York*, 12 NY2d 151, 155 [1962]). Where there is a direct physician-patient relationship, continuous treatment exists "when further treatment is explicitly

anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past" (*Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985]; *see Cox v Kingsboro Med. Group*, 88 NY2d 904 [1996]). Included within the scope of the continuous treatment doctrine is a timely return visit instigated by the patient to complain about and seek treatment for a matter relating to the initial treatment (*see McDermott v Torre*, 56 NY2d 399, 406 [1982]).

The record shows that neither the doctor nor plaintiff anticipated any further treatment after the November 1999 call. Plaintiff testified that she believed nothing more could be done and she did not seek further medical attention until January 2001. The gastroenterolgist testified that he did not believe any further treatment was necessary since the colonoscopy revealed a benign condition that was healing, and while plaintiff stated that she called defendant's Patient Representative Office in January 2001 to schedule another colonoscopy, she did not call the gastroenterologist directly. No evidence was presented that plaintiff viewed the January 2001 call as related to the November 1999 call, and since she did not contact the doctor who may have spoken with her in November 1999, the January 2001 call was a renewal of contact rather than a continuation of the treatment

rendered a year earlier (*see O'Donnell v Siegel*, 49 AD3d 415, 417 [2008]). Accordingly, since the continuous treatment doctrine is not applicable, the 2½-year statute of limitations for plaintiff's claim relating to the November 1999 phone call expired in May 2002 and the action commenced in June 2003 is time-barred (*see* CPLR 214-a).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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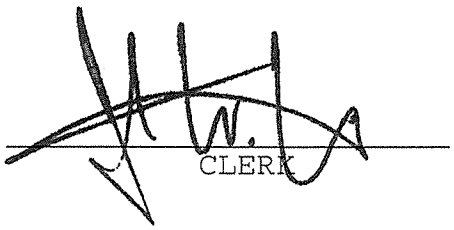


Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5111 The People of the State of New York, Ind. 776/78
Respondent,

-against-

Carmelo Morales,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), and Debevoise & Plimpton LLP, New York (S. Ethan Bowers of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

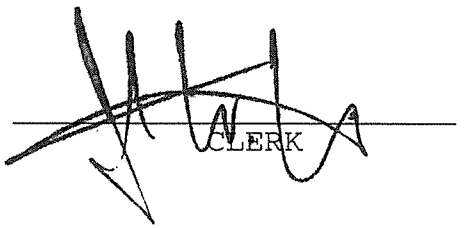
Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about September 14, 2007, which denied defendant's motion to be resentenced under the Drug Law Reform Act of 2005, unanimously affirmed.

The court recognized the degree of discretion it possessed (*compare People v Arana*, 32 AD3d 305 [2006]), and providently exercised it. There is no basis for disturbing the court's determination that substantial justice dictated denial of the resentencing application, particularly in view of the seriousness of the underlying drug crime and its aggravating factors, as well

as defendant's criminal history (*see e.g. People v Vasquez*, 41 AD3d 111 [2007], *lv dismissed* 9 NY3d 870 [2007]). We have considered and rejected defendant's remaining arguments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5112-
5112A The People of the State of New York,
Respondent,

Ind. 9386/96

-against-

Sharmalee Gales,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about September 19, 2006, and order, same court and Justice, entered March 9, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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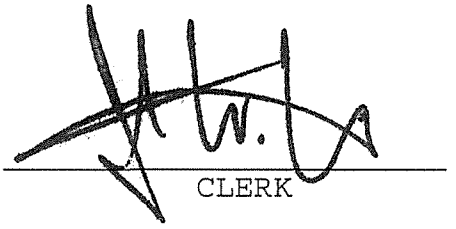

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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5113 Helene Gottlieb, Index 601546/04
Plaintiff-Appellant,

-against-

Northriver Trading Company LLC, et al.,
Defendants-Respondents.

- - - - -

Northriver Trading Company LLC, et al.,
Counterclaimants-Respondents,

-against-

Philip Gottlieb also known as
Feivel Gottlieb,
Additional Counterclaim
Defendant-Appellant.

Bruce D. Katz, New York, for appellant.

Starr Associates LLP, New York (Evan R. Schieber of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered May 14, 2007, which dismissed the complaint, granted defendants' motion for summary judgment on their sixth counterclaim and denied plaintiff's cross motion for discovery, unanimously reversed, on the law, with costs, the complaint reinstated, defendants' motion denied, and plaintiff's cross motion granted to compel discovery on an extended schedule to be approved by the court.

Contrary to the court's ruling, members of a limited liability company may seek an equitable accounting under common law. The assertion that such members are limited to statutory

remedies with regard to potential fraud is inconsistent with the reasoning in *Tzolis v Wolff* (10 NY3d 100 [2008]). Furthermore, while plaintiff's sole claim was for an accounting, the ad damnum of her complaint did seek monetary damages based on misallocation of the company's assets, and the case should thus be permitted to go forward. Issues of fact also preclude summary judgment on the losses in the trading account. Plaintiff raised a number of factual issues as to her prior payment of losses in other sub-accounts, and whether those losses were ever charged to other members.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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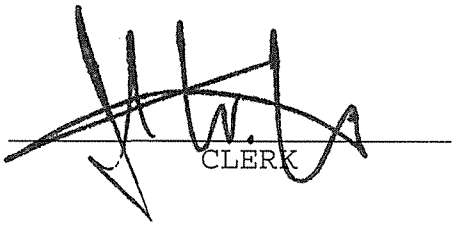

Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5114 The People of the State of New York, Ind. 4183/05
Respondent,

-against-

Michael Burnside,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne Hale of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Steven Purdy of counsel), for respondent.

Judgment, Supreme Court, New York County (Gerald Harris, J.), rendered June 27, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 6 years, unanimously affirmed.

The court sufficiently instructed the jury on the People's obligation to prove identity beyond a reasonable doubt (*see People v Knight*, 87 NY2d 873 [1995]; *People v Whalen*, 59 NY2d 273, 278-279 [1983]), and its refusal to deliver an expanded charge on identification does not warrant reversal. We note that the court's general instructions on the evaluation of testimony included much of the same information that would be contained in a typical expanded identification charge.

Defendant's ineffective assistance of counsel claim is

without merit (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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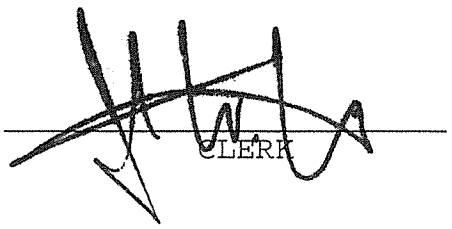


Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5115 The People of the State of New York, Ind. 810/05
Respondent,

-against-

Calvin Rodriguez,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered June 1, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 1½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The evidence credited by the court established probable cause for defendant's arrest.

The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral

pronouncement of sentence, was lawful (*see People v Harris*, 51 AD3d 523 [2008], *lv denied* 10 NY3d 935 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009

Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5116 Samee M. Smith, Index 17195/01
Plaintiff-Respondent,

-against-

Manhattan and Bronx Surface
Transit Operating Authority,
Defendant-Appellant,

The Metropolitan Transit Authority, et al.,
Defendants.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellant.

Friedman & Moses, LLP, New York (I. Bryce Moses of counsel), for respondent.

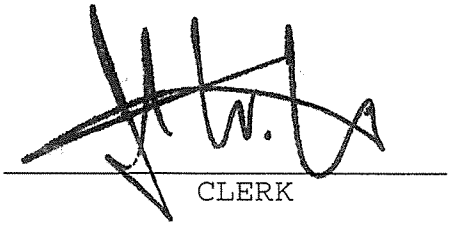
Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered October 25, 2007, upon a jury verdict awarding plaintiff $100,000 for past pain and suffering and $800,000 for future pain and suffering, unanimously affirmed, without costs.

The trial evidence established that plaintiff suffered severe damage to her left knee, including tears of the medial and lateral menisci, a torn ligament, torn cartilage in various places, and damage to the patella, with permanent osteochondral defect. She underwent arthroscopic surgery some months after the accident, and, while her knee improved to some degree, it never functioned normally again. Indeed, plaintiff continued to experience chronic pain, swelling and buckling of the knee, and her treating orthopedic surgeon, who testified at trial as her

expert witness, recommended a second arthroscopic surgery. The surgeon testified that the injuries to plaintiff's knees were permanent and would continue to progress, and that arthritic changes would probably develop, requiring further surgical procedures, including perhaps knee replacement. The damages awarded to plaintiff for past and future pain and suffering in connection with the foregoing injuries do not "deviate[] materially from what would be reasonable compensation" (CPLR 5501[c]; *see e.g. Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268 [2007]; *Nassour v City of New York*, 35 AD3d 556 [2006]; *Calzado v New York City Tr. Auth.*, 304 AD2d 385 [2003]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



CLERK

Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5117 The People of the State of New York, Ind. 6555/06
Respondent,

-against-

Derrick Newton,
Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Brian P. Weinberg of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered September 10, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously affirmed.

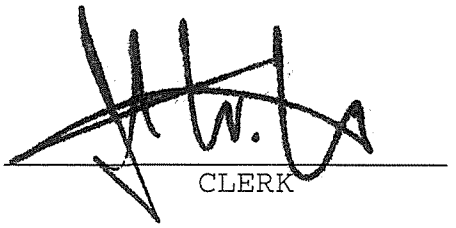
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. The evidence established that defendant actively participated in the drug transaction as a lookout and steerer.

Defendant's challenges to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the

merits. The challenged remarks generally constituted fair comment on the evidence and the reasonable inferences to be drawn therefrom, and the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



CLERK

Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5118-
5118A Andrew Mark, in his individual capacity and derivatively on behalf of both Smart Tone Authentication, Inc., et al.,
Plaintiffs-Appellants,

-against-

Dechert, LLP, formerly known as Dechert Price & Rhoads, LLP,
Defendant-Respondent.

Index 103805/06

Eric W. Berry, New York, for appellants.

Miller & Wrubell P.C., New York (Claire L. Huene of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about March 19, 2008, dismissing the complaint and awarding defendant $38,604.18, and bringing up for review an order, same court and Justice, entered June 15, 2007, which, inter alia, granted defendant's motion to dismiss and for the imposition of sanctions on plaintiffs' counsel, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

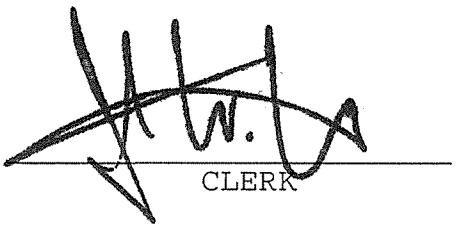
Plaintiffs' legal malpractice claim is barred by the statute of limitations (CPLR 214[6]), which began to run in January 2000, when the merger of the corporate plaintiffs was completed and defendant law firm filed the merger documents. Even assuming

plaintiffs could sustain their allegations that defendant represented them with respect to the merger, the complaint would have to be dismissed because their claim of continued representation is without merit (*see West Vil. Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC*, 49 AD3d 270, 270 [2008]).

The court properly imposed sanctions on plaintiff's counsel for frivolous conduct (*see* 22 NYCRR 130-1.1[a], [c]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5119 The People of the State of New York, Ind. 5156/06
Respondent,

-against-

Eddie Zabala,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 2, 2007, convicting defendant, after a jury trial, of attempted assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a persistent felony offender, to an aggregate term of 20 years to life, unanimously modified, on the law, to the extent of amending the sentence and commitment sheet to reflect that defendant was sentenced as a persistent felony offender rather than as a persistent violent felony offender, and otherwise affirmed.

By failing to object, by making only generalized objections, and by failing to request further relief after the court took curative action, defendant has failed to preserve his present challenges to the People's cross-examination and summation, and we decline to review them in the interest of justice. As an

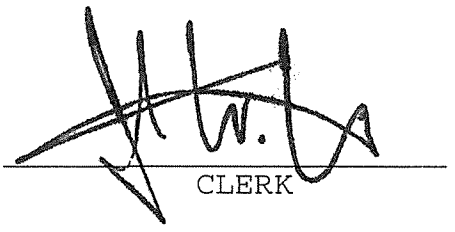
alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). With regard to the challenged portion of the cross-examination of defendant, the court took actions that were sufficient to prevent any prejudice. As for the summation, the remarks at issue were generally fair comment on the evidence, and any improprieties did not rise to the level of depriving defendant of a fair trial.

Defendant's sentencing as a persistent felony offender was constitutional (*see People v Rivera*, 5 NY3d 61 [2005], *cert denied* 546 US 984 [2005]; *People v Graham*, 48 AD3d 265 [2008], *lv denied* 10 NY3d 959 [2008]).

The People concede that the sentence and commitment sheet should be amended to the extent indicated in order to correct the clerical error stating that defendant was sentenced as a persistent violent felony offender.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



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Saxe, J.P., Gonzalez, Sweeny, Renwick, DeGrasse, JJ.

5120-
5120A The People of the State of New York, Ind. 983/06
Respondent, SCI 4048/06

-against-

Jeremy Johnson,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Allen J. Vickey of counsel), for respondent.

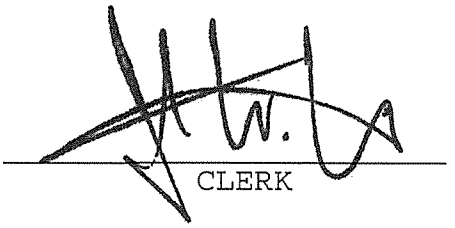
Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 26, 2007, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a term of 5 years followed by 5 years' post-release supervision, unanimously modified, on the law, to the extent of vacating the provision for post-release supervision and remanding for further proceedings in accordance with this decision, and otherwise affirmed. Judgment, same court and Justice, rendered September 6, 2006, as amended February 26, 2007, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to a concurrent term of 1 to 3 years, unanimously affirmed.

We perceive no basis for reducing the sentences. However, defendant is entitled to a remand for the sole purpose of imposition of a lawful period of post-release supervision. The

five-year period pronounced by the sentencing court was illegal. The correct period ranges from one and one-half to three years (*see* Penal Law § 70.45[2][e]), and we remand to permit the sentencing court to exercise its discretion accordingly.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Luis A. Gonzalez
James M. Catterson
Rolando T. Acosta, JJ.

4490
Index 115453/01

x

Gina Williams,
Plaintiff-Appellant,

-against-

The New York City Housing Authority, et al.,
Defendants-Respondents.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered August 14, 2007, which granted defendants summary judgment dismissing the amended complaint.

Gina Williams, appellant pro se.

Ricardo Elias Morales, New York (Steven J. Rappaport and Donna M. Murphy of counsel), for respondents.

ACOSTA, J.

Introduction

This appeal presents us with the opportunity to construe for the first time the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]).

Defendants' summary judgment motion - addressed to an amended complaint alleging a hostile work environment, disparate treatment on the basis of sex, and retaliation in violation of applicable provisions of the Executive Law and the New York City Administrative Code - was granted in its entirety. While we agree with the motion court that the claims arising under both State and City human rights laws must be dismissed, we take a different approach and consider the City claims under the commands of the Restoration Act, as a distinct analysis is required to fully appreciate and understand the distinctive and unique contours of the local law in this area.

Background

Plaintiff was, at all times relevant to the action, an employee of defendant Housing Authority. From November 1995 to June 2004, she worked as a heating plant technician assigned to the Authority's South Jamaica Houses development. As such, she was responsible for maintaining the development's heating system.

The pro se plaintiff commenced this action in August 2001. After converting defendants' dismissal motion to one for summary judgment, Justice Louise Gruner Gans dismissed the claims asserted under Title VII of the federal Civil Rights Act of 1964 (as amended), and otherwise granted plaintiff's motion for leave to amend the complaint. In the 2003 amended complaint, plaintiff alleged that defendants engaged in, or permitted, a hostile work environment, disparate treatment on the basis of sex, and retaliation, all in violation of Executive Law 296(a)(1), (6) and (7), and Administrative Code § 8-107(a)(1), (6) and (7).

Plaintiff alleged she was sexually harassed in January 1997, when her supervisor allegedly told her, after she had requested facilities to take a shower, "You can take a shower at my house." Plaintiff alleged a second incident on October 21, 1998, where sex-based remarks were made in her presence, although not directed at her. Plaintiff interpreted some of those remarks as being complimentary to a co-worker, and a disparaging reference to the supervisor's own wife.

For her disparate treatment claim, plaintiff alleged that her supervisor denied her tools that she needed for her work, preferred (higher paying) shifts, and some training, all during her probationary year (i.e., no later than 1996). Plaintiff acknowledges that she was ultimately permitted to work the

preferred shifts when they were vacated by employees of longer standing. She also alleged that she was denied two training opportunities in 1999. The record reflects that plaintiff did participate in other substantial training throughout her tenure.

Plaintiff asserted that she was retaliated against after making complaints about discriminatory treatment. She alleges that in August 1999 she had to do work outside of her regular duties; specifically, she was required to strip and wax the boiler room office floor, a task that she completed in two regular workdays. Plaintiff also asserted that in August 2001, she was required to perform work in the field and to respond to tenant complaints, work she claimed was customarily given to utility staff. She alleged that a 2002 incident of retaliation consisted of her supervisor's refusal to permit her to take "excused time" to resolve a parking ticket she had received.

Plaintiff was promoted in June 2004 to become an assistant superintendent.

In August 2007, the court (Michael D. Stallman, J.) granted defendants' motion for summary judgment dismissing the amended complaint in its entirety. The sexual harassment claim was dismissed on the basis that the conduct complained of was not "severe or pervasive."

On the disparate treatment claim, the court found the allegations from plaintiff's probationary year were time-barred because they were not part of a continuing pattern of discriminatory conduct. He also found that plaintiff had attended at least nine one- or two-day training courses, and did not allege that she suffered any injury as a result of not attending more. Finally, he found that plaintiff accepted a promotion offered in May 2004, and had not claimed that she would have been promoted earlier had she taken more classes. The court characterized the disparate treatment claim as missing the necessary element of an "adverse employment action."

Evaluating the retaliation claim, the court found that a one-time assignment to perform a task arguably within plaintiff's duties did not constitute retaliation, and that the other claims did not involve being treated differently from workers who had not complained.

We agree with the court's analysis as it pertains to plaintiff's State claims under the Executive Law. The decision dismissing the action failed, however, to properly construe plaintiff's claims under the local Restoration Act,[1] which mandates that courts be sensitive to the distinctive language,

[1]*See* 2005 NY City Legis Ann, at 528-535.

purposes, and method of analysis required by the City HRL, requiring an analysis more stringent than that called for under either Title VII or the State HRL. In light of this explicit legislative policy choice by the City Council, we separately analyze plaintiff's HRL claims.

I. Requirements and Purposes of the Restoration Act

While the Restoration Act amended the City HRL in a variety of respects,[2] the core of the measure was its revision of Administrative Code § 8-130, the construction provision of the City HRL (Local Law 85, § 7, deleted language, new language italicized):

> The provisions of this [chapter] *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed*.

As a result of this revision, the City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be

[2]These include re-emphasizing the breadth of the anti-retaliation requirement, discussed *infra*, Part II. Other provisions include creating protection for domestic partners, increasing civil penalties for claims brought administratively, restoring attorney's fees for "catalyst" cases, and requiring thoroughness in administrative investigations conducted by the New York City Human Rights Commission.

targeted to understanding and fulfilling what the statute characterizes as the City HRL's "uniquely broad and remedial" purposes, which go beyond those of counterpart State or federal civil rights laws.

Section 1 of the Restoration Act amplifies this message. It states that the measure was needed because the provisions of the City HRL had been "construed too narrowly to ensure protection of the civil rights of all persons covered by the law." It goes on to mandate that provisions of the City HRL be interpreted "independently from similar or identical provisions of New York state or federal statutes." Taking sections 1 and 7 of the Restoration Act together, it is clear that interpretations of State or federal provisions worded similarly to City HRL provisions may be used as aids in interpretation only to the extent that the counterpart provisions are viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise" (§ 1), and only to the extent that those State- or federal-law decisions may provide guidance as to the "uniquely broad and remedial" provisions of the local law.

The Committee Report accompanying the legislation likewise states that the intent of the Restoration Act was to "ensure construction of the City's human rights law in line with the

purposes of the fundamental amendments to the law enacted in 1991," and to reverse the pattern of judicial decisions that had improvidently "narrowed the scope of the law's protections" (Report of Committee on General Welfare, 2005 NY City Legis Ann, at 536).

The City Council's debate on the legislation made plain the Restoration Act's intent and consequences:

> Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy. There are many illustrations of cases, like *Levin* on marital status, *Priore*[,] *McGrath* and *Forrest* that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore [*sic*] the text of specific provisions of the law, or both. With [the Restoration Act], these cases and others like them will no longer hinder the vindication of our civil rights.[3]

In other words, the Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were

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[3]Statement of Annabel Palma at the meeting of the NY City Council (Sept. 15, 2005, transcript at 41). Council Member Palma was a member of the Committee on General Welfare that had brought the bill to the floor of the Council. Committee Chairman Bill de Blasio emphasized that "localities have to stand up for their own visions" of "how we protect the rights of the individual," regardless of federal and State restrictiveness (transcript at 47). Council Member Gale Brewer, the chief sponsor of the Restoration Act, reiterated the comments of Palma and de Blasio, and the importance of making sure that civil rights protections "are stronger here than [under] the State or federal law" (transcript at 48-49). (Transcript on file with NY City Clerk's Office and the NY Legislative Service.)

textually distinct from its State and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes[4] and (c) cases that had failed to respect these differences were being legislatively overruled.

There is significant guidance in understanding the meaning of the term "uniquely broad and remedial." For example, in telling us that the City HRL is to be interpreted "in line with the purposes of the fundamental amendments to the law enacted in 1991," the Council's committee was referring to amendments[5] that were "consistent in tone and approach: every change either expanded coverage, limited an exemption, increased responsibility, or broadened remedies. In case after case, the balance struck by the Amendments favored victims and the interests of enforcement over the claimed needs of covered

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[4]The City Council in amending Administrative Code § 8-130 could have mandated that "some" provisions of the law be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof," or that "new" provisions of the law be so construed. The Council instead made the "shall construe" language applicable to "the provisions of this title," without limitation.

[5]Local Law No. 39 (1991) of City of NY.

entities in ways materially different from those incorporated into state and federal law."[6]

The Council directs courts to the key principles that should guide the analysis of claims brought under the City HRL: "discrimination should not play a role in decisions made by employers, landlords and providers of public accommodations; traditional methods and principles of law enforcement ought to be applied in the civil rights context; and victims of discrimination suffer serious injuries, for which they ought to receive full compensation" (Committee Report, 2005 NY City Legis Ann, at 537).

In short, the text and legislative history represent a desire that the City HRL "meld the broadest vision of social justice with the strongest law enforcement deterrent."[7] Whether

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[6]Prof. Craig Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law,* 33 Fordham Urb LJ 255, 288 (2006). The article - described elsewhere as "an extensive analysis of the purposes of the Local Civil Rights Restoration Act, written by one of the Act's principal authors" (*Ochei v Coler/Goldwater Mem. Hosp.*, 450 F Supp 2d 275, 283 n 1 [SD NY 2006]) - summarizes some of the dramatic changes of the 1991 Amendments (*see* Gurian, at 283-88).

[7]*Gurian, Return to Eyes on the Prize,* 33 Fordham Urb LJ at 262. This is consistent with statements and testimony of the Association of the Bar of the City of NY (letter dated Aug. 1, 2005), the Brennan Center for Justice (Jul. 8, 2005), and the Anti-Discrimination Center (Apr. 14, 2005), all on file with the Committee on General Welfare and the NY Legislative Service, each confirming that the Council sought to have courts maximize civil

or not that desire is wise as a matter of legislative policy, our judicial function is to give force to legislative decisions.[8]

As New York's federal and State trial courts are recognizing the need to take account of the Restoration Act, the application of the City HRL as amended by the Restoration Act must become the rule and not the exception.[9]

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rights protections. For example, the Bar Association, at p. 4 of its letter, referred to "the Council's clear intent to provide the greatest possible protection for civil rights." At the Council's debate prior to passage, Council Member Palma described the Bar Association and Brennan Center statements as important to the Committee, and characterized the Anti-Discrimination Center's testimony as "an excellent guide to the intent and consequences of [the] legislation we pass today."

[8]We note in this context two cardinal rules of statutory construction: that legislative amendments are "deemed to have intended a material change in the law" (McKinney's NY Statutes § 193 [a]), and that "courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy" (*id.* § 95). As such, we are not free to give force to one section of the law that has specifically been amended (e.g. Administrative Code § 8-107 [7]), and decline to give force to another (e.g. § 8-130). We must give force to all amendments, and not relegate any of them to window dressing.

[9]*See e.g. Selmanovic v NYSE Group* (2007 US Dist LEXIS 94963, *9-20, 2007 WL 4563431 *4-6 [SD NY], recognizing the Restoration Act's enhanced liberal construction requirement, and its impact on sexual harassment and retaliation claims under the local law); *Pugliese v Long Is. R.R. Co.* (2006 US Dist LEXIS 66936, *38-40, 2006 WL 2689600, *12-13 [ED NY], identifying Administrative Code § 8-107(13)(b)(1) as the City law's explicit statutory basis for imposing vicarious liability on those exercising managerial or supervisory authority, and noting that "the breadth and scope of

II. Retaliation

In 1991, the anti-retaliation provision of the City HRL (Administrative Code § 8-107[7]) - which had been identical to the State HRL provision - was amended in pertinent part to proscribe retaliation "*in any manner*" (Local Law 39 [1991], § 1). If courts were to construe this language to make actionable only conduct that has caused a materially adverse impact on terms and conditions of employment, it would constitute a significant narrowing of the Council's proscription on retaliation "in any manner." However, courts have consistently engaged in this construction. Therefore, the City Council was determined, via the Restoration Act of 2005 to "make clear that the standard to be applied to retaliation claims under the City's human rights law differs from the standard currently applied by the Second Circuit in [Title VII] retaliation claims . . . [and] is in line with the standard set out in the guidelines of the Equal

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CHRL will often yield results different from Title VII"); *Okayama v Kintetsu World Express (U.S.A.)* (2008 WL 2556257 [Sup Ct, NY County], holding that the explicit statutory structure of Administrative Code § 8-107[13][b] precludes the availability of the federal *Faragher* affirmative defense where the conduct of those exercising managerial or supervisory authority is at issue); *Farrugia v North Shore Univ. Hosp.* (13 Misc 3d 740, [2006],, noting that "The New York City Human Rights Law was intended to be more protective than the state and federal counterparts"; *Bumpus v New York City Tr. Auth,* (2008 NY Misc LEXIS 4628, *7, 2008 WL 399147, *3, noting that "The legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation").

Employment Opportunity Commission" (Committee Report, 2005 Legis Ann, at 536). In § 8(d)(3) of its compliance manual (1998), dealing with the subject of retaliation, EEOC indicates that the

> broad coverage accords with the primary purpose of the anti-retaliation provisions, which is to "[m]aintain[] unfettered access to statutory remedial mechanisms." Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. An interpretation of Title VII that permits some forms of retaliation to go unpunished would undermine the effectiveness of the EEO statutes and conflict with the language and purpose of the anti-retaliation provisions [citations omitted].[10]

To accomplish the purpose of giving force to the earlier proscription on retaliation "in any manner," the Restoration Act amended § 8-107(7) to emphasize that

> [t]he retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be

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[10]The Committee Report cited, inter alia, *Ray v Henderson* (217 F3d 1234, 1241-1243 [9th Cir 2000]) to help illustrate the broad sweep of the re-emphasized City anti-retaliation provision.

made with a keen sense of workplace realities, of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of those realities.[11] Accordingly, the language of the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable. On the contrary, no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, "reasonably likely to deter a person from engaging in protected activity".[12]

Turning to the retaliation claims, it is clear that even under this broader construction, plaintiff's claim that her

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[11]*See* discussion in *Return to Eyes on the Prize,* 33 Fordham Urb LJ at 321-322.

[12]Subsequent to passage of the Restoration Act, the U.S. Supreme Court modified the Title VII anti-retaliation standard (*Burlington N. & Santa Fe Ry. Co. v White,* 548 US 53 [2006]). In doing so, however, *Burlington* still spoke in terms of "material adversity," i.e., conduct that might have dissuaded a reasonable worker from making or supporting a charge of discrimination (*id.* at 68). While this was a standard similar to that set forth in § 8-107(7), it cannot be assumed that cases citing *Burlington* adequately convey the full import of the City HRL standard, especially because the confusing use of the term "materially adverse" might lead some courts to screen out some types of conduct *prior* to conducting "reasonably likely to deter" analysis. In fact, to reiterate, § 8-107(7) specifically rejects a materiality requirement.

assignment to strip and wax the boiler room floor did not constitute retaliation. It is certainly possible for a jury to conclude that someone would be deterred from making a complaint if knowing that doing so might result in being assigned to duties outside or beneath one's normal work tasks. However, an examination of this record shows conclusively that plaintiff cannot link her complained-of assignment to a retaliatory motivation. The same allegedly "out of title" work was given to non-complaining employees for whom the work was not normally part of the job.

Although not raised expressly on appeal by the pro se plaintiff, her other retaliation claims are similarly unavailing. Her assignment to do field work and respond to tenant complaints did not represent a difference in treatment attributable to retaliation, since the record shows that other workers (who did not complain of discrimination) were given similar assignments. The failure to grant plaintiff "excused time" to deal with a parking ticket also did not represent a difference in treatment from workers who did not complain of discrimination.[13] Accordingly, plaintiff's retaliation claim must fail.

[13]There is no evidence in the record to suggest that in the circumstances presented, the failure to grant such time off was an act reasonably likely to deter a person from engaging in protected activity.

III. Continuing violations

In *National R.R. Passenger Corp. v Morgan* (536 US 101 [2002]), the Supreme Court established that for federal law purposes, the "continuing violation" doctrine only applied to harassment claims as opposed to claims alleging "discrete" discriminatory acts. At the time the comprehensive 1991 amendments to the City HRL were enacted, however, federal law in the Second Circuit did not so limit continuing violation claims (*see e.g. Acha v Beame*, 570 F2d 57, 65 [2d Cir 1978], holding that a continuing violation would exist if there had been a continuing policy that "limited opportunities for female participation" in the work force, including policies related to "hiring, assignment, transfer, promotion and discharge"; *Cornwell v Robinson*, 23 F3d 694, 704 [2d Cir 1994], reaffirming the vitality of a 1981 decision finding a continuing violation where there had been a consistent pattern of discriminatory hiring practices). There is no reason to believe that the Supreme Court's more restrictive rule of 2002 was anticipated when the City HRL was amended in 1991, or even three years after that ruling, when the Restoration Act was passed in 2005.[14]

[14]*See, e.g.*, the statement of then-Mayor Dinkins in connection with the signing of the 1991 Amendments, endorsed in the 2005 Committee Report, that "there is no time in the modern civil rights era when vigorous local enforcement of anti-discrimination laws has been more important. Since 1980, the federal government

On the contrary, the Restoration Act's uniquely remedial provisions are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period.

The continuing violation doctrine is discussed in the specific context of plaintiff's sexual harassment and disparate treatment claims, *infra*, at Parts IV and V, respectively.

IV. Sexual Harassment

In 1986 the Supreme Court ruled, for federal law purposes, that sexual harassment must be "severe or pervasive" before it could be actionable (*Meritor Sav. Bank, FSB v Vinson*, 477 US 57,

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has been marching backward on civil rights issues" (Committee Report, 2005 NY City Legis Ann, at 536). Indeed, one motivation expressed by the Committee for passing the Restoration Act was that construction of numerous provisions of the City HRL "narrowed the scope of the law's protections." This enhanced liberal construction was directly confronted in *McGrath v Toys "R" Us, Inc.* (3 NY3d 421 [2004]), a case in which a narrow, post-1991 interpretation of federal law was transplanted into the local law without Council action (Committee Report, at 537). *McGrath* was also identified on the floor of the Council as a case inconsistent with the requirements of the Restoration Act (*see* Council Member Palma's statement at footnote 3, *supra*).

67).[15] The "severe or pervasive" rule has resulted in courts "assigning a significantly lower importance to the right to work in an atmosphere free from discrimination" than other terms and conditions of work.[16] The rule (and its misapplication) has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender.[17]

Before the Restoration Act, independent development of the City HRL was limited by the assumption that decisions interpreting federal law could safely be imported into local human rights law because, it was said, any broad anti-discrimination policies embodied in State or local law are "*identical* to those underlying the federal statutes" (*McGrath*, 3

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[15]Although the assumption has been that such a rule applies to the City HRL (*see, e.g*, the recent case of *Gallo v Alitalia-Linee Aeree Italiane-Societa Per Azione*, 2008 US Dist LEXIS 94195, *26-30, 2008 WL 865036, *10-11 [SD NY]), the fact is that "severe or pervasive" was not the accepted City HRL rule at the time of the 1991 Amendments (*see* discussion in *Return to Eyes on the Prize*, 33 Fordham Urb LJ at 300-301). Moreover, there is no evidence that "severe or pervasive" has ever been subjected to liberal construction analysis, let alone the enhanced analysis required by the Restoration Act.

[16]Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates among "Terms and Conditions" of Employment* (62 Md L Rev 85, 87 [2003]).

[17]*Id.* at 111-134, describing a variety of techniques by which claims have been turned away using "severe or pervasive" as a shield for discriminators.

NY3d at 433 [emphasis added]). If the City Council had wanted to depart from a federal doctrine, *McGrath* stated, it should have amended the law to rebut that doctrine specifically (*id.* at 433-434). The City Council followed this *McGrath* admonition, legislatively overruling it by amending the construction provision of Administrative Code § 8-130, and putting to an end this view of the City HRL as simply mimicking its federal and State counterparts.[18] By making a specific textual amendment to the construction provision (something not done in 1991), the Council formally and unequivocally rejected the assumption that the City HRL's purposes were identical to that of counterpart civil rights statutes. In its place, the Council instructed the courts -- reflected in text and legislative history -- that it wanted the City HRL's provisions to be construed *more broadly than federal civil rights laws and the State* HRL, and wanted the

[18]See Committee Report, 2005 NY City Legis Ann, at 537. Importantly, the way that the Council responded to *McGrath* was not by dealing with the specific topic of the case (the availability of attorney's fees in circumstances where only nominal damages are awarded), but by changing the method of analysis applicable to *all* provisions of the law. *McGrath*, of course, was also explicitly mentioned on the floor of the City Council as one of the cases that, with the passage of the Restoration Act, would - in Council member Palma's words - "no longer hinder the vindication of our civil rights" (*see* text at footnote 3, *supra*). In light of the foregoing, it is puzzling that *Gallo* would make the identical Council "could have done so" argument already specifically rejected by the Restoration Act (see 2008 US Dist LEXIS 94195, *30, 2008 WL 4865036, *11).

local law's provisions to be construed as *more remedial than federal civil rights laws and the State* HRL (Administrative Code § 8-130, as amended by the Restoration Act in 2005).

The Council saw the change to § 8-130 as the means for obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law. While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, § 8-130's specific *construction* provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions" (*Return to Eyes on the Prize*, 33 Fordham Urb LJ at 280).[19]

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[19]*See also* page 4 of the Bar Association letter (*supra* at footnote 7), reciting the expectation that the undoing of narrow construction of the law by legislative amendment "should no longer be necessary" if there is judicial appreciation for the Restoration Act's intention that the law provide "the greatest possible protection for civil rights"; and page 5 of the Brennan Center Statement (same footnote), noting the suggestion that "a better approach would be for the Council to limit itself to specifically overruling individual interpretations that it views as unduly restrictive. However, this approach has proven ineffective in the past, as the courts have tended to construe narrowly specific Council amendments. Without an explicit instruction that the City Human Rights Law should be construed independently, courts will continue to weaken New York City's Law with restrictive federal and state doctrines."

Accordingly, we first identify the provision of the City HRL we are interpreting and then ask, as required by the City Council: What interpretation "would fulfill the broad and remedial purposes of the City's Human Rights Law"?[20] Despite the popular notion that "sex discrimination" and "sexual harassment" are two distinct things, it is, of course, the case that the latter is one species of sex- or gender-based discrimination. There is no "sexual harassment provision" of the law to interpret; there is only the provision of the law that proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender (Administrative Code § 8-107 [1] [a]).[21]

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[20] *See* Committee Report, 2005 NY City Legis Ann, at 538 n 8; *see also* page 4 of the Bar Association letter (*supra* at footnote 7) that construction must flow from "the Council's clear intent to provide the greatest possible protection for civil rights"); Anti-Discrimination Center testimony (same footnote) that "In the end, regardless of federal interpretations, the primary task of [a] judge hearing a City Human Rights Law claim is to find the interpretation for the City Law that most robustly further[s] the purposes of the City statute."

[21] The fact that Title VII has language similar to that of the City HRL does not even begin our inquiry, let alone end it. The Restoration Act made clear, with specific statutory language, that the obligation to determine what interpretation best fulfills the City law's purposes is in no way limited by the existence of cases that have interpreted analogous federal civil rights provisions (Administrative Code § 8-130); *cf. Gallo*, where the courts apparently believed there was something called "the hostile work environment law" (2008 US Dist LEXIS 94195, *31, 2008 WL 4865036, *11), but never asked what interpretation of §

As applied in the context of sexual harassment, therefore, the relevant question is what constitutes inferior terms and conditions based on gender. One approach would be to import the "severe or pervasive" test, a rule that the Supreme Court has characterized as "a middle path" between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury" (*Harris v Forklift Sys.*, 510 US 17, 21 [1993]). This "middle path," however, says bluntly that a worker whose terms and conditions of employment include being on the receiving end of all unwanted gender-based conduct (except what is severe or pervasive) is experiencing essentially the same terms and conditions of employment as the worker whose employer has created a workplace free of unwanted gender-based conduct.

Twenty-two years after *Meritor* (477 US 57, 67), it is apparent that the two workers described above do not have the same terms and conditions of employment. Experience has shown that there is a wide spectrum of harassment cases falling between "severe or pervasive" on the one hand and a "merely" offensive utterance on the other.[22] The City HRL is now explicitly

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8-107(1)(a)'s "terms and conditions" language would best fulfill the uniquely broad and remedial purposes of the City HRL.

[22]It would be difficult to find a worker who viewed a job where she knew she would have to cope with unwanted gender-based

designed to be broader and more remedial than the Supreme Court's "middle ground," a test that had sanctioned a significant spectrum of conduct demeaning to women. With this broad remedial purpose in mind, we conclude that questions of "severity" and "pervasiveness" are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability (*Farrugia*, 13 Misc 3d at 748-749).

In doing so, we note that the "severe or pervasive" test reduces the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status. In contrast, a rule by which liability is normally determined simply by the existence of differential treatment (i.e., unwanted gender-based conduct) maximizes the law's deterrent effect. It is the latter approach -- maximizing deterrence -- that incorporates "traditional methods and principles of law enforcement," one of the principles by which our analysis must be guided (Committee Report, 2005 NY City Legis Ann, at 537). Permitting a wide range of conduct to be found beneath the "severe or pervasive" bar would mean that discrimination is allowed to play *some significant role* in the workplace. Both Administrative Code § 8-101 and the Committee

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conduct (except what is severe or pervasive) as equivalent to one free of unwanted gender-based conduct.

Report accompanying the Restoration Act say the analysis of the City HRL must be guided by the need to make sure that discrimination plays *no* role (2005 NY City Legis Ann, at 537), a principle again much more consistent with a rule by which liability is normally determined simply by the existence of unwanted gender-based conduct. Finally, the "severe or pervasive" doctrine, by effectively treating as actionable only a small subset of workplace actions that demean women or members of other protected classes, is contradicted by the Restoration Act principle that the discrimination violations are *per se* "serious injuries" (*id.*).[23] Here again, a focus on differential treatment better serves the purposes of the statute.

Further evidence in the legislative history precludes making the standard for sexual harassment violations a carbon copy of the federal and State standard. The City HRL's enhanced liberal construction requirement was passed partly in recognition of multiple complaints that a change to § 8-130 was necessary to prevent women from being hurt by the unduly restrictive "severe or pervasive" standard. The Council had been told that the "severe or pervasive" standard "continuously hurts women" and "means that many victims of sexual harassment may never step

[23]As already noted, the fact that conduct is actionable does not control the amount of damages to be awarded.

forward."[24] Likewise, the Council was told that "without any

[24]Kathryn Lake Mazierski, President, New York State Chapter of the National Organization for Women, Testimony at Hearing of the City Council's Committee on General Welfare, at 49-50 (Sept. 22, 2004) (NOW testimony, transcript on file with NY City Clerk's Office). Note that *Gallo* asserts that organizations sought to have the "severe and pervasive" test "removed" from the City HRL; that the Council "ignored" that suggestion and "amended only those specific portions of the CHRL that the City thought needed to be addressed," and that Prof. Gurian's article supports that account (2008 US Dist LEXIS 94195, *30, 2008 WL 4865036, *11). In so stating, *Gallo* ignores the legislative history and mischaracterizes the article. In fact, as discussed, *supra*, the most important specific textual changes made by the Council were the changes to § 8-130 -- changes designed to control the construction of every other provision of the HRL, and so important that they were doubly emphasized in Section 1 of the Restoration Act. Contrary to *Gallo*, neither the New York Chapter of NOW nor any of the other organizations that spoke to this issue had argued that the City Council should revise the text of § 8-107(1)(a)'s terms-and-conditions provision to proscribe the "no severe or pervasive" limitation, and the Council made no decision to "adopt" the "severe or pervasive" rule. Instead, the organizations all raised the issue as part of their (successful) advocacy to have the language of § 8-130 changed. For example, Ms. Mazierski, after describing the "problem of hitching the local law to a federal standard" (NOW testimony, at 47) argued for an enhanced liberal construction provision: "If judges are forced to look at a proper standard for sexual harassment claims under the City's Human Rights Law, independent[of] the federal standard, *we will be able to have an argument on the merits and not be stuck on the standard that continuously hurts women*" (at 50, emphasis added). As for Prof. Gurian's article, it set forth the decision that the City Council actually made, describing the enhanced liberal construction provision as the Restoration Act's "declaration of independence," and noting that areas of law that have been settled by virtue of interpretations of federal or State law "will now be reopened for argument and analysis. . . . As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law, including the parameters of actionable sexual harassment" (*Return to Eyes on the Prize*, 33 Fordham Urb LJ at 258).

consideration of what standard would best further the purposes of the City Law, women who have been sexually harassed are routinely thrown out of court without getting a chance to have a jury hear their claims because a judge uses the federal standard that they have not been harassed enough,"[25] and that "[w]e have long had the problem of judges insisting that harassment [has] to be 'severe or pervasive' before it is actionable, even though such a requirement unduly narrows the reach of the law."[26]

For HRL liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms-and-conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred (Administrative Code § 8-107(1)(a); *see Farrugia,* 13 Misc 3d at 748-749 ["Under the City's law, liability should be determined by the existence of unequal treatment, and questions of severity and frequency reserved for consideration of damages"], cited by the

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[25]Brennan Center statement (*supra at* footnote 7), at p. 5.

[26]Anti-Discrimination Center testimony (*supra at* footnote 7), at p. 2.

Southern District Court in *Selmanovic*, 2007 US Dist LEXIS 94963, *11, 2007 WL 4563431, *4).[27]

Farrugia was recently criticized in *Gallo* for its focus on "unequal treatment," the Southern District insisting that the "severe or pervasive" restriction be applied to City HRL claims just as the restriction is applied to Title VII and State HRL claims. We conclude that the criticism simply does not recognize the City HRL's broader remedial purpose. The *Gallo* decision states:

> A single instance of "unequal" treatment (between, say, a man and woman or a homosexual and heterosexual) can constitute "discrimination," but may not qualify as "harassment" of the sort needed to create a hostile work environment. If inequality of treatment were all that the hostile work environment law required, hostile work environment and discrimination claims would merge.

(2008 US Dist LEXIS 94195, *31, 2008 WL 4865036, *11). In other words, the *Gallo* court begins with the premise that it is necessary to maintain the distinction that current federal law makes between non-harassment sex discrimination claims on the one hand (where a permissive standard is applied), and sex discrimination claims based on harassment (where "hostile work

[27]In the "mixed motive" context, of course, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct. Under Administrative Code § 8-101, discrimination shall play no role in decisions relating to employment, housing or public accommodations.

environment" is the term of art describing the application of a restrictive standard).

Contrary to the assumption embedded in *Gallo*,[28] the task under the City HRL, as amended by the Restoration Act, is not to ask, "Would a proposed interpretation differ from federal law?", but rather, "How differently, if at all, should harassment and non-harassment sex discrimination cases be evaluated to achieve the City HRL's uniquely broad and remedial purposes?"[29]

As discussed above, we conclude that a focus on unequal treatment based on gender - regardless of whether the conduct is "tangible" (like hiring or firing) or not -- is in fact the approach that is most faithful to the uniquely broad and remedial purposes of the local statute. To do otherwise is to permit far

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[28]Throughout this decision, we have referenced *Gallo* to illustrate types of analyses that have now been rejected by the Restoration Act, but it is important to note that the Restoration Act will require many courts to approach the City HRL with new eyes. It is not that frequent that legislation is enacted "to remind, empower, and require judges to fulfill their essential role as active and zealous agents for the vindication of the purposes of the law" (*Return to Eyes on the Prize*, 33 Fordham Urb LJ at 290). Nor are judges often urged by the legislative body to exercise judicial restraint against substituting their own more conservative social policy judgments for the policy judgments made by the Council or treating a local law as merely in parallel with its federal or state counterpart (*id*).

[29]*Cf*. Committee Report, 2005 NY City Legis Ann, at 538 n 8: The Restoration Act "underscores the need for thoughtful, independent consideration of whether the proposed interpretation would fulfill the uniquely broad and remedial purposes of the City's human rights law."

too much unwanted gender-based conduct to continue befouling the workplace.

Our task, however, is not yet completed because, while the City HRL has been structured to emphasize the vindication of civil rights over shortcuts that reduce litigation volume, we recognize that the broader purposes of the City HRL do not connote an intention that the law operate as a "general civility code" (*Oncale v Sundowner Offshore Servs.*, 523 US 75, 81 [1998], discussing Title VII). The way to avoid this result is not by establishing an overly restrictive "severe or pervasive" bar, but by recognizing an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider "petty slights and trivial inconveniences."

In doing so, we narrowly target concerns about truly insubstantial cases, while at the same time avoiding improperly giving license to the broad range of conduct that falls between "severe or pervasive" on the one hand and a "petty slight or trivial inconvenience" on the other. By using the device of an affirmative defense, we recognize that, in general, "a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline

situations should be characterized as sexual harassment and retaliation" (*Gallagher v Delaney*, 139 F3d 338, 342 [2d Cir 1998]). At the same time, we assure employers that summary judgment will still be available where they can prove that the alleged discriminatory conduct in question does not represent a "borderline" situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences.

In the instant case, the complaint was filed in August 2001. As such, actions that occurred prior to August 1998 would normally be barred except if the continuing violation doctrine applies. During the limitations period, the only harassment allegation supported by evidence that could be credited by a jury consists of comments made in plaintiff's presence on one occasion in October 1998 that were not directed at her, and were perceived by her as being in part complimentary to a co-worker. These comments were, in view of plaintiff's own experience and interpretation, nothing more than petty slights or trivial inconveniences, and thus are not actionable.[30]

[30] One can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable. No such circumstances were present here.

Prior to the limitations period, the record does reflect the inappropriate comment about taking a shower, made in January 1997 (i.e., 19 months before the start of the limitations period). Since this pre-limitation-period comment was not joined to actionable conduct within the limitation period,[31] the continuing violation doctrine does not render the complaint about the January 1997 comment timely. Accordingly, plaintiff's sexual harassment claims must fail.

V. Other Disparate Treatment Claims

Plaintiff's allegations regarding not initially being provided with necessary tools and not being assigned to more desirable work-shift assignments refer to conduct in 1995 and 1996. The absence of any problem for at least 20 months prior to the start of the limitations period does not evidence a "consistent pattern," and in any event, there is no connection to actionable conduct during the limitations period. Plaintiff does not show differences in treatment with male workers in the limitations period; like other workers, she received substantial

[31]The lack of actionable gender-based discrimination in this case (to which a pre-limitation period harassing comment could otherwise be linked) is discussed, *infra*, in Part V.

training.[32] It is thus unnecessary to reach the issue of the "materiality" of these non-harassment claims.[33]

Accordingly, the order of Supreme Court, New York County (Michael D. Stallman, J.), entered August 14, 2007, which granted defendants summary judgment dismissing the amended complaint, should be affirmed, without costs.

All concur except Andrias, J.P. who concurs in the result only in a separate Opinion:

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[32]The record shows that plaintiff was, in fact, absent on two occasions, but complained about being denied training.

[33]In view of the Restoration Act's rejection of *Forrest v Jewish Guild for the Blind* (3 NY3d 295 [2004]) and *Galayba v New York City Bd. Of Educ.* (202 F3d 636 [2d Cir 2000]) two of the cases cited by the court below, that issue would need to be decided afresh with due regard for the commands of the enactment (*see e.g.* Council Member Palma's statement, at footnote 3, *supra*, that cases like these "will no longer hinder the vindication of our civil rights"; *see also* Committee Report, 2005 NY City Legis Ann, at 537, demanding that "discrimination . . . not play a role," and at 538 n 4, contrasting *Galayba* with the Council's preferred approach to materiality). However, given the factual circumstances of the instant case, such a determination is not necessary.

ANDRIAS, J. (concurring in the result only)

Because my learned colleagues insist on addressing and deciding an issue that was raised neither below nor on appeal, I would affirm for the reasons stated by the motion court which, in pertinent part, properly dismissed plaintiff's claim for retaliation upon a finding that a one-time assignment to strip and wax the boiler room floor - a task that was, at least arguably, a part of her duties - did not constitute retaliation.

Relying upon the Supreme Court's decision in *Burlington N. & Santa Fe Ry. Co. v White* (548 US 53, 67-68 [2006]) for its holding that "actionable retaliation" is that which "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (internal quotations and citations omitted), plaintiff succinctly argues on appeal that a reassignment of duties can constitute retaliatory discrimination even where both the former and present duties fall within the same job description, that a jury could reasonably conclude the reassignment would have been "materially adverse to a reasonable employee," and that the motion court inappropriately assessed the credibility of the witnesses' statements regarding that assignment.

My colleagues find no merit to plaintiff's arguments and agree with the motion court's analysis as pertinent to plaintiff's State Human Rights Law claim, but take issue with its decision because it failed to construe her claim according to the standard set forth in the Local Civil Rights Restoration Act of 2005. However, neither at nisi prius nor on appeal has plaintiff enunciated a specific claim under the New York City Human Rights Law. Moreover, even if it could be argued that, by amending her verified complaint to add in its introduction that "This is an action pursuant to the New York Executive Law §§ 296(a)(1),(6), (7) and New York City Administrative Code §§ 8-107(a)(1),(6), (7), of a hostile work environment and retaliation to vindicate the civil rights of plaintiff," she had actually raised the issue, she clearly has not pursued it on appeal.

The question of whether we should be deciding appeals on the basis of arguments not raised by the parties on appeal has recently become a recurring issue in this Court. It is, however, a fundamental principle of appellate jurisprudence that arguments raised below but not pursued on appeal are generally deemed abandoned, and such arguments, which are therefore not properly before us, should not be considered (*see McHale v Anthony*, 41 AD3d 265, 266-267 [2007]). The rationale for such principle, as

expressed by this Court, is that deciding issues not even raised or addressed in the parties' briefs would be so unfair to the parties as to implicate due process concerns (*id.* at 267). "By any standard it would be unusual behavior for an appellate court to reach and determine an issue never presented in a litigation, and to do so without providing an opportunity for the adversely affected parties to be heard on a question which they had no reason to believe was part of the litigation" (*Grant v Cuomo*, 130 AD2d 154, 176 [1987], *affd* 73 NY2d 820 [1988]).

> "These principles are not mere technicalities, nor are they only concerned with fairness to litigants, important as that goal is. They are at the core of the distinction between the Legislature, which may spontaneously change the law whenever it perceives a public need, and the courts which can only announce the law when necessary to resolve a particular dispute between identified parties. It is always tempting for a court to ignore this restriction and to reach out and settle or change the law to the court's satisfaction, particularly when the issue reached is important and might excite public interest. However, it is precisely in those cases that the need for judicial patience and adherence to the common-law adversarial process may be - or is often greatest" (*Lichtman v Grossbard*, 73 NY2d 792, 794-795 [1988]).

For my colleagues to adopt a new and supposedly more liberal

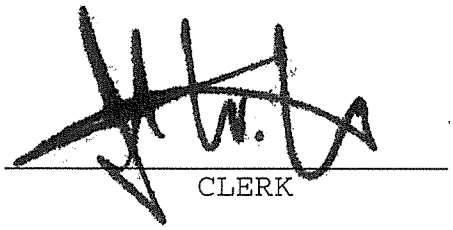
standard for determining liability under the City's Human Rights Law and to abandon the present, supposedly unduly restrictive, "severe or pervasive" standard in favor of one that "is most faithful to the uniquely broad and remedial purposes of the local statute," without any input from the parties concerned, flies in the face of these well settled principles.

In *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law* (33 Fordham Urb LJ 255 [2006]), which my colleagues repeatedly cite with approval, the author, who is described as "the principal drafter of the Local Civil Rights Restoration Act" of 2005, complains that the failure of such reforms to achieve their potential is due in significant part to the supposed "unwillingness of judges to engage in an independent analysis of what interpretation of the City Human Rights Law would best effectuate the purposes of that law" (*id.* at 255-256). However, in the next breath, he states: "In fairness, advocates for victims of discrimination must also take responsibility for the stunted state of City Human Rights Law. On far too many occasions, courts have not been asked to engage in this independent analysis" (*id.* at 256 n 5). That is exactly the case here, and my colleagues' departure from the normal rules

governing appellate courts is singularly unwarranted (see *Grant*, 130 AD2d at 176).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 27, 2009



CLERK