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COURT OF APPEALS  
STATE OF NEW YORK

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CHAUCA,

Appellant,

-against-

NO. 113

ABRAHAM,

Respondent.

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20 Eagle Street  
Albany, New York  
October 10, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

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1 CHIEF JUDGE DIFIORE: The next appeal on the  
2 calendar is number 113, Chauca v. Abraham.

3 MR. BERGSTEIN: Good afternoon; may it please the  
4 court, Stephen Bergstein for Plaintiff Veronika Chauca.  
5 May I have two minutes for rebuttal?

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. BERGSTEIN: Okay. The New York City Human  
8 Rights Law entitles employment discrimination plaintiffs to  
9 a punitive damages charge if they can prove they suffered  
10 employment discrimination. There were some mitigating - -  
11 -

12 JUDGE RIVERA: What - - - what is the common  
13 understanding of punitive damages? What is their purpose?

14 MR. BERGSTEIN: The purpose of punitive damages  
15 is to punish and for society to send a message and to tell  
16 the employer that what you did was not acceptable. Now the  
17 - - -

18 JUDGE WILSON: And deter.

19 MR. BERGSTEIN: And deter. And the federal  
20 standard under Kolstad doesn't apply to the New York City  
21 Law. Kolstad involves malice and - - -

22 JUDGE RIVERA: At Common Law, does it require  
23 more than the obvious violation of a right?

24 MR. BERGSTEIN: That is the City of New York's  
25 argument. I don't think the - - -



1 JUDGE RIVERA: Well, I know. That's why I'm  
2 asking you.

3 MR. BERGSTEIN: Under Common Law, the - - - we  
4 normally understand punitive damages to involve malice.  
5 The city law is a different law. The city law approaches  
6 discrimination differently than Title VII. It's a law  
7 enforcement approach. It's a no tolerance approach.

8 JUDGE WILSON: How is the federal standard  
9 different from the Common Law standard? I know you're not  
10 advocating either, but is there a difference?

11 MR. BERGSTEIN: Nothing substantial.

12 JUDGE WILSON: And if there is, what is it?

13 MR. BERGSTEIN: They both involve malice and  
14 willfulness. That is not what the city council in enacting  
15 this law wanted.

16 JUDGE GARCIA: What standard would you impose for  
17 punitive damages?

18 MR. BERGSTEIN: The standard would be the same as  
19 liability. If the plaintiff can show liability, then the  
20 plaintiff is entitled to appear - - -

21 JUDGE FAHEY: So ordinary negligence and for  
22 ordinary damages and punitive damages would have the same  
23 level?

24 MR. BERGSTEIN: The - - - you need to prove  
25 intent. Normally, in - - - in a disparate treatment claim,



1 under the city law most discrimination cases involve a  
2 showing of intent. I was fired because of my race. You  
3 have to prove intent. If you prove intent to discriminate  
4 it's logical under this law that the employer will be  
5 subjected to punitive damages. There is scienter here.  
6 There is no innocent employer.

7 JUDGE GARCIA: So how would the jury decide that?  
8 If the standard's the same, what does the jury consider in  
9 whether or not to impose punitive damages, which is - - -  
10 would be, I think as you're saying, a very big departure  
11 from our case law, our Common Law. So how would a jury  
12 consider whether or not to award punitive damages and how  
13 would that be reviewed?

14 MR. BERGSTEIN: We have a proposed jury charge in  
15 our reply brief at the end, and the jury is told if you  
16 find that the plaintiff proved discrimination by a  
17 preponderance of the evidence, you are to consider punitive  
18 damages in your discretion, because punitive damages are  
19 normally discretionary.

20 JUDGE GARCIA: But basically unreviewable by an  
21 appellate court then as long as you meet the negligence  
22 standard?

23 MR. BERGSTEIN: Well, if you can prove  
24 discrimination and the jury awards punitive damages. There  
25 are mitigating factors under the statute under Section (d).



1 But that's up to the jury. If the jury finds  
2 discrimination took place, which is the substantive evil  
3 that the city council is trying to eliminate completely - -  
4 -

5 JUDGE RIVERA: Well, what would be the basis not  
6 to grant under - - - I thought under your analysis that the  
7 party has an automatic right to punitive damages because  
8 you've equated the standard with merely violating the  
9 statute. What - - - so what would be the grounds by which  
10 a jury would not - - - would not grant?

11 MR. BERGSTEIN: In the jury's discretion? Well -  
12 - -

13 JUDGE RIVERA: Based on what? Isn't the jury  
14 charge if there's discrimination my client's entitled to  
15 punitive damages?

16 MR. BERGSTEIN: Correct. The employer can  
17 mitigate. Under the statute, the employer can mitigate.  
18 The - - -

19 JUDGE FAHEY: Well, you can - - - you can always  
20 mitigate. You'd mitigate in ordinance damages too. Here's  
21 what - - - here's what - - - I'm a little confused. The  
22 New York - - - the way I understand the Second Circuit's  
23 decision in Farias or whatever, I think that's the name, is  
24 - - - is that the New York standard is saying there is  
25 essential - - - is essentially the same as a Title VII



1 standard. And the way I understood the corporation  
2 counsel's brief from the City is they said that there were  
3 two distinct differences and that the New York Common Law  
4 standard in the corporation counsel's amicus brief was a  
5 little - - - was a little bit different. First, they said  
6 that a Title VII only applies when it alleges disparate  
7 treatment, or in other words, not where there's disparate  
8 impact. But under punitive damages, it would apply if  
9 there's disparate impact.

10 MR. BERGSTEIN: Correct.

11 JUDGE FAHEY: So that would be one difference for  
12 punitive damage, disparate impact, right? Then the second  
13 one would be the Title VII requires a plaintiff to prove  
14 that the defendant acted with malice or reckless  
15 indifference to a friend who protected rights of the  
16 individuals. So the defendant must discriminate in the  
17 face of a perceived - - - face of a perceived impact not  
18 that his actions will violate the federal law. In other  
19 words, that the employer's knowledge came into play under  
20 punitive damages and under New York Common Law, and they  
21 don't here under the equation of Farias, Title VII, and New  
22 York law. So that - - - so if you apply the New York  
23 Common Law statute, according to the city corporation  
24 counsel's brief, the way - - - and it's - - - the argument  
25 made some sense to me, then you would and then, in essence,



1 be raising an elevated standard in line with New York  
2 Common Law but also something that is not equivalent to  
3 Title VII. As a matter of fact, it's a little bit  
4 different from that.

5 MR. BERGSTEIN: Problem with the City's proposal  
6 is that it is not found anywhere in the statute. The  
7 statute jumps from employer liability - - -

8 JUDGE FAHEY: no. But the problem is - - - no.  
9 Let me - - - let me take a step back. The problem is you  
10 use a phrase in the statute, punitive damages. You know,  
11 you don't define the phrase. So in the absence of  
12 definition what are we to rely on but the Common Law?

13 MR. BERGSTEIN: Well, you rely on the statutory  
14 interpretation principles that the City law wants the  
15 courts to apply. This - - - this is one of the few civil  
16 rights law which has a language in the law directing courts  
17 how to interpret the law.

18 JUDGE FAHEY: Wouldn't that have been easy for  
19 the City to say this is what we mean by punitive damages?  
20 This is what the standard is?

21 MR. BERGSTEIN: Well, if we look at the - - -

22 JUDGE RIVERA: Or wouldn't it be even easier why  
23 would you pick a term that has a well understood meaning  
24 under the Common Law? If it really means what you mean  
25 would you not have called it something else?



1 MR. BERGSTEIN: Because - - - let me answer that  
2 in two parts. First, the City commission can impose a  
3 civil penalty which is the equivalent of punitive damages  
4 without a showing of malice, 125,000 dollars, which is a  
5 lot of money, for a non-showing of malice. And then it's  
6 double that if there is malice. So the city council  
7 understood what it was doing when it set forth the punitive  
8 damages scheme. And number two - - -

9 JUDGE RIVERA: I thought it - - - I'm sorry.  
10 You'll correct me. I thought the statute provided for  
11 punitive damages without explaining anything else?

12 MR. BERGSTEIN: But - - -

13 JUDGE RIVERA: Without defining what it is. You  
14 - - - you've now said well, it doesn't require malice. Did  
15 I miss something?

16 MR. BERGSTEIN: Well, no. Under the city  
17 commission when there - - - there's language under the  
18 statute regarding civil penalties or the equivalent of  
19 punitives, you can impose 125,000 dollars without a showing  
20 of malice.

21 JUDGE RIVERA: Okay.

22 MR. BERGSTEIN: And two points I want to  
23 emphasize. Number one, all the legislative history  
24 surrounding this statute, including that set forth by one  
25 of the principle drafters, Craig Gurian, Williams, and





1 Bennett and Alburnio tell us that every provision of this  
2 statute with respect to every legal problem have to be  
3 interpreted in light of - - -

4 JUDGE RIVERA: True. But - - - but even Gurian  
5 didn't take the position you're taking originally. I'm not  
6 talking about the amicus to us.

7 MR. BERGSTEIN: But what other - - - how else can  
8 we read the statute? The statute tells us under - - -

9 JUDGE STEIN: Well, how - - - what is - - - I  
10 guess part of my problem is is that we know what  
11 compensatory damages are. They - - - they are to  
12 compensate the - - - the victim for - - - for their  
13 expenses and make them whole. And we know that punitive  
14 damages are to punish and deter. But how does a jury make  
15 a distinction when they are not given any guidance or  
16 standard at all and - - - and when the - - - this - - - the  
17 rule itself, Section 8-502 says - - - lumps punitive  
18 damages with other damages and says that: "as may be  
19 appropriate." So - - - so isn't it up to the court to - -  
20 - to instruct to the jury on when it is appropriate and  
21 then it is up to the jury to decide if it is?

22 MR. BERGSTEIN: The city council has authority to  
23 regulate punitive damages this way. This court said in New  
24 School that the City can depart from Common Law standards  
25 because the City has authority to increase penalties so

1 long as it's not violating anybody else's rights. If we  
2 look at Section B that looks at the various ways an  
3 employer can be held liable, the next portion of the  
4 statute jumps right to the mitigation of punitive damages.  
5 So there's an understanding that upon a showing of  
6 liability with respect to punitives all the employer can do  
7 is mitigate and there's no safe harbor. But if it's a good  
8 employer and if - - -

9 JUDGE STEIN: That - - - that doesn't mean that  
10 there's no standard for set -- - for applying punitive  
11 damages in the first place. I don't think that's your  
12 strongest argument there. I mean basically what it's  
13 saying is if punitive damages are deemed appropriate they  
14 can still be mitigated. But - - -

15 JUDGE WILSON: So would the - - - would the  
16 Common Law and constitutional bounds on excessiveness of  
17 punitive damages apply to your standard?

18 MR. BERGSTEIN: Yes. Because that always applies  
19 when the jury awards too much money. It's reviewable on  
20 appeal. It's reviewable on a post-trial motion. Remember  
21 what this court said in *Albunio*. This court wanted:  
22 "interpret the law broadly in favor of discrimination  
23 plaintiffs to an extent the construction is reasonably  
24 possible." And just because Common Law says one thing  
25 doesn't mean the city council can't adopt a different



1 approach, which this court has said in New School and which  
2 the Appellate Divisions have said in the Bennett and  
3 Williams which also abandoned Common Law principles on sex  
4 harassment - - -

5 JUDGE RIVERA: But it is possible, is it not,  
6 aligned with the Restoration Act to read the provisions  
7 that you were referring to as saying punitive damages are  
8 available to every single person who establishes  
9 discrimination and punitive damages are to be based on  
10 whatever's the most liberal plaintiff-friendly definition  
11 available? As punitive damages are - - - it's a term of  
12 art. It has some particular meaning.

13 MR. BERGSTEIN: Under the Common Law, but the  
14 City is approaching discrimination - - - anti-  
15 discrimination from a different angle.

16 JUDGE RIVERA: I understand that. But why isn't  
17 what I have suggested to you completely aligned with this  
18 legislative history and the clear mandate from the  
19 Restoration Act?

20 MR. BERGSTEIN: Because that language is not in  
21 the statute. It's perceived.

22 JUDGE RIVERA: Well, neither - - - neither is  
23 what you're describing. So - - -

24 MR. BERGSTEIN: But - - -

25 JUDGE RIVERA: - - - my question is why - - - why



1 is what I'm suggesting to as a potential construction not  
2 one that is aligned with the intent of the city council?

3 MR. BERGSTEIN: I don't think we can assume that  
4 the city council left out that language on purpose or by  
5 mistake. This is a comprehensive independent law that is  
6 quite different from Title VII that rejects elementary - -  
7 -

8 CHIEF JUDGE DIFIORE: Do you assume that the city  
9 council meant anything by not characterizing the Farias  
10 case like it did other cases as wrongly decided?

11 MR. BERGSTEIN: It doesn't have to. Under - - -  
12 this - - - the city council rejected the McGrath analysis  
13 where every time a bad decision comes down you have to  
14 enact a new - - - an amendment to the law to reject that  
15 opinion. You don't have to do it anymore. The point of  
16 the Restoration Act, the point of the 2016 amendments was  
17 this has to be independently evaluated with respect to  
18 every provision - - -

19 CHIEF JUDGE DIFIORE: So take nothing from that.

20 MR. BERGSTEIN: - - - in every case.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. BERGSTEIN: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MR. FORMAN: May it please the court, Arthur  
25 Forman for respondents Jamil Abraham, Park Health Center,



1 and Ann Marie Garriques. We are - - - we are presented  
2 with a case of statutory interpretation. We have a statute  
3 that was passed by the city council. It included - - - it  
4 included punitive damages and appellants want to argue that  
5 in every case where a person - - - where - - - where the  
6 issue of discrimination is sent to a jury the punitive  
7 damages can be considered in the same sense as attorney  
8 fees, compensatory damages - - -

9 JUDGE GARCIA: What standard would you have  
10 applied?

11 MR. FORMAN: The - - - it is difficult to see the  
12 difference between the Common Law in the federal courts and  
13 the state courts.

14 JUDGE STEIN: But if there is a difference - - -

15 MR. BERGSTEIN: But one of them should apply.

16 JUDGE STEIN: - - - what if - - - what if there's  
17 a difference and the Common Law is more plaintiff friendly?  
18 Do you - - - would you agree that that's the standard that  
19 should be - - -

20 MR. FORMAN: Absolutely.

21 JUDGE STEIN: - - - in play?

22 MR. FORMAN: I - - - it's clear that the City - -  
23 - that New York City Council intends to be a liberal and as  
24 - - - as broad-minded as possible to eliminate  
25 discrimination. That's not at issue. The question is more



1 like are - - - is there a type of discrimination that - - -  
2 that does not deserve punitive damages? A type of  
3 employment discrimination that occurred and yet there was  
4 no malicious intent and - - -

5 JUDGE WILSON: Well, let me ask you about - - -

6 MR. FORMAN: - - - egregious conduct.

7 JUDGE WILSON: Let me ask you about then that  
8 because subsection 8-107(13) (f) says that an employer who  
9 otherwise would be - - - I'm paraphrasing, but an employer  
10 who otherwise would be liable for punitive damages will not  
11 be liab- - - - cannot be liable for punitive damages if  
12 that employer adopts the rules that the commission  
13 promulgates. So doesn't that suggest to you that there is  
14 a way that an employer under the Human Rights Law can avoid  
15 punitive damages but it - - - but the city council's  
16 determined that it requires them to adopt the commission  
17 promulgated rules. If they do - - - if they adopt some  
18 rules less than that but - - - but they are rules then they  
19 fall under subsection (13) (e), which allows them to  
20 mitigate but not entirely eliminate the punitive damages.

21 MR. FORMAN: The - - - as I will contend to that  
22 appellant is stretching that law. The - - - statute - -  
23 the paragraph 13 is - - - is entitled: "Employer Liability  
24 for Discriminatory Conduct by Employee, Agent, or  
25 Independent Contractors." Clear that - - - that entire



1 Section (13) deals with vicarious liability. There was no  
2 vicarious liability under Common Law for malicious acts of  
3 an agent or employee and clearly the city council wanted to  
4 overrule that and impose vicarious liability on, let's say,  
5 for - - - for example, the employer in this case, Park  
6 Health Center, for the - - - for the malicious acts of Dr.  
7 Abraham or Ann Marie Garriques, their employees. And it  
8 said that the employer could avoid that type of liability  
9 even if the employees are liable and including punitive  
10 damages. The statute doesn't even address the liability  
11 for - - - of the employees themselves who are - - - who are  
12 liable under the city council's City Human Rights Law. So  
13 the appellate - - - the appellant would - - -

14 JUDGE WILSON: Well, it wouldn't be - - -  
15 wouldn't it be a little of an incongruous result for the  
16 city council to say an employer who's vicariously liable  
17 can avoid punitive damages only if they adopt the  
18 commission's procedures but the actual offender, the  
19 violator, isn't liable for punitive damages at all or maybe  
20 is liable only under the Common Law? I mean it seems to  
21 be, then, punishing the employer who maybe even lack  
22 knowledge and employed some procedures, though not the ones  
23 that the commission promulgated, more severely than the  
24 actual offender?

25 MR. FORMAN: Right. Again, (13) would not apply



1 unless there - - - there could be a punitive damages  
2 charged to the jury. So that not in every case would there  
3 be a punitive damages charge and (13) wouldn't come into  
4 play. This statute is only ameliorating cases where the  
5 employer is charged possibly with punitive damages. But  
6 you can't reverse that and say oh, this - - - this statute  
7 shows that the city council wanted to impose punitive  
8 damages in every case where - - - where charge of  
9 discrimination goes to the jury. It's respectfully  
10 submitted that there are cases of discrimination that are  
11 worse than others. A person who is subjected to constant -  
12 - -

13 JUDGE RIVERA: But - - - but isn't the  
14 legislative history of - - - of the City Human Rights Law  
15 clear that all discrimination - - - put aside what I think  
16 you're going to argue about degrees of discrimination, all  
17 discrimination carries with it, not just the vigil, which I  
18 think is more about your point about the degrees of  
19 discrimination, but this public harm that all of society  
20 suffers with every level of discriminatory action,  
21 intentional or not? Doesn't matter because the statute  
22 covers impact. Isn't that very clear? So I'm - - - I'm  
23 troubled by where you were going with this argument and why  
24 I've interrupted you. I want you to address that  
25 legislative history.





1 MR. FORMAN: That - - - that's clear that the  
2 council doesn't want any type of - - - wants to eliminate  
3 the - - - the types of discrimination that's in the statute  
4 and that it wants to do it not only for the plaintiff but  
5 for - - - for the city as a whole.

6 JUDGE RIVERA: Doesn't that weigh, then in favor  
7 of Ms. Chauca's counsel's argument that what you want to do  
8 is ensure that punitive damages are indeed imposed so that  
9 you have the greatest effect on - - - eliminatory effect on  
10 discriminatory actions?

11 MR. FORMAN: If the city council wanted to do it  
12 and that - - - that is a departure from the Common Law and  
13 it would have been a drastic measure, they could have done  
14 it. But it's our contention that they didn't do it. It's  
15 not in the statute. There's no - - - there's no definition  
16 of it.

17 JUDGE RIVERA: Let's say we disagree with you  
18 that - - - which I think is what you're arguing here, that  
19 Title VII and the Common Law are exactly the same standard.  
20 Let's say we disagree with you on that, right.

21 MR. FORMAN: Not a factor.

22 JUDGE RIVERA: And we see that there is - - - is  
23 a difference.

24 MR. FORMAN: The - - - the - - -

25 JUDGE RIVERA: If you were going to argue what -



1 - - what that rule then should be with this assumption that  
2 there's a difference what - - - what would then your other  
3 position be?

4 MR. FORMAN: Well, that - - - that it should - -  
5 - that the State Common Law would apply, and it includes  
6 maliciousness. It includes reckless disregard, gross  
7 negligence.

8 JUDGE WILSON: Well, maybe - - - maybe it does  
9 but to follow on Judge Rivera's question, if there are  
10 findings by the city council that parti- - - - that New  
11 York City particularly thinks that discrimination is an  
12 awful thing, our decision in Home Insurance Company v.  
13 American Home Products Corporation says, it - - - with  
14 regard to punitive damages: "Damages may be considered  
15 expressive of a community attitude towards one who  
16 willfully and wantonly causes hurt or injury to another."  
17 And essentially the city council has made that sort of a  
18 finding about that - - - at the community of New York City  
19 and we don't say - - - in that case we don't say criminal  
20 recklessness or anything like that, we say: "Conduct which  
21 manifests a conscious disregard of the rights of others or  
22 conduct so reckless as to amount to such disregard." And  
23 we're talking about intentional discrimination here. I  
24 mean isn't that sufficient to bring sort of the city  
25 council right within the Common Law?



1 MR. FORMAN: That sounds more like a federal case  
2 when you're talking about intentional discrimination and in  
3 the - - - in the City's brief they argue that the Common  
4 Law in the state does not include a finding of intentional  
5 - - - of intentional - - of intent.

6 JUDGE RIVERA: But doesn't the Title - doesn't  
7 Title VII or the way the courts have interpreted Title VII  
8 means intentionally discriminate with the full knowledge  
9 that you're violating Title VII or violating the law  
10 itself?

11 MR. FORMAN: Right.

12 JUDGE RIVERA: Isn't that the distinction that  
13 the amici - - -

14 MR. FORMAN: Right. That - - -

15 JUDGE RIVERA: - - - and the City and - - - were  
16 trying to draw?

17 MR. FORMAN: Right. The City's saying that that  
18 should not be included in the - - - in the State Common Law  
19 which does not - - - it - - - or that the city council  
20 would not want that in the charge to the jury.

21 JUDGE FAHEY: But - - - but aren't they also  
22 saying that New York doesn't require the defendant to be  
23 specifically aware that his conduct is in violation of the  
24 law? And that's one of the two distinctions that make the  
25 New York Common Law more liberal than the Title VII



1 punitive damages standard?

2 MR. FORMAN: Well, the Common Law - - - Common  
3 Law is even - - - it seems to be more - - - more strict  
4 than the federal law in that cases have said it's  
5 practically more - - - more in the line of - - -

6 JUDGE FAHEY: I don't know if I'd count on that.  
7 I don't know if I'd count on that. I don't know if that's  
8 exactly true. That's not the way I read their brief, but  
9 okay. I understand your argument.

10 MR. FORMAN: The - - - the respondent's point is  
11 that there should be a - - - there should be some  
12 discretion for the trial court. There should be a case  
13 that does not allow punitive damages to go to the jury. If  
14 there - - - if there was a finding that - - - if the trial  
15 judge decides that the - - -

16 JUDGE STEIN: Well, we want to be sure that the  
17 trial judge is doing that under the right standard, right?

18 MR. FORMAN: Well, there should be a standard.  
19 And - - -

20 JUDGE STEIN: It's not just pure discretion well,  
21 I don't - - - you know, I don't think so. I mean there has  
22 to be a basis, a grounds for that, right?

23 MR. FORMAN: Right. We're - - - we're saying it  
24 should be taken either from the federal statute - - - from  
25 the federal standard or the state standard, but there



1 should be one. Whereas appellant is saying that as long as  
2 there's a finding of discrimination the jury gets to decide  
3 how much in punitive damages should be awarded. We don't  
4 think that's the standard.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. FORMAN: You're welcome.

7 CHIEF JUDGE DIFIORE: Mr. Bergstein.

8 MR. BERGSTEIN: Three points. Why is our  
9 formulation reasonable under Albunio? If the employer - -  
10 - if the employer complies with the factors under (D) and  
11 undertakes in advance the anti-discrimination measures and  
12 policies and practices, which is what the city council  
13 wants, there probably won't be punitive damages because  
14 there probably won't be a lawsuit because there won't be  
15 any discrimination if the employer takes its obligation  
16 seriously, which is exactly what the city council wants to  
17 do. Number two, I don't see any requirement that a  
18 punitive damages test needs to have a heightened degree of  
19 scienter. We understand punitives generally because we've  
20 all been brought up to understand that punitives involve  
21 malice, but the city council's not required to adopt that  
22 standard. And there's nothing in the statute that makes  
23 reference to malice. And as I mentioned earlier, somebody  
24 could be found - - - somebody could be hit with civil  
25 penalties without a finding of malice at a minimum - - - at



1 a minimum, which is one of the reasons the Second Circuit  
2 sent this case over here. I don't think it can be a  
3 federal standard. The federal standard of malice and  
4 willfulness has no place in this statute, which has very  
5 different goals at combatting the problem of - - -

6 JUDGE RIVERA: So - - - so let's say we agree  
7 with you that Title VII is inapplicable given the  
8 legislative history and the clear mandate of the  
9 Restoration Act. But let's say we disagree with you that  
10 violation of the statute makes every single defendant  
11 subject to punitive damages, that there's some standard  
12 that needs to apply beyond just a finding of  
13 discrimination. What would be your alternative rule? If  
14 you - - - if you knew that we couldn't agree with either  
15 one of those, what would be your alternative rule?

16 MR. BERGSTEIN: My alternative rule would be the  
17 one advanced by Craig Gurian, the reckless disregard of the  
18 possibility of harming the plaintiff. That's in his amicus  
19 brief.

20 JUDGE RIVERA: And - - -

21 MR. BERGSTEIN: That also departs from the  
22 federal standard. It probably gets us to the same place  
23 because if you are found liable for discrimination there  
24 probably was reckless disregard, at a minimum of - - - of  
25 somebody's entitlements.



1 JUDGE STEIN: Yeah. Can you give me an example  
2 of - - - of when that wouldn't apply?

3 MR. BERGSTEIN: Well, how it wouldn't apply?

4 JUDGE STEIN: Yeah.

5 MR. BERGSTEIN: That's hard because usually if -  
6 - - if the jury finds discriminatory - - -

7 JUDGE STEIN: So isn't that really going back to  
8 your original proposal?

9 MR. BERGSTEIN: Well, it's a little more nuanced  
10 than mine. My proposal is easy to articulate and it's easy  
11 to apply.

12 JUDGE STEIN: Okay. But I think that what the  
13 court is trying to determine is is that there - - - is  
14 there something between that and the federal standard or  
15 even that and - - - and the Common Law standard - - -

16 MR. BERGSTEIN: Well, the Gurian standard - - -

17 JUDGE STEIN: - - - that is workable.

18 MR. BERGSTEIN: - - - involves recklessness. So  
19 there's some degree - - - there is some mental state  
20 involved, you know, reckless disregard of causing the  
21 plaintiff harm. It's - - - it's different from ours  
22 because we have some scienter there. But in the end I  
23 don't know if there's a substantial difference between the  
24 two because you're still hurting the plaintiff. Otherwise,  
25 there wouldn't be a lawsuit. And you're still going to



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have a finding of discrimination which is, as we mentioned,  
a - an evil that the city council was trying to root out  
root and branch, and one way to do it is to have strong  
penalties to deter discrimination from happening in the  
first place. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)

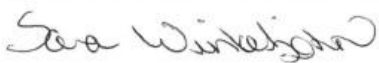




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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Chauca v. Abraham, No. 113 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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