

**Testimony of Dana Sussman**  
**Deputy Commissioner for Policy and Intergovernmental Affairs**  
**New York City Commission on Human Rights**  
**Before the Committee on Aging and the Committee on Civil and Human Rights**  
**October 8, 2019**

Good afternoon Chair Chin and Chair Eugene, and members of the Committees on Aging and Civil and Human Rights. I am Dana Sussman, Deputy Commissioner for Policy and Intergovernmental Affairs at the New York City Commission on Human Rights. I am joined today by my colleague, Sapna V. Raj, Deputy Commissioner for Law Enforcement. I am also happy to be joined by my colleagues Edgar J. Yu and Maria Serrano from the Department for the Aging, key partners and collaborators in this work.

Thank you for convening today's hearing on Intros. 1684, 1685, 1693, 1694, and 1695—five pieces of legislation that seek to address age discrimination in the workplace. Before I turn to the legislation, I want to highlight some of the Commission's recent work. The Commission is the local civil rights enforcement agency that enforces the NYC Human Rights Law, one of the broadest and most protective anti-discrimination and anti-harassment laws in the country, now totaling 26 protected categories across nearly all aspects of city living: housing, employment, and public accommodations, in addition to discriminatory harassment and bias-based profiling by law enforcement. Over the past four and a half years, since Commissioner Carmelyn P. Malalis took the helm of the agency, the Commission has implemented 28 changes to the NYC Human Rights Law, including seven new substantive areas of protection, and other statutory expansions of the agency's mandate and scope. At the same time, the Commission is increasingly becoming the preferred venue for victims of discrimination. In Fiscal Year 2019, the Commission fielded nearly 10,000 inquiries from members of the public, via calls, emails, and in-person intakes, the highest in Commission history, resulting in 785 complaints filed and 396 pre-complaint interventions. Also in Fiscal Year 2019, the agency obtained over \$5.3 million in damages for complainants, and nearly \$800,000 in civil penalties, for a combined total of over \$6 million, the highest in the Commission's history and over five times the amount of damages and penalties recovered in 2014, the year prior to start of Commissioner Malalis's tenure. In Fiscal Year 2019, age discrimination cases accounted for nearly \$500,000 in damages and penalties assessed.

Over the past two years, the Commission has filed 110 complaints on behalf of individuals alleging age discrimination. The vast majority of those cases are in the employment context. In one case, an employee alleged that he had been terminated because of a policy that stated the company could not hire or employ anyone over sixty-five years old. The Commission's Law Enforcement Bureau investigated the matter and tried the case at a hearing before the Office of Administrative Trials and Hearings. After considering the Administrative Law Judge's Report and Recommendation, the Office of the Chairperson at the Commission issued a final Decision & Order, awarding \$70,216 in compensatory damages (including back pay, interest, and emotional distress damages), imposing a civil penalty of \$30,000, and ordering Respondents to modify their policies and undergo training on the NYC Human Rights Law.

The Commission's Community Relations Bureau, which engages in outreach and education on New Yorkers' rights and obligations under the NYC Human Rights Law has partnered with community-based organizations throughout New York City to provide information to older New Yorkers on their rights and as you may be aware, the Commission regularly publishes materials, in multiple languages, and conducts trainings and outreach on discrimination and other protected categories to audiences across the City. In Fiscal Year 2019, the Commission conducted 38 trainings focused on the rights of older New Yorkers, in partnership with organizations such as Sage, Deshi Senior Center, St. Jerome's Hands Community Center, Rain Senior Center, GRIOT Circle, and many others. In addition, Commission leadership spoke at several forums and events on age discrimination throughout the year.

Most recently, on September 16, 2019, the Commission, along with our colleagues at the Department for the Aging, convened a roundtable with age justice stakeholders and experts to discuss how the Commission and DFTA can work more effectively to combat age discrimination in the workplace. Many of the advocates and stakeholders here today were present for a rich conversation, highlighting the protections offered by the NYC Human Rights Law and how the Commission can best serve the communities most vulnerable to discrimination and harassment. Finally, later this month, attorneys from the Commission's Law Enforcement Bureau will be training DFTA staff on the NYC Human Rights Law to ensure that any potential discrimination cases they come across are properly identified and directed to the Commission.

Turning to the bills that are the subject of today's hearing, Int. 1684 mandates that the Commission create a poster addressing age discrimination and requires that all City agencies post it in common areas for employees. I'll note that the Commission created a Notice of Rights that includes information about one's rights broadly under the NYC Human Rights Law, covering all 26 protected categories. As part of all case resolutions against both private and public entities, we require respondents to post this Notice of Rights in an area visible to employees and/or tenants and customers.

Int. 1685 requires that the Commission create a training that city agencies must complete once per year and post information on the Commission's website about age discrimination, how to report violations, and available avenues of relief and action. Int. 1693 establishes a task force to study age discrimination in the workplace chaired by the Commissioner/Chair of the Commission or her designee, and Int. 1695 establishes a testing program targeting age discrimination in the workplace, with at least five investigations per year and requires that the agency produce an annual report on or before June 15.

The Commission supports the intent of the bills and, in recognition of the fact that age discrimination is pervasive, the Commission is actively engaged in policy making, enforcement, and outreach to further highlight the protections under the NYC Human Rights Law with respect to age discrimination in the workplace. Further, many of the Commission's current efforts and future initiatives reflect many of the bills' goals. As I mentioned, the Commission regularly provides training to different audiences, in dozens of languages, across the City, and conducts workshops and outreach to older New Yorkers. The Commission's outreach continues expand. In Fiscal Year 2019, the Commission served nearly 100,000 people through these outreach

activities. In addition, the Commission is already mandated to publish an annual report every year on September 30 and is required to include information on public inquiries received by the Commission, Commission-initiated investigations, complaints filed at the Commission, and the Commission's education and outreach efforts during that fiscal year. You can find the Fiscal Year 2019 report on the agency's website. We welcome the opportunity to work with Council to further our shared goals of aggressively promoting and protecting older New Yorkers; rights in the workplace. My colleague, Deputy Commissioner for the Law Enforcement Bureau, Sapna V. Raj, will now highlight some of the Commission's law enforcement efforts.

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Good afternoon. My name is Sapna V. Raj, and I am the Deputy Commissioner for the Law Enforcement Bureau at the Commission on Human Rights. I oversee a team of 78 attorneys and support staff who on a daily basis field hundreds of calls, email inquiries, walk-ins, schedule appointments, undertake investigations, litigate cases and test for discrimination on behalf of New Yorkers who have experienced discrimination and harassment.

First, it is important to note that the NYC Human Rights Law offers far more protections than the federal Age Discrimination in Employment Act (“ADEA”). Under the ADEA, plaintiffs must prove that their age was the “but for” cause of their discrimination, meaning it is not enough for a plaintiff to show that age discrimination contributed to the adverse action; rather, they must show that age discrimination was such a motivating factor that the adverse action would not have occurred absent the discriminatory motive. This is a standard that is purposefully difficult to meet and, unlike the standard under the NYC Human Rights Law, is not aimed at completely eliminating discrimination from the workplace. The heightened federal standard only exists with respect to age discrimination claims, so that individuals alleging age discrimination have a higher bar to meet than members of other protected categories who allege discrimination under federal law.

The NYC Human Rights Law, by contrast, treats age discrimination the same as every other protected category – and, as mentioned earlier, there are 26 such protected categories. The NYC Human Rights Law protects against “mixed motive” discrimination, meaning that a plaintiff may prevail if age discrimination contributed to the adverse action. Notably, the NYC Human Rights Law protects both employees and job applicants from age discrimination, whereas under federal law there is a circuit split on whether the ADEA covers job applicants.<sup>1</sup> And for hostile work environment claims, under the ADEA the conduct must be “severe or pervasive,”<sup>2</sup> versus the NYC Human Rights Law standard of simply being “treated less well” because of someone’s age or other protected status.

In addition, the ADEA has several affirmative defenses written into the statute that employers can use, such as a bona fide occupational qualification of the job, or that the policy differentiates among workers based on some “reasonable factor” other than age, such as seniority. The NYC Human Rights Law does not have any such affirmative defense codified in

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<sup>1</sup> Compare Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 974-75 (11th Cir. 2016) (holding that job applicants are not protected by ADEA), with Rabin v. Pricewaterhouse Coopers LLP, 236 F. Supp. 3d 1126, 1133 (N.D. Cal. 2017) (holding that job applicants may bring disparate impact claims under ADEA), and Kleber v. CareFusion Corp., 888 F.3d 868, 870 (7th Cir. 2018) vacated and reh'g granted No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. 2018).

<sup>2</sup> See, e.g., Kassner v. 2nd Ave. Delicatessen, 496 F.3d 229 (2d Cir. 2007) (manager’s ageist comments to older waitresses that they should “retire early,” “wear a wig,” or “drop dead” did not support a claim for hostile work environment under the ADEA or Title VII because the conduct was not considered severe or pervasive).

the law. The NYC Human Rights Law also offers more comprehensive remedies to plaintiffs: those who have been unlawfully discriminated against based on their age under the law are entitled to many kinds of relief, including economic damages, emotional distress damages, and, depending on the forum, punitive damages. The ADEA provides limited remedies: backpay, promotion, and reinstatement of employment. Liquidated damages are only permitted for willful violations of the ADEA. Unlike under the NYC Human Rights Law, claimants under the ADEA are not entitled to receive emotional distress or punitive damages.

As you know, the Commission has the power to initiate its own investigations when entities are suspected of engaging in discriminatory policies or practices. In addition to filing complaints and deploying testing, the Commission sends cease-and-desist letters and also uses a range of investigative methods, such as requests for information on policies and practices, demands for documents, and interviews of key witnesses. In our experience, each of these investigative tools serves an important role in detecting and proving claims of discrimination. Under Commissioner Malalis, the Commission has significantly expanded its Commission-initiated actions. For example, in Fiscal Year 2019, the Commission initiated 56 actions, compared to 33 in 2015. All Commission-initiated actions are referenced and explained in each annual report issued every September. We welcome information about possible targets of these Commission-initiated actions from Council Members, community groups, and any other entities concerned that discriminatory practices may be taking place. Thank you for the opportunity to speak about our work. We look forward to your questions.