APL-2016-00003

Court of Appeals
State of New York

VERONIKA CHAUCA,

Plaintiff-Appellant,

against

JAMIL ABRAHAM, Individually,
PARK MANAGEMENT SYSTEMS, LLC, a/k/a Park Health Center, and ANN MARIE GARRIQUES, Individually,

Defendants-Respondents.

BRIEF FOR *AMICUS CURIAE* CITY OF NEW YORK

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The City of New York submits this amicus brief to address the standard for punitive damages under the New York City Human Rights Law (City HRL). The City urges this Court to hold that the City HRL incorporates the common law's well-settled understanding of punitive damages, as liberally construed to further to City HRL's fundamental policy goal of preventing unlawful discrimination.

The City is uniquely situated to speak on this issue. The City HRL was enacted by the New York City Council. It is enforced in administrative proceedings by a city agency, the New York City Commission on Human Rights, and may be enforced via judicial proceedings by the Corporation Counsel. As a result, the City has a strong interest in the proper interpretation of its law. Moreover, the City and its employees appear as defendant in lawsuits under the City HRL, although the City is not itself subject to punitive damages under the statute. *See Krohn v. N.Y.C. Police Dep't*, 2 N.Y.3d 329, 338 (2004).

Here, defendants ask this Court to adopt the federal punitive damages standard, which requires proof that the defendant acted with malice or reckless disregard of federally protected rights. The City Council could not have been clearer, however, that the City HRL must be construed independently of federal and state law to effectuate its uniquely broad and remedial purposes. And there is strong evidence in the statute's text and legislative history suggesting that the City Council intended a broader standard for punitive damages than the standard under federal law, which some federal courts have construed to permit a defense of ignorance of the law.

Instead, this Court should perform the required independent construction of the statute. Although "punitive damages" is not defined in the City HRL, this Court does not lack guidance in how to properly interpret the statute. "Punitive damages" is a legal term of art with a settled meaning in the common law. Under fundamental principles of statutory interpretation, courts presume that when the legislature uses a term of art, it intends to incorporate the term's commonly accepted meaning, unless there

is specific evidence to suggest otherwise. Here, the statutory text and legislative history provide strong indication that the City Council intended to incorporate the settled background understanding of punitive damages, meaning damages intended to express moral condemnation for, and to deter, particularly culpable conduct.

Giving the City HRL a liberal construction as the City Council has directed, this Court should hold that the City HRL follows the broadest articulation of the standard found in New York common law, permitting punitive damages where a discriminator has acted maliciously, exhibited a conscious or reckless disregard or gross negligence toward the rights of others, or caused injury or harm to another willfully, wantonly, or recklessly based on that person's protected status under the statute. A defendant's professed ignorance of what the law requires should not be accepted as a defense. And the courts should be directed to apply these principles liberally on an ongoing basis in service of the statute's broad remedial goals.

STATUTORY BACKGROUND

The City HRL is New York City's comprehensive civil rights statute. Among other protections, the law prohibits employers from discriminating on the basis of the "actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation or alienage or citizenship status of any person." N.Y.C. Admin. Code § 8-107(1)(a). In enacting the law, the City Council declared that, in light of the City's extraordinarily diverse population, "there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of" prejudice. *Id.* § 8-101. Thus, the law directs the New York City Commission on Human Rights, which is tasked with administering the law, "to eliminate and prevent discrimination from playing any role in actions relating to employment." *Id.*

The City HRL has its roots in two local laws enacted in the 1950s. *See* New York, N.Y., Local Law No. 55 (1955) (creating a Commission on Intergroup Relations); New York, N.Y., Local Law 80 (1957) (banning discrimination in private housing); Marta B.

Varela, *The First Forty Years of the Commission on Human Rights*, 23 Fordham Urb. L.J. 983, 984-86 (1995).[1] Since that time, the City Council has repeatedly expanded the law's protections.

A. The 1991 amendments making punitive damages available to plaintiffs alleging discrimination

1991 was a watershed year for the City HRL. Following an increase in bias-motivated crimes and a decline in race relations in the City in the 1980s, the City Council passed a comprehensive package of amendments to address systemic discrimination. *See* NYLS Bill Jacket, New York, N.Y., Local Law No. 39 (1991), Report of the Committee on General Welfare at 1-2. Before the 1991 amendments, an individual who had suffered disparate treatment could only file a complaint with the Commission. *See id.* at 8-9. After the amendments, he or she could also elect to file a complaint in any court of competent jurisdiction, against both individuals and their employers. *See* New York, N.Y., Local Law No. 39 (1991), § 1 (codified at N.Y.C. Admin. Code § 8-502). And

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[1] *Available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1684&context=ulj.

where there was reasonable cause to believe that any person was engaging in a discriminatory pattern or practice, the Office of the Corporation Counsel could commence a civil action. *See id.* (codified at N.Y.C. Admin. Code § 8-402(a)).

The 1991 amendments also expanded the remedies available under the City HRL. In court, individuals alleging discriminatory practices, as well as representatives of the Corporation Counsel alleging a discriminatory pattern and practice, could now seek punitive damages, injunctive relief, "and such other remedies as may be appropriate." *See* New York, N.Y., Local Law No. 39 (1991), § 1 (codified at N.Y.C. Admin. Code §§ 8-402(a); 8-502(a)). The amendments also gave the Commission the discretion to impose civil penalties in administrative proceedings of up to $50,000 "to vindicate the public interest." *Id.* (codified at N.Y.C. Admin. Code § 8-126(a)). Where the Commission found that a discriminatory act was willful, wanton, or malicious, it could impose penalties up to $100,000. *Id.*

Although the amendments did not include a provision specifically defining when punitive damages were proper, the

amendments did define when an employer could *mitigate* or *avoid* the amount of punitive damages imposed based on the conduct of an employee or agent. *See* New York, N.Y., Local Law No. 39 (1991), § 1 (codified at N.Y.C. Admin. Code § 8-107(13)(e), (f)). Mitigation was allowed where the employer had established and complied with procedures for preventing and detecting unlawful discriminatory practices and had a record of no, or relatively few, prior incidents of discrimination. *See id.* Punitive damages could be avoided if the employer had established and complied with specified policies and procedures established by the Commission. *See id.* § 8-107(13)(f).

In amending the law, the City Council reaffirmed the policy of requiring the law to be interpreted liberally. *See* New York, N.Y., Local Law No. 39 (1991), § 1 (codified at N.Y.C. Admin. Code § 8-130); NYLS Bill Jacket, Committee Report at 12-13 (directing that "particular attention" be paid to this provision); NYLS Bill Jacket, Transcript of Hearing Held June 18, 1991, at 3-4 (remarks of Mayor David N. Dinkins) ("[I]t is the intention of the Council that judges interpreting the [City HRL] … are to take seriously

the requirement that this law be liberally and independently construed."). The Council expressed concern that both state and federal courts had been too restrictive in interpreting civil rights laws and that it was "imperative" that such interpretations be avoided. *See* NYLS Bill Jacket, Committee Report at 12-13.

B. The 2005 and 2016 amendments mandating that the City HRL be interpreted separately from similar state and federal laws

Fourteen years later, in response to concerns that courts had continued to interpret the City HRL too narrowly, the City Council again amended the law by enacting the "Local Civil Rights Restoration Act of 2005." New York, N.Y., Local Law No. 85 (2005), § 1. The stated purpose of the amendments was to ensure that the City HRL "be construed independently from similar or identical provisions" of state and federal statutes. *Id.* Although the City Council approved the use of similarly worded provisions to aid in interpreting the City HRL, the City Council declared that such provisions should be viewed "as a floor below which the [City HRL] cannot fall, rather than a ceiling above which the law could not rise." *Id.* To implement these principles,

the law's construction provision now stated that the law should be construed liberally in light of its "uniquely broad and remedial purposes …, regardless of whether federal of New York State civil and human rights laws … have been so construed." *Id.* § 7 (codified at N.Y.C. Admin. Code § 8-130).

Before adopting the amendments, the City Council cited several specific judicial decisions as examples of overly narrow judicial construction of the City HRL. In its report on the amendments, for example, the Committee on General Welfare pointed to *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421 (2004), in which this Court applied federal standards in interpreting the attorney's-fee provision of the City HRL. *See* New York, N.Y., Local Law No. 85 (2005), Report of the Governmental Affairs Division, Committee on General Welfare, at 4-5 (Aug. 17, 2005).[2] The Committee opined that several principles should guide courts in interpreting the City HRL: discrimination should play no role

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[2] *Available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=441304&GUID=79DC9B4A-845F-4BDA-AA6C-D6F63F0C8A0B&Options=ID%7cText%7c&Search=85.

in employment decisions; traditional methods and principles of law enforcement should be applied in the civil rights context; and victims should receive full compensation for injuries. *See id.* at 5.[3]

In addition to reaffirming that the City HRL should be construed independently from analogous state and federal laws, the amendments increased the maximum civil penalties that the Commission could award in its discretion: from $50,000 to $125,000 in all cases, and from $100,000 to $250,000 in cases involving "willful, wanton or malicious conduct." New York, N.Y., Local Law No. 85 (2005), § 6 (codified at N.Y.C. Admin. Code § 8-126(a)). The 2005 amendments did not expressly address the circumstances when an award of punitive damages was proper.

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[3] Other cases that were criticized by Council Members were *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004) (holding employer not liable for supervisory employee's racial slurs and harassment); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484 (2001) (holding that discrimination against unmarried couples did not constitute discrimination based on marital status under the City HRL); *Priore v. N.Y. Yankees*, 307 A.D.2d 67 (1st Dep't 2003) (holding individual employees not liable for their discriminatory conduct); and *Gurry v. Merck & Co.*, No. 01-civ-5659, 2003 U.S. Dist. LEXIS 6161 (S.D.N.Y. Apr. 14, 2003) (applying federal standard to City HRL provision on retaliation despite difference in statutory language). *See* New York, N.Y., Local Law 85 (2005), Transcript of Hearing Held Sept. 15, 2005, at 41 (Statement of Member Palma) (available online at website cited at *supra* note 2).

Indeed, one of the only statements on the subject came from Craig Gurian, the Executive Director of the Anti-Discrimination Center of Metro New York and a former Deputy Commissioner at the Commission on Human Rights. Gurian opined that courts should examine the "current imported federal standard," which he was concerned gave discriminators an incentive to plead ignorance of the law. Testimony of Craig Gurian Regarding Intro 22A, Committee on General Welfare, at 4 (Apr. 14, 2005).[4]

In 2016, the City Council again amended the construction provision of the City HRL to provide additional guidance on a proper interpretation of the law. *See* New York, N.Y., Local Law No. 35 (2016). Among other amendments, the Council included language expressing approval of three decisions that the Council determined had "correctly understood and analyzed" the liberal construction requirement. *Id.* § 2 (codified at N.Y.C. Admin. Code § 8-130). In the first case, *Albunio v. City of New York*, 16 N.Y.3d 472 (2011), this Court gave the City HRL a "broad reading" and

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[4] *Available at* www.antibiaslaw.com/sites/default/files/all/CenterTestimony041405.pdf.

found limited evidence sufficient to satisfy the requirement of the City HRL's retaliation provision that the plaintiff had "opposed" discrimination. *See id.* at 479.

In the two remaining cases, courts made targeted departures from federal standards after carefully analyzing whether the federal standard comported with a liberal, but reasonable, interpretation of the City HRL. In *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29 (1st Dep't 2011), *lv. denied*, 18 N.Y.3d 811 (2012), the court held that the *McDonnell-Douglas* burden-shifting framework from federal law applied under the City HRL, but modified the standard to lower the plaintiff's evidentiary burden after a close analysis of the plain language and purposes of the City HRL. *See id.* at 36-45. And in *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dep't 2009), the court held that the text and purposes of the City HRL militated against any adoption of the federal requirement that conduct be severe and pervasive in order to be actionable as sexual harassment, but retained the requirement from federal law that the conduct at

issue consist of more than petty slights and inconveniences. *See id.* at 76-81.

ARGUMENT

The City HRL does not expressly define when punitive damages are available, but its silence on this point does not leave the Court without guidance on how to properly interpret the statute. In evaluating the proper standard under the City HRL, this Court should not uncritically adopt the federal standard, as defendants suggest. Instead, this Court should look to the background principles of New York law, and apply them liberally to effectuate the statute's remedial goals.

POINT I

FEDERAL LAW DOES NOT SET THE STANDARD FOR PUNITIVE DAMAGES UNDER THE CITY HRL

Defendants ask the Court to incorporate into the City HRL the standard for punitive damages applicable to federal civil rights statutes. They rely primarily on court decisions that have treated the City HRL as substantively equivalent to federal law (Resp. Br. at 9-14). The City Council, however, has expressed an unmistakable intention that the City HRL be construed

independently of the federal and state civil rights laws in all circumstances. Moreover, wholesale adoption of the federal standard is inappropriate because there are substantial textual differences between the statute establishing the federal punitive damages standard and the City HRL, and the legislative history on this point independently suggests that the City Council intended a broader standard.

A. The New York City Council has clearly stated that courts should no longer apply federal standards by default.

The same year that the City Council comprehensively amended the City HRL, including to provide for punitive damages, Congress for the first time allowed plaintiffs alleging intentional employment discrimination under federal civil rights statutes to recover compensatory and punitive damages. *See* Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a. Punitive damages, however, were available only where the plaintiff was alleging disparate treatment (not disparate impact), and could show that the employer had acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." *Id.* § 1981a(b)(1). The

U.S. Supreme Court construed the statute to require that an employer "at least discriminate in the face of a perceived risk that its actions will violate federal law." *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 546 (1999).

In urging the Court to adopt this standard for the City HRL, defendants primarily rely on federal and state decisions that have concluded that the standard under the City HRL tracks the federal standard (Resp. Br. at 8-14). The City Council, however, has expressly directed courts to undertake an independent analysis of the City HRL rather than uncritically adopting standards from analogous federal civil rights statutes. N.Y.C. Admin. Code § 8-130. Thus, the existence of a federal provision addressing the same subject matter does not relieve courts of the requirement to perform a separate analysis of the City HRL, construing the statute liberally in light of its "uniquely broad and remedial purposes." N.Y.C. Admin. Code § 8-130; *see Albunio*, 16 N.Y.3d at 477-79 (construing retaliation provision of City HRL broadly in light of this interpretive requirement).

Because none of the cases that defendants cite engaged in the required analysis, they lack persuasive force. Indeed, many of these cases were decided before the Restoration Act clarified the requirement to perform a liberal, independent interpretation of the statute. *See, e.g.*, *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 101 (2d Cir. 2001); *Hill v. Airborne Freight Corp.*, 212 F. Supp. 2d 59, 75 (E.D.N.Y. 2002). Other cases, though decided after the 2005 amendment, simply did not comply with its requirement that courts engage in an independent inquiry. *See, e.g.*, *Johnson v. Strive E. Harlem Emp't Grp.*, 990 F. Supp. 2d 435, 449-50 (S.D.N.Y. 2014); *Grella v. Avis Budget Grp., Inc.*, No. 14-civ-8273, 2016 U.S. Dist. LEXIS 19248, at *18-20 (S.D.N.Y. Feb. 11, 2016); *Taylor v. N.Y. Univ. Med. Ctr.*, 871 N.Y.S.2d 568, 573 (1st Dep't, App. Term 2008).

It does not change the analysis that the Restoration Act omitted mention of cases applying the federal punitive damages standard to City HRL claims among the list of decisions that the City Council intended to overrule. *See Chauca v. Abraham*, 841 F.3d 86, 91-92 (2d Cir. 2016) (observing that City Council did not

indicate that it intended to overrule *Farias v. Instructional Sys., Inc.*, 259 F.3d 91 (2d Cir. 2001), which first held that courts should apply the federal standard). In enacting the Restoration Act, the City Council made clear that it did not intend to expressly correct every judicial misinterpretation of the statute. *See, e.g.*, New York, N.Y., Local Law 85 (2005), Transcript of Hearing Held Sept. 15, 2005 at 41 (Statement of Council Member Palma) ("With [the Act], these cases and others like them will no longer hinder the vindication of our civil rights.").[5]

This view is confirmed by the 2016 amendments to the City HRL. The three cases cited with approval by the City Council in the 2016 amendments had applied the requirement that the City HRL be interpreted independently to areas of the law *not* addressed by the 2005 Act. For example, the City Council expressly approved the Appellate Division's decision in *Bennett*, which reevaluated the continued viability of the *McDonnell-Douglas* framework, despite the fact that neither the text of the

[5] *See supra* note 2.

2005 Act nor the Council debates had even addressed the framework. *See* New York, N.Y., Local Law No. 35 (2016) (codified at N.Y.C. Admin. Code § 8-130). The legislative history thus demonstrates that the Council did not intend to limit the independent construction requirement to only specific circumstances.

B. The statutory language and legislative history indicate that the City Council did not incorporate the limitations of the federal punitive damages standard.

Significant textual differences between the federal punitive damages statute and the City HRL confirm that the City Council did not intend to incorporate the federal standard. This Court has recognized that such differences may warrant a departure from the federal standard. *See Zakrzewska v. New School*, 14 N.Y.3d 469, 479 (2010) (declining to apply federal defense to vicarious liability to claims under City HRL because of clear differences in wording). As a result, federal law has at best limited relevance to an interpretation of the City HRL.

The federal standard derives from two features of the federal civil rights statutes. First, punitive damages are available under federal law only in lawsuits alleging disparate treatment—that is, intentional discrimination. *See* 42 U.S.C. § 1981a(a) (precluding punitive damages in disparate impact cases). Second, federal law requires individuals alleging discrimination to make a specific demonstration in order to be entitled to punitive damages: that the employer acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1).

In the leading case interpreting the federal standard, the Supreme Court relied on both of these aspects of the federal law, reasoning that Congress had clearly intended to limit punitive damages to only a subset of intentional discrimination claims. *See Kolstad*, 527 U.S. at 535. And it was on the basis of the plain language of the specific standard outlined by Congress—that "[t]he employer must act with 'malice or with reckless indifference *to [the plaintiff's] federally protected rights*'"—that the Court held that the focus of the federal standard was whether the employer knew or consciously disregarded the possibility that it may have

been acting in violation of *federal law*, rather than merely consciously disregarding the risk of causing discrimination-based *harm or injury* to the plaintiff. *Id.* at 535 (quoting 42 U.S.C. § 1981a(b)(1)) (second alteration and emphasis in original). That the employer intentionally discriminated, or engaged in particularly reprehensible conduct, is not enough, if the employer was not also aware that the conduct violated federally protected rights. *See id.* at 536-37 ("[T]he employer may simply be unaware of the relevant federal prohibition.").

The City HRL has neither of these textual features. The statute does not limit punitive damages only to suits alleging intentional discrimination. *See* N.Y.C. Admin. Code §§ 8-107(17) (defining unlawful discriminatory practice based on disparate impact); 8-402(a) (making punitive damages available in pattern-and-practice lawsuits brought by Corporation Counsel); 8-502(a) (providing that any person aggrieved by discriminatory practice may bring a civil action for damages, including punitive damages, and other appropriate relief). And the statute includes no language focusing on whether the defendant knew that it was

violating the law. As a result, the statutory text provides no basis to incorporate these requirements into the City HRL.

In addition to the Council's broad directive that the statute be independently construed in all circumstances, the specific legislative history regarding punitive damages under the City HRL further indicates that the City Council intended punitive damages to be more readily available than the federal standard would allow. Craig Gurian, an advocate who played an important role in pressing the Restoration Act, argued in testimony before the City Council that courts should examine the "current imported federal standard," which he was concerned gave discriminators an incentive to plead ignorance of the law. Testimony of Craig Gurian Regarding Intro 22A, *supra*, at 4. This testimony suggested that the federal standard, at least as it had been applied by the federal courts, was too restrictive to accomplish the City HRL's remedial ends.

POINT II

THE CITY HRL INCORPORATES THE PUNITIVE DAMAGES STANDARD FROM NEW YORK COMMON LAW, LIBERALLY CONSTRUED

Rather than incorporate the federal punitive damages standard into the City HRL, this Court should look to New York law. Under fundamental principles of statutory interpretation, this Court should interpret the City HRL consistent with established background principles on the availability of punitive damages, as liberally construed to achieve the City HRL's objectives.

A. The reference to punitive damages in the City HRL should be read in light of the term's well-settled meaning.

Applying the City Council's direction to liberally construe the City HRL, courts should choose the interpretation that best comports with the broad remedial purposes of the statute "to the extent such a construction is reasonably possible." *Albunio*, 16

N.Y.3d at 477-78. In making this judgment, courts should employ ordinary principles of statutory interpretation.[6]

1. The City Council legislated against the backdrop of the common law's conception of punitive damages.

Established principles of statutory interpretation provide clear guidance on when punitive damages are available under the City HRL. This is because "punitive damages"—just like "compensatory damages" and "injunctive relief"—is a legal term of art that has meaning under New York law. Absent evidence to indicate a contrary legislative intent, courts assume that legislatures intend to give legal terms of art their most obvious, commonly understood meaning. *See Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240, 250 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and

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[6] Indeed, in their testimony urging adoption of the Restoration Act, advocates emphasized that they expected courts to rely on the traditional tools of statutory construction in interpreting the act. *See, e.g.*, Testimony of Craig Gurian of the Anti-Discrimination Center Regarding Intro 22A, *supra*, at 4-5 & n.10 (noting that there is an entire volume of McKinney's *Consolidated Laws of New York* devoted to the principles of statutory interpretation).

adopts the cluster of ideas that were attached to each borrowed word ...."); McKinney's Consol. Laws of N.Y., Book 1, Statutes § 233 ("[W]hen a word having an established meaning at common law is used in a statute, the common law meaning is generally followed ...."); *see also id.* § 301.

This Court has applied this principle in construing the City HRL, stating that it will "presume that the City Council was aware of the common-law rule and abrogated it only to the extent indicated by the clear import of its enactment." *Krohn*, 2 N.Y.3d at 336 (quotation marks omitted). Thus, the Court held that the City Council had enacted the City HRL's punitive damages provision with knowledge of the common law principle that municipalities are immune from punitive damages, and did not clearly indicate an intention to depart from that background principle. *Id.*

The Court has also looked to the common law to interpret provisions of the State HRL that incorporate terms of art with a well-understood meaning. In *Batavia Lodge No. 196 v. New York State Division of Human Rights*, 35 N.Y.2d 143 (1974), the Court addressed the standard of proof for an award of compensatory

damages for "mental anguish" under the statute. In its analysis, the Court noted the ordinary conception of compensatory damages in state law, emphasizing that mental anguish is "a traditional component of fair compensation" and that this form of relief should be available because "there is no exception carved out of the term 'compensatory damages'" in the statute. *Id.* at 146 (quoting *N.Y. State Div. of Human Rights v. Luppino*, 35 A.D.2d 107, 113 (2d Dep't 1970) (Hopkins, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

The Court similarly looked to the common law standard for punitive damages in interpreting whether punitive damages were available under the State HRL. *See Thoreson v. Penthouse Int'l*, 80 N.Y.2d 490, 497 (1992). Although the Court ultimately concluded that, under the plain terms of the State HRL, punitive damages are available only in suits alleging housing discrimination, *see id.* at 497-99 (citing N.Y. Exec. Law § 297(4)(c)), New York courts have applied the common law standard in circumstances when punitive damages are available, *see Stalker v. Stewart Tenants Corp.*, 93 A.D.3d 550, 552 (1st Dep't 2012); *Biondi v. Beekman Hill*

House Apartment, Corp., 257 A.D.2d 76, 81 (1st Dep't 1999), *aff'd*, 94 N.Y.2d 659 (2000).

2. Neither statutory text nor legislative history suggests that the City Council intended to unmoor the statute from this understanding of punitive damages.

The language of the City HRL does not indicate that the City Council intended to untether the statute from common-law principles regarding punitive damages. Most significantly, the law does not include an alternative definition of when punitive damages should be available, which strongly suggests that the City Council intended for the term to carry its ordinary meaning. *See Moran Towing & Transp. Co. v. N.Y. State Tax Comm'n*, 72 N.Y.2d 166, 171 (1988) ("Nothing in the statutory language or legislative history suggests that the Legislature intended to depart from this long-standing and commonly accepted definition.").

Further evidence can be found in the provision regarding vicarious employer liability for punitive damages awarded against an employee. This provision is the only one to address when

punitive damages may be awarded for violation of the City HRL. Under New York law, it has long been the rule that an employer is not liable for the malicious acts of its employees, absent some evidence that a superior officer authorized, ratified, participated in, or deliberately ignored those acts. *Loughry v. Lincoln First Bank*, 67 N.Y.2d 369, 378 (1986). The Council's decision to expressly modify only this particular aspect of the background law strongly suggests that the Council otherwise intended to incorporate basic principles regarding punitive damages.

Moreover, the vicarious-liability provision preserves the background principle that punitive damages are reserved for particularly blameworthy conduct. It gives an employer the opportunity to mitigate punitive damages by showing that it sought in good faith to prevent discrimination and had no, or relatively few, prior incidents of discrimination. *See* N.Y.C. Admin. Code § 8-107(13)(d)-(e). This provision thus, like the common law, links the employer's liability for punitive damages to its own culpability—whether it took concrete, good-faith steps to

prevent misconduct by employees, or instead acted in ways that enabled misconduct to occur.

The City HRL's civil penalties provision also resonates with common-law principles. The statute creates a two-tiered system of civil penalties: the Commission has the discretion to impose up to $125,000 in penalties "to vindicate the public interest," and may award up to an additional $125,000 (for a total of $250,000) where the conduct was "willful, wanton or malicious." N.Y.C. Admin. Code § 8-126(a). These latter mental states are of the kind traditionally associated with punitive damages, and the Council reserved a level of heightened civil penalties to target them.

The City Council's decision to authorize the Commission, in its discretion, to impose up to a capped amount of penalties even absent "willful, wanton or malicious conduct" does not equate to a judgment to authorize civil juries to award uncapped punitive damages in the same circumstances. *See Krohn*, 2 N.Y.3d at 337 (holding availability of civil penalties against the City not dispositive of availability of punitive damages). Juries do not bring to bear the same systemic perspective as the Commission, and

they benefit from guidance about when punitive damages are appropriate.

The provision of the law creating a private right of action states that the aggrieved individual "shall have a cause of action ... for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate." N.Y.C. Admin. Code § 8-502(a). That provision is best understood to mean that punitive damages are an available remedy—not to suggest that established understandings of punitive damages are inapplicable. Indeed, the statute also says that injunctive relief is available, but that hardly means that the traditional equitable standards for injunctive relief do not apply.

Nor does the legislative history suggest that the City Council intended to untether the award of punitive damages under the statute from common-law principles. Indeed, there is nothing in the available history of the 1991 amendments, which made punitive damages available for the first time, indicating that the City Council intended to do so. To the contrary, in announcing the legislation, Mayor Dinkins emphasized that, under the new law,

individuals could be awarded punitive damages "where warranted." NYLS Bill Jacket, New York, N.Y., Local Law No. 39 (1991), Transcript of Hearing Held June 18, 1991, at 6.

The same is true for the 2005 Act. Gurian, who made one of the only statements about the availability of punitive damages at the time, testified that (1) the federal punitive damages standard "should be examined" by the courts because it was too restrictive, and (2) "where a discriminator recklessly disregards the possibility that his conduct may cause harm, he should be subject to punitive damages." Testimony of Craig Gurian Regarding Intro 22A, *supra*, at 4. To the extent these brief statements by a non-legislator are indicative of the intent of the City Council, Gurian's proposed standard is very similar to New York's common law punitive damages standard.

B. New York law should be applied liberally to effectuate the purposes of the City HRL.

The Court should incorporate and liberally construe the common law understanding of punitive damages to effectuate the City HRL's uniquely broad remedial goals. Under New York law,

punitive damages serve two purposes: as a punishment for gross misbehavior for the good of the public and as a deterrent to the offender and a warning to others. *See Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 203-04 (1990); *Sharapata v. Islip*, 56 N.Y.2d 332, 335 (1982) (discussing "important distinctions" between compensatory and punitive damages). They have been referred to as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine," and are warranted where there is conduct "having a high degree of moral culpability." *Home Ins. Co.*, 75 N.Y.2d at 203-04; *see also Sharapata*, 56 N.Y.2d at 335-36.

Punitive damages thus require an offender's mental state to be more than negligent, but they do not necessarily require intent to do harm. *Sharapata*, 56 N.Y.2d at 335-36. Instead, they are available where an actor causes injury to another through "willful or wanton negligence or recklessness," or where the actor manifests a "conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." *Home Ins. Co.*, 75 N.Y.2d at 203-04; *see also Sharapata*, 56 N.Y.2d at 335-36

(punitive damages are available when there is misconduct "which transgresses mere negligence," including when an offender has acted "maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness").[7]

The U.S. Supreme Court reviewed similar common law principles in *Kolstad*, noting that there must be "a 'subjective consciousness' of a risk of injury or illegality and 'a criminal indifference to civil obligations'" to warrant a punitive damages instruction. *Kolstad*, 527 U.S. at 535-36 (quoting *Smith v. Wade*, 461 U.S. 30, 37 n.6, 41 (1983)). Nonetheless, based on the plain language of the federal punitive damages statute, the Supreme Court placed a key gloss on the common law standard, requiring that the offender have known or consciously disregarded the

[7] As this Court has noted, concepts like "malice" have not been consistently defined. *See Mahoney v. Adirondack Pub. Co.*, 71 N.Y.2d 31, 36 n.1 (1987). And some concepts—like "gross negligence" and "recklessness"—overlap. *See Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992) (defining "gross negligence" as "conduct that evinces a reckless indifference to the rights of others"); *see also Saarinen v. Kerr*, 84 N.Y.2d 494, 501 (1994). But a broad, liberal reading of New York law on punitive damages standards incorporates all formulations of these terms.

possibility that it may have been acting in violation of federal law. *Id.* at 538.

But as noted, testimony to the City Council before the enactment of the Restoration Act asserted that the federal courts had construed the punitive damages standard too narrowly, creating the possibility that a defendant could avoid punitive damages by claiming ignorance of the requirements of the law. The City HRL cannot and should not be read to adopt the same heightened requirement—that a discriminator must have known that he or she was violating the law—and it reaches any culpable discriminatory conduct based on the victim's protected status that causes injury or harm. *See Home Ins. Co.*, 75 N.Y.2d at 203-04; *Sharapata*, 56 N.Y.2d at 335-36.[8] Thus, a defendant's professed

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[8] As defendants note (Resp. Br. at 13-14), some federal courts have concluded that the New York standard is "virtually identical" to the federal standard. *Farias v. Instructional Sys.*, 259 F.3d 91, 101-02 (2d Cir. 2001) (quoting *Greenbaum v. Handelsbanken*, 67 F. Supp. 2d 228, 262 (S.D.N.Y. 1999)); *Grella*, 2016 U.S. Dist. LEXIS 19248, at *18-20 (citing *Farias*). The reasoning of those courts is flawed. Although there may be some overlap between the two standards because both derive in some way from the common law, the standards are different. Most pointedly, the New York standard does not forgive ignorance of the law or focus on federal rights, as does the federal standard, and the New York standard also allows damages where a discriminator causes injury willfully or wantonly, recklessly, or through gross

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ignorance of what the law requires should be deemed no defense to punitive damages under the City HRL.

Applying this formulation liberally to claims under the City HRL shows that the standard for punitive damages is broader than the federal standard. Punitive damages should be available when they would be under the federal standard—when the defendant knowingly or recklessly disregarded of the possibility of violating protected rights—and also when the defendant willfully, wantonly, or recklessly caused injury based on a protected characteristic, regardless of whether there is evidence that the actor was consciously disregarding obligations under the City HRL. *See Home Ins. Co.*, 75 N.Y.2d at 203-04; *Sharapata*, 56 N.Y.2d at 335-36. Such conduct would include reprehensible

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negligence. *Home Ins. Co.*, 75 N.Y.2d at 203-04; *see also Sharapata*, 56 N.Y.2d at 335-36.

To be sure, there are varying statements on the availability of punitive damages in New York case law, some of which are more restrictive than others. *Compare Prozeralik v. Capital Cities Communs.*, 82 N.Y.2d 466, 479-80 (1993) (requiring more than actual malice in the defamation context), *with Nardelli v. Stamberg*, 44 N.Y.2d 500, 503-04 (1978) (finding actual malice sufficient in the malicious prosecution context). But the City HRL requires the selection of the most liberal available standard from among the various formulations of the common-law standard.

conduct motivated by the plaintiff's protected class even where the evidence does not clearly establish that the defendant was aware that the conduct violated the City HRL. This broader formulation of New York law comports with the purposes and requirements of the statute, while maintaining the vitality of the public policies underlying punitive damages to punish and deter highly culpable conduct.

This liberal construction is consistent with the Court's approach to construing other civil rights statutes. As noted, in *Batavia Lodge* the Court considered the standard of proof for an award of compensatory damages for mental anguish under the State HRL. *See* 35 N.Y.2d at 143. Although rejecting the Appellate Division's requirement that a discrimination victim make the same evidentiary showing as a tort plaintiff, the Court also rejected the suggestion that "what would amount to punitive damages" could be awarded automatically upon proof of unlawful discrimination—an outcome that would have been alien to ordinary legal understandings. *Id.* at 146. Rather, because the State HRL expressed an "extremely strong" policy of eliminating

discrimination, the Court gave the statutory provision authorizing compensatory damages a liberal construction consistent with the settled meaning of that remedy, under which the "quantum and quality" of evidence required to prove those damages would be less than under the common law. *See id.* at 145-47.

The City HRL makes clear that discrimination will not be tolerated in the City of New York, and that the law should be construed liberally to accomplish its purposes, both in its interpretation and in its application. As a result, with the understanding that the City HRL sweeps very broadly, punitive damages should be available more frequently than they are in the negligence context, and the very same evidence that establishes liability in a given case may well warrant punitive damages. For example, if a jury finds that an employee has been fired because of his or her race, it will be quite difficult for a defendant acting in the year 2017 to claim that there is no basis to conclude that it was acting with at least reckless disregard or gross negligence toward the employee's rights or toward the possibility that it was causing harm based on a protected characteristic.

The common law punitive damages standard aligns with the established purposes of punitive damages. Before adopting the 2005 Act, the City Council emphasized that as a guiding principle in the construction of the City HRL, courts should apply "traditional methods and principles of law enforcement." *See* Report of the Governmental Affairs Division, Committee on General Welfare, at 5 (Aug. 17, 2005).[9] Punitive damages have traditionally been available to single out reprehensible conduct for condemnation and deterrence. Courts construing the City HRL should apply that traditional understanding liberally, to the extent reasonably possible, in light of the broad purposes of the City HRL and the danger that discrimination poses to the well-being of the City.

[9] *See supra* note 2.

CONCLUSION

This Court should answer the certified question as follows: under the City HRL, punitive damages are available in accordance with the broadest articulation of the standard found in New York common law, including where a discriminator has acted maliciously, exhibited a conscious or reckless disregard or gross negligence toward the rights of others, or caused injury or harm to another willfully, wantonly, or recklessly based on that person's protected status.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 6,741 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

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