21-267

United States Court of Appeals
for the Second Circuit

CLARA LEROY,

Plaintiff-Appellant,

v.

DELTA AIR LINES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK (Brooklyn)

BRIEF OF *AMICI CURIAE* ANTI-DISCRIMINATION CENTER AND NELA/NY IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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STATEMENT OF INTERESTS OF *AMICI*

Central to the mission of the Anti-Discrimination Center, Inc., a not-for-profit corporation dedicated to the preservation and expansion of civil rights, is education of the public and the bar about the uniquely broad protections for victims of discrimination provided by the New York City Human Rights Law ("City HRL").

NELA/NY is the approximately 300-member New York chapter of The National Employment Lawyers Association (NELA), the nation's only professional bar organization comprised exclusively of lawyers who represent individual employees. Through is various activities, including amicus work, NELA/NY promotes effective legal protections for employees and offers a perspective on the impact of laws and regulations on working people and the workplace relationship.[1]

INTRODUCTION

The opinion issued by the Panel majority in *Leroy v. Delta Air Lines, Inc.*, 36 F.4th 469 (2d Cir. 2022) ("Majority Opinion") is profoundly disruptive to the settled understanding of the City HRL, ignoring statutory language as well as judicial interpretations that have been ratified by the City Council. The Majority Opinion is premised on erroneous and narrow understandings of: (a) what can constitute harassment for City HRL purposes; and (b) the contexts of discrimination covered

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the *amici curiae*, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

by the City HRL's retaliation provision. So, even before examining the Majority Opinion's interpretation of what constitutes a "reasonable belief" that one is opposing discrimination, it is clear that allowing the Majority Opinion to stand would generate inconsistent development of the City HRL. Some judges will follow prior state and Circuit precedent, City HRL language, and City HRL history; others will deviate from that path to follow the Majority Opinion's erroneous rulings on harassment and retaliation.

The foregoing is ample warrant for *en banc* review. But such review is also called for because the Majority Opinion substantially limited the scope of what can be considered a "reasonable belief" that one is opposing discrimination under the City HRL, declaring plaintiff's opposition to a passenger's explicitly race-based conduct categorically outside the bounds of what reasonably could be opposition to discrimination. Notably, the Majority Opinion provided no workable rule by which a plaintiff's assessment that discrimination was unlawful could be incorrect but nevertheless be treated as good-faith opposition to discrimination within the meaning of the City HRL. The ruling predictably will inhibit some people from trying to vindicate their civil rights and make that vindication unduly difficult for those who still make the attempt.

The Majority Opinion's failure to engage in the liberal construction analysis required by the Restoration Act in 2005 and underlined anew by Local Law 35 of

2016 underlay these problems and is another reason for *en banc* review.[2] It provided no analysis of "reasonable belief" in relation to factors deemed important by the City Council: factors like maximizing deterrence; minimizing evasion; providing the broadest possible protections against discrimination; seeking to enforce a regime where discrimination "plays no role" in decisions related to employment, housing, and public accommodations; and, critically, insisting that judges restrain the impulse to impose summary judgment rather than allow for factual development and a hearing by a jury (here, of course, the case was not even allowed to proceed past the pleadings).

The City HRL does not require that laypeople understand the precise contours of its text or carry around a nuanced, ever-updating hornbook on applicable legal doctrines. On the contrary, the last thing the City Council would have wanted was for people who suspected discrimination to forego complaining about it because of the risk their "legal analysis" would be incorrect, exposing them to negative action from which there was no protection. *Cf. Leroy*, 36 F.4th at 483 (Bianco, J., dissenting) (explaining a similar conundrum).

[2] The full text of Local Law 35 of 2016 is set out as pages 17-18 of the *Amici* Appendix submitted herewith.

ARGUMENT

POINT I

THE SCOPE OF ACTIONABLE HARASSMENT IS FAR MORE EXPANSIVE UNDER THE CITY HRL THAN THE MAJORITY OPINION HELD.

According to the Majority Opinion, the question raised by an allegation of harassment is whether a "hostile work environment" was created by the conduct alleged. The answer here, it says, must be "no" because the comment complained of did not "rise to the level of the sort of 'extraordinarily severe' and 'most egregious' conduct" that a single incident requires. *Delta*, 36 F.4th at 476 (citation and footnote omitted). The Majority Opinion is wrong.

Williams v. New York City Housing Authority, 61 A.D.3d 62 (N.Y. 1st Dept. 2009), is the seminal City HRL case on harassment and liberal construction. Rejecting the Title VII approach, it viewed harassment as simply type of terms-and-conditions discrimination, not a separately proscribed category of misconduct that requires a distinct "hostile work environment" analysis. *Williams* explains that "severity" and "pervasiveness" go only to questions of damages, not liability. It affirmatively explains that a single comment – not necessarily one that bears any indicia of being "extraordinarily severe" or "most egregious" – could be actionable. *Id.* at 75, 76-78, 80, n.30.

This Court accepted the *Williams* doctrine in *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 110-11 (2d Cir. 2013). Subsequently,

Local Law 35 of 2016 specifically ratified the liberal construction analysis and holdings of three cases, including *Williams*. *See* NYC Admin. Code § 8-130(c).

In other words, the Majority Opinion disregarded Circuit precedent, state precedent, and action by the City Council confirming *Williams*. Under these precedents, plaintiff was reasonable in believing that the type of "single incident" conduct she complained of is prohibited conduct for City HRL purposes.[3]

[3] Subsequent to the pleading stage, the development of the record could sometimes throw doubt on the reasonableness of a plaintiff's belief, but that is a matter of particularized facts, not treatment of single-incident cases as categorically excluded.

POINT II

THE CONTEXTS OF ACTIONABLE RETALIATION ARE FAR MORE EXPANSIVE UNDER THE CITY HRL THAN THE MAJORITY OPINION HELD.

According to the Majority Opinion, "the passenger's comment was not an employment practice, so it falls outside the scope of the NYCHRL." *Leroy*, 36 F.4th at 477. Incorrect: the City HRL's anti-retaliation provision expressly covers "any person engaged in *any* activity to which this chapter applies," and specifically references employment, housing, and public accommodations. NYC Admin. Code § 8-107(7) (emphasis added). Defendant cannot deny that it is a place and provider of public accommodation. *See* NYC Admin. Code § 8-102. Thus, the reasonableness of plaintiff's belief could have been grounded in public accommodations coverage, in addition to (or instead of) employment-context coverage, a critical consideration that the Majority Opinion failed to examine. *See also* Admin. Code § 8-107(19), another City HRL provision not examined by the Majority Opinion (making it illegal for any person to interfere or attempt to interfere any other person "in the exercise or enjoyment of … any right granted or protected pursuant to" the City HRL).

Was it reasonable for plaintiff to have considered the passenger calling her a "Black bitch" interference with a "right granted or protected" pursuant to NYC Admin. Code § 8-107 or a violation of the substantive prohibitions against discrimination in public accommodations, NYC Admin. Code § 8-107(4)? Yes, especially in light of the Committee Report that accompanied Local Law 35 of 2016.

That Report stated that the Comprehensive 1991 Amendments and the 2005 Restoration Act demonstrated the City HRL's "very specific vision" of a Human Rights Law "designed as a law enforcement tool *with no tolerance for discrimination in public life*." *See* Excerpt of March 8, 2016 Committee Report ("2016 Committee Report"), *Amici* Appendix, 1-16, at 8 (emphasis added). What else is the race-based comment of the passenger if not the continuation of discrimination in public life.[4]

Since plaintiff opposed underlying discriminatory conduct by the passenger, the Majority Opinion needed to turn its focus to two elements of the pilot's conduct, each of which is arguably retaliatory. The first is the pilot's directing plaintiff to have a discussion with the passenger on the jet bridge; the second is the pilot's command that plaintiff be removed from the aircraft. Each must be assessed for whether either or both were responses "reasonably likely to deter a person from engaging in protected activity," NYC Admin. Code 8-107(7).

That assessment must be 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." *Williams*, 61 A.D.3d at 71 (citations omitted).

[4] Here, the Panel was not even obliged to evaluate a comment that was subtle or ambiguous, spoken to a third party, or separated in time from negative consequences to plaintiff. The comment was racially explicit, directed specifically at plaintiff, and was, according to the complaint, reported instantaneously. This was not, in other words, an "edge" case but rather one where the precipitating event was at the heart of what would commonly be called "discriminatory."

The Majority Opinion failed to perform this context-sensitive analysis itself; it also ignored the importance of allowing a factual record to be developed that can ultimately be evaluated by a jury. It thus failed to meet the requirements of *Williams*, as ratified by NYC Admin. Code § 8-130(c).

POINT III

THE MAJORITY OPINION FAILED TO APPRECIATE THE POSSIBILITY THAT THE PILOT'S CONDUCT COULD HAVE BEEN SEEN BOTH AS DISCRIMINATORY AND AS RETALIATORY, AND ALSO FAILED TO APPLY CORRECTLY CITY HRL PRINCIPLES OF VICARIOUS LIABILITY.

The Majority Opinion implies defendant effectively had no choice to do anything beyond what it did and thus cannot be deemed to be responsible (vicariously liable) for the passenger's conduct. *Leroy*, 36 F.4th at 475-76. But not only are passengers removed from aircrafts in some circumstances,[5] the far milder step of warning a passenger not to continue engaging in objectionable behavior can also be used. Neither step was taken here. (Likewise, the pilot could have refrained from normalizing the passenger's racist comment by not choosing to direct plaintiff to meet with the passenger on the jet-bridge.) Of course, one could imagine reasons why defendant would object to either type of remedial action or, less plausibly, that it might have some explanation for wanting to have a passenger and a flight attendant engage in an off-airplane "dialog." But making factual determinations as to these matters would have required the development of a factual record – precisely what the Majority Opinion precluded.

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[5] *See e.g.,* Alexandra Deabler, *Southwest Airlines Passenger Removed for Calling Flight Attendant the N-word, Delaying Plane*, FOX NEWS, Oct. 1, 2018, *available at* https://fxn.ws/3amRn0R (last accessed July 12, 2022).

Separate from vicarious liability for passenger conduct, *amici* submit that "control" of the passenger has nothing to do with the question of whether defendant, through its pilot, retaliated against plaintiff for having opposed what she saw as discriminatory conduct by the passenger. NYC Admin. Code § 8-107(7) does not limit its coverage to "opposition" to the underlying conduct *of the retaliator*. The broad prohibition against retaliation is for opposing *any* practice forbidden or for filing a complaint about *any* action. *Id.* Further judge-made limitations are impermissible. *Cf.* NYC Admin. Code § 8-130(b) (even where an exception to or exemption from a provision exists, such exceptions and exemptions "shall be construed narrowly in order to maximize deterrence of discriminatory conduct").

Additionally, plaintiff raised, albeit not fulsomely, the question of disparate treatment *by defendant*. She complained that a passenger's *race-based conduct:* (a) did not result in the pilot (or other senior staff member of defendant) warning or otherwise confronting the passenger; and (b) did result in her being directed to have a conversation with the passenger outside of the aircraft. This puts front and center the question of whether the pilot (or the defendant more generally) treats *non-race-based conduct of passengers* with more seriousness. But a factual record has never been permitted to be developed.

Separate from and in addition to vicarious liability for the *passenger's* conduct, Defendant is strictly liable for discriminatory conduct of an employee like

its pilot who exercises managerial or supervisory responsibilities. NYC Admin. Code § 8-107(13)(b).

If the "speak to the passenger" direction was also or alternatively an act of retaliation for plaintiff's having opposed the passenger's conduct, then defendant is strictly liable pursuant to NYC Admin. Code § 8-107(13)(a) (retaliation, NYC Admin. Code § 8-107(7), is not a provision carved out of the purview of Section 8-107(13)(a)). Likewise, to the extent that the pilot's having removed plaintiff from the airplane was retaliation, defendant is again strictly liable pursuant to Section 8-107(13)(a).

POINT IV

THE MAJORITY OPINION FAILED TO ENGAGE IN THE REQUIRED LIBERAL CONSTRUCTION ANALYSIS OF WHAT CONSTITUTES "REASONABLE BELIEF."

Even assuming, *arguendo*, that Plaintiff *was* mistaken in her view that she was opposing conduct proscribed by the City HRL, a very different type of analysis is required under the City HRL from that of the Majority Opinion.

A. Failure to analyze.

The Majority Opinion nominally recognizes that the assessment of whether even an incorrect belief that one was opposing an unlawful discriminatory practice was reasonable is supposed to be a "forgiving" standard, *Leroy*, 36 F.4th at 477; *see also* NYC Admin. Code § 8-130(a) (the City HRL must "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 . . . have been so construed"). But the standard actually applied by the Majority Opinion was not consistent with those requirements, an error that itself requires rehearing. *See Williams,* 61 A.D.3d at 67-68 (the Restoration Act notified courts, *inter alia*, that "all provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes," and that "cases that had failed to respect these differences were being legislatively overruled").

The City Council has given considerable thought to when and how liberal construction analysis should proceed. Seeing that the commands of the Restoration

Act were not being followed universally, it enacted Local Law 35 of 2016. The law ratified the holdings and interpretative approach of the majority opinion in *Williams*, 61 A.D.3d 62; and the opinions in *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29 (N.Y. 1st Dept. 2011); and *Albunio v. City of New York*, 16 N.Y.3d 472 (N.Y. 2011). *See* Admin. Code § 8-130(c).

The Council was very clear that highlighting those particular cases would, *inter alia*, "reaffirm that court must apply the liberal construction provisions *in every case and with respect to every issue*," and "illustrate best practices when engaging in the required analysis." 2016 Committee Report, *Amici* Appendix at 8-9 (emphasis added). The Committee Report went on to state that:

> These cases do not just establish specific ways in which the HRL differs from its federal and state counterparts; *they also illustrate a correct approach to liberal construction analysis and then develop legal doctrine accordingly*. It is therefore important for courts to examine the reasoning of the cases . . . and then *for courts to employ that kind of reasoning when tackling other interpretative problems that arise under the HRL*. Finally, Int. No. 814-A [which came to be denominated as Local Law 35] would remind courts that legal doctrine might need to be revised to comport with the requirements of § 8-130 of the Administrative Code.

Id. at 13 (emphases added). *Amici* respectfully request that, in light of the apparent failure of the Majority Opinion to engage in this process, rehearing is warranted.[6]

[6] In the course of such rehearing, it will be important to bear in mind that the "point of the entire exercise is to find the construction that best accomplishes law's purposes." Craig Gurian, A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law, 33 FORDHAM URB. L.J. 255, 279 (2006). For a discussion of intended interpretive "dos and don'ts," *see id.* at 277-79.

B. The appropriate guideline.

"Reasonable belief" must encompass at least those circumstances where the conduct complained of: (a) occurred in a context of public life regulated by the City HRL; and (b) consisted of behavior akin to that regulated by the City HRL (the "reasonable layperson standard"). This guideline is consistent with the key elements of "the correct approach to liberal construction analysis" exemplified by *Albunio, Williams,* and *Bennett.*

Albunio commands that the retaliation provision, like other provisions of the City HRL be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio*, 16 N.Y.3d at 477-78. Our proposed test falls well with *Albunio's* bounds: rather than "transforming every complaint" into activity protected by the City HRL, it requires clear linkages to the zones of interest protected by the City *HRL that a layperson can reasonably understand*. The passenger comment in this case, for example, was not merely a random, frustrated passenger comment, it was explicitly *race-based.* And it occurred in the course of employment *and* while plaintiff was present in a public accommodation – contexts of public life that are regulated by the City HRL. The Majority Opinion, by contrast, effectively requires a layperson concerned about the ramifications of opposing discrimination to consider questions of "high level of control" and precisely what types of "persons" are proscribed from what conduct in what contexts of discrimination before proceeding. Some will undoubtedly decide

that it is better not to speak up at all. Creating an environment of inhibition cannot possibly be the broadest pro-plaintiff interpretation reasonably possible, and thus runs afoul of *Albunio.*

Williams engages in a more detailed liberal construction analysis, and each of the factors it finds relevant align the reasonable layperson standard and against the Majority Opinion. *Williams* rejected the "severe or pervasive" doctrine because the doctrine: (a) allowed to wide a swath of misconduct to go unpunished, thereby undermining the law's goal to have zero tolerance for harassment (that discrimination "play no role"); (b) worked at cross purposes with the City HRL's goal of maximizing deterrence; and (c) devalued some harassment injuries, contrary to the Restoration Act principle that "discrimination injuries are per se 'serious injuries.'" *Williams*, 61 A.D.3d at 76-77 (citation and footnote omitted).

Here, deterrence can only be maximized, all the conduct sought to be proscribed can only be brought to light, and the goal of having discrimination "play no role" in decisions related to employment, housing, and public accommodations, NYC Admin. Code § 8-101, if those who see or who are victimized by discrimination *are not inhibited from coming forward.* The Majority Opinion effectively puts at risk for "non-actionable retaliation" at least some significant portion of those laypeople whose have not correctly interpreted the ins-and-outs of the City HRL. By contrast, the reasonable layperson standard would only exclude from anti-retaliation protection those circumstances where, even in colloquial terms,

the conduct is not "discrimination" that is "based upon" a person's "protected-class status" or is conduct that did not occur in a context regulated by the City HRL. It is only these clearly "off-topic" expressions of opposition that the City HRL has no interest in protecting.

The reasonable layperson standard is consistent with the Restoration Act's intention that unfettered access to the anti-retaliation provision be retained, *inter alia*, because of the importance of the public interest is not having anyone deterred from filing a charge. *See Williams*, 61 A.D.3d at 70 (citation omitted). It is also consistent with the understanding of the Council's desire to have the City HRL "meld the broadest vision of social justice with the strongest law enforcement deterrent." *Id.* at 68 (citation omitted). Under the reasonable layperson rubric, it is unmistakably clear that covered entities have a greater incentive to try to steer clear of retaliatory conduct; under the Majority Opinion's rubric, covered entities are incentivized to engage in collateral litigation over the precision of a plaintiff's understanding of the law. It is the reasonable layperson rubric that captures the desired "broadest vision of social justice with the strongest law enforcement deterrent."

Bennett's interpretative framework is relevant here, too. A central purpose of the Restoration Act, it holds, was to "resist efforts to ratchet down or devalue the means by those intended to be protected by the City HRL could be *most strongly* protected." *Bennett*, 92 A.D.3d at 44 (emphasis added). The Majority Opinion's

system requiring specialized legal knowledge of the provisions of the City HRL does indeed functionally ratchet down anti-retaliation protections, deterring not retaliation but the layperson thinking of complaining about a discriminatory act.[7]

Bennett applied its warning to the context of when summary judgment should be awarded. It rejected the promiscuous award of a summary disposition: the "strongest possible safeguards" are needed to assure an "alleged victim of discrimination of a full and fair hearing before a jury of her peers. . . ." *Bennett*, 92 A.D.2d at 44. That admonition is applicable here. If the case were allowed to move forward,[8] defendant would retain the ability to do what its papers made clear it wants to do: challenge the good-faith nature of plaintiff's belief, show that the events transpired in a way different from the way that plaintiff describes in her complaint, and show that it (defendant) did not take opposition to discrimination or perceived discrimination into account when responding to plaintiff, either during the incident or thereafter.[9] It is worth underlining that a defendant that does not act, in whole or

[7] There is no reason the to assume any layperson would be familiar with the specific and complex prohibitions of the NYC HRL.

[8] Note that *Bennett* thought (and the Council ratified its view) that there must be the "strongest possible safeguards" to prevent an alleged victim of discrimination from being deprived of "a full and fair hearing before a jury of her peers" through the improvident grant of a summary disposition. *Id.; see also* NYC Admin. Code § 8-130(c).

[9] It is certainly possible defendant might seek to show, for example, that the pilot's decision to remove plaintiff from the aircraft was consistent with longstanding rules

in part, *because of* opposition to discrimination or perceived discrimination will be able to defend itself on the merits successfully.

Any complaint about burdensomeness has already been addressed by *Williams* in its prelude to describing the City HRL's vision: "In case after case, the balance struck by the [1991] Amendments favored victims and the interest of enforcement over the claimed needs of covered entities in ways materially different from those incorporated into federal and state law." *Williams*, 61 A.D.3d at 68.

* * *

To protect those who "reasonably" believe they are opposing discrimination, and to honor the acknowledged requirement that the evaluation proceed "from the perspective of a reasonable similarly situated person," *Leroy*, 36 F.4th at 477 (citation omitted), a framework needs to be workable for laypeople. The Majority Opinion did not create such a framework, in derogation of the liberal construction requirement of the City HRL as well as its express provisions.

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and practice. This, though, requires evidence, and the case has not been permitted to reach that stage.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to grant the petition for rehearing *en banc*.

Dated: July 12, 2022
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief, prepared in proportionally spaced, 14-point Times New Roman font, contains 3,893 words, excluding the parts of the brief exempted by FRAP 32(f), according to the word-count feature of Microsoft Word. As such, the brief, pursuant to FRAP 29(b), would be over-length unless *amici's* motion for permission to file an over-length brief is granted. [Local Rule 29.1(c) does not apply because *amici* are not proceeding pursuant to FRAP 29(a).]

Dated: New York, New York
July 12, 2022

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Brief of *Amici Curiae* Anti-Discrimination Center and NELA/NY in Support of Plaintiff-Appellant's Petition for Rehearing *En Banc* was made on July 12, 2022, via the Court's Electronic Case Filing system, with which counsel for the parties are registered.

Dated: New York, New York
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