

# UNLOCKING THE POWER AND POSSIBILITY OF LOCAL ENFORCEMENT OF HUMAN AND CIVIL RIGHTS: LESSONS LEARNED FROM THE NYC COMMISSION ON HUMAN RIGHTS

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## ABSTRACT

If you ask most people in the United States where to go to file a complaint of discrimination or receive assistance from the government in addressing discrimination, chances are that they will not likely be able to tell you. For those who do have some familiarity, they may point to the United States Equal Employment Opportunity Commission (“EEOC”), the federal agency that handles workplace discrimination claims under Title VII of the Civil Rights Act of 1964. A smaller number may be familiar with their state human rights agencies or equivalent. Even fewer will have knowledge about local or city counterparts to the extent that these agencies even exist in their respective jurisdictions. While the federal government has certainly played a powerful and dominant role in furthering civil rights in the United States, the last several years have seen a rolling back of civil rights protections, through federal administrative rulemaking, Supreme Court jurisprudence, and executive orders and other mechanisms. Under the administration of President Donald J. Trump, the federal government has also flagrantly espoused rhetoric and policies that have led to an increase in bias incidents and violence across the country, inspired by a resurgent white supremacist movement.

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When human rights and civil rights protections are deprioritized, underenforced, and undermined through federal action, local governments can be powerful incubators of new and innovative ideas for how government can protect its residents and also serve as a bulwark against the actions of the federal government. This article proposes that local and state human rights agencies can and should prominently step forward to push the limits of their mandates, including: adopting a holistic and highly visible approach to combat discrimination in their jurisdictions; building relationships with advocates; steering the national conversation on civil rights; and continuing to create powerful legal precedents to protect society's most vulnerable.

This article will focus on the strategies employed by the New York City Commission on Human Rights (the "Commission") from 2015 to 2020 under the leadership of Commissioner and Chair Carmelyn P. Malalis, who helped revive a moribund agency and turn it into a national leader. The Commission's progress during this timeframe has demonstrated that even with limited resources, a local human rights commission can play a prominent role in the civil rights movement.

## TABLE OF CONTENTS

Introduction .....	585
I. Background and Organizational Structure .....	587
II. Brief History of the Commission .....	592
A. The Commission’s Structure and Values .....	594
B. The New York City Human Rights Law (“NYCHRL”) .....	598
C. The Community Relations Bureau .....	600
D. Law Enforcement Bureau and Adjudications.....	602
E. Improving the LEB Investigatory Process: From Intake to Determination.....	606
F. Adjudications.....	611
G. Restorative Justice Solutions.....	613
H. Communications and Marketing .....	615
III. Combating Discrimination through Legislative Changes, Policy- Making, Enforcement, and Education .....	617
A. Amendments.....	618
B. Guidance .....	621
C. Rules .....	621
D. Hearings and Reports.....	623
E. The Fair Chance Act .....	623
F. Gender Identity and Gender Expression .....	630
G. Combating Sexual Harassment .....	634
1. Recommendations Raised in Hearing Testimony and Takeaways .....	638
2. The Commission’s Hearing Report.....	639
H. Pregnancy and Caregiving Discrimination.....	642
1. Recommendations Raised in Hearing Testimony and Takeaways .....	647
I. Anti-Black Racism.....	648
J. National Origin, Immigration Status, and Religion .....	655
K. Disability .....	663
Conclusion.....	666

## INTRODUCTION

If you ask most people in the United States where to go to file a complaint of discrimination or receive assistance from the government in addressing discrimination, chances are that they will not likely be able to tell you. For those who do have some familiarity, they may point to the United States Equal Employment Opportunity Commission (“EEOC”), the federal agency that handles workplace discrimination claims under Title VII of the Civil Rights Act of 1964. A smaller number may be familiar with their state human rights agencies or equivalent. Even fewer will have knowledge about local or city counterparts to the extent that these agencies even exist in their respective jurisdictions. While the federal government has certainly played a powerful and dominant role in furthering civil rights in the United States, the last several years have seen a rolling back of civil rights protections, through federal administrative rulemaking, Supreme Court jurisprudence, and executive orders and other mechanisms. Under the administration of President Donald J. Trump, the federal government has also flagrantly espoused rhetoric and policies that have led to an increase in bias incidents and violence across the country, inspired by a resurgent white supremacist movement.

When human rights and civil rights protections are deprioritized, underenforced, and undermined through federal action, local governments can be powerful incubators of new and innovative ideas for how government can protect its residents and also serve as a bulwark against the actions of the federal government.<sup>1</sup> This article proposes that local and state human rights agencies can and should prominently step forward to push the limits of their mandates, including: adopting a holistic and highly visible approach to combat discrimination in their jurisdictions; building relationships with advocates; steering the national conversation on civil rights; and continuing to create powerful legal precedents to protect society’s most vulnerable.

Municipal and state human rights commissions (or their equivalents) are local agencies that perform a number of functions:

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1. See Dominic Holden, *New York City Has a New Campaign to Fight Discrimination in the Trump Era*, BUZZFEED NEWS (May 23, 2017), <https://www.buzzfeednews.com/article/dominicholden/new-york-city-has-a-new-campaign-to-fight-discrimination-in> [https://perma.cc/SP62-QN8V].

some may be empowered to enforce a state or city anti-discrimination law, some may investigate and resolve discrimination complaints in employment, places of public accommodation, and housing, and some may address institutional and systemic discrimination with a civil rights and human rights lens.<sup>2</sup> These agencies are predominantly funded by state or local governments, and may also be mandated with engaging in community outreach, policy-making, and education efforts to fight discrimination. There are dozens of human rights agencies in the United States that are mandated by state or municipal governments to carry out these functions.<sup>3</sup>

This article will focus on the strategies employed by the New York City Commission on Human Rights (the “Commission”) from 2015 to 2020 under the leadership of Commissioner and Chair Carmelyn P. Malalis, who helped revive a moribund agency and turn it into a national leader. The Commission’s progress during this timeframe has demonstrated that even with limited resources, a local human rights commission can play a prominent role in the civil rights movement. Some of the Commission’s most effective strategies include reviving the Commission’s function to initiate its own investigations and prosecutions to tackle systemic pattern and practice discrimination, bolstering one of the strongest anti-discrimination laws in the country through innovative and bold policy positions, exploring restorative justice remedies and early dispute resolution processes, creating procedural tools to address harm to the public and alleviate uncertainty and fears about interacting with government, developing strong relationships with community partners, timely responding to issues of public concern, and utilizing effective communications and marketing strategies to inform and educate the public on their rights and obligations.

Part I describes the Commission’s background and organizational structure, including the condition of the agency at the

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2. COLUMBIA LAW SCH. HUMAN RIGHTS INST. & INT’L ASSOC. OF OFFICIAL HUMAN RIGHTS AGENCIES, STATE AND LOCAL HUMAN RIGHTS AGENCIES: RECOMMENDATIONS FOR ADVANCING OPPORTUNITY AND EQUALITY THROUGH AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK 14, [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/45408\\_HRI-Text%20\[online\]%20-%202nd%20printing%20\(updated%2010.1.09\).pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/45408_HRI-Text%20[online]%20-%202nd%20printing%20(updated%2010.1.09).pdf) [<https://perma.cc/3U66-FP7Z>].

3. KENNETH L. SAUNDERS & HYO EUN (APRIL) BANG, A HISTORICAL PERSPECTIVE ON U.S. HUMAN RIGHTS COMMISSIONS (Marea L. Beeman ed., 2007), [http://www.hrccj.org/pdfs/history\\_of\\_hrc.pdf](http://www.hrccj.org/pdfs/history_of_hrc.pdf) [<https://perma.cc/WDU7-QR34>].

time Commissioner Malalis took over, a brief history of the Commission, the Commissioner's priorities and how that played a role in re-structuring the different departments of the Commission to increase the agency's impact, the power of the City's previously under-enforced anti-discrimination law, and the various ways the different programmatic areas of the Commission work hand-in-hand to improve its policy-making, enforcement, community outreach, and communications work. Part II discusses the Commission's holistic and value-driven approach in bolstering protections in a number of different thematic areas, including the introduction and implementation of legislation, the publication of legal enforcement guidance and rules, and the use of public hearings and reports. Part III outlines the Commission's work in specific areas of anti-discrimination protection, including criminal history, gender identity and gender expression, sexual harassment, pregnancy and caregiving, anti-Black racism, national origin, immigration status, religion, and disability.

#### I. BACKGROUND AND ORGANIZATIONAL STRUCTURE

Commissioner and Chair Carmelyn P. Malalis was appointed by Mayor Bill de Blasio to lead the New York City Commission on Human Rights in November 2014 and took the helm in February 2015.<sup>4</sup> The appointment followed public outcry for more robust enforcement of the New York City Human Rights Law ("NYCHRL") by the Commission<sup>5</sup> and signified a major directional shift for the agency.<sup>6</sup> Commissioner Malalis, a nationally-recognized employment lawyer with over a decade of experience representing workers in

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4. *Commissioner/Chair*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/about/commissioner-chair.page> [<https://perma.cc/ZS4W-QD34>].

5. Kristen Meriwether, *City Officials Sharpening Teeth of Human Rights Commission*, GOTHAM GAZETTE (Mar. 2, 2015), <https://www.gothamgazette.com/government/5608-city-officials-sharpening-teeth-of-human-rights-commission-law-mark-viverito> [<https://perma.cc/V44D-M772>]; Ross Barkan, *James to de Blasio: Fire the Human Rights Commissioner*, OBSERVER (Nov. 6, 2014), <https://observer.com/2014/11/james-to-de-blasio-fire-the-human-rights-commissioner/> [<https://perma.cc/HSU9-4LRJ>].

6. Rachel L. Swarns, *New Commissioner Vows to Revitalize Agency that Fights Discrimination in New York*, N.Y. TIMES (Mar. 8, 2015), <https://www.nytimes.com/2015/03/09/nyregion/a-new-commissioner-joins-the-fight-against-discrimination-in-new-york.html> (on file with the *Columbia Human Rights Law Review*).

discrimination cases, was explicitly tasked with rebuilding an agency that had been under-resourced and languishing for many years.<sup>7</sup> As one of Mayor de Blasio's last commissioner-level appointments in his first term, Commissioner Malalis was tasked with rebuilding—or creating—all aspects of the agency, including law enforcement, community outreach and education, communications, and operations on an expedited timeline.<sup>8</sup> Commissioner Malalis was determined to establish the Commission as the national leader in civil rights and human rights enforcement and to build a credible venue of justice for New Yorkers to vindicate their rights under the NYCHRL.<sup>9</sup>

When Commissioner Malalis joined the agency in February 2015, it was severely understaffed and under-resourced, leading to critique that it was a “moribund agency.”<sup>10</sup> The total headcount at the agency was approximately sixty-five people, a far cry from the pre-Giuliani staff cuts when the Commission had over 240 staff members.<sup>11</sup> Leadership functions had been consolidated such that a single individual was tasked with serving as General Counsel and the deputy commissioner for the Commission's two bureaus, creating concerns about a lack of independence and possible conflicts of interest. The Law Enforcement Bureau, which is tasked with investigating and prosecuting violations of the NYCHRL, had approximately thirteen attorneys.<sup>12</sup> The Commission had little to no name recognition in New York City, and among attorneys in the civil rights bar, it was a venue to avoid due to lack of capacity, staff, and resources to vigorously prosecute civil rights complaints.<sup>13</sup> The Commission's other bureau, the Community Relations Bureau, mandated to provide education and outreach, had not had a deputy commissioner for over a year and was similarly suffering from

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7. *Id.*

8. *Id.*

9. Meriwether, *supra* note 5.

10. *See* Barkan, *supra* note 5.

11. Meriwether, *supra* note 5.

12. N.Y.C. COMM'N ON HUMAN RIGHTS, 2014 ANNUAL REPORT 6 (2015), <https://www1.nyc.gov/assets/cchr/downloads/pdf/annual14.pdf> [<https://perma.cc/U8CR-A3VC>].

13. N.Y.C. BAR ASSOC. COMM. ON CIVIL RIGHTS, IT IS TIME TO ENFORCE THE LAW: A REPORT ON FULFILLING THE PROMISE OF THE NEW YORK CITY HUMAN RIGHTS LAW (2001), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/it-is-time-to-enforce-the-law-a-report-on-fulfilling-the-promise-of-the-new-york-city-human-rights-law> [<https://perma.cc/37QS-9JLD>].

understaffing. Though that bureau had a dedicated group of human rights specialists, many of whom had several decades of experience, it did not have a coordinated strategy or system in place for effective outreach. The communications team of the agency was limited to one person with no digital media experience. As a result, there was scant media coverage of the Commission's work, and the agency lacked any presence on social media. Its website had not been updated in months. Though the Commission has a statutory mandate to maintain an Office of Mediation and Conflict Resolution, the office had been effectively shut down.<sup>14</sup> No one on staff had been charged with working on legislative or regulatory proposals, which deprived the agency, as the subject matter experts on the NYCHRL, of the opportunity to offer its valuable input to lawmakers and close loopholes in the law. As a result, the Commission had for the most part simply responded to bills proposed by the City Council without providing significant substantive input, and the agency had not engaged in any rulemaking in decades.<sup>15</sup>

Commissioner Malalis set out to revitalize the Commission by restructuring various areas of the agency, creating new offices within it to focus on key needs, and addressing many of the gaps identified above. She also prioritized hiring staff to ensure that the Commission reached the city's most vulnerable populations. Commissioner Malalis felt very strongly that communities that had historically been alienated from government due to language barriers, over-policing or surveillance, historic oppression, or other negative interactions were also more vulnerable to experiencing discrimination and harassment and less likely to report it. She felt that these segments of New York needed to know that the Commission understood their challenges and would fight to vindicate their rights.<sup>16</sup> The Administration

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14. N.Y.C. ADMIN. Code § 8-115.

15. Testimony of Dana Sussman, Special Counsel of the Office of the Chairperson, N.Y.C. COMMISSION ON HUM. RTS. (Sept. 21, 2015), [https://www1.nyc.gov/assets/cchr/downloads/pdf/DSussman\\_Testimony20150921.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/DSussman_Testimony20150921.pdf) [<https://perma.cc/AEB9-8YRY>].

16. Testimony of Dana Sussman, Deputy Commissioner for Policy and Intergovernmental Affairs, Before the Committee on Civil and Human Rights, N.Y.C. COMMISSION ON HUM. RTS. (Oct. 15, 2018) <https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR%20Testimony%2010.15%20final.pdf> [<https://perma.cc/PN97-G8XB>] [hereinafter Oct. 15, 2018 Testimony of Dana Sussman].



empowered her to work with a supportive City Council to effect the agency's most significant staff increase in decades.<sup>17</sup>

Commissioner Malalis strove to hire staff with experience working in civil rights and human rights, and/or experience with vulnerable communities. She prioritized both linguistic and cultural fluency to reflect New York City's diverse and underrepresented communities.<sup>18</sup> When Commissioner Malalis began her tenure in February 2015, Commission staff spoke less than ten languages.<sup>19</sup> Two years later, Commission staff spoke over thirty languages.<sup>20</sup> In addition, Commissioner Malalis hired staff who came from diverse backgrounds, expertise, and experience and brought relationships with community-based organizations, neighborhood associations, faith communities, legal services providers, and other stakeholders with them, who could instantly draw from those community connections to build credibility the Commission previously lacked. Commissioner Malalis believed that government should look and sound like the diversity of New York City. For the first time, the Commission created positions to reflect this focus: a Muslim, Arab, South Asian Communities Lead Advisor, an African Communities Lead Advisor, a Jewish Communities Liaison, an LGBTQ Lead Advisor, a Transgender Communities Liaison, a Youth Lead Advisor, and other staff tasked with focusing on racial justice, outreach to Asian communities, Afro-Caribbean communities, Sikh communities, Latinx communities, and more.<sup>21</sup> The religious, ethnic, gender, racial, and other points of diversity represented in these key positions attracted people of a variety of demographics and across lines of difference to staffing positions throughout the agency.

The Commissioner assembled a leadership team of experts in the field of civil rights and human rights enforcement and litigation, community outreach, organizational management, communications,

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17. N.Y.C. BAR ASSOC. COMM. ON CIVIL RIGHTS, *supra* note 13.

18. Testimony of Carmelyn P. Malalis, Commissioner and Chair, New York City Commission on Human Rights, Before the Committee on Civil and Human Rights, N.Y.C. COMMISSION ON HUM. RTS. (Mar. 26, 2018), [https://www1.nyc.gov/assets/cchr/downloads/pdf/20180326\\_CCHR\\_Testimony.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/20180326_CCHR_Testimony.pdf) [https://perma.cc/NW84-VPWK] [hereinafter Mar. 26, 2018 Testimony of Carmelyn Malalis].

19. *Id.*

20. Our Team, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/about/our-team.page> [https://perma.cc/BL47-W9AU].

21. Oct. 15, 2018 Testimony of Dana Sussman, *supra* note 16.

and policy to implement the agency's new vision.<sup>22</sup> She provided her leadership team the runway to undertake a complete audit of their areas, build out teams where none existed, create policies and procedures, and raise standards across the board. Specifically, Commissioner Malalis created the Office of the Chairperson, consisting of staff to handle policy and intergovernmental affairs, adjudication, legislation, legal enforcement guidance, interagency initiatives, and to build relationships with elected officials and liaise with City Hall.<sup>23</sup> She created a Communications and Marketing Department to re-brand the agency; build relationships with media, especially ethnic and community media, launch the agency's digital media presence, create outreach materials in different languages, and develop public awareness campaigns. She also resurrected the Office of Mediation and Conflict Resolution, as well as necessary back-office departments that had atrophied into non-existence.<sup>24</sup>

For the first two years of the Commissioner's tenure, the Commissioner and her new leadership focused on hiring and developing staff, creating consistent protocols and methods of transparency, elevating standards, working strategically with stakeholders, raising the profile of the agency through public awareness campaigns, events, and strategic outreach, and issuing thorough and clear legal decisions and policy documents. After the presidential election in November 2016 and the subsequent rollback of human rights and civil rights by the federal government, the Commission quickly repositioned itself. It became apparent that local government, including government agencies like the Commission, had to distinguish themselves from the federal government and work aggressively to combat the rising tide of both hate crimes and hateful and divisive rhetoric that the federal administration engaged in and encouraged. It was particularly important for the Commission to situate itself as a counterpoint to the federal government's constant

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22. Testimony of Carmelyn P. Malalis, Commissioner and Chair, Before the Committee on Civil and Human Rights, N.Y.C. COMMISSION ON HUM. RTS. (Mar. 22, 2017), <https://www1.nyc.gov/assets/cchr/downloads/pdf/2017%20March%2022%20Budget%20Testimony%203.22.17%20edits%5b4%5d.pdf> [https://perma.cc/8XNF-5T9E] [hereinafter Mar. 22, 2017 Testimony of Carmelyn Malalis].

23. Testimony of Carmelyn P. Malalis, Commissioner and Chair, Before the Committee on Civil and Human Rights, N.Y.C. COMMISSION ON HUM. RTS. (Dec. 9, 2015) [https://www1.nyc.gov/assets/cchr/downloads/pdf/CPMalalis\\_Testimony\\_20151209.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/CPMalalis_Testimony_20151209.pdf) [https://perma.cc/ZT8D-PRP4] [hereinafter Dec. 9, 2015 Testimony of Carmelyn Malalis].

24. Mar. 22, 2017 Testimony of Carmelyn Malalis, *supra* note 22, at 2.

undermining of civil rights protections, reminding New Yorkers that despite attempts to curtail civil rights by the federal government, in most instances, New Yorkers' rights remained robust.<sup>25</sup> For example, the Commission has engaged in countless actions, through community outreach and engagement to policy guidance and strategic law enforcement, in direct response to announcements of policy changes or rhetoric at the federal level.<sup>26</sup> More specifically, the Commission, often in partnership with other city agencies, has submitted amicus briefs or comments to proposed federal rules in order to oppose the rolling back of civil rights protections for, among others, transgender members of the military and LGBTQ people in employment, healthcare, education, and federal contracting, and to address the weakening of anti-discrimination protections.<sup>27</sup>

## II. BRIEF HISTORY OF THE COMMISSION

As a result of citywide concerns about race relations following riots in 1943, Mayor Fiorello H. LaGuardia created the Mayor's Committee on Unity by Executive Order on February 28, 1944.<sup>28</sup> Its purpose was to "make New York City a place where people of all races and religions may work and live side by side in harmony and have

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25. See Holden, *supra* note 1.

26. N.Y.C. COMM'N ON HUMAN RIGHTS, 2017 YEAR END REVIEW 11 (2018), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2017YearEndReviewFINAL.pdf> [<https://perma.cc/UDF4-YNP6>].

27. *Id.*; see also 2017 Press Releases, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/2017-press-releases.page> [<https://perma.cc/A3CL-HDAP>]; (covering the Commission's advocacy on behalf of LGBTQ rights in Colorado and transgender rights nationwide, among others); see, e.g., *New York City and San Francisco File Amicus Brief with Supreme Court on Behalf of 31 Jurisdictions Supporting Education Equality For Transgender Students*, N.Y.C. OFFICE OF THE MAYOR (Mar. 2, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/124-17/new-york-city-san-francisco-file-amicus-brief-supreme-court-behalf-31-jurisdictions> [<https://perma.cc/W8L4-ULKL>] (advocating on behalf of transgender students' access to bathrooms that match their gender identity in response to North Carolina's "bathroom bill"); *New York City Files Amicus Brief on Behalf of 65 Jurisdictions in Support of Enforcing Colorado Anti-Discrimination Law*, N.Y.C. OFFICE OF THE MAYOR (Oct. 30, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/698-17/new-york-city-files-amicus-brief-behalf-65-jurisdictions-support-enforcing-colorado> [<https://perma.cc/M9W7-X2H5>].

28. Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, 23 FORDHAM URB. L.J. 983, 984 (1996).

mutual respect for each other, and where democracy is a living reality.”<sup>29</sup>

The Committee had no enforcement powers but was able to effect change through the persuasive powers of its members.<sup>30</sup> By the mid-1950s, however, it was apparent that the Committee could not address the city’s problems of discrimination and bias. In 1955, Mayor Robert F. Wagner and the City Council moved to replace the original Committee with a city agency that had more extensive powers and permanent status: the Commission on Intergroup Relations (“COIR”).<sup>31</sup> COIR was given the power to receive and investigate complaints and to initiate its own investigations into racial, religious, and ethnic group tensions on the basis of race, creed, color, national origin, and ancestry.<sup>32</sup> It was empowered to hold hearings, to report its findings of facts, and to make recommendations to the Mayor.<sup>33</sup> COIR was also charged with studying the problems of prejudice, intolerance, bigotry, discrimination, and disorder caused by intergroup tension, and then developing intergroup dialogue.<sup>34</sup> It coordinated efforts among federal, state, and city agencies to develop courses on techniques for achieving harmonious intergroup relations within New York City.

COIR’s powers were first greatly expanded in 1958 with the passage of the Fair Housing Practices Law (also known as Local Law 80, the Sharkey-Brown-Isaacs Law).<sup>35</sup> This local law gave COIR the power to investigate and hold hearings on allegations of discrimination in private housing, and was the “first in the nation to extend protection against discrimination to private housing.”<sup>36</sup> In 1962, COIR changed its name to the Commission on Human Rights.<sup>37</sup>

In 1965, Local Law 55 and Local Law 80 were amended and combined into Local Law 97, the Human Rights Law of the City of

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29. *Id.*

30. *Id.*

31. *Id.* at 984–85.

32. *Id.* at 985.

33. *Id.* at 984 n.10.

34. *Id.* at 985 nn.12, 16.

35. *Id.* at 985.

36. *Id.*

37. *Commission’s History*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/about/commissions-history.page> [<https://perma.cc/2JF2-BE7L>].

New York.<sup>38</sup> This amendment “greatly expanded the Commission’s powers of investigation and enforcement, and extended the Commission’s jurisdiction to prosecute discrimination based on race, creed, color and national origin in employment, public accommodations, and housing, as well as commercial space.”<sup>39</sup>

Prominent former leaders of the Commission include Eleanor Holmes Norton, who held the nation’s first hearings on gender discrimination and now serves as a Congresswoman for the District of Columbia,<sup>40</sup> and Dennis deLeon, who was an advocate against HIV/AIDS discrimination and went on to become the president of the Latino Commission on AIDS.<sup>41</sup>

#### A. The Commission’s Structure and Values

The first step in the revitalization and re-structuring of the Commission under Commissioner Malalis was identifying the core values of the agency to most effectively further its mission of combating discrimination. This was necessary to help guide the agency’s direction and implement goals amidst inevitable resource constraints. The Commission’s structure—as required by statute and further developed under Commissioner Malalis—is thus intended to promote the values that the Commissioner has espoused for the agency. Under Commissioner Malalis, the Commission has prioritized the core principles of legitimacy, transparency and education, relationship-building with marginalized communities, responsiveness to contemporaneous events and social issues, and diverse representation among staff. Commissioner Malalis has worked to re-invigorate the agency to transform it into a credible venue for filing, investigating, conciliating, and litigating anti-discrimination complaints, including high impact cases. The Commissioner has also worked to make the agency an accessible space for diverse communities throughout the city to avail of government support. Both of these goals have boosted the agency’s overall legitimacy as a

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38. Varela, *supra* note 28, at 985.

39. *Id.* at 985.

40. *Full Biography*, U.S. HOUSE OF REPRESENTATIVES: CONGRESSWOMAN ELEANOR HOLMES NORTON, <https://norton.house.gov/about/full-biography> [<https://perma.cc/G6XT-QD7R>].

41. Dennis Hevisi, *Dennis deLeon, AIDS Activist, Dies at 61*, N.Y. TIMES (Dec. 14, 2009), <https://www.nytimes.com/2009/12/15/nyregion/15deleon.html> (on file with the *Columbia Human Rights Law Review*).

powerful law enforcement agency that serves to further civil and human rights in the United States.

Commissioner Malalis created the Office of the Chairperson to encourage transparency in how the Commission enforces the NYCHRL. The Office of the Chairperson issues guidance, rules, frequently asked questions, and brochures; is readily accessible to members of the public and the legal community to address any questions about the law; and provides free and frequent trainings to the public to help covered entities better comply with their legal obligations and to educate individuals about their rights.<sup>42</sup> The Office of the Chairperson is also responsible for working with other City agencies to ensure compliance with the law, a practice not commonly engaged in by the prior administration, but critical to helping eradicate discrimination within government and setting a standard for the private sector. As a government agency committed to serving marginalized communities, the Commission purposefully centered programming around relationship-building with groups historically distrustful of government to build connections with and hear from impacted groups directly. This has helped the Commission meet its goal of responding to public needs and contemporary issues. Examples include re-building governmental connections with New York's different Muslim communities which were historically distrustful of government after experiencing mass surveillance and profiling by law enforcement and responding to civil and human rights issues emerging from the 2016 presidential election, such as the #MeToo movement, the Black Lives Matter movement, and the rise of white nationalism and xenophobia.<sup>43</sup>

By statute, the Commission serves two main functions. The first is as a civil law enforcement agency. The Law Enforcement Bureau ("LEB"), staffed primarily by attorneys, takes in complaints of discrimination from the public, initiates its own investigations on behalf of the Commission, and utilizes its in-house testing program to help identify entities breaking the law.<sup>44</sup> Where LEB's investigation leads to a finding of probable cause to believe that a person or entity has engaged in an unlawful discriminatory practice, LEB attorneys

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42. Mar. 22, 2017 Testimony of Carmelyn P. Malalis, *supra* note 22, at 9.

43. *Id.* at 5.

44. N.Y.C. ADMIN. Code § 8-101; *see also* *Inside the N.Y.C. Commission on Human Rights*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/about/inside-cchr.page> [<https://perma.cc/H5UZ-8PD7>].

prosecute the case at a trial through the Office of Administrative Trials and Hearings (“OATH”) before an Administrative Law Judge (“ALJ”). The ALJs provide reports and recommendations, which may include “findings of fact, decisions of law, and recommendations on damages and civil penalties” to the Office of the Chairperson, who then reviews the recommendations along with the trial transcript and evidentiary record *de novo* and issues a final decision and order that is reviewable in New York state court under a “substantial evidence” standard.<sup>45</sup>

The second main function of the Commission is to perform community outreach and provide education on the City Human Rights Law and human rights-related issues. This function is primarily the responsibility of the Community Relations Bureau, comprised of Community Service Centers in each of the City’s five boroughs, but staff and leadership across the agency engage in this work regularly.<sup>46</sup> The Commission’s Community Relations Bureau (“CRB”) is also charged with cultivating understanding and respect among the City’s many diverse communities. At a time when the forces of hate and division seem to be disturbingly empowered, CRB works to counter these elements through education, outreach, and relationship-building, and working actively with local community leaders, community-based organizations, houses of worship, elected officials, small businesses, and schools to provide vital know-your-rights and know-your-obligations information.<sup>47</sup>

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45. See *Matter of Marine Holdings, LLC v. N.Y.C. Comm’n on Human Rights*, 100 N.E.3d 849, 850 (N.Y. 2018); see also *119–121 East 97th St. Corp. v. N.Y.C. Comm’n. on Human Rights*, 642 N.Y.S.2d 638, 640 (N.Y. App. Div. 1996); *Complaint Process—Detailed*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/complaint-process-detailed.page> [<https://perma.cc/5Y8E-QVGH>].

46. *Community*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/community/community.page> [<https://perma.cc/P4NT-37BU>]; see N.Y.C. Local Law No. 36 (2011).

47. See *Services and Programs*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/community/initiatives.page> [<https://perma.cc/K7FX-XARN>]; *Bias Response Team*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/community/bias-response.page> [<https://perma.cc/8VfV-APPU>]; *Youth Initiatives*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/community/youth-initiatives.page> [<https://perma.cc/LH4Y-4B4H>]; *Engaging Faith Communities*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/community/faith-communities.page> [<https://perma.cc/75SP-YMY3>]; *Business Outreach*, N.Y.C. COMMISSION ON HUM. RTS.,

As the Commission expanded its staff and sought to raise standards and practices across the agency, Commissioner Malalis committed to bringing in external experts and identifying internal experts to train staff on working with the diversity of New Yorkers in a culturally competent manner. For example, in July 2019, the Commission worked with the Perception Institute, a leading industry expert on the issues of racial anxiety and implicit bias in the workplace, to provide mandatory trainings and workshops to all staff<sup>48</sup>. In 2018, the Commission also offered anti-oppression training to supervisory staff. In addition, the Commission offers staff training on other issues, including LGBTQ rights, working with people with disabilities, combating sexual harassment, understanding Muslim experiences, Sikh awareness, and discrimination based on race and color. These trainings—some mandatory and some optional—have been crucial both to educating staff and ensuring that the Commission addresses any internal or external problems that may arise in providing services to the public.<sup>49</sup>

As part of its goal of furthering its legitimacy and credibility as a civil rights powerhouse, the Commission also resurrected the agency's Office of Mediation and Conflict Resolution ("OMCR") in early 2017. The OMCR continues to develop the Commission's voluntary mediation program and provides alternative pathways to resolving matters brought before the Commission.<sup>50</sup> The OMCR is staffed by a Director and a Mediation Coordinator. In Fiscal Year 2019, the Mediation Director "successfully mediated 37 cases to resolution—the highest in this category since 2009—representing, in the aggregate, \$1,193,500 in damages," excluding non-economic terms such as "agreements to provide reference letters and conduct trainings."<sup>51</sup> Through the Commission's multi-faceted approach to

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<https://www1.nyc.gov/site/cchr/community/business-outreach.page> [<https://perma.cc/42HA-4JNX>]; *Community*, *supra* note 46.

48. Testimony of Carmelyn P. Malalis, Commissioner and Chair, New York City Commission on Human Rights, Before the Committee on Civil and Human Rights, (Mar. 25, 2019), [https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR\\_Budget\\_Testimony\\_32519.2.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR_Budget_Testimony_32519.2.pdf) [<https://perma.cc/4ZHW-Z7CS>] (hereinafter Mar. 25, 2019 Testimony of Carmelyn P. Malalis).

49. *Id.* at 4.

50. *Id.* at 2.

51. N.Y.C. COMM'N ON HUMAN RIGHTS, FISCAL YEAR 2019 ANNUAL REPORT (2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/AnnualReport2019.pdf> [<https://perma.cc/6SHH-2PZ5>] [hereinafter 2019 ANNUAL REPORT].



achieving growth both internally and externally, it has sought maximum enforcement of the City's anti-discrimination law, the NYCHRL, and its mandate to fight discrimination.

#### B. The New York City Human Rights Law ("NYCHRL")

The NYCHRL is one of the broadest and most protective anti-discrimination laws in the country. The law includes specific areas of protection that do not exist in many other anti-discrimination statutes, including, for example, bans on inquiring into an prospective employee's salary history, criminal history, and credit history.<sup>52</sup> Legislative amendments to the NYCHRL have made it explicit that the law must be interpreted broadly to effectuate its remedial purpose—to construe protections broadly and exemptions narrowly—and to consider federal and state analogous statutes as the floor and not the ceiling.<sup>53</sup>

Despite the notable differences between the NYCHRL and its state and federal counterparts, there is, for the most part, a lack of legal analysis of the NYCHRL as a wholly distinct framework, which creates an environment whereby factfinders, including the Office of the Chairperson, have little direction or precedent to draw from and demands that new legal theories and creativity be tested. Because the NYCHRL has not historically been utilized to its fullest extent, neither in state and federal court, nor at the Commission, caselaw applying this more liberal standard or adjudicating some of the newer areas of protection under the NYCHRL is also limited. For instance, since 2009, the NYCHRL has provided greater protections to victims of sexual harassment in the workplace than state or federal law by only requiring employees to prove that they have been treated "less well" than others on the basis of gender, which the courts have indicated may include even a single comment that objectifies a person based on their gender,<sup>54</sup> as opposed to the more stringent requirement of showing "severe or pervasive" treatment to establish a hostile work environment.<sup>55</sup>

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52. N.Y.C. ADMIN. CODE § 8-107.

53. See N.Y.C. LOCAL LAW 85 (Oct. 3, 2005).

54. See *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 29, 38–39 (N.Y. App. Div. 2009).

55. See *id.*

In addition, the NYCHRL requires that covered entities provide reasonable accommodations beyond categories required by state and federal law, including for disability, religion, pregnancy, childbirth, and related medical conditions, and for victims of domestic violence, stalking, and sex offenses.<sup>56</sup> Unlike Title VII of the Civil Rights Act of 1964, for all categories of reasonable accommodation required by the NYCHRL, the covered entity must demonstrate that it is a significant undue hardship—not just a minimal burden—to deny the accommodation.<sup>57</sup>

In response to federal and state courts' failure to separately analyze claims under the NYCHRL's more liberal standard, the New York City Council enacted the 2005 Civil Rights Restoration Act, to specify that the City's anti-discrimination law must be interpreted "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."<sup>58</sup> The New York City Council passed a second Restoration Act in 2016 incorporating, by reference, three judicial opinions that had applied a more expansive interpretation of NYCHRL protections.<sup>59</sup> While the Restoration Acts have corrected some of the challenges, there remains a lack of case law construing many provisions of the NYCHRL, and the Commission has stepped in to publish legal enforcement guidance documents, promulgate rules, draft model policies, and issue reports to provide transparency to members of the public about how to interpret the NYCHRL's standards consistent with their intent. In addition, the Commission's significant enforcement actions under Commissioner Malalis' tenure,

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56. See generally N.Y.C. ADMIN. CODE § 8-107.

57. See, e.g., *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, 2016 WL 1644879, at \*6 (N.Y.C. Comm'n on Human Rights Apr. 21, 2016); *Litzman v. N.Y.C. Police Dep't*, 12 Civ. 4681 HB, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013) (finding that it was not a "significant difficulty or expense" for the NYPD to provide a reasonable religious accommodation to an observant Jewish cadet to maintain a one-inch beard under the NYCHRL but that the requested accommodation did constitute a minimal burden under Title VII).

58. N.Y.C. LOCAL LAW 85 (2005); see also N.Y.C. ADMIN. CODE § 8-130(a) ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.").

59. N.Y.C. LOCAL LAW 35 (2016).

including its conciliations—detailed summaries of which are available on the agency’s website<sup>60</sup>—Decisions and Orders (“D&Os”), and work with the New York City Law Department to successfully uphold its D&Os on appeal, have helped create powerful legal precedent and further develop the NYCHRL.<sup>61</sup>

### C. The Community Relations Bureau

Under the leadership of Commissioner Malalis, the Community Relations Bureau (“CRB”) has reimagined its outreach to include engaging programming, community conversations, responsive outreach, and educational workshops and trainings to meet New Yorkers where they are and promote relationship-building with marginalized communities. This has led to the agency increasing its impact and, on average, reaching 100% more New Yorkers under Commissioner Malalis than under prior administrations.<sup>62</sup> During Commissioner Malalis’s tenure, CRB’s structure was revamped to reflect the agency’s new mission. This revamping included the creation of an Education, Restorative Justice, and Development unit tasked with curating curricula to educate New Yorkers on the various protections under the NYCHRL. CRB also began to incorporate restorative and transformative justice principles in its outreach and engagement with communities who have experienced harm or who are newly acknowledging their role in perpetuating discrimination and bias. Examples of new content, built around developing audiences’ cultural competency in addition to understanding legal rights and obligations, include workshops focusing on Working with Transgender and Gender Non-Conforming Communities, Protections

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60. 2019 *Settlement Highlights*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/2019-settlements.page> [<https://perma.cc/K4TW-TADV>] (hereinafter *2019 Settlements*).

61. See *Decisions and Orders*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/decisions-and-orders-2019.page> [<https://perma.cc/2NBA-F7FP>]; see, e.g., *Automatic Reading Corp. v. N.Y.C.*, 63 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2019) (upholding the Commission’s civil penalty of \$250,000 ordered against Respondent-employer in an egregious sexual harassment case, the maximum statutory penalty and highest fine issued in the Commission’s history).

62. THE CITY OF N.Y., PRELIMINARY MAYOR’S MANAGEMENT REPORT 100 (2019), [https://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2019/2019\\_pmmr.pdf](https://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2019/2019_pmmr.pdf) [<https://perma.cc/CLG9-GFWG>] [hereinafter *MANAGEMENT REPORT*].

Against Discrimination Based on Race and Color, and Understanding Muslim Experiences and Combatting Anti-Muslim Racism.<sup>63</sup>

Commissioner Malalis also created Lead Advisor and Community Liaison roles within CRB to elevate the Commission's expertise in several policy areas and communities. This includes, but is not limited to, Lead Advisor for Youth Initiatives, Lead Advisor for Muslim, Arab, and South Asian Communities, Lead Advisor for Reentry, Jewish Communities Liaison, Liaison for Trans Communities, and Liaison for Fair Housing.<sup>64</sup> These new roles and portfolios have increased the Commission's focus on community-led programming, where attendees can engage in constructive dialogue on their rights at a community forum or where the agency can foster intergroup relations at a cultural or religious celebration. Under Commissioner Malalis, the Commission's events have attracted anywhere from seventy-five to over 1100 attendees. CRB's robust efforts and relationships with community partners have allowed the agency to host New York City government's first-ever Vaisakhi event in 2018 to celebrate Sikh communities, which was continued in 2019, an Iftar in the City for the past four years, an LGBTQ Iftar for the past three years, an Interfaith Justice Seder for the past three years, an African Communities forum for the past three years, and other large-scale programming centering around underrepresented communities.<sup>65</sup>

Due to the steep increase in hateful rhetoric leading up to the 2016 presidential elections and continuing to this day, CRB also relaunched its Bias Response Team.<sup>66</sup> The Bias Response Team addressed and combated bias incidents through the city in the late 1980s and early 1990s, but was dormant for over twenty years. CRB shifted priorities to boost the agency's responses to bias incidents and to work proactively with vulnerable communities by providing trainings on bystander intervention and addressing ways of being good allies. By coordinating days of visibility, bystander intervention trainings for communities, and other convenings, CRB worked more closely with sister agencies to ensure that these vulnerable

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63. Mar. 25, 2019 Testimony of Carmelyn P. Malalis, *supra* note 24, at 3.

64. Mar. 26, 2018 Testimony of Carmelyn P. Malalis, *supra* note 48, at 3.

65. 2019 ANNUAL REPORT, *supra* note 51.

66. Peter Haskell *New York City Responds to Recent Surge in Bias Incidents*, CBS LOCAL (Dec. 20, 2016), <https://newyork.cbslocal.com/2016/12/20/nyc-bias-incidents-response-team/> [<https://perma.cc/QGL5-A3KC>].

communities were aware of the rights and resources available to them should they be faced with an act of discrimination.<sup>67</sup> Furthermore, in late 2016 and early 2017, anticipating large-scale concerns among the public after the 2016 election, CRB convened a series of roundtable conversations with community leaders and organizations, including immigrants' rights advocates, workers' rights groups, LGBTQ advocates, faith leaders, and racial justice advocates, to learn what the agency could do to better serve communities most under attack by the election of President Trump.<sup>68</sup> These roundtables are consistent with the Commission's practice under Commissioner Malalis to engage with community leaders and stakeholders before diving into any major new initiatives to ensure that the Commission is doing work that is responsive to and informed by community needs. These efforts have increased the reporting of incidents to the Commission,<sup>69</sup> which is a reflection of the good faith communities have in the agency to stand with them when their rights are violated.

#### D. Law Enforcement Bureau and Adjudications

The Commission enforces the NYCHRL through LEB, comprised of attorneys, human rights specialists, and support staff. The Commission has dramatically improved LEB's impact by transitioning from a quantitative approach of analyzing success to a more qualitative one. More specifically, LEB made five major changes in its approach: shifting its focus from exclusively investigating individual cases to also identifying pattern-or-practice violations; creating specialized units to address priority or time-sensitive cases; improving its procedural practices and launching Commission-initiated cases; developing unique and creative affirmative relief including restorative and transformative justice solutions; and ensuring diverse representation among staff.<sup>70</sup>

These changes, in part, helped to ensure that a file-by-right agency like the Commission with an extensive docket could still achieve significant and even nationwide impact instead of merely struggling to stay afloat. Unique among civil rights agencies,

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67. 2019 ANNUAL REPORT, *supra* note 51.

68. N.Y.C. LOCAL LAW 85 (2005).

69. MANAGEMENT REPORT, *supra* note 62, at 100.

70. N.Y.C. COMMISSION ON HUM. RTS., *Enforcement*, <https://www1.nyc.gov/site/chr/enforcement/enforcement.page> [<https://perma.cc/466C-9LZZ>].

complaints filed with LEB are handled by an attorney from intake to investigation to prosecution. When Commissioner Malalis first arrived at the Commission, the agency was not well known as a reputable source for resolving complaints of discrimination by members of the public and within the legal community.<sup>71</sup> LEB prioritized closing cases and handling issues on a case-by-case basis, rather than considering factors such as the impact that actions had on members of the public, whether they addressed systemic areas of discrimination, expanded interpretation in newer areas of the NYCHRL, or improved settlement outcomes. For several decades prior to Commissioner Malalis's tenure, LEB was severely understaffed and lacked connections with civil rights groups across New York City's diverse communities, thereby creating barriers between the government and those most impacted by discrimination.<sup>72</sup> Commissioner Malalis focused her energy on recruiting skilled and passionate civil rights attorneys to staff LEB, with an intentional focus on hiring individuals representing a variety of backgrounds and language skills, including advocates and litigators from the non-profit legal services and private sectors.<sup>73</sup> LEB grew from twenty-five staff positions to eighty-five under Commissioner Malalis' leadership.<sup>74</sup>

With significant staff growth, LEB was able to focus on its specific needs. For example, LEB built a team of nine multilingual staff to answer the agency's information line, which is most people's first contact with the agency.<sup>75</sup> These staff members perform the initial assessments for over 9,000 inquiries a year made by phone, by webform on the agency's website (another innovation under Commissioner Malalis), and through in-person walk-ins. The team provides a critical triage function by flagging urgent matters in which an immediate intervention may be necessary, or a statute of limitations may be about to run. Frontline staff are trained to identify such urgent matters in specified areas, such as homebound tenants refused disability accommodations, homeless tenants denied a lease

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71. Swarns, *supra* note 6.

72. N.Y.C. BAR ASSOC. COMM. ON CIVIL RIGHTS, *IT IS TIME TO ENFORCE THE LAW: A REPORT ON FULFILLING THE PROMISE OF THE NEW YORK CITY HUMAN RIGHTS LAW* (2001).

73. *Mar. 26, 2018 Testimony of Carmelyn P. Malalis*, *supra* note 18, at 1.

74. *Id.*

75. N.Y.C. COMM'N ON HUMAN RIGHTS, *ANNUAL REPORT 2015*, at 16 (2016) <https://www1.nyc.gov/assets/cchr/downloads/pdf/annual15.pdf> [<https://perma.cc/GK3A-JQ7Q>].

because they present a public assistance voucher, or workers suffering ongoing harassment or retaliation.<sup>76</sup> When these issues arise, staff are trained to address them directly or forward them to appropriate staff for immediate follow-up.<sup>77</sup>

LEB also restructured into teams of attorneys led by supervisors to provide consistent supervision and guidance and increased its administrative staff numbers to provide much needed support to attorneys with respect to case processing and tracking. LEB also created a robust internship program and prioritized professional development opportunities to attract and retain talent.

With dedicated funding for critical enforcement needs, LEB established specialized units including the Source of Income Unit (“SOI Unit”) and the Gender-based Harassment Unit<sup>78</sup>. The Commission designed these units both to bring expanded enforcement power to urgent and intractable situations with high numbers of claims and to focus attorneys’ specialized expertise on these areas of the law.

Since its inception in January 2018, the SOI Unit has achieved hundreds of successful interventions on behalf of tenants denied a lease or threatened with eviction because they presented a public assistance voucher.<sup>79</sup> Because of the nature of the New York rental market, these situations require intervention with the discriminating landlord within hours of the denial to ensure that the unit is not rented to another applicant. The SOI Unit helps address the City’s homelessness crisis by seeking to stem rampant source of income discrimination by obtaining housing for tenants exiting the shelter system and keeping low-income tenants in their apartments. The SOI Unit also brings cases against large housing providers and those that repeatedly violate the law to create systemic change and maximize the impact of the agency’s enforcement power. For example, the Commission ordered a landlord with 15 buildings to pay \$20,000 in emotional distress damages and \$4,000 in civil penalties for refusing to accept a prospective tenant’s Section 8 voucher. As a

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76. Mar. 26, 2018 Testimony of Carmelyn P. Malalis, *supra* note 24, at 9.

77. *Id.*

78. The Gender-based Harassment Unit is discussed further *infra* in Part III.

79. See *Source of Income Discrimination*, N.Y.C. COMMISSION ON HUM. RTS. (2019), <https://www1.nyc.gov/site/cchr/law/source-of-income.page> [https://perma.cc/C52V-S3BH].

result of discrimination, the tenant had lost their voucher and had to seek alternative housing options. Following an investigation, the Commission was able to restore the Complainant's voucher, and ultimately, the landlord agreed to train all employees with job duties related to reviewing and accepting prospective tenants, and to post the Commission's Fair Housing poster in all their buildings located in New York City.<sup>80</sup>

The SOI Unit's intervention staff have performed several hundred interventions to assist tenants facing eviction, seeking housing with a voucher, facing termination of a housing voucher, and/or attempting to use a voucher in an apartment where they already reside. To educate the community about their rights and obligations, the SOI Unit has also conducted dozens of trainings for grassroots community groups, shelters, legal services providers, brokers, landlords, and even housing court judges. When the SOI Unit receives a complaint, a member of the Intervention Staff performs a holistic intake, evaluating the individual's current housing and benefits status. If necessary to address an emergency, the SOI Unit makes a direct referral to a legal services provider. In addition, the SOI Unit prioritizes community members who face voucher termination. The Unit works with other governmental agencies to preserve that individual's housing voucher and helps intervene when community members experience additional housing discrimination.<sup>81</sup>

Under Commissioner Malalis, the agency has also made several changes to reinforce LEB's authority and transform the agency's reputation as a venue for "discount justice" to a reputable venue in the civil rights legal landscape. Under its current leadership, damages, awards, and penalties assessed in cases at the Commission are the highest they have ever been in the history of the agency—four times what they were just four years ago.<sup>82</sup> For instance, in Fiscal Year 2019, LEB secured \$5,306,052 in damages for complainants of discrimination, and assessed \$788,261 in civil

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80. *Id.*

81. *Id.*

82. MANAGEMENT REPORT, *supra* note 62, at 100; THE CITY OF N.Y., MAYOR'S MANAGEMENT REPORT, 108 (2018), [https://www1.nyc.gov/assets/operations/downloads/pdf/mmr2018/2018\\_mmr.pdf](https://www1.nyc.gov/assets/operations/downloads/pdf/mmr2018/2018_mmr.pdf) [https://perma.cc/7WZZ-UXMF].



penalties against respondents, a significant jump from prior administrations.<sup>83</sup>

The Commission also began to address challenges that have plagued the agency for decades. Immediate changes included ensuring that LEB staff applied correct legal standards in enforcing the law and properly applied the agency's administrative rules, improving transparency with members of the public about LEB's investigatory processes, overhauling and implementing a new case tracking system, instituting regular staff professional development and training, and strengthening investigation and litigation processes. LEB also began to assert jurisdiction in areas the Commission had not previously addressed. This included filing cases of bias-based profiling against the New York City Police Department and reinforcing the agency's willingness to apply its enforcement authority against large City actors, including the New York City Department of Correction and New York City Department of Social Services as providers of public accommodation.<sup>84</sup>

#### E. Improving the LEB Investigatory Process: From Intake to Determination

Under Commissioner Malalis, the agency recommitted itself to ensuring that any complainant who stated a claim of discrimination under the NYCHRL would have the right to file their complaint for investigation by the agency as required by statute.<sup>85</sup> In addition, LEB created a process for attorney-filed complaints and permitted complainants, in exceptional circumstances, to file complaints on an anonymous basis.<sup>86</sup>

LEB and the Office of the Chair simultaneously created protocols to implement under-utilized case determination tools, including reviving agency rules which permitted dismissal of cases "not in the public interest" as a form of administrative convenience (the "AC dismissal") to avoid increased backlogs and case processing delays.<sup>87</sup> The AC dismissal allows LEB to exercise prosecutorial

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83. MANAGEMENT REPORT, *supra* note 62, at 101.

84. N.Y.C. ADMIN. CODE § 14-151 (2018).

85. N.Y.C. ADMIN. CODE § 8-109 (2018).

86. *Id.*

87. See *Steps in the Complaint Process*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/steps-in-the-complaint-process.page> [https://perma.cc/SH2L-FMVF].

discretion and avoid using investigation resources on cases unlikely to uncover probable cause while preserving the due process rights of individual complainants. Specifically, an AC dismissal protects the right of complainants to pursue action in state court, akin to a “right to sue” letter in EEOC proceedings.<sup>88</sup>

Most significantly, LEB improved its case investigation and litigation processes and revised its metrics of success. Instead of focusing on closures, the Commission shifted to a substantive concentration on outcomes and increased investigation of pattern or practice violations.<sup>89</sup> This included expanding its Commission-initiated investigations practice and installing an Assistant Commissioner to oversee its work and testers, focusing particularly in the areas of source of income discrimination and criminal history discrimination to identify and address *per se* violations and tackle systemic harm.<sup>90</sup>

The Commission’s authority to initiate its own investigations without a named complainant is particularly vital where would-be complainants may be afraid to file complaints and/or are otherwise unable to come forward for a multitude of reasons. Commission-initiated investigations and cases addressing systemic violations improve LEB’s collaboration with stakeholders and allow the agency to publicly announce its investigations, sending a strong message to potential violators of the law that discrimination will not be tolerated and that there will be consequences. For example, LEB announced enforcement actions against landlords who threatened tenants with immigration enforcement as violations of the NYCHRL’s protections against discrimination on the basis of immigration status and/or national origin.<sup>91</sup> In doing so, LEB brought attention to the mounting problem of landlords and employers exploiting fears fomented by the

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88. *Id.*

89. *Mar. 25, 2019 Testimony of Carmelyn Malalis, supra* note 50, at 2.

90. *See Commissioners*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/about/commissioners.page> [<https://perma.cc/CZ6S-9EV3>].

91. *See NYC Charges Queens Landlord with Retaliating Against Immigrant Tenants Who Filed Discrimination Complaints*, N.Y.C. OFFICE OF THE MAYOR (July 19, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/491-17/nyc-charges-queens-landlord-retaliating-against-immigrant-tenants-who-filed-discrimination> [<https://perma.cc/GA2N-N4GL>] (describing efforts by NYC Commission of Human Rights to enforce against landlords discriminating against tenants based on immigrant status).

federal government's anti-immigrant actions.<sup>92</sup> LEB also announced enforcement actions against substance abuse centers that denied access to transgender patients or stated that housing would only be provided based on sex assigned at birth. This issue was brought to the Commission's attention by transgender rights advocates and confirmed through Commission testing.<sup>93</sup> Finally, LEB publicly announced its settlement against Lenox Hill Radiology for its failure to provide equal access to people with disabilities to obtain mammograms, a complaint that the New York Lawyers for the Public Interest brought to the Commission.<sup>94</sup>

LEB also combined Commission-initiated enforcement actions with individual claims to have the impact of a class action. These actions sought both class-wide relief—damages and remedies for large groups of affected individuals—as well as systemic reform ensuring the elimination of discrimination in the future. This was a particularly useful tool to address housing discrimination. For example, the Commission obtained a significant settlement in a case in which a large housing provider was using criminal history to screen out potential tenants.<sup>95</sup> Under the NYCHRL's newer provisions on organizational standing, a number of advocacy groups have also filed complaints on behalf of their constituents. For example, in 2018, Make the Road filed an organizational complaint with LEB against the New York Police Department (“NYPD”) for allegedly failing to provide translation services to its clients, and in 2016, Picture the Homeless and the New York Civil Liberties Union filed an organizational complaint with LEB alleging that members of

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92. *Id.*

93. Press Release, N.Y.C. Comm'n on Human Rights, NYC Commission on Human Rights Charges Four Substance Abuse Centers with Discriminatory Intake Policies for Transgender Patients (July 13, 2017), <https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Press%20Release%20-%20Substance%20Abuse%20Centers%20FINAL.pdf> [https://perma.cc/6JAH-Y9QK].

94. Press Release, N.Y.C. Comm'n on Human Rights, NYC Commission on Human Rights Announces Settlement with Lenox Hill Radiology Following Investigation Into Failure to Provide Equal Access to Mammograms for Patients with Disabilities (Mar. 14, 2018), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Lenox\\_Hill\\_Radiology\\_Press\\_Release.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Lenox_Hill_Radiology_Press_Release.pdf) [https://perma.cc/BR8R-NEWV].

95. See Anne Brangin, *Exclusive: In Combatting Housing Discrimination, New York City Goes an Unconventional Route*, ROOT (Dec. 5, 2018), <https://www.theroot.com/exclusive-in-combatting-housing-discrimination-new-yo-1830801469> [https://perma.cc/EKM7-EKUN].

the NYPD were unlawfully profiling their homeless clients by asking them to “move along” for simply being present on streets or sidewalks.<sup>96</sup>

Other changes included ensuring that LEB attorneys used correct legal determination standards. Under prior Commission leadership, complaint determinations were made by using the preponderance of the evidence standard. The Commission restored the probable cause standard, consistent with agency rules, for determinations. If there was a probable cause of discrimination—i.e. it was more likely than not that the discrimination occurred—LEB investigators were ordered to issue a probable cause determination. Similarly, in another departure from prior Commission practice, LEB now must not issue a no probable cause finding—which extinguishes a complainant’s right to pursue a case in court—without conducting interviews of parties and witnesses, where available.

With respect to investigation standards more generally, LEB developed protocols to train attorneys to engage in more thorough investigations of complaints, including engaging in thorough interviews with respondents and witnesses and engaging in site visits. Pursuant to the Commission’s Rules of Practice, LEB also utilized procedures that allow for motions to compel to be submitted to the Office of the Chairperson to gain stronger compliance from parties with investigatory requests and motions to seek adverse inferences for a failure to cooperate with investigations. Consistent with its efforts to elevate the caliber of litigation, after a finding of probable cause, LEB increased its use of formal discovery, including depositions, and filed more motions for summary judgment prior to trial. LEB also improved the quality of its litigation practice by engaging in moot practice with junior attorneys and offering mentorship and co-counseling opportunities.

LEB started, for the first time, identifying appropriate individual cases that could be used to catalyze systemic change. Where appropriate, investigators demand information about

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96. See Jake Offenhartz, *NYPD Accused of Discriminating Against Non-English Speakers by Withholding Translation Services*, GOTHAMIST (Aug. 13, 2018), [https://gothamist.com/2018/08/13/nypd\\_translation\\_suit.php](https://gothamist.com/2018/08/13/nypd_translation_suit.php) [<https://perma.cc/T238-TBZA>]; Nikita Stewart, *New York Police Illegally Profiling Homeless People, Complaint Says*, N.Y. TIMES (May 26, 2016), <https://www.nytimes.com/2016/05/27/nyregion/new-york-police-illegally-profiling-homeless-people-complaint-says.html> (on file with the *Columbia Human Rights Law Review*).

widespread compliance with the NYCHRL. Where investigations unearth systemic problems, LEB mandates that respondents address such issues through affirmative relief in conciliation agreements, including training, policy changes, monitoring by the Commission, posting, and, where appropriate, restorative and transformative justice solutions. This relief should be consistent with Commissioner Malalis' vision that all efforts be undertaken to prevent future harm by respondents. In specific areas, LEB has leveraged its enforcement power to obtain statewide or nationwide changes, even where laws outside of the Commission's jurisdiction do not mandate such reform. In cases involving discrimination based on criminal history, for example, LEB has successfully obtained employers' agreement to "Ban the Box" nationwide.<sup>97</sup>

LEB also ramped up demanding civil penalties for violations of the NYCHRL in appropriate cases, sending a powerful message to respondents that discrimination in New York City comes at a cost. At the same time, LEB considers respondents' size and sophistication in assessing penalties so as not to use a cookie-cutter approach. The Commission also offers assistance to smaller businesses, including access to free training on the law.

Additionally, LEB improved its outreach to members of the public by creating informational materials and walking people through its process, in an effort to provide more transparency to the public.<sup>98</sup> LEB translated core documents used throughout the

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97. Press Release, N.Y.C. Human Rights Comm'n, NYC Commission on Human Rights Charges 12 National and Local Businesses for Discriminating Against Job Applicants with Criminal Histories (Nov. 16, 2017), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/FairChance\\_PR.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/FairChance_PR.pdf) [<https://perma.cc/GTC4-ARHX>]; *Complaint Process—Detailed*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/complaint-process-detailed.page> [<https://perma.cc/SXZ5-2DEG>] (showing that the Commission employs the probable cause standard for making determinations of discrimination); 47 R.C.N.Y. § 1-33 (2019), [https://www1.nyc.gov/assets/cchr/downloads/pdf/Commission%20Rules\\_updated\\_Sept\\_9\\_2019.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/Commission%20Rules_updated_Sept_9_2019.pdf) [<https://perma.cc/S2EC-AXRQ>] (detailing investigatory standards to be used by attorneys, such as interviews and depositions); *Id.* § 1-37 (showing that the LEB encourages motions to compel to be submitted to the Office of the Chairperson to gain stronger compliance from parties with investigatory requests).

98. See *Complaint Process*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/complaint-process.page> [<https://perma.cc/F7MK-TCLZ>]; Ryan Kirrane, *NYC Commission on Human Rights*, LOFT: LGBT CMTY. SERVS. CTR., [http://www.lgbtlifewestchester.org/nyc\\_commission\\_on\\_human\\_rights](http://www.lgbtlifewestchester.org/nyc_commission_on_human_rights) [<https://perma.cc/ST6Z-TB5C>] (describing

investigation and determination process into nine languages. It also created a general language insert with a disclaimer in twenty-three languages stating that the enclosed information contains important legal information and providing a direct line to call to receive language translation and interpretation assistance.<sup>99</sup>

#### F. Adjudications

The Commission's Office of the Chairperson adjudicates appeals of LEB determinations, including administrative closures and no probable cause findings, and hears discovery-related disputes. The Office of the Chairperson also issues Decisions and Orders in matters litigated at the Office of Administrative Trials and Hearings before an ALJ, and after the ALJ issues a Report and Recommendation. The Office of the Chairperson has focused on strengthening the Commission's adjudicatory work under Commissioner Malalis, with the goal of developing the Commission as a leading anti-discrimination forum marked by judicious legal analysis and the availability of meaningful remedies.<sup>100</sup> Since 2015, the Office of the Chairperson has issued over twenty-two Decisions and Orders after trial.<sup>101</sup>

In cases involving sophisticated respondents and willful violations of the law, the Office of the Chairperson has imposed robust civil penalties and awarded compensatory damages on par with those available in state and federal court, moving Commission

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Commission's efforts to take action against discrimination through outreach efforts, trainings, and other mechanisms); *see also* 2019 *Settlements*, *supra* note 60 (detailing various cases in which the Commission assessed fines and obtained cash settlements for those affected by violations of the NYC Human Rights Law); *see, e.g., In re Comm'n on Human Rights v. A Nanny on the Net LLC*, OATH Index Nos. 1364/14, 1365/14, 2017 WL 694027, at \*10 (N.Y.C. Comm'n on Human Rights Feb. 10, 2017), [https://www1.nyc.gov/assets/cchr/downloads/pdf/decisions-and-orders/Commission%20on%20Human%20Rights%20v%20Nanny\\_on\\_the\\_Net%20-%20Decision%20and%20Order.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/decisions-and-orders/Commission%20on%20Human%20Rights%20v%20Nanny_on_the_Net%20-%20Decision%20and%20Order.pdf) [<https://perma.cc/6FPM-KD3Z>] (detailing efforts to require small or financially-struggling respondents to undergo training, rather than pay civil penalties).

99. *See Language Access and Policy Implementation Plan*, N.Y.C. COMMISSION ON HUM. RTS. (2018), <https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR%20LAP%202018%20Final.pdf> [<https://perma.cc/M6Q7-AV8Z>].

100. *Mar. 26, 2018 Testimony of Carmelyn Malalis*, *supra* note 18, at 5.

101. *Decisions and Orders*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/decisions-and-orders-2018.page> [[perma.cc/T383-TZTB](https://perma.cc/T383-TZTB)].

cases beyond the level of mere nuisance value for respondents and helping to establish the Commission as a credible venue for combatting discrimination.<sup>102</sup> One of the most noteworthy decisions is *Cardenas v. Automatic Reading Corp.*, in which a business owner repeatedly engaged, over a three-year period, in unwanted touching of his employee, regularly used lewd and sexually inappropriate language with her, and posted a sexually explicit cartoon of her in the workplace.<sup>103</sup> The Commission ordered the highest civil penalty allowable under the law for the first time in Commission history—\$250,000—and awarded \$422,000 in damages to the complainant, including \$200,000 in emotional distress damages.<sup>104</sup> Respondents appealed the Commission’s decision and it was upheld, in its entirety, by the New York Supreme Court, effectively realigning the range of damages and penalties available under the NYCHRL and setting a new standard for cases prosecuted at the agency.<sup>105</sup>

In cases involving smaller, less sophisticated respondents and less egregious violations, the Office of the Chairperson has generally favored remedial action in place of financial penalties. Similar to LEB’s approach to small businesses that have expressed a willingness to cooperate and that lack resources to pay high civil penalties, the Office of the Chairperson has reversed the former administration’s approach of fining small businesses thousands of dollars for job posting violations, when they agree to stop engaging in the practice. In the cases of *In re Comm’n on Human Rights v. A Nanny on the Net LLC* and *Comm’n on Human Rights v. CU29 Copper Rest. & Bar*, the Office of the Chairperson required small or financially-struggling respondents to undergo training rather than pay financial penalties, rejecting ALJs’ recommendations to impose civil penalties. Civil penalties had been the practice under the previous administration even where respondents had no resources, had cooperated in the

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102. *Mar. 26, 2018 Testimony of Carmelyn Malalis, supra* note 18, at 3.

103. *In re Comm’n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, 2015 WL 7260567, at \*1 (N.Y.C. Comm’n on Human Rights Oct. 28, 2015).

104. *Id.*

105. *Automatic Meter Reading Corp. v. New York City*, 63 Misc. 3d 1211(A), slip op. at 12 (N.Y. Sup. Ct. Feb. 28, 2019). It should be noted that in New York, the Supreme Court is the name of the trial court, not the court of last resort. It is still possible that a different trial or appellate court could interpret this particular damages issue differently.

litigation process, and had recognized their wrongdoing.<sup>106</sup> In several other cases, the Office of the Chairperson offered a restorative justice option to the parties in lieu of requiring the respondent to pay damages or a fine. In *Spitzer v. Dahbi*, the parties agreed that the respondent taxi driver, who discriminated against two riders based on their sexual orientation, would perform community service with an LGBT rights organization and provide written updates to the complainants about what he extracted from the experience.<sup>107</sup>

### G. Restorative Justice Solutions

Under Commissioner Malalis' leadership, all conciliation agreements have included non-monetary, affirmative relief designed to address harm to both the complainant and their community. This can include community service, educational programming, and tailored trainings as alternatives to relying exclusively on punitive fines to address complaints filed with LEB. For example, in a landmark settlement involving the Commission's first resolution of a race discrimination case on the basis of hair, the Commission negotiated a conciliation agreement that required the Respondents, Sally Hershberger Salon and Sharon Dorram Color to partner with a NYC-based styling school that specializes in the care and styling of natural hair and hairstyles closely associated with Black people in order to train current salon employees to cut and style natural hair; and create a multicultural internship program which will provide professional opportunities to hair stylists from underrepresented groups. In addition, business owner Sharon Dorram and senior stylist Tim Lehman (Hershberger Salons), are required to complete 35 hours of community service with a racial justice organization—to be

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106. See *In re Comm'n on Human Rights v. A Nanny on the Net LLC*, OATH Index Nos. 1364/14, 1365/14, 2017 WL 694027, at \*10 (N.Y.C. Comm'n on Human Rights Feb. 10, 2017); *Comm'n on Human Rights v. CU29 Copper Rest. & Bar*, OATH Index No. 647/15, 2015 WL 1745775 at \*1 (N.Y.C. Comm'n on Human Rights Oct. 29, 2015); *Decisions and Orders*, N.Y.C. COMMISSION ON HUM. RTS, <https://www1.nyc.gov/site/cchr/enforcement/decisions-and-orders-2015.page> [perma.cc/LY3G-R3N5].

107. *In re Comm'n on Human Rights ex rel. Spitzer v. Dahbi*, OATH Index No. 883/15, 2016 WL 7106071, at \*9–10 (N.Y.C. Comm'n on Human Rights July 7, 2016).



approved by the Commission—that works to combat hair discrimination and promote Black beauty.<sup>108</sup>

Restorative principles are instrumental in connecting respondents to communities that experience discrimination and seeking innovative ways to remedy harm to impacted people. The goal is not punishment, but rather to foster learning and the development of a deeper understanding of the communities that are facing discrimination. Staff work to educate respondents to help them deconstruct biases and prejudices and “open their minds and hearts,” work with respondents so that they understand the hurtful impact of discriminatory acts upon individuals and communities, and create meaningful opportunities for respondents to serve communities that were discriminated against under the law.

Community service is a frequent restorative approach to discrimination. While it is mandated through conciliation agreements, CRB staff work to tailor community service assignments to both the harm caused by the discrimination and the respondents’ needs. For example, in *Spitzer v. Dahbi*, the community service experience involved a respondent taxi driver that discriminated against passengers based on sexual orientation.<sup>109</sup> Respondent, with the input and consent of complainants, was ordered to perform community service in lieu of a fine. CRB staff met with the respondent regularly and, with his participation, developed an education and training plan and assessed placement at an LGBTQ community organization. During the months that the Commission worked with the respondent, he participated in core trainings, such as *Overview of the Human Rights Law* and *Working with Transgender and Gender Non-Conforming Communities*, and he submitted written assignments demonstrating what he had learned. He also completed other reading and written assignments centered on discrimination and protections for the LGBTQ community, which were topics of discussion during meetings with Commission staff that supervised him.

Respondent reported to the LGBTQ community-based organization and complied with all meetings and community service

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108. Press Release, Hair Discrimination Settlement, N.Y.C. COMMISSION ON HUM. RTS. (Nov. 12, 2019), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Hair\\_Discrimination\\_Settlement\\_Release.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Hair_Discrimination_Settlement_Release.pdf) [https://perma.cc/V6W5-KEGY].

109. *Id.*

hours assigned. During meetings with the respondent, CRB staff observed a positive transformation. Respondent expressed that learning about the LGBTQ community gave him a new understanding of discrimination and how bad it made him feel. He told CRB that during his community service placement, he made new acquaintances and intended to continue volunteering on his own. He also connected discrimination against the LGTBQI community to how, as a Muslim, he has faced discrimination based on his religion. In the exit interview with the Commission, respondent thanked CRB staff and stated how the culmination of this process allowed him to continue with his religious practice with a clean heart.<sup>110</sup>

The Commission firmly believes that restorative alternatives to punitive fines and penalties provide a framework to engage respondents in a process that benefits them through education and service and benefits individuals and communities that have faced discrimination. However, restorative justice is resource-intensive work. The Commission is dedicated to optimizing its current resources to engage in as many restorative practices as possible, and is dedicated to growing its ability to do so. Restorative justice work, particularly community service that is meaningfully tailored, requires an individualized and unique approach for each case, which can be time-consuming and require significant oversight. But the Commission believes restorative efforts—which are almost always transformative for participants—are among the most effective means to change hearts and minds in our divisive society.

#### H. Communications and Marketing

In many ways, the strength of the Commission's work is the power of its Communications and Marketing team, which did not exist prior to Commissioner Malalis's tenure. This programmatic area is one of the most effective tools at the agency's disposal. If no one knows about the work or knows about the agency, then it is difficult for it to achieve its mandate. The Communications and Marketing team consists of five people who build on the Commission's relationships with communities vulnerable to discrimination and all New Yorkers by raising public awareness about the Commission's

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110. See Decision and Order, *In re Comm'n on Human Rights ex rel. Spitzer v. Dahbi*, OATH Index No. 883/15, 2016 WL 7106071 (N.Y.C. Comm'n on Human Rights July 7, 2016) (describing resolution and background of case).

work and the NYCHRL in earned, digital, and paid media. The Commission's Communications and Marketing Office has led some of its most effective public campaigns including the #IamMuslimNYC<sup>111</sup> and #WhileBlackNYC<sup>112</sup>, and other campaigns visible across New York City public transportation and social media. The Communications and Marketing Office also completely revamped the Commission's website, which is updated weekly and houses the Commission's extensive collection of multi-lingual fact sheets, brochures, and one-pagers; short videos to educate the public on different areas of protection under the NYCHRL; legal enforcement guidance, rules, and the NYCHRL itself; campaigns; and settlement summaries and Decisions and Orders. Using a combination of organic and paid media, the team revived the agency's essentially non-existent social media presence, garnering over 12,000 followers on Twitter and 26,000 followers on Facebook as of January 2020, up from approximately a few hundred on each platform respectively, during Commissioner Malalis' tenure. The Commission's improved social media presence allowed the agency to engage in real-time reporting of initiatives and events. The Commission also created accounts and content on different platforms, including Instagram, Medium, and LinkedIn.

The focus on communications has increased the Commission's visibility in mainstream and national news outlets, including the *New York Times*, *Washington Post*, CNN, AP; local New York City-based outlets such as the *New York Daily News*, *WNYC*, and *Gothamist*; online outlets like *Buzzfeed*, *Huffington Post*, and *The City*; and community and ethnic media in multiple languages, in print, on the radio, and on television. Commissioner Malalis has frequently written op-eds and letters to the editor that have been placed in such varied outlets as *New Amsterdam News*<sup>113</sup>, *Ozy.com*<sup>114</sup>, and the *New York*

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111. Press Release, "I Am Muslim" Campaign, N.Y.C. COMMISSION ON HUM. RTS. (Sept. 26, 2016), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/PressRelease\\_CampaignAnnouncement\\_IAMuslimNYC.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/PressRelease_CampaignAnnouncement_IAMuslimNYC.pdf) [https://perma.cc/EZY6-8BTS].

112. Press Release, The "While Black" Campaign, N.Y.C. COMMISSION ON HUM. RTS. (Mar. 15, 2019), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/While\\_Black\\_Campaign\\_Press\\_Release.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/While_Black_Campaign_Press_Release.pdf) [https://perma.cc/R3G7-BSN9].

113. See Carmelyn P. Malalis, Opinion, *Every New Yorker Should Stand Up to Racial Discrimination*, AMSTERDAM NEWS (March 2, 2017), <http://amsterdamnews.com/news/2017/mar/02/every-new-yorker-should-stand-racial-discriminatio/> [https://perma.cc/EF3J-GSCP].

*Times*<sup>115</sup>. This media outreach has been monumental in maximizing the reach of the Commission's work. For instance, the Communications team connected with the *New York Times* to announce its historic hair discrimination guidance, released in February 2019,<sup>116</sup> which helped to elevate the work globally, build momentum for legislative change in multiple jurisdictions, and produce over 750 major media stories on the initiative, in dozens of languages and across the world.<sup>117</sup>

The Communications team regularly engages with the media in this fashion to ensure public understanding of complex changes to the NYCHRL and other policies affecting marginalized communities. The Communications team has prioritized building relationships with ethnic media, which is often its first source of outreach in much of its work to offer the Commission's public education to key communities. For several years, 100% of the Commission's media ad buys have been in community and ethnic media. Through all of these efforts, the agency has enjoyed increased visibility and created and contributed to national dialogue around furthering civil rights law at the local level.<sup>118</sup>

### III. COMBATING DISCRIMINATION THROUGH LEGISLATIVE CHANGES, POLICY-MAKING, ENFORCEMENT, AND EDUCATION

The Commission combats discrimination by utilizing a systemic and holistic approach, achieved through legislative changes, policy-making, enforcement, and education. The latter two—enforcement and education—have been described in great detail in Section I. The Commission's role in legislative changes and policy-making originates in several areas: proposing amendments to the

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114. See Oxiris Barbot & Carmelyn P. Malalis, Opinion, *Scalpels Down! Let Intersex Children Choose*, OZY (June 30, 2019) <https://www.ozy.com/opinion/scalpels-down-let-intersex-children-choose/95202/> [<https://perma.cc/UVE2-DWYE>].

115. See Adam Bryant, *Carmelyn P. Malalis: Leading Through Praise, Not Fear*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/08/business/carmelyn-p-malalis-leading-through-praise-not-fear.html> (on file with the *Columbia Human Rights Law Review*).

116. See Stacey Stowe, *New York City to Ban Discrimination Based on Hair*, N.Y. TIMES (Feb. 18, 2019), <https://www.nytimes.com/2019/02/18/style/hair-discrimination-new-york-city.html> (on file with the *Columbia Human Rights Law Review*).

117. 2019 ANNUAL REPORT, *supra* note 51, at 1-2.

118. 2019 ANNUAL REPORT, *supra* note 51, at 50.

NYCHRL, providing expert analysis and input on legislation introduced by the City Council, implementing and interpreting new laws, enacting official rules, and issuing legal enforcement guidance interpreting the City's anti-discrimination law. In addition, the Commission has the authority to convene public hearings and publish reports or surveys to further its policy work. This section will center on how and why the Commission holistically combats discrimination and promulgates its work in the areas of criminal conviction history, gender identity and gender expression, sexual harassment, pregnancy and caregiving rights, anti-Black racism, national origin, immigration status, religion, and disability.

#### A. Amendments

While the City Council is the entity that introduces legislation, the Commission has identified gaps in the law or where case law has narrowly or wrongly interpreted the law,<sup>119</sup> and has drafted legislation reviewed and approved by City Hall. The proposed legislation is subsequently transmitted to City Council for introduction to address those gaps or correct wrongly-decided case law. Over Commissioner Malalis' tenure, approximately five bills have been introduced by City Council using that mechanism. Overall, since 2015, City Council has passed, and the Commission has implemented, approximately twenty-eight changes to the NYCHRL, all of which required significant input, negotiation, and editing by the Commission, other City agencies, the City's Law Department, and City Hall before a final vote at the City Council.<sup>120</sup>

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119. Examples of gaps in legislation identified by the Commission include the areas of retaliation, veterans' rights, cooperative dialogue for reasonable accommodations, an amendment to the Fair Chance Act, and forthcoming medical marijuana legislation.

120. Compare the number of times the NYCHRL has been amended under Commissioner Malalis' tenure to the 13 amendments passed to the NYCHRL from 1993–2014. See *Amendments*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/law/amendments.page> [perma.cc/ES43-LXBC]. Significant amendments to the NYCHRL made under Commissioner Malalis' term include: the Stop Credit Discrimination in Employment Act, an amendment to the NYCHRL introduced on May 6, 2015 that prohibits discrimination based on credit history in employment, making it “an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to request or to use for employment purposes the consumer credit history of an applicant for employment or employee,” N.Y.C. ADMIN. CODE § 8-107(24) (2015); the Salary History Ban, prohibiting discrimination based on salary history in employment.

Amendments are critical to ensuring that the NYCHRL is evolving with the needs of New Yorkers and that it continues to remain one of the most protective anti-discrimination laws in the country. Often, the specific language and stipulations of an amendment proposed in City Council are the result of countless meetings and conversations between the Commission and relevant stakeholders—community-based organizations, non-profits, community members, legislators, and activist groups, among others. While the process necessarily varies from amendment to amendment, the Commission's own principles are that amendments to the NYCHRL should both reflect the needs of the City and should be drafted with expert input from litigators, advocates, and attorneys who regularly interact with and use the NYCHRL to advocate for their clients.<sup>121</sup> As such, consultation with those affected by discrimination and inequality of all kinds is a priority in the process of drafting and obtaining amendments. Sometimes, this consultation takes the form of a public hearing.<sup>122</sup> This was the case with the series of amendments passed in May 2018 pertaining to sexual harassment in the workplace. Other times, this consultation takes the form of meetings and conversations between the Commission, community members and community-based organizations, legislators, and other interested parties. In this regard, the policy-facing work of the Commission is inseparable from the work of CRB, which not only informs the public of their rights and responsibilities under the law but ensures that the Commission's policy agenda is informed by the city's constituents and the struggles facing its most vulnerable populations.

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This amendment prohibits employers from inquiring about prospective employees' salary histories during the job application process, and prohibits employers from relying on the salary history of an applicant in order to determine their salary, benefits, or other compensation during the hiring process, N.Y.C. ADMIN. CODE § 8-107(25) (2017); and the Cooperative Dialogue amendment, requiring covered entities to engage in a cooperative dialogue with persons who are or may be entitled to reasonable accommodations including for religious needs; disability; pregnancy, childbirth, or a related medical condition; and needs as a victim of domestic violence, sex offenses, or stalking, N.Y.C. ADMIN. CODE § 8-107(28) (2018).

121. See *Amendments*, *supra* note 120.

122. See, e.g., N.Y.C. COMM'N ON HUMAN RIGHTS, COMBATING SEXUAL HARASSMENT IN THE WORKPLACE: TRENDS AND RECOMMENDATIONS BASED ON 2017 PUBLIC HEARING TESTIMONY (2017), [https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass\\_Report.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass_Report.pdf) [<https://perma.cc/99KP-E7KB>] [hereinafter Sexual Harassment Report].

When major new protected categories are added to the NYCHRL, the Commission commits resources to creating transparent and comprehensive information in the public domain, to providing covered entities with information they need to understand how to comply with the law based on how the Commission is interpreting the law. When the Commission implemented the nation's first ban on salary history inquiries in October 2017, it published extensive frequently asked questions on its website in direct response to questions and concerns raised through stakeholder conversations and roundtable discussions.<sup>123</sup> Similarly, the Commission published frequently asked questions, three model policies, and additional materials in March 2019, beyond what was statutorily mandated under the law, regarding new lactation room accommodation requirements for employers, to ensure that the agency was providing useful information and tools to employers of varied means and resources.<sup>124</sup>

Other notable additions to the NYCHRL include broadened definitions of sexual orientation and gender to encompass asexuality, pansexuality, and gender non-conformity;<sup>125</sup> a requirement for employers to provide a lactation room for employees who need to pump or express breastmilk;<sup>126</sup> and the requirement that covered entities engage in a cooperative dialogue with individuals entitled to reasonable accommodations in housing, employment, and public accommodations.<sup>127</sup> All of these amendments have benefited from the input of Commission staff, given their subject matter expertise in these areas.

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123. See *Salary History Law: Frequently Asked Questions*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page> [<https://perma.cc/M99Q-FEHC>].

124. See *Lactation Accommodations*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/law/lactation.page> [<https://perma.cc/J5WH-JMS8>].

125. Compare N.Y.C. LOCAL LAW § 38 (2018) (“[G]ender’ shall include actual or perceived sex, gender identity, and gender expression including a person’s actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth.”) with N.Y.C. LOCAL LAW 3 (2002) (“[G]ender’ shall include actual or perceived sex and shall also include a person’s gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth”).

126. N.Y.C. ADMIN. CODE § 8-107(22) (2017).

127. N.Y.C. ADMIN. CODE § 8-107(28) (2018).

## B. Guidance

Under Commissioner Malalis, the agency began issuing legal enforcement guidance documents for the first time in order to provide transparency and clarity regarding the Commission's own interpretation of the NYCHRL. The guidance documents, which have long been used by federal agencies including the U.S. Equal Employment Opportunity Commission, had never been used by the Commission in its history. Under Commissioner Malalis, they have become one of the most critical advocacy tools used by the agency to help further its work and to distinguish the NYCHRL from less protective state and federal anti-discrimination law, which is why the agency generates them so frequently. To develop them, the Commission identified areas of the law that it believed would benefit from further explanation and clarification. These included older provisions of the law such as protections for gender identity and gender expression; new protections that have been added to the law, such as the Fair Chance Act; and clarification about the applicability of older provisions of the law in specific areas of modern life, such as the guidance on anti-Black racism based on hair, particularly where analogous anti-discrimination provisions have not been interpreted in the same way. Unlike rules, guidance documents are longer, and allow for more analysis and examples of discrimination to assist members of the public with understanding their rights and obligations.

## C. Rules

The Commission has the authority to promulgate rules to codify its interpretation of the NYCHRL.<sup>128</sup> The Commission's rules,

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128. City Administrative Procedure Act, N.Y.C. Charter § 1043(a) (1988). Examples of rules issued by the Commission include rules establishing certain *per se* violations of the Stop Credit Discrimination in Employment Act ("SCDEA"), for which covered entities are liable regardless of whether there is any adverse employment or licensing action taken against an individual. Examples of such *per se* violations include requesting consumer credit history either from an applicant or a consumer reporting agency, requiring applicants to consent to disclosure of their consumer credit history, and using consumer credit history for any employment, licensing or permitting purpose. 47 R.C.N.Y. § 2-05(a) (2017). On July 30, 2019, the Commission adopted new rules of practice governing the investigation and litigation of cases filed with the agency. The rules are intended to modernize agency practices, increase transparency, and promote fairness. See 47 R.C.N.Y. § 1-04 (2019).



codified as Title 47 of the Rules of the City of New York, govern its interpretation and application of the NYCHRL. Prior to Commissioner Malalis's tenure, the agency had rarely undertaken rulemaking in a substantive area of the law, issuing only a handful of rules regarding gender and general rules of practice. Under Commissioner Malalis, the Commission reinvigorated its rulemaking function to preserve and codify its interpretation of key provisions of NYCHRL, typically where the protections are new or where there is a real need for clarity regarding application and impact. Over the past four years, the Commission has issued rules to clarify enforcement of new or expanded protections against discrimination on the grounds of gender;<sup>129</sup> discrimination on the basis of criminal history and conviction or arrest record in employment;<sup>130</sup> and credit discrimination in employment.<sup>131</sup> In September 2019, the Commission concluded a complete overhaul of its rules of practice, which govern the investigation and litigation of cases filed with the agency. This constituted the first update to the Commission's rules of practice since they were originally introduced in 1998.<sup>132</sup> The overhaul was intended to provide greater transparency and clarity about how cases are handled and to promote principles of fairness and due process.<sup>133</sup> The Commission also plans to issue proposed rules in the areas of pregnancy discrimination and accommodations, lactation accommodations, discrimination on the basis of reproductive and sexual health decisions, and hair discrimination based on race and religion.<sup>134</sup>

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129. 47 R.C.N.Y. § 2-06 (2019).

130. *Id.* § 2-04.

131. *Id.* § 2-05.

132. See *Proposed Rules of Practice*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/assets/cchr/downloads/pdf/Rules-of-Practice-Final-Rules-2019.pdf> [<https://perma.cc/WLJ3-Z865>].

133. *Id.* § 1.

134. See N.Y.C. Record, "Hearing for Public Comment on Proposed Rules of Practice of the Commission on Human Rights" (Apr. 22, 2019), <https://a856-cityrecord.nyc.gov/RequestDetail/20190415118> [<https://perma.cc/L3H4-TST5>]; N.Y.C. COMM'N ON HUMAN RIGHTS, YOUR RIGHTS WHILE PREGNANT, BREASTFEEDING, OR CAREGIVING: A REPORT ON THE 2019 COMMISSION PUBLIC HEARING ON PREGNANCY AND CAREGIVER DISCRIMINATION iv (2019), [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_Report.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_Report.pdf) [<https://perma.cc/N2GJ-JFNZ>] [hereinafter *Pregnancy Report*].

#### D. Hearings and Reports

Under Commissioner Malalis, the Commission revived its City Charter mandate of holding public hearings and issuing reports to address critical issues in New York City. Such practices go back as far as the 1970s and 1980s.<sup>135</sup> The Commission convened hearings and published comprehensive reports in the areas of Sexual Harassment in the Workplace and Pregnancy and Caregiver Discrimination, and also released a report following a major survey on the experiences of Muslim, Arab, South Asian, Jewish, and Sikh New Yorkers following the 2016 presidential election.<sup>136</sup> The agency holds hearings and issues reports in order to gather community input, shed light on specific topics of concern, and tailor its responses based on the feedback and information collected.

#### E. The Fair Chance Act

The Commission's work implementing the 2015 Fair Chance Act is instructive of the Commission's holistic approach, highlighting the agency's principles of legitimacy, transparency and education, relationship-building, and inclusive and diverse representation. Shortly after the start of Commissioner Malalis' tenure, the Fair Chance Act ("FCA") was signed into law on June 29, 2015.<sup>137</sup> It amended the NYCHRL to prohibit a variety of adverse actions taken by employers against prospective applicants based on their criminal

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135. N.Y.C. Charter §§ 905(e), (f) (2018). One such report and survey focused on the HIV/AIDS epidemic: a survey of 60 persons with AIDS and of AIDS service organizations conducted by the New York City Commission on Human Rights in 1989 reported cases of discrimination and "not[ed that] the social impact of discrimination on costs of and access to health care, social services, education, and prevention must be factored into all programs and policy planning." Panel on Monitoring the Social Impact of the AIDS Epidemic in the United States, National Research Council, *The HIV/AIDS Epidemic in New York City*, in *THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES* 243, 267-68 (Albert R. Jonsen & Jeff Stryker eds., 1993) (citing AIDS DIVISION, N.Y.C. COMM'N ON HUMAN RIGHTS, *THE EXTENT AND IMPACT OF HIV-RELATED DISCRIMINATION IN NEW YORK CITY—A SURVEY OF PWAS AND SERVICE PROVIDERS* (1989) (unpublished draft report)).

136. See *Reports & Guides*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/reports.page> [<https://perma.cc/6278-8V2U>].

137. Office of the Mayor, *Mayor de Blasio Signs "Fair Chance Act,"* N.Y.C. (June 29, 2015), <https://www1.nyc.gov/office-of-the-mayor/news/456-15/mayor-de-blasio-signs-fair-chance-act-#/0> [<https://perma.cc/5LBF-UW25>].

conviction histories.<sup>138</sup> Effective July 11, 2019, the NYCHRL was amended again, through a state law change, to prohibit employers from inquiring about or considering a disposition of an adjournment in contemplation of dismissal, even if the criminal case was still pending.<sup>139</sup> The FCA represents a monumental shift in protecting the employment rights of individuals with criminal histories.

The Commission, in response to this major legal change, utilized a comprehensive approach to transform itself into a legitimate venue for FCA enforcement, and took steps to ensure transparency and to educate members of the public on their new obligations and rights. The Commission created an FCA supervisory role and hired one of the leading advocates who helped to draft and lobby for the FCA to lead the unit; issued legal enforcement guidance and undertook rulemaking; created trainings for both people working with individuals with criminal histories and employers; launched a public awareness campaign; and engaged in substantial legal enforcement to fully realize the powers of the new law.<sup>140</sup>

The FCA represents one of the strongest Ban-the-Box<sup>141</sup> protections in the nation.<sup>142</sup> It created comprehensive procedural protections for individuals with criminal histories and prohibited

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138. *Id.*

139. See *Fair Chance Act: Legal Enforcement Guidance*, N.Y.C. COMM'N ON HUMAN RIGHTS, <https://www1.nyc.gov/site/cchr/law/fair-chance-act.page> [<https://perma.cc/QC8W-D4V6>] [hereinafter *Fair Chance Act: Legal Enforcement Guidance*]. This amendment incorporated changes reflected in Executive Law Section 296(16), which prohibits employers from inquiring when applicants have obtained an adjournment in contemplation of dismissals. N.Y. EXEC. L. § 296(16) (2015).

140. Testimony of Dana Sussman, Deputy Commissioner of Policy and Intergovernmental Affairs and Zoey Chenitz, Senior Policy Counsel, N.Y.C. COMMISSION ON HUM. RTS. (January 22, 2020), [https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR\\_Testimony\\_FCA\\_1.22.2020.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR_Testimony_FCA_1.22.2020.pdf) [<https://perma.cc/P3J9-BZ4E>] [hereinafter Jan. 22, 2020 Testimony of Dana Sussman and Zoey Chenitz].

141. Ban-the-Box refers to employers being prohibited from inquiring about a person's pending arrest or criminal conviction history before making them a conditional offer of employment. See Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (July 1, 2019), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> [<https://perma.cc/3QKM-L66S>].

142. Allison Que, *Two Years of New York City's Fair Chance Act: From Robust Legislation to Effective Enforcement*, NAT'L EMP. L. PROJECT (Nov. 7, 2017), <https://www.nelp.org/blog/two-years-of-new-york-citys-fair-chance-act-from-robust-legislation-to-effective-enforcement/> [<https://perma.cc/9A9H-PGV6>].

most employers from inquiring about an individual's criminal conviction history before making them a conditional offer of employment. In addition, if an employer determines, after reviewing an applicant's criminal history, that it wishes to withdraw the conditional offer, the FCA requires that employers provide applicants with notice and a form demonstrating it followed a particular analysis and a copy of the criminal background information on which it relied.<sup>143</sup>

The FCA is intended to level the playing field for the approximately seventy million adults who have been arrested or convicted of a crime in the United States. It gives them the opportunity to be considered for positions alongside other equally qualified candidates, and prevents them from being barred from employment simply because they have to check a box.<sup>144</sup> Even though Article 23-A pre-dates the FCA and has protected people with criminal records from employment discrimination in New York State since 1976, the FCA and its procedural protections were introduced because the City determined discrimination based on criminal history was still common. Many employers explicitly continued to inquire about applicants' criminal records during the hiring process, which was then permitted. However, these employers made their employment decisions without weighing the factors provided in Article 23-A, including evidence of rehabilitation; the age of the individual when committing the offense; whether there was a direct relationship between the conviction and the desired position; and whether the individual posed an unreasonable risk to the safety of persons or property, in violation of state and city law.<sup>145</sup>

The FCA outlines the proper process for employers to follow when fielding employment applications and delineates when it is permissible to inquire about an applicant's criminal history. During the application process, employers are prohibited from declaring any limitation or specification in employment based on a person's arrest or criminal conviction, and from inquiring about arrest or criminal conviction records.<sup>146</sup> Employers may only inquire about an applicant's arrest or conviction record after a conditional offer of

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143. N.Y.C. ADMIN. CODE § 8-107(11-a)(b) (2019).

144. *Fair Chance Act: Legal Enforcement Guidance*, *supra* note 139.

145. N.Y.C. ADMIN. CODE § 8-107(11-a)(b) (2019); N.Y. CORRECT. L. §§ 750–55 (2014).

146. N.Y.C. ADMIN. CODE § 8-107(11-a)(a) (2019).

employment is extended, and if they do so, they must (i) provide a written copy of the inquiry to the applicant; (ii) perform an analysis of the applicant under Article 23-A and provide the applicant with a written copy of said analysis; and (iii) allow the applicant a reasonable time to respond while holding the position open for the applicant.<sup>147</sup> If, after the Article 23-A analysis, an employer wishes to decline an individual employment, they must follow the Fair Chance Process: disclosing to the applicant a written copy of any inquiry conducted into their criminal history; sharing a written copy of the Article 23-A analysis with the applicant; and giving the applicant at least three business days from receipt of the inquiry and analysis to respond.<sup>148</sup> The FCA also provides numerous other protections.<sup>149</sup>

In sum, the FCA moved the inquiry into criminal history to the end of the employment process, meaning it could only be initiated *after* the employer determined that the individual was the best person for the job. The FCA process ensured that employers could not rescind an employment offer until *after* an individualized analysis had been completed and communicated to the applicant.<sup>150</sup>

To further its legitimacy and expertise in this area, the Commission hired an advocate who had helped draft the FCA to lead the unit, investigate and litigate FCA cases, oversee testing and Commission-initiated investigations, and train Commission staff and external stakeholders, including employers. By ensuring that the unit charged with enforcing this new area of law was staffed with a knowledgeable expert recognized and respected by the greater legal community, the Commission was able to demonstrate that its enforcement and policy-making in this area would be thoughtful, credible, and impactful.

After the FCA's enactment, the Commission launched a public awareness campaign to educate employers and members of the public alike.<sup>151</sup> The Commission's campaign included subway ads in

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147. *Id.* § 8-107(11-a)(b).

148. *Fair Chance Act: Legal Enforcement Guidance*, *supra* note 139.

149. N.Y.C. ADMIN. CODE § 8-107(11-b) (2019). For instance, the FCA amendment makes it an unlawful discriminatory practice to deny or act adversely toward any person seeking credit “by reason of an arrest or criminal accusation of such person when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the New York State Executive Law.” *Id.*

150. *Fair Chance Act: Legal Enforcement Guidance*, *supra* note 139.

151. Jan. 22, 2020 Testimony of Dana Sussman and Zoey Chenitz, *supra* note 140.

English and Spanish that read “Criminal record? You can work with that.”<sup>152</sup> The Commission published an easy-to-digest brochure explaining the FCA in English, Spanish, French, Russian, Haitian Creole, Urdu, Chinese, Korean, and Arabic.<sup>153</sup> The Commission engaged in relationship-building with organizations that assist individuals with criminal conviction histories and made regular visits to correctional facilities, probation sites, parole orientations, and organizations that work with incarcerated or formerly incarcerated clients to educate impacted individuals. In 2018, the Commission offered nearly 250 workshops on FCA protections to almost ten thousand people.<sup>154</sup>

In 2015, shortly after the FCA’s effective date, the Commission issued legal enforcement guidance on the Act, including a sample FCA notice that employers could use to undertake the Article 23-A analysis and provide to employees if they planned to revoke a conditional offer of employment based on the applicant’s criminal conviction history.<sup>155</sup> The Commission continues to periodically update its FCA legal enforcement guidance with new changes to inform and educate employers and members of the public.

On June 28, 2017, the Commission adopted FCA rules to further clarify protections available under the NYCHRL for people with criminal histories. The FCA rules codify much of the original legal enforcement guidance. They also codify, for the first time, conduct that constitutes a *per se* violation of the FCA, including:

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152. *Fair Chance Act Campaign*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page> [<https://perma.cc/ERQ2-7M3D>].

153. *Criminal Record? You Can Work with That*, N.Y.C. COMMISSION ON HUM. RTS., [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/FairChance\\_Brochure.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/FairChance_Brochure.pdf) [<https://perma.cc/7A92-3FCL>].

154. N.Y.C. COMM’N ON HUMAN RIGHTS, FISCAL YEAR 2018 ANNUAL REPORT: FIGHTING THE RISING TIDE OF HATE 12 (2018), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/NYCCHR-Annual-Report-2018.pdf> [<https://perma.cc/2XYE-337E>] [hereinafter N.Y.C. COMM’N ON HUMAN RIGHTS 2018 ANNUAL REPORT].

155. N.Y.C. COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON THE FAIR CHANCE ACT, LOCAL LAW NO. 63 <https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-052419.pdf> [<https://perma.cc/9LN7-ZS34>] [hereinafter LEGAL ENFORCEMENT GUIDANCE ON THE FAIR CHANCE ACT]; *Fair Chance Act Notice*, N.Y.C. COMMISSION ON HUM. RTS., [https://www1.nyc.gov/assets/cchr/downloads/pdf/FairChance\\_Form23-A\\_distributed.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf) [<https://perma.cc/E8DK-XEQF>].

declaring, printing, or circulating advertisements and job applications that express limitations or specifications in employment regarding criminal history; inquiring about applicants' criminal histories before extending a conditional offer of employment; and failing to provide the applicant a written copy of the background check that the employer intends to rely on, or a written copy of the employer's analysis of the employee's criminal history, as required under the law.<sup>156</sup>

Finally, in an effort to promote transparency and efficiency, the Commission's FCA rules include a discretionary early resolution mechanism—the first of its kind at the agency—to allow LEB to respond to *per se* FCA violations. If LEB, through a Commission-initiated investigation or a report from a member of the public, discovers a *per se* violation of the FCA (for example, a job application that still seeks criminal history information), then LEB can send the employer an Early Resolution Notice offering the employer the option to immediately admit liability and pay a fine in lieu of litigation. As established in the FCA rules, Early Resolution is available when: respondents have committed *per se* violations as defined in Section 2-04(a); there is no other pending or current allegations concerning violations of the NYCHRL; they have fifty or fewer employees at the

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156. 47 R.C.N.Y. §§ 2-01, 2-04(a)–(e) (2019). The rules also clarify the types of statements and inquiries about criminal history that are prohibited, including statements and questions that seek to discover or obtain information about applicants' criminal histories before a conditional offer is made; express any limitations or specifications based on criminal history in job advertisements; or inquire about applicants' criminal histories during job interviews. The rules further clarify that a "conditional offer of employment" refers to offers of employment, promotion, or transfer, and sets out the limited circumstances under which an employer can revoke a conditional offer. Employers can only revoke conditional offers after engaging in an analysis prescribed by Article 23-A and determining that either there is a direct relationship between the person's criminal history and the job, or the employment would pose an unreasonable risk to property or people's safety. Employers may not revoke a conditional offer without providing written copies of the background check and the Article 23-A analysis to the applicant, and providing applicants a reasonable amount of time—at least three days—to respond to their concerns by, for example, correcting errors that may appear on the background check or providing evidence of rehabilitation. The rules also clarify that if an employer inadvertently learns about an applicant's criminal history prior to making a conditional offer, this does not automatically create liability. However, an employer will be held liable if it uses the inadvertent disclosure as an opportunity to further explore an applicant's criminal history before making a conditional offer, or relies on the information to determine whether to make a conditional offer.

time of the alleged violation; and they have had no more than one NYCHRL violation in the past three years. The Commission retains the option of proceeding with a full investigation if it is determined that Early Resolution is not in the public interest, for reasons that may include rampant discrimination in the respondent's industry or inferences of willfulness regarding the respondent's violation.<sup>157</sup>

In addition to policy development and outreach to impacted communities, the Commission has undertaken significant enforcement efforts both to create FCA precedent and to convey to employers and employees alike that FCA enforcement is a priority for the agency. FCA cases represent a significant part of the Commission's employment docket.<sup>158</sup> The Commission's LEB has vigorously pursued enforcement against major employers and has sought full damages under the law.<sup>159</sup> Since the law went into effect, LEB has conducted nearly 300 tests to determine whether employers were unlawfully asking job applicants about their criminal histories, and in 2017, LEB announced that it had launched major investigations into twelve national and local employers that collectively employ more than 140,000 people for discriminating against job applicants with criminal histories.<sup>160</sup> Since October 2015, the Commission has secured \$487,110 in damages for complainants (including attorneys' fees) and \$219,000 in civil penalties in FCA cases.<sup>161</sup>

The case of *Tomas Ramos v. Yelp, Inc.* is demonstrative of the Commission's focus on using enforcement as a mechanism to create systemic change by targeting widespread practices against larger employers with a large imprint in New York City.<sup>162</sup> LEB found that Yelp, Inc. had unlawfully run a background check on the complainant prior to making him a conditional offer of employment, and had

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157. 47 R.C.N.Y. § 2-04(i) (2019).

158. N.Y.C. COMM'N ON HUMAN RIGHTS 2018 ANNUAL REPORT, *supra* note 154, at 12.

159. *2019 Settlements*, *supra* note 60.

160. N.Y.C. COMM'N ON HUMAN RIGHTS 2018 ANNUAL REPORT, *supra* note 154, at 12–13. Employers included Estée Lauder, Family Dollar, Kroll Associates, Tavern on the Green, Serafina Restaurants, Resorts World Casino, Barilla Restaurants, Best Market, Goldfarb Properties, inVentiv Health, Safeguard Self Storage, and Aaron's Rent-to-Own.

161. *Id.*

162. See *2017 Settlement Highlights*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/2017-settlements.page> [https://perma.cc/6WQK-JKMG].



unlawfully denied him employment because of a two-year-old misdemeanor conviction.<sup>163</sup> Yelp, Inc., the complainant, and the Commission entered into a conciliation agreement requiring the company to pay \$20,000 in emotional distress damages to the complainant, to pay a \$10,000 civil penalty to the City of New York, and to engage in extensive affirmative relief. Yelp agreed to train more than 800 New York City-based employees on the New York City Human Rights Law, including the Fair Chance Act; formally commit to ban-the-box at all of its offices nationwide; display the Commission's Notice of Rights and Fair Chance Act posters at conspicuous locations accessible to all New York City-based employees; and revise and update its internal policies regarding applicants with criminal conviction records.<sup>164</sup> Similarly, the Commission's vigorous enforcement led to it pursuing a major resolution against a giant in the healthcare industry, Montefiore Medical Center, a large employer which had failed to consider evidence of rehabilitation of a long-time employee before refusing to re-hire him for a twenty-year-old felony conviction. The case settled for \$196,674 in compensatory damages and civil penalties—the highest damages collected, and penalty administered in an FCA settlement to date—comprehensive policy changes, and training to relevant staff on the FCA and how to assess candidates with criminal conviction histories.<sup>165</sup>

#### F. Gender Identity and Gender Expression

In 2002, the New York City Council passed the Transgender Rights Bill to define gender-based discrimination to include discrimination based on an individual's "actual or perceived sex, and discrimination based on an individual's gender identity, self-image, appearance, behavior, or expression with the recognition that gender identity does not necessarily conform with one's sex assigned at birth."<sup>166</sup> The City's intent in amending the law was to make explicit that the law prohibits discrimination against people based on gender identity and gender expression. The amendment was made in recognition of the profoundly negative impact of gender-based discrimination on transgender, non-binary, and other gender non-

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163. *See id.*

164. *See id.*

165. *See 2019 Settlements, supra* note 60.

166. N.Y.C. LOCAL LAW 3 (2002).

confirming people, for whom gender-based discrimination can have life-threatening consequences. In 2016, the Commission led the effort that resulted in New York City Mayor Bill de Blasio issuing Executive Order 16, which ordered City agencies to provide employees and members of the public access to City single-sex facilities consistent with their gender identity, mandated that all City agencies post signage ensuring people were made aware of their right to use the single-sex facility consistent with their gender identity, and required that all City agency employees who interact with the public are trained.<sup>167</sup> In addition, in 2018, City Council amended the definition of “gender” in the NYCHRL to reflect a broader and more inclusive understanding of gender.<sup>168</sup>

From the very beginning of her tenure, Commissioner Malalis was committed to creating real and lasting impact for transgender and gender non-conforming, and non-binary (“TGNCNB”) New Yorkers. While legal protections existed since 2002, they had been underutilized, and the TGNCNB community either had no relationship to the Commission or had a negative relationship to the Commission. The agency had a reputation for being inhospitable to TGNCNB people seeking to file complaints.<sup>169</sup> To engage in necessary relationship-building with transgender communities, Commissioner Malalis hired a Transgender Communities Liaison and instructed Office of the Chair staff to ensure maximum public awareness of the protections available under the NYCHRL.

Despite having codified protections in the NYCHRL for over a decade, Commissioner Malalis felt it necessary, during a moment in time where transphobic “bathroom bills” were being debated across the country, to clearly and transparently explain the real-world application of gender identity and expression protections. In 2015, the Commission released legal enforcement guidance on discrimination on the basis of gender identity and gender expression, highlighting the ways in which this form of discrimination manifests, and

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167. Press Release, Bill de Blasio, Mayor, N.Y.C. Statement on Executive Order 16 (2016), <https://www1.nyc.gov/office-of-the-mayor/news/223-16/mayor-de-blasio-mandates-city-facilities-provide-bathroom-access-people-consistent-gender#0> [<https://perma.cc/E578-T5TZ>].

168. N.Y.C. ADMIN. CODE § 8-102 (2018).

169. Cristian Salazar, *Bryan Ellicott, Transgender Man, Sued Alleging He Was Kicked out of Men's Public Locker Room*, AMNY.COM (June 3, 2014), <https://www.amny.com/news/transgender-man-sues-alleging-workers-kicked-him-out-of-men-s-public-locker-room-1.8320728> [<https://perma.cc/8JAD-K55Q>].

articulating specific violations of the law. These violations included failing to use the name or pronouns with which a person self-identifies; refusing to allow people to use single-gender facilities and programs most closely aligned with their gender; gender stereotyping by, for example, requiring people to conform to stereotypical norms of masculinity or femininity; imposing different uniforms or grooming standards based on gender; providing employee benefits that discriminate based on gender (in particular, health benefit plans must cover gender-affirming care); and considering gender when evaluating requests for accommodations (for example, employers cannot deny leave requests to employees undergoing gender transition treatment if they accommodate the leave requests of other employees for different medical conditions).<sup>170</sup> Additionally, the Commission updated its legal enforcement guidance in 2019, including new definitions for “cisgender,” “gender identity,” “gender expression,” “gender,” “gender non-conforming,” “intersex,” “sex,” and “transgender.”<sup>171</sup>

In 2016, the Commission launched a citywide public awareness campaign affirming the right of transgender individuals to use the bathroom consistent with their gender identity or expression, making New York the first municipality in the nation to do so.<sup>172</sup> The “Look Past Pink and Blue” campaign, developed through feedback from focus groups that included both TGNCNB New Yorkers and cisgender New Yorkers, sought to make it explicitly clear that, in New York City, it is your right to use the “restroom consistent with who you are . . . no questions asked.”<sup>173</sup> In 2016, the Commission’s

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170. N.Y.C. COMM’N ON HUMAN RIGHTS, NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION, (Feb. 15, 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf> [<https://perma.cc/XZB8-UQ4U>] [hereinafter GENDER IDENTITY GUIDANCE].

171. GENDER IDENTITY GUIDANCE, *supra* note 170, at 3.

172. Press Release, Bill de Blasio, Mayor, N.Y.C. Office of the Mayor, Mayor de Blasio Launches First Ever Citywide Ad Campaign Affirming Right to use Bathrooms Consistent with Gender Identity (June 6, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/508-16/mayor-de-blasio-launches-first-ever-citywide-ad-campaign-affirming-right-use-bathrooms> [<https://perma.cc/XZB8-UQ4U>].

173. *Id.*

campaign won the first annual Shorty Social Good Awards for Best in Government and Politics.<sup>174</sup>

Through LEB, the Commission has investigated and conciliated significant cases on behalf of individuals facing discrimination on the basis of gender identity. In 2019, the Commission settled a case against the New York City Department of Homeless Services (“DHS”) and a contractor shelter provider, Acacia Group, for discriminating against a transgender man, Stevin Bonaficio, and kicking him out of his housing because of his gender identity.<sup>175</sup> The complainant was also outed, deadnamed, and misgendered by DHS peace officers at other city shelters.<sup>176</sup> The case settled for \$55,000 in compensatory damages to the complainant, a \$10,000 civil penalty paid by Acacia Group, and comprehensive affirmative relief, including the development and implementation of a new transgender, gender nonconforming, and intersex (“TGNCI”) policy by DHS, although some of the revisions were already independently underway.<sup>177</sup> The settlement also included training of all staff on the new policy, designating a staff LGBTQ Housing Specialist at the shelter for a minimum of three years, updating DHS’ peace officer policy to require officers to use gender pronouns consistent with an individual’s gender identity, and mandating that Acacia Group establish record-keeping protocols on all gender-based discrimination and harassment complaints, and report violations to the Commission twice a year, for a period of two years.<sup>178</sup>

The Commission has also successfully used its testing program to root out gender identity discrimination in healthcare settings. In 2018, the Commission settled a case against a substance

174. *Winner: NYC Commission on Human Rights Campaign: “Look Past Pink and Blue” Transgender Rights Campaign*, SHORTY AWARDS, <https://shortyawards.com/category/1st-socialgood/government-and-politics> [<https://perma.cc/D5BH-2VMN>].

175. *AVP Client Receives Settlement from City of New York DHS for Anti-Trans Discrimination*, N.Y.C. ANTI-VIOLENCE PROJECT (Aug. 13, 2019), <https://avp.org/avp-client-receives-settlement-from-city-of-new-york-dhs-for-anti-trans-discrimination/> [<https://perma.cc/78JE-3SDL>].

176. *Id.*

177. *Id.*; Ese Olumhense, *Shelter Settlement Spawns New Policies to Support Transgender Homeless*, CITY (Aug. 29, 2019), <https://thecity.nyc/2019/08/settlement-spawns-new-policies-for-transgender-homeless.html> [<https://perma.cc/8NS4-Q9WH>].

178. *AVP Client Receives Settlement from City of New York DHS for Anti-Trans Discrimination*, *supra* note 175.

abuse treatment shelter, Promesa Residential Health Care Facility, that discriminated against transgender patients.<sup>179</sup> The Commission sent testers to the facility, who were told by respondent's staff that transgender women would be housed with men, and in another test, told that transgender women would be turned away completely unless there was an available private room (the facility only had one private room).<sup>180</sup> Following the Commission's complaint and investigation, Promesa settled the case for \$10,000 in civil penalties, and agreed to implement policies prohibiting discrimination against transgender people including in room assignments, notify organizations that assist LGBTQ people facing substance abuse issues of their updated policies, conduct anti-discrimination training, and be monitored by the Commission.<sup>181</sup> The same year, in response to a public-initiated complaint, the Commission also settled a case against Mount Sinai Beth Israel Medical Center for asking invasive questions to a transgender woman, including asking her "what she had down there," and insisting that she not room with other women.<sup>182</sup> Following the Commission's investigation, the Medical Center paid \$25,000 in compensatory damages to the complainant, made significant policy changes, and agreed to trainings in an effort to prevent future incidents of discrimination based on gender identity.<sup>183</sup>

### G. Combating Sexual Harassment

While combating sexual harassment has always been a core mission of the Commission throughout its history, the agency ramped up its efforts in response to the resurgence of Tarana Burke's #MeToo movement and public demands for more meaningful and substantive enforcement in this area, building on the legacy of former Commissioner and now Congresswoman Eleanor Holmes Norton. While at the Commission in 1975, Congresswoman Norton held the first ever public hearing on gender discrimination, where the term "sexual harassment" was used publicly for the first time.<sup>184</sup> The

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179. 2018 Settlement Highlights, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/enforcement/2018-settlements.page> [<https://perma.cc/N74X-YJW8>].

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. See Sexual Harassment Report, *supra* note 122, at 7.

Commission's ongoing and intensive work to combat sexual harassment is consistent with Commissioner Malalis' belief in having the agency respond to contemporary issues of injustice that matter to the public. Immediately after high-profile stories began to hit the media, the Commission formulated a response consisting of outreach and education, stakeholder engagement, a public hearing, implementation of new legislation, and a dedicated enforcement unit.

The Commission's response was fortified by courts' recognition that sexual harassment claims under the NYCHRL must be assessed more liberally. In its 2009 decision in *Williams v. New York City Housing Authority*, the New York State Appellate Division, for the first time, interpreted the NYCHRL to reject the "severe or pervasive" standard in assessing sexual harassment claims, and instead applied the "less well than" standard.<sup>185</sup> In other words, under the NYCHRL, an employer that treats an employee "less well" than others on the basis of gender may be engaging in unlawful sexual harassment, a standard much more protective of employees than its federal counterpart. Violations of the "less well than" standard can include even "a single comment that objectifies women . . . made in circumstances where that comment would, for example, signal views about the role of women in the workplace."<sup>186</sup> The *Williams* decision was codified into the NYCHRL through the 2016 Restoration Act.<sup>187</sup> In 2013, the Second Circuit followed suit and overturned a lower court's application of the federal "severe or pervasive" standard<sup>188</sup> to the NYCHRL in the case of a bank employee who had been subjected to sexual harassment by her supervisor, and

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185. See *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 39 (N.Y. App. Div. 2009).

186. *Id.* at n.30 (explaining that while a single comment directed at a coworker may be actionable, the comment described here did not rise to such a level).

187. N.Y.C. LOCAL LAW NO. 35 (2016) (citing the *Williams* decision as an example of a case that has "correctly understood and analyzed the liberal construction requirement.").

188. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (recognizing sexual harassment as a prohibited form of gender discrimination under Title VII but only if the harassment is "severe or pervasive," unwelcome, and based on the person's gender); *Mihalik v. Credit Agricole*, 715 F.3d 102 (2d Cir. 2013) (holding that a jury could reasonably find that an employee had been treated less well based on her gender due to sexually charged conduct, including unwanted sexual attention and two sexual propositions, in the workplace); see also *Williams*, 872 N.Y.S.2d at 39 (finding that the more restrictive severe and pervasive test should not apply to gender-based discrimination claims under the NYCHRL).

instead applied the *Williams* “less well” standard.<sup>189</sup> In addition, pursuant to the NYCHRL and unlike under federal law, managers and supervisors are liable for sexual harassment where they are the harassers themselves; or where they knew or should have known of the harassment and did not act to stop it, regardless of whether the employer took reasonable corrective action in response to the harassment.<sup>190</sup>

Throughout Commissioner Malalis’ term, the Commission has made combatting sexual and gender-based harassment<sup>191</sup> a priority.<sup>192</sup> As noted above, the first Decision and Order issued during her tenure, in October 2015, was *Cardenas v. Automatic Meter Reading Co.*, in which an owner of a company harassed an employee for over three years until the employee was constructively discharged, and in which the Commission ordered \$250,000 in civil penalties—the maximum allowable under the NYCHRL—along with \$422,670 to the complainant in front and back pay and emotional distress damages.<sup>193</sup> In March 2019, the *Cardenas* decision was upheld in New York State Supreme Court in its entirety.<sup>194</sup> The NYCHRL continues to be a powerful tool to combat sexual harassment, yet many members of the public remain unaware of how robust the law is, further reinforcing the Commission’s desire to increase its education and awareness efforts.<sup>195</sup>

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189. See *Mihalik*, 715 F.3d at 114.

190. N.Y.C. ADMIN. CODE §§ 8-107(13)(b)(1), (3). The federal *Faragher-Ellerth* affirmative defense, where an employer may escape liability if it exercises reasonable care to promptly correct harassing behavior, does not apply under the NYCHRL with respect to managers and supervisors.

191. While the term “gender-based harassment” more accurately encompasses the NYCHRL’s protections against illegal behavior related to gender, the term “sexual harassment” is still much more widely understood. For that reason, the Commission continues to use the term “sexual harassment” in public-facing materials. The authors have adopted the same approach for this article.

192. See *Sexual Harassment in the Workplace*, N.Y.C. COMMISSION ON HUM. RTS. (2018), <https://www1.nyc.gov/site/cchr/media/sexual-harassment-campaign.page> [<https://perma.cc/S2VB-QGCZ>] (describing a comprehensive expansion in the NYCHRL undertaken in 2018).

193. *Automatic Meter Reading Corp. v. New York City*, 63 Misc. 3d 1211(A), slip op. at 8 (N.Y. Sup. Ct. Feb. 28, 2019).

194. *Id.* at 31.

195. Indeed, Commissioner Malalis even penned a Letter to the Editor, published in the *New York Times*, explaining the differences between the NYCHRL and Title VII’s standards in response to an article entitled, “When

On December 6, 2017, the Commission convened a citywide public hearing on sexual harassment in the workplace, the first public hearing on sexual harassment since 1975.<sup>196</sup> The hearing was one of the first government-sponsored hearings in the country soliciting testimony from workers and advocates on sexual harassment in the wake of #MeToo. Those who testified included advocates, activists, workers, and elected officials representing a broad range of industries, including construction, fashion, media, domestic work, tech, finance, hospitality, and others. All shared their varied experiences with sexual harassment and the challenges they faced in reporting it and obtaining justice.<sup>197</sup> Over twenty-five people provided oral testimony, and the Commission received twenty-one written submissions.<sup>198</sup>

The testimony of advocates and workers highlighted the particular vulnerabilities of workers with intersecting identities, such as low-wage and immigrant workers, workers of color, and LGBTQ workers. Opening remarks were given by former Chair and Commissioner, Congresswoman Eleanor Holmes Norton, and the hearing was moderated by a panel of people serving as commissioners in different City agencies or bodies, including Chair and Commissioner Malalis, Department of Consumer and Worker Protection Commissioner Lorelei Salas, Catherine Albisa, Carrie Davis, and Beverly Tillery.<sup>199</sup>

The public hearing provided an essential opportunity for local government leaders to hear directly from impacted communities and revealed several ways in which the NYCHRL and the Commission

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Harassment Isn't Harassment," describing how difficult it was for people to succeed on sexual harassment claims at the federal level even in the #MeToo era. See Carmelyn P. Malalis, Letter to the Editor, *Sexual Harassment in New York*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/13/opinion/sex-harassment-new-york.html> (on file with the *Columbia Human Rights Law Review*).

196. Sexual Harassment Report, *supra* note 122, at 1.

197. *Id.*

198. *Id.* The panel received oral testimony from 27 members of the public, including representatives from advocacy groups, activists, and workers representing a wide range of industries. The Commission continued to receive written testimony after the hearing through the end of December and received a total of 21 submissions. *Id.*

199. *Id.* Catherine Albisa and Carrie Davis are Commissioners for the Commission on Human Rights. Beverly Tillery is a Commissioner on the Commission on Gender Equity.



itself could improve by opening up more pathways to justice for individuals who have experienced sexual harassment. The public hearing also became a model for soliciting input from the people most impacted in order to drive policy and legislative change. For instance, the State of New Jersey convened a series of public hearings in Fall 2019, explicitly following the Commission's model.<sup>200</sup> In addition, the recommendations from the public hearing were useful in assisting the Commission in directing its work, as explained in greater detail below.

### 1. Recommendations Raised in Hearing Testimony and Takeaways

Hearing testimony identified a host of changes to the NYCHRL that would better position workers to bring claims to the Commission and in state court. These recommendations included extending the statute of limitations to bring a claim of sexual harassment to the Commission from one year to three years; extending protection to all workers regardless of employer size, particularly considering the vulnerability of workers in small or isolated workplaces—such as domestic workers—to sexual harassment; banning non-disclosure agreements around sexual harassment allegations; and reducing dependence on tips by eliminating the tipped minimum wage.

The hearing emphasized for the Commission that employers should: provide multiple avenues for reporting sexual harassment so that employees can choose the manner of reporting with which they are most comfortable; be required to train their employees on sexual harassment in the workplace; and institute clear policies regarding sexual harassment that outline effective mechanisms for reporting, investigating, and resolving complaints.<sup>201</sup> The Commission also received critical feedback on how it could better address sexual harassment in the workplace and took steps to improve its enforcement work after the hearing.

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200. See *Public Hearings on Sexual Harassment*, N.J. DIV. ON CIVIL RIGHTS, <https://www.nj.gov/oag/dcr/hearings.html> [<https://perma.cc/43QT-4VBA>].

201. *Id.* at 11.

## 2. The Commission's Hearing Report

In April 2018, the Commission issued a report summarizing the hearing testimony, including recommended policy and legislative changes as well as best practices for employers to combat sexual harassment in the workplace.<sup>202</sup> The report represented an effort to memorialize the themes and recommendations to further policy developments and to maintain transparency and accountability to the public. The report counseled employers to provide multiple avenues for reporting sexual harassment, so that employees can choose the manner of reporting with which they are most comfortable.<sup>203</sup> The report also noted that employers should be required to train their employees on sexual harassment in the workplace and institute clear policies regarding sexual harassment that outline effective mechanisms for reporting, investigating, and resolving complaints.<sup>204</sup>

The report further outlined recommended initiatives to combat workplace harassment for the Commission.<sup>205</sup> For instance, one recommendation was that the Commission expand its resources for Commission-initiated investigations into workplace harassment and retaliation.<sup>206</sup> Commission-initiated cases can lead to more comprehensive relief, deeper remedies, and policy changes for offending entities; they can also be helpful when individuals are afraid to come forward for fear of retaliation.<sup>207</sup> The Commission also determined that it should develop sexual harassment training tailored to the needs and challenges of workers in various industries, especially considering that vulnerabilities are different depending on employment context.<sup>208</sup> In addition, the report recommended that the Commission increase outreach efforts to educate employers and workers on their legal rights and responsibilities with respect to sexual harassment in the workplace.<sup>209</sup>

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202. Sexual Harassment Report, *supra* note 122.

203. *Id.* at 17.

204. *Id.*

205. *Id.* at 13.

206. *Id.* at 17.

207. *Id.* at 13–14.

208. *Id.* at 14.

209. *Id.* at 14–16. A final recommendation was that the Commission should increase its education and outreach efforts to youth: “[A]ccording to a 2011 survey of 7–12 graders, 48% of students experienced some form of sexual harassment during the school year,” yet many teenagers and young adults do not have a clear understanding of sexual harassment and its magnitude. *Id.* at 15–16.

In May 2018, the New York City Council passed the Stop Sexual Harassment in NYC Act, codifying several of the recommendations from the hearing and report.<sup>210</sup> The statute of limitations for gender-based harassment claims was increased from one year to three years,<sup>211</sup> giving the Commission extended jurisdiction over such complaints and reflecting testimony describing barriers to reporting to a government agency, including structural inequality and fear of retaliation.<sup>212</sup> Another amendment codified the recommendation to expand sexual harassment protections to all employees, including those who work for employers with fewer than four persons in their employ.<sup>213</sup>

Another amendment requires that all employers in New York City “conspicuously display an anti-sexual harassment rights and responsibilities poster designed by the commission, in employee breakrooms or other common areas employees gather,” with posters displayed at minimum in English and in Spanish.<sup>214</sup> The Commission developed these materials and has published them in English, Spanish, and eight additional languages.

Another amendment requires that employers with fifteen or more employees annually conduct an interactive sexual harassment prevention training for all employees employed within the city of New York and mandates that the Commission create a free online interactive training that all employers may use.<sup>215</sup> Accordingly, the Commission has launched an interactive sexual harassment prevention training for employees, available in English, Spanish, and nine other languages.<sup>216</sup> The training, created by staff within the Commission’s Office of the Chairperson, incorporates feedback from advocates representing workers and employers across communities and industries. The training is robust, intersectional, and

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210. *Stop Sexual Harassment Act*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/law/stop-sexual-harassment-act.page> [<https://perma.cc/4RR5-RG7W>].

211. *Id.*

212. Sexual Harassment Report, *supra* note 122, at 8–9.

213. See N.Y.C. ADMIN. CODE § 8-102 (“Employer”).

214. N.Y.C. ADMIN. CODE § 8-107 (29) (2018).

215. N.Y.C. ADMIN. CODE § 8-107 (30) (2018).

216. See *Anti-Sexual Harassment Training*, N.Y.C. COMMISSION ON HUM. RTS. (2018), <https://www1.nyc.gov/site/cchr/law/sexual-harassment-training.page> [<https://perma.cc/PDR7-JC59>].

comprehensive. It uses a story-based learning model, and the stories to highlight the ways in which sexual harassment impacts women of color, immigrant workers, pregnant and breastfeeding workers, and transgender, gender non-conforming, and non-binary workers. It also frames sexual harassment broadly to include harassment based on gender stereotypes and sexual orientation.<sup>217</sup> The training is available in ten languages; has alt-text for images, in addition to captions and audio descriptions for videos, in order to make it more accessible to people with disabilities; and it meets State and City sexual harassment prevention training requirements.<sup>218</sup> As part of its outreach efforts, the Commission sent mailers in English and Spanish to over 275,000 small businesses across the City with information on how to access the training. In addition, a multimedia and multiplatform campaign ran citywide in 2018 to increase public awareness of the Commission as a “venue for justice” for sexual harassment claims.<sup>219</sup> These efforts resulted in an almost doubling of sexual harassment complaints brought to the Commission in a single year: in 2017, fifty-six sexual harassment in the workplace claims were filed, compared to 104 in 2018.<sup>220</sup>

The Commission’s expertise in this area has been recognized in other jurisdictions, and its work has helped usher in legislative change. Commissioner Malalis testified before the California State Senate Judiciary Committee on a hearing on sexual harassment, highlighting the NYCHRL’s more generous standard and the

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217. Press Release, N.Y.C. Comm’n on Human Rights, N.Y.C. Human Rights Commission Launches Free, Online Anti-Sexual Harassment Training for Employees Citywide, 1, [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Sexual\\_Harassment\\_Training\\_Press\\_Release.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Sexual_Harassment_Training_Press_Release.pdf) [<https://perma.cc/MVG3-D9GD>].

218. *Id.*

219. Press Release, N.Y.C. Comm’n on Human Rights, N.Y.C. Human Rights Commission on Human Rights Launches Citywide Ad Campaign to Encourage New Yorkers to Report Sexual Harassment in the Workplace, 1–2 (Apr. 4, 2018), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/CampaignLaunch\\_PressRelease\\_SexualHarassment.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/CampaignLaunch_PressRelease_SexualHarassment.pdf) [<https://perma.cc/ED7A-DPHL>].

220. Testimony of Dana Sussman, Deputy Commissioner, Intergovernmental Affairs and Policy, New York City Commission on Human Rights, Before the New York State Senate and New York State Assembly, N.Y.C. COMMISSION ON HUM. RTS. (Feb. 13, 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR%20Testimony%20to%20NYS%20on%20SH%202.13.19.pdf> [<https://perma.cc/Y5SB-UPPG>] [hereinafter Feb. 13, 2019 Testimony of Dana Sussman].

Commission's work.<sup>221</sup> Deputy Commissioner Dana Sussman testified twice before the joint sessions of the New York State Senate and Assembly, recommending that New York State make four key changes to the New York State Human Rights Law to mirror the NYCHRL to ensure that victims of sexual harassment can seek justice across New York State.<sup>222</sup> Months later, the New York State legislature passed most of these reforms.

The Commission also established the Gender-Based Harassment Unit within LEB to add increased attention to the growing numbers of claims of sexual harassment in the workplace and, in particular, to allow the agency the capacity to intervene in ongoing, active harassment cases with a particular focus on low-wage and other vulnerable workers.<sup>223</sup> This unit prioritizes gathering initial reports from survivors as promptly as possible, taking steps to preserve evidence, and securing relief that, in addition to vindicating the survivor, minimizes the likelihood that harassment will recur.<sup>224</sup> Where possible, the unit intervenes to stop or mitigate the consequences of ongoing harassment.<sup>225</sup> For example, the unit secured a swift transfer for a young worker who wanted to change worksites after being groped by a customer.

#### H. Pregnancy and Caregiving Discrimination

The NYC Pregnant Workers Fairness Act went into effect in 2014 and requires that employers provide reasonable accommodations to employees on the basis of pregnancy, childbirth, and related medical conditions.<sup>226</sup> Under the NYCHRL, pregnancy

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221. See Testimony of Carmelyn P. Malalis, Chair/Commissioner of the NYC Commission on Human Rights 2–5, CA S. JUDICIARY COMM. (Jan. 11, 2018), [https://www1.nyc.gov/assets/cchr/downloads/pdf/Testimony\\_Commissioner\\_Malalis-CA\\_Senate\\_Judiciary\\_Committee.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/Testimony_Commissioner_Malalis-CA_Senate_Judiciary_Committee.pdf) [<https://perma.cc/452A-XEMQ>].

222. Testimony of Dana Sussman, Deputy Commissioner, Intergovernmental Affairs and Policy, New York City Commission on Human Rights, Before the New York State Senate and New York State Assembly, N.Y.C. COMMISSION ON HUM. RTS. 1–2 (May 24, 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR%20Testimony%20to%20NYS%20052419%20FINAL.pdf> [<https://perma.cc/H9WA-EDTD>] [hereinafter May 24, 2019 Testimony of Dana Sussman]; Feb. 13, 2019 Testimony of Dana Sussman, *supra* note 220, at 3–6.

223. See May 24, 2019 Testimony of Dana Sussman, *supra* note 222, at 1–2.

224. See *id.* at 1.

225. *Id.*

226. N.Y.C. LOCAL LAW 78 (2013).

discrimination is discrimination based on sex.<sup>227</sup> However, prior to 2014, claims for accommodations in the workplace relating to pregnancy or for medical conditions related to pregnancy or childbirth had to be filed as disability claims, meaning that the claimant was required to show their conditions amounted to a temporary disability.<sup>228</sup> Because of this requirement, people with routine pregnancies were regularly denied even minor accommodations. Noting this shortcoming, on October 2, 2013, the City enacted Local Law 78, the Pregnant Workers Fairness Act, which affirmatively requires employers to reasonably accommodate “the needs of an employee for her pregnancy, childbirth, or related medical condition,” without necessitating that the employee’s limitation qualifies as a disability to be protected.<sup>229</sup>

The NYCHRL was further amended on January 15, 2016 to add protections based on actual or perceived caregiver status in employment.<sup>230</sup> The addition of caregiver protections into the NYCHRL makes it easier for New York City residents caring for the 1.8 million children under the age of eighteen, one million people aged sixty-five and older, and roughly 900,000 individuals with disabilities to file workplace discrimination claims under the NYCHRL. The change supports the Commission’s position that

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227. See *Wilcox v. Cornell Univ.*, 986 F. Supp. 2d 281, 285 (S.D.N.Y. 2013) (finding under the NYCHRL that “discrimination on the basis of a woman’s pregnancy—including because of any ‘related medical conditions’—constitutes discrimination ‘on the basis of sex.’”).

228. N.Y.C. COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY iii (May 2016), [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_InterpreterGuide\\_2016.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpreterGuide_2016.pdf) [<https://perma.cc/J5H2-8Z3H>] [hereinafter PREGNANCY GUIDANCE].

229. N.Y.C. ADMIN. CODE § 8-107(22)(a) (2019).

230. *Id.* § 8-107(1); see also *id.* § 8-102(30) (defining the term “grandchild” as “a child of a caregiver’s child”). Caregivers include parents with children under the age of 18, including adopted or foster children, who provide direct and ongoing care to their children; or individuals who provide direct and ongoing care to a parent, sibling, spouse, child (of any age), grandparent, or grandchild with a disability or someone with a disability who lives with them. This amendment prohibits various discriminatory actions against actual or perceived caregivers including, but not limited to: refusing to hire or discharging someone from employment due to actual or perceived caregiver status; excluding someone from labor organizations due to actual or perceived caregiver status; or inquiring about caregiver status in the employment process or in flyers, applications, or job postings.

caregivers, being the people who keep families and communities together, should not be treated differently or denied opportunities in the workplace because of the essential care that they provide.<sup>231</sup>

The NYCHRL was further amended on November 17, 2018 to require explicitly that employers provide workers with a lactation room and reasonable time to pump.<sup>232</sup> The first amendment requires certain employers to provide lactation rooms to their employees as well as refrigerators suitable for storing breast milk.<sup>233</sup> The second amendment requires employers to implement a lactation room accommodation policy, “a written policy regarding the provision of a lactation room which shall be distributed to all employees upon hiring.”<sup>234</sup> Following the passage of the amendments, the Commission has engaged in extensive efforts to change work culture surrounding lactation accommodations to reduce stigma, educate employers, support employees, and normalize pumping through its publication of materials on lactation. These have included model policies, FAQs, and a guidance document for employers.<sup>235</sup> These changes reflect the rights of employees to make personal health choices such as deciding to breastfeed a baby or to pump or express breast milk after returning to work from parental leave. Failing to accommodate an

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231. Press Release, N.Y.C. Comm’n on Human Rights, Mayor de Blasio and Human Rights Commissioner Malalis Announce New Caregiver Law Goes into Effect, Providing Protection to Employees with Caregiving Responsibilities from Workplace Discrimination (May 4, 2016), <https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/CaregiverPressRelease050416.pdf> [<https://perma.cc/P524-Q9YC>].

232. N.Y.C. ADMIN. CODE §§ 8-102, 8-107(22) (2019).

233. *Id.* Lactation rooms are defined as “sanitary places other than restrooms that can be used to express breast milk shielded from view and free from intrusion.” However, “should the provision of a lactation room . . . pose an undue hardship on an employer, the employer shall engage in a cooperative dialogue” as outlined in the NYCHRL.

234. *Id.* § 8-107(22)(c)(i). The law now requires that the policies declare that employees have a right to request a lactation room, identify a process by which employees can make this request, and provide employees reasonable break times to express breast milk. As with the first amendment, “if the request for a lactation room poses an undue hardship on the employer, the employer shall engage in a cooperative dialogue” as outlined in the NYCHRL. *Id.* § 8-107 (22)(c)(i)(5). This amendment states that the Commission will develop a model lactation room accommodation policy and room request form for employers’ reference.

235. *Lactation Accommodations*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/law/lactation.page> [<https://perma.cc/7YM6-JSQM>].

employee who pumps after they return to work can have a significant negative physical and/or emotional impact.<sup>236</sup>

Prior to these legislative amendments, in 2015, the Commission published a notice of rights, required under the NYC Pregnant Workers Fairness Act, which clarified that the Commission interprets pregnancy accommodations to include time off to recover from childbirth and to pump in the workplace.<sup>237</sup> This notice of rights was one of the first documents the agency updated under Commissioner Malalis.<sup>238</sup> In May 2016, the Commission issued legal enforcement guidance on pregnancy accommodations and discrimination explaining how the Commission interprets the Pregnant Workers Fairness Act, and set the stage for the codification of the lactation room requirements. This practice of drafting legal interpretive guidance or issuing rules on an area of anti-discrimination law has been successful in helping to push for legislative changes both in New York City and in other jurisdictions.<sup>239</sup>

The Pregnancy Guidance was innovative in that it outlined for the first time that employers must engage in a cooperative dialogue—or an open problem-solving conversation—with pregnant employees in addressing accommodations.<sup>240</sup> The cooperative dialogue requirement was later codified into law in 2018, to apply to all reasonable accommodation requests under the NYCHRL.<sup>241</sup> The

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236. N.Y.C. COMM'N ON HUMAN RIGHTS, LACTATION ACCOMMODATIONS: WHAT NYC EMPLOYERS NEED TO KNOW 2 (Mar. 2019), [https://www1.nyc.gov/assets/cchr/downloads/pdf/Lactation%20Accommodation\\_WhatNYCEmployersNeedToKnow%20FINAL.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/Lactation%20Accommodation_WhatNYCEmployersNeedToKnow%20FINAL.pdf) [<https://perma.cc/4RFU-BYAX>].

237. N.Y.C. COMM'N ON HUMAN RIGHTS, NOTICE: PREGNANCY ACCOMMODATIONS AT WORK, [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_Poster\\_2017.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_Poster_2017.pdf) [<https://perma.cc/34M2-XASV>].

238. *Id.*

239. PREGNANCY GUIDANCE, *supra* note 228, at 2; *see also* S. Bill S6209A (N.Y. 2019) (proposing legislation prohibiting racial discrimination based on natural hair as a result of guidance published by the New York City Commission on Human Rights, in which the Commission classified hair-based discrimination in the workplace as racial discrimination).

240. PREGNANCY GUIDANCE, *supra* note 228, at 2, 5.

241. *See* N.Y.C. ADMIN. CODE § 8-107(28) (2019). The cooperative dialogue provision was added in response to case law that had held to the contrary. *See, e.g., Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014) (holding that under the NYCHRL, the employer “does not automatically fail to establish the affirmative defense premised on the lack of any reasonable accommodation solely because it did not participate in an interactive process . . .”).



guidance also defined “related medical conditions” broadly to include abortion, miscarriage, and fertility treatments.<sup>242</sup> Another major area of distinction for pregnancy accommodations was the Commission’s interpretation that employers may not request medical notes for routine pregnancy accommodation requests such as requesting more bathroom breaks throughout the work day.<sup>243</sup> Employers may only request medical notes for leave not related to the six- to eight-week period after childbirth or for requests to work remotely.<sup>244</sup> The Commission opted to make this change to decrease the burden on pregnant workers, to diminish the impact of any paternalistic responses from medical providers, and to remedy the fact that medical note requirements disadvantage people who do not have regular or easy access to a healthcare provider.<sup>245</sup> The guidance also outlined that it was presumed to be a reasonable accommodation for an employee to receive six to eight weeks of unpaid leave after childbirth absent undue hardship. It also described other accommodations that were also presumed to be reasonable, including allowing a pregnant worker to sit on a stool or chair instead of stand, to carry a water bottle while working, and to adjust uniform requirements.<sup>246</sup>

On January 30, 2019, exactly five years after the Pregnant Workers Fairness Act went into effect,<sup>247</sup> the Commission held a public hearing to address pregnancy and caregiver discrimination in the workplace to learn more about the experiences of people who have faced pregnancy or caregiver discrimination, the impact of the legal enforcement guidance, what more the Commission could do to combat

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242. PREGNANCY GUIDANCE, *supra* note 228, at 2; *see also* N.Y.C. ADMIN. CODE § 8-107(22) (noting that reasonable accommodations must include coverage for medical conditions related to pregnancy, such as abortion, infertility treatments, miscarriage, or lactation needs).

243. PREGNANCY GUIDANCE, *supra* note 228, at 6.

244. *Id.*

245. *See* Catherine St. Louis, *Doctor’s Notes for Pregnant Employees Can Backfire*, N.Y. TIMES (July 8, 2015), <https://well.blogs.nytimes.com/2015/07/08/doctors-notes-for-pregnant-employees-often-backfire-experts-warn/> (on file with the *Columbia Human Rights Law Review*); *see also* N.Y.C. ADMIN. CODE § 8-107(22)(b) (requiring employers to “provide written notice . . . of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions” and requiring the Commission to develop policies and “conduct ongoing public education efforts”).

246. PREGNANCY GUIDANCE, *supra* note 228, at 8.

247. N.Y.C. ADMIN. CODE § 8-107(22).

this persistent and insidious form of discrimination, and what policy, regulatory, or legislative changes could strengthen protections.<sup>248</sup> Those who testified included members of reproductive advocacy groups, the government, representatives from the medical field—including doulas and doctors in private practice, parents, and caregivers. Speakers shared their clients' stories, their personal stories, and their ideas as to how to best combat discrimination based on pregnancy and caregiver status. Over the course of the hearing—similar to the hearing on sexual harassment in the workplace—it became clear that certain populations were especially vulnerable to discrimination based on pregnancy and caregiver status: low-wage workers, immigrants, and people of color, and populations that were predominantly overlapping in all three of these categories. In addition, it became evident that discrimination existed not just in employment but in places of public accommodation, including in healthcare settings.<sup>249</sup>

In July 2019, the Commission published a report based on the testimony and recommendations from the hearing.<sup>250</sup> The report lays out the legal landscape of the protections from pregnancy and caregiver discrimination under the NYCHRL and state and federal law; examines the common themes that emerged from the oral and written testimony; and highlights recommendations to combat pregnancy and caregiver discrimination.

### 1. Recommendations Raised in Hearing Testimony and Takeaways

The testimony included recommendations relating to proposed legislation, policy changes, and other initiatives. Legislative recommendations included: amending the NYCHRL to improve protections for pregnancy and caregiver discrimination; amending the NYCHRL to require workplace accommodations for caregiving responsibilities; extending protections under the NYCHRL to all workers regardless of employer size; adding state tax credit for family caregivers; improving state protections for domestic workers; and modifying Child Safety Alert 14, a policy that advocates say “operates often to unnecessarily separate newborns from their mothers,” to

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248. Pregnancy Report, *supra* note 134, at iii.

249. *Id.* at 14.

250. *Id.* at 1.

ensure families can stay together when there is no evidence of an identifiable imminent safety concern.<sup>251</sup> Recommendations for employers included requiring employers to provide current and former employees access to their personnel files; requiring employers to have training and policies focused on pregnancy discrimination; and prohibiting employers from adopting non-disclosure policies. Testifiers urged the Commission to take particular action as well, including: formalizing and improving legal enforcement guidance on pregnancy discrimination; improving case processing and how structurally to proceed with cases in LEB; pursuing targeted investigations; promoting greater public education and outreach; and deepening inter-agency engagement with the Department of Health and Mental Hygiene and hospitals.<sup>252</sup>

The Commission is in the process of incorporating several recommendations into its updated legal enforcement guidance on the basis of pregnancy, childbirth, and related medical conditions. As with other Commission public hearings, this hearing was a particularly useful tool to help the agency more meaningfully protect the rights of individuals based on pregnancy and caregiver status by having an avenue to receive recommendations from those directly impacted.

### I. Anti-Black Racism

The Commission has taken on a number of projects to tackle anti-Black racism, including a seminal legal enforcement guidance prohibiting hair discrimination based on race, public campaigns recognizing the harm of profiling on Black communities, raising awareness through art, and holding community forums and convenings following public incidents of racial profiling, and partnering with community-based organizations to document Black narratives and histories in parts of New York City.

After several high-profile stories reverberated across the country involving Black children being turned away from school because of their locs or braids or being forced to cut off their locs to participate in a high school athletic event, the Commission turned its focus to whether there was any reason why the Commission could not interpret the NYCHRL's prohibition on race discrimination to include

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251. *Id.* at 14.

252. *See id.*

hair-based discrimination. Federal courts interpreting Title VII have universally held that, because hair is “mutable,” to ban a certain kind of hairstyle, even if it is closely associated with a particular race, is not discriminatory.<sup>253</sup> Commission staff determined that no court had held similarly under the NYCHRL and concluded that the Title VII case law was simply wrong because it ignored the underlying Eurocentric and racist assumptions about what is “professional” and “work-appropriate” by allowing employers and school administrators to deem certain hairstyles associated with Black people as unprofessional and necessitating alteration.

Commissioner Malalis determined that it was important for the agency to speak clearly and unequivocally on this topic, in the hopes that it would serve as a warning to employers and other covered entities, and also serve as a model to other jurisdictions to adopt. In February 2019, the Commission released legal enforcement guidance—the first of its kind in the country—establishing unequivocally that policies or practices that ban or prohibit natural hair or hairstyles most commonly associated with Black people amounts to discrimination on the basis of race.<sup>254</sup>

The Commission’s legal enforcement guidance on hair discrimination outlines its position that race discrimination, specifically anti-Black bias, is regularly expressed through biases based on characteristics or cultural practices associated with being Black. These biases include prohibitions on natural hair or hairstyles most closely associated with Black people.<sup>255</sup> Bans or restrictions on natural hair or hairstyles associated with Black people are often rooted in white standards of appearance. These restrictions can perpetuate racist stereotypes that Black hairstyles are unprofessional, and are prone to exacerbating anti-Black bias in employment, at school, in sports, and in other areas of daily living.<sup>256</sup> The Commission’s guidance is intended to cover federal loopholes and

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253. See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016) (holding that employer did not engage in race discrimination under Title VII when it refused to hire a Black customer service representative who styled her hair into dreadlocks, which was a violation of the company’s grooming policy).

254. N.Y.C. COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON RACE DISCRIMINATION ON THE BASIS OF HAIR 2 (Feb. 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf> [<https://perma.cc/LGK5-XQTE>] [hereinafter HAIR GUIDANCE].

255. *Id.* at 2–4.

256. *Id.* at 1.

haphazard interpretations of this area of law by federal courts under Title VII of the Civil Rights Act. Specifically, federal courts have failed to provide race-based protections for hair because they often deem it to be a “mutable characteristic” and have not recognized the vast physical, psychological, and financial harm of grooming policies on impacted communities who are forced to cut, straighten, or relax their hair using harmful chemicals or heat to maintain employment. The Commission’s legal enforcement guidance emphasizes that the NYCHRL protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities, and that employers that enact policies prohibiting such styles are engaging in racial stereotyping and disparate treatment based on race.<sup>257</sup>

For Black people, the guidance thus permits the right to maintain natural hair; to maintain treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros; and even to keep hair in an uncut or untrimmed state.<sup>258</sup> The enforcement guidance focuses on policies addressing natural hair or hairstyles most commonly associated with Black people, who are frequent targets of race discrimination based on how they maintain their hair.<sup>259</sup>

The Commission’s hair guidance received international acclaim from sources ranging from the fashion industry to legal experts to racial justice advocates and was covered by media outlets from the *New York Times*<sup>260</sup> to *Teen Vogue*<sup>261</sup> to *Essence*<sup>262</sup>, across the United States, and around the world. Following the Commission’s release of its guidance, California became the first state in the nation

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257. *Id.* at 6–8.

258. *Id.* at 3–4.

259. *Id.* at 6–10.

260. Stacey Stowe, *New York City to Ban Discrimination Based on Hair*, N.Y. TIMES (Feb. 18, 2019) <https://www.nytimes.com/2019/02/18/style/hair-discrimination-new-york-city.html> (on file with the *Columbia Human Rights Law Review*).

261. Evan Ross Katz, *Doris “Wendy” Greene Helped Fight for New York City’s Ban on Natural-Hair Discrimination*, TEEN VOGUE (Feb. 28, 2019), <https://www.teenvogue.com/story/doris-wendy-greene-natural-hair-anti-discrimination-ban> [<https://perma.cc/R6NA-MGG5>].

262. See Breanna Edwards, *New York City Releases New Guidelines Putting an End to Discrimination Based on Hair*, ESSENCE (Feb. 19, 2019), <https://www.essence.com/news/new-york-city-releases-new-guidelines-putting-an-end-to-discrimination-based-on-hair/> [<https://perma.cc/3YQK-MQDB>].

to pass a state-wide bill—called the CROWN Act—banning hair discrimination based on race.<sup>263</sup> On July 12, 2019, New York State, citing the Commission's legal enforcement guidance on hair, became the second state in the country to ban race-based hair discrimination by amending the New York State Human Rights Law to define race to include characteristics historically associated with race, including hairstyles.<sup>264</sup>

The Commission felt it important to focus the guidance on hair discrimination experienced by Black people, but it also reinforces NYCHRL protections against grooming or appearance policies that generally target communities of color, religious minorities, or other historically marginalized groups.<sup>265</sup> Examples include: “a Sikh applicant being denied employment because of his religiously-maintained uncut hair and turban,” and “a male server ordered to cut his ponytail while similar grooming policies are not imposed on female servers.”<sup>266</sup> The Commission will codify much of the legal enforcement guidance on hair discrimination into formal rules in 2020.

As with other programmatic areas, beyond issuing this historic guidance, the Commission has sought to combat anti-Black racism and honor and celebrate Blackness using a diverse array of innovative tools, including embracing the power of art to challenge assumptions and create dialogue. To that end, in January 2018, the Commission, through its Office of the Chairperson, welcomed Tatyana Fazlalizadeh, who joined as the agency's first-ever Public Artist in Residence (“PAIR”). PAIR, administered through the Department of Cultural Affairs, embeds artists within City agencies to address pressing civic issues through creative practice.

Fazlalizadeh's formal partnership with the Commission grew out of mutual admiration and shared values.<sup>267</sup> Upon completing the

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263. Alexia Fernandez Campbell *California Is About to Ban Discrimination Against Black Workers with Natural Hairstyles*, VOX (Jul. 3, 2019), <https://www.vox.com/identities/2019/7/3/20680946/california-crown-act-natural-hair-discrimination> [https://perma.cc/74VZ-D7YF].

264. Amanda Mitchell, *New York Becomes the Second State to Ban Natural Hair Discrimination*, ALLURE (Jul. 18, 2019), <https://www.allure.com/story/new-york-natural-hair-discrimination-law> [https://perma.cc/CN65-FCQD].

265. HAIR GUIDANCE, *supra* note 254, at 67–68.

266. HAIR GUIDANCE, *supra* note 254, at 2 n.7.

267. See Tatyana Fazlalizadeh, *Bio/CV*, <http://www.tlynnfaz.com/Bio-CV> [https://perma.cc/3H8Z-C4CD]

research phase of her residency, in which she embedded herself at the agency to learn about the Commission's work and get to know the staff, Fazlalizadeh proposed an interactive public mural project focusing on anti-Blackness and gender-based street harassment, two themes that were also central to the Commission's work. To execute the project, the Commission drew upon its extensive relationships with community-based organizations as well as its in-house outreach and communications expertise and its relationships with other City agencies. Because it was critically important to the Commission and to Fazlalizadeh that the project engage and reflect the thoughts and concerns of New Yorkers, Fazlalizadeh designed and the Commission distributed hundreds of postcards asking people to share their experiences with anti-Black racism and gender-based street harassment anonymously. The artist drew upon the responses she received to conceptualize the murals. The Commission partnered with organizations like Weeksville Heritage Center, Girls for Gender Equity, GRIOT Circle, YWCA Brooklyn, New Settlement Apartments, local NAACP chapters, and others to host community conversations on the central topics which also informed the art. The partnership resulted in six large-scale installations across four boroughs, centering the faces and words of girls and women of color who have confronted misogyny and racism.<sup>268</sup>

In March 2019, the Commission launched a public awareness campaign seeking to address the everyday indignities that Black people face while going about their lives, and to affirm Black people's rights to work, rent, shop, drive, and engage in other acts of living without being subject to discrimination, including profiling by others and harassing calls to law enforcement.<sup>269</sup> Advertisements were placed in New York City bus shelters and on subways, and on social media, with the goal of educating covered entities—including housing providers, employers, employment agencies, and business owners—of their responsibilities under the NYCHRL, as well as to encourage more New Yorkers to report anti-Black discrimination.<sup>270</sup>

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268. *Tatyana Fazlalizadeh Profile*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/pair.page> [<https://perma.cc/JR96-A6U9>].

269. Monique Judge, *While Black': New York City Commission on Human Rights Launches Campaign to Combat Anti-Black Racism*, ROOT (Mar. 15, 2019), <https://www.theroot.com/while-black-new-york-city-commission-on-human-rights-1833322693> [<https://perma.cc/UW23-DGR7>].

270. *Id.*

Demonstrative of its efforts to use community-building to address human rights abuses, the Commission, in November 2018, held a community truth and reconciliation event following the #CornerstoreCaroline incident, in which a white woman in Brooklyn falsely accused a young Black boy of touching her in a grocery store and called the police on him. The incident outraged the local community and inspired—yet another—discussion nationwide on the high rates of racial profiling faced by members of the Black community, especially the use of law enforcement for benign activities. The Commission held the event in Flatbush, Brooklyn (in the area of the incident) to provide space for community members to discuss challenges the community is facing in the midst of gentrification and changing neighborhood dynamics.

The Commission also, through the receipt of a Mayor's Grant for Cultural Impact, completed a six-month long partnership with the Weeksville Heritage Center that focused on collecting stories of Black community spaces and Black-owned businesses in the face of gentrification and neighborhood change. The effort, "Meals as Collective Memory," documented the social and culinary history behind Black-owned restaurants in central Brooklyn. Through this project, the agency celebrated Brooklyn's food culture from across the African diaspora (and shared delicious food), promoted discussions about entrepreneurship, and helped connect the city's resources, including NYC Small Business Services, to Black-owned restaurants and entrepreneurs in Brooklyn. This initiative culminated in the Commission's first-ever Juneteenth Community Festival, attended by over 100 people honoring the rich history of Black activism in Brooklyn and beyond.

Finally, the Commission's LEB has launched vigorous investigations into major offenders, and addressed intersectional challenges in creative ways. For instance, while it is not currently illegal to discriminate against tenants based on criminal conviction history, these policies often have a disparate impact based on race or national origin, and therefore may still violate anti-discrimination laws. In 2018, in the first case of its kind in the Commission's history, the agency entered into a settlement with PRC Management, LLC, a housing management company that controls 100 buildings comprising 5,000 units citywide, after charging it with discriminating against prospective tenants based on their race, color, and national



origin by denying housing to applicants with criminal histories without performing individualized analysis of those records.<sup>271</sup> The Commission filed charges after the 2016 release of U.S. Department of Housing and Urban Development (“HUD”) enforcement guidelines that addressed the discriminatory effects of criminal history checks on Black and Latinx prospective tenants; these individuals are disproportionately impacted by arrest, conviction, and incarceration rates in New York City and around the United States.<sup>272</sup> As part of the settlement, respondents were required to “pay \$55,000 in emotional distress damages to a victim impacted in the case, \$25,000 in civil penalties, change and distribute new screening and application policies, train staff on new policy and law, and invite applicants with criminal histories who were previously denied housing to reapply.”<sup>273</sup>

Another part of LEB’s strategy has been identifying and initiating agency action against publicly reported cases of race discrimination by major companies and developing innovative solutions to remedy harm in its conciliations. For instance, in December 2018, the Commission was alerted to the fact that fashion house Prada was selling merchandise using blackface imagery at its stores, causing a massive outcry. In response, the Commission immediately sent a cease and desist letter and initiated an investigation.<sup>274</sup> A civil rights lawyer, Chinyere Ezie, discovered the window display and posted on social media about its disturbing similarity to Sambo-type imagery. Shortly thereafter, she filed a complaint at the Commission. As part of the settlement, announced in February 2020, Prada agreed to hire a Diversity and Inclusion Officer, reporting directly to the top executives at the company, to

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271. Press Release, N.Y.C. Comm’n on Human Rights, NYC Commission on Human Rights Settles Landmark Housing Discrimination Case with Bronx Management Company Controlling 100 Buildings with 5,000 Units Citywide Accused of Denying Housing to Any Applicant with a Criminal Record (Dec. 6, 2018), <https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/PRESS%20RELEASE%20-%20Criminal%20History%20Disparate%20Impact%20Press%20Release%20120618.pdf> [<https://perma.cc/QW3E-X7D8>].

272. *Id.*

273. *Id.*

274. Dennis Green, *Prada Pulled Monkey Trinkets Accused of Using ‘Blackface Imagery’, and Now New York’s Commission on Human Rights Is Investigating*, BUSINESS INSIDER (Dec. 16, 2018), <https://www.businessinsider.com/prada-investigated-by-nyc-commission-on-human-rights-after-blackface-incident-2018-12> [<https://perma.cc/85G3-7P7G>].

review Prada's advertising and products sold in the United States, as well as review and monitor Prada's internal anti-discrimination policies; ensure that NYC employees and Milan-based executives receive racial equity training; develop a scholarship program for people historically underrepresented in fashion; maintain Prada's Diversity and Inclusion Council, launched by Prada in February of 2019, with a minimum of 3-5 members for a period of at least 6 years, with regular reporting by Prada on the council's progress to the Commission; and consult with Dr. Joyce Brown, president of the Fashion Institute of Technology, who sits on the council. The agreement requires that Prada report back to the Commission on their progress on all aspects of the agreement.<sup>275</sup>

In 2019, Sally Bershberger Salon and Sharon Dorrarn Color—an employer who was allegedly discriminating against Black employees who wore their hair in natural hairstyles—agreed, as part of the settlement, to partner with a New York City-based hairstyling school to launch the “Working with Natural Hair Program,” through which the employer will offer training opportunities for hairstylists at their New York City-based salons and teach these employees how to cut and style natural hair.<sup>276</sup> The employer also agreed to create internships and increase opportunities for employment within their New York City-based salons for stylists from underrepresented groups, including stylists of color.<sup>277</sup>

#### J. National Origin, Immigration Status, and Religion

The Commission has engaged in extensive relationship building with communities targeted by the Trump administration, particularly with respect to national origin, immigration status, and religious identity, and has prioritized timely responding to issues as they arise, whether in news reports or in response to complaints raised by members of the public. This has included drafting legal enforcement guidance on discrimination based on immigration status, investigating housing providers who retaliate against tenants'

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275. See Vanessa Friedman, *Miuccia Prada Will Be Getting Sensitivity Training*, N.Y. TIMES (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/style/Prada-racism-City-Commission-on-Human-Rights.html> (on file with the *Columbia Human Rights Law Review*).

276. *2019 Settlements*, *supra* note 60. See also Press Release, Hair Discrimination Settlement, *supra* note 108 (describing settlement reached).

277. *2019 Settlements*, *supra* note 60.

complaints of discrimination by threatening to call U.S. Immigration and Customs Enforcement (“ICE”), issuing a report on the experiences of Muslim, Arab, South Asian, Jewish, and Sikh New Yorkers following the 2016 election, holding focus group sessions with advocacy groups during Asian American and Pacific Islander Heritage Month, responding to bias-based incidents through its Bias Response Team, and celebrating religious minorities by hosting interfaith events, often with community-gathering, food, speeches, and performances.

During this period of increased immigration enforcement, coinciding with more and more Islamophobic, xenophobic, and anti-Semitic propaganda, the Commission has sought to position itself as a government space that protects, respects, and supports impacted communities.<sup>278</sup> In the fall of 2019, the Commission released legal enforcement guidance on the NYCHRL’s protections against discrimination based on actual or perceived immigration status and national origin. The guidance sets forth that the terms “alien” and “illegal” as applied to immigrants are dehumanizing and potentially harassing, and the use of such terms, where not otherwise required by statute, may be a violation of the NYCHRL. In addition, the guidance makes clear that threats by respondents to call ICE, or to harass or intimidate tenants, employees, or people seeking to access public accommodations, or threats in response to a complaint of discrimination filed with the Commission, constitute prohibited retaliation under the NYCHRL. In 2017, the Commission’s LEB had already set a precedent by filing retaliation charges against a Queens landlord for sharing personal information about his tenants with ICE in response to a complaint of discrimination they filed with the Commission.<sup>279</sup> Furthermore, in September 2019, in a first-of-its-kind

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278. As a result of these efforts, the Commission has received honors. For instance, in 2016, the Commission was honored by Immigration Equality with the Leading Light Award for leadership advancing the civil and human rights of LGBTQ and HIV-positive immigrants. See *Immigration Equality to Honor Congresswoman Barbara Lee, NYC Commission on Human Rights Chair and Commissioner Carmelyn Malalis, and Immigration Equality Co-Founder Noemi Masliah at Women’s Leadership Event*, IMMIGRATION EQUALITY (Oct. 26, 2016), <https://www.immigrationequality.org/immigration-equality-honor-congresswoman-barbara-lee-nyc-commission-human-rights-chair-commissioner-carmelyn-malalis-immigration-equality-co-founder-noemi-masliah-womens-le/> [https://perma.cc/6KLH-CBXQ].

279. Press Release, N.Y.C. Office of the Mayor, NYC Charges Queens Landlord with Retaliating Against Immigrant Tenants Who Filed Discrimination

case in the country, an ALJ upheld LEB's finding of liability against a landlord who threatened to call ICE on a tenant, charging her \$17,000 in damages and fines for violating the NYCHRL and ordering her to complete fifty hours of community service.<sup>280</sup>

The Commission has also initiated investigations into discrimination based on religion, national origin, and other protected classes. For instance, in 2017, the Commission initiated a major investigation into a condominium board following reports of tenant harassment and discrimination, including displays of Nazi and Confederate imagery, swastikas, and hate symbols in the building lobby.<sup>281</sup> In 2018, as part of the settlement, the board removed all offensive posters, symbols, and materials from the lobby and made changes to the Condominium's "House Rules" to comply with the NYCHRL, and offending board members resigned.<sup>282</sup>

The Commission has also publicly spoken out against incidents of xenophobia and human rights violations against immigrants. In 2019, the Commission worked with the International Association of Official Human Rights Agencies ("IAOHRA"), a membership organization of human rights agencies, to release a statement and create a video condemning detention conditions at immigration facilities at the border.<sup>283</sup> The Commission also proposed a resolution condemning these conditions, which was adopted by

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Complaints (July 19, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/491-17/nyc-charges-queens-landlord-retaliating-against-immigrant-tenants-who-filed-discrimination> [<https://perma.cc/D769-DSDT>].

280. N.Y.C. Comm'n on Human Rights *ex rel.* Holly Ondaan v. Dianna Lysius, OATH Index No. 2801/18, 2019 WL 4560434 (N.Y. Comm'n on Human Rights Sept. 12, 2019); Zach Schonfeld, *Queens Landlord Fined \$17,000 for Threatening to Call ICE on a Tenant*, GOTHAMIST (Sept. 20, 2019), <https://gothamist.com/news/queens-landlord-fined-17000-threatening-call-ice-tenant> [<https://perma.cc/4XN7-VWCH>]. The case is pending final adjudication with the Commission's Office of the Chairperson, which will issue a Decision and Order.

281. Press Release, N.Y.C. Comm'n on Human Rights, NYC Commission on Human Rights Announces Settlement with Sunnyside Queens Condo Board Following Investigation into Tenant Harassment and Discrimination (Feb. 16, 2018), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Sunnyside\\_Press\\_Release\\_Feb\\_2018.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Sunnyside_Press_Release_Feb_2018.pdf) [<https://perma.cc/K9S5-DE5V>].

282. *Id.*

283. *Condemning Immigration Detention Conditions at the U.S.-Mexico Border*, NYC COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/Immigration%20Detention.page> [<https://perma.cc/4XF5-J22S>].

IAOHRA members in 2019 and published on the IAOHRA website.<sup>284</sup> Finally, to alleviate incidents of discrimination based on immigration status, the Commission worked with the New York City Mayor's Office of Immigrant Affairs to release a fact sheet on the Trump Administration's re-issuance of Social Security No-Match Letters, explaining that these letters do not constitute evidence that an employee is undocumented and that adverse action taken in response to these notices may violate the NYCHRL.<sup>285</sup>

In the fall of 2017, the Commission surveyed over 3,100 Muslim, Arab, South Asian, Jewish, and Sikh ("MASAJS") New Yorkers about their experiences with discrimination and harassment following the 2016 presidential election. This survey project was inspired by a similar report published by the Commission immediately after 9/11 documenting the experiences of Muslim and South Asian communities.<sup>286</sup> To garner responses from as large of a cross-section as possible, including youth and adults, English speakers and non-English speakers, the Commission created survey questions in Arabic, Bengali, English, French, Hindi, Punjabi, Russian, Urdu, and Yiddish, and distributed them widely in partnership with over 150 community leaders, faith-based organizations, and advocacy organizations.<sup>287</sup> The survey reflected an extensive input process. For instance, the survey development and collection process included critical consultations with Commission staff who liaise with these communities and with a wide variety of community stakeholders, including direct service providers, faith-based organizations, and advocacy groups, and those who identify as members of MASAJS communities.<sup>288</sup> For example, during the

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284. IAOHRA, Draft Resolution (2019), [https://docs.wixstatic.com/ugd/a7a927\\_411a864f9ae64c90b6526791c26d1be2.pdf](https://docs.wixstatic.com/ugd/a7a927_411a864f9ae64c90b6526791c26d1be2.pdf) [<https://perma.cc/J2JQ-44K9>].

285. *SSA No-Match Letters Factsheet*, NYC COMMISSION ON HUM. RTS., (July 2019), <https://www1.nyc.gov/site/cchr/media/No-Match-Letter-Factsheet.page> [<https://perma.cc/YY85-CF9V>].

286. N.Y.C. COMM'N ON HUMAN RIGHTS, DISCRIMINATION AGAINST MUSLIMS, ARABS AND SOUTH ASIANS IN NEW YORK CITY SINCE 9/11 (2003).

287. N.Y.C. COMM'N ON HUMAN RIGHTS ET AL., XENOPHOBIA, ISLAMOPHOBIA, AND ANTI-SEMITISM IN NYC LEADING UP TO AND FOLLOWING THE 2016 PRESIDENTIAL ELECTION: A REPORT ON DISCRIMINATION, BIAS, AND ACTS OF HATE EXPERIENCED BY MUSLIM, ARAB, SOUTH ASIAN, JEWISH, AND SIKH NEW YORKERS (June 2018), [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/MASAJS\\_Report.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/MASAJS_Report.pdf) [<https://perma.cc/B6UD-ULUT>] [hereinafter MASAJS REPORT].

288. *Id.* at Executive Summary.

process, the Commission developed relationships with New York City's Sikh communities through its Sikh staff and through its Lead Advisor for Muslim, Arab, and South Asian Communities, whose primary responsibility is to foster these connections. Sikhs have faced significant discrimination and violence particularly after 9/11 because of their religious appearance—wearing turbans and maintaining unshorn hair—and have not previously had strong connections with or access to local government in New York City. The Commission's relationship with the community helped to improve survey participation rates of Sikhs and provided an opportunity for the Commission to hear directly about the challenges Sikhs face in New York City.<sup>289</sup>

In 2018, the Commission released a comprehensive report assessing the survey results, entitled “Xenophobia, Islamophobia, and Anti-Semitism in NYC Leading Up to and Following the 2016 Presidential Election: A Report on Discrimination, Bias, and Acts of Hate Experienced by Muslim, Arab, South Asian, Jewish, and Sikh New Yorkers” (the “MASAJS Report”).<sup>290</sup> The MASAJS Report is the first of its kind in New York City to rigorously document the experiences of the named communities across a wide variety of topics, including experiences of bias, harassment, discrimination, and acts of hate as well as whether and how these groups report such experiences and outcomes.<sup>291</sup> The MASAJS report confirmed that the incidence of bias and acts of hate against these groups is disturbingly high. For example, “nearly two in five (38.7%) survey respondents had experienced ‘verbal harassment, threats or taunting referring to race, ethnicity or religion,’” and one in four (26.6%) reported they had experienced such harassment more than once.<sup>292</sup> However, rates of reporting bias harassment, discrimination, and acts of hate to community-based organizations, faith-based organizations, the Commission, the NYPD, or elsewhere remain low.<sup>293</sup> Overall, fewer

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289. As a result of this new relationship, in 2019, the Commission collected Sikh community voices and released a short video called *Being Sikh in New York City: The Experiences of a Sangat*, directed by Commissioner staffer Sania Ahmed. N.Y.C. Commission on Hum. Rts., *Being Sikh in New York City: The Experiences of a Sangat*, YOUTUBE (Aug. 15, 2019), <https://www.youtube.com/watch?v=heGwiz1WywA> [<https://perma.cc/G9FS-X8NB>].

290. MASAJS REPORT, *supra* note 287, at 3.

291. *Id.* at Executive Summary.

292. *Id.* at 9.

293. *Id.* at 12–13.

than one in three (29.2%) survey respondents who experienced discrimination or harassment reported at least one bias incident to a community-based organization, a faith-based organization, the Commission, NYPD, or somewhere else.<sup>294</sup> Other notable findings included the high relative rates of discrimination against the Sikh community: for instance, the report concluded that a Sikh person under thirty-five is nearly twice as likely to experience verbal harassment as a non-Sikh.<sup>295</sup>

The MASAJS report sought to address the experiences of individuals and their obstacles in reporting bias incidents as well as lay out action steps to address bias and harassment, including recommendations on how to encourage victims to report incidents to the Commission. Recommendations for policymakers and advocates to address discrimination and violence against MASAJS communities included: creating a network of community- and faith-based organizations for those who experience bias-related harassment, discrimination, and acts of hate; “partnering with fundraising organizations to encourage increased philanthropic support for community-based and faith-based organizations that service and support local communities of [MASAJS] New Yorkers”; connecting clients to the Commission, other City agencies, and other organizations that can provide legal, mental health, and other forms of support; planning and developing a bystander-intervention training for delivery to City employees who work directly with the public on how to deescalate bias incidents and what resources to offer those who have been involved in such incidents; addressing the mental health needs of [MASAJS] New Yorkers; and focusing outreach and legal resources on impacted communities in order to educate New Yorkers about their rights, and encourage vulnerable communities to report incidents to the Commission.<sup>296</sup>

The MASAJS Report’s release was announced in a media event at the Arab-American Family Support Center in Brooklyn which was attended by the Mayor’s Office of Immigrant Affairs and Community Affairs Unit, dozens of community-based organizations, and community and ethnic media. The findings were intended for use by the Commission and other City agencies, community-based organizations, faith-based organizations, policy makers, elected

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294. *Id.*

295. *Id.* at 9.

296. *Id.* at Executive Summary.

officials, and City residents. The Report highlights ways for community members to seek and get help to ensure their rights are protected.<sup>297</sup> The MASAJIS report continues to inform the Commission's work. For example, the Commission formalized a referral network of seven organizations—partners that were instrumental in outreach and data collection during the survey period—to identify potential cases of discrimination and harassment and connect petitioners directly with an identified staff member at the agency to discuss the case and determine next steps. It is an effort to foster and build direct and long-standing relationships with key organizations that are on the ground every day hearing of incidents of harassment and discrimination, and to position the Commission in a way that will allow the agency to respond quickly.

The Commission has also prioritized programming that lifts up and celebrates New York City's religious diversity. For instance, in 2018 the Commission organized a New York City-wide event to celebrate an important Sikh observance—Vaisakhi<sup>298</sup>—and raise awareness about New York's Sikh communities, which as mentioned above disproportionately experience hate and discrimination but remain largely unknown to the majority of Americans. The Commission continues to hold the Vaisakhi event every year as part of its efforts to combat discrimination using a variety of holistic solutions and methods. The Commission also hosts an annual Interfaith Justice Seder to celebrate Jewish communities and link the Passover narrative to other people's struggles for liberation and justice; an annual Iftar in the City, which in 2019 had over 1,000 attendees to come together and celebrate Muslim communities; and annual Diwali events to celebrate Hindu and Jain communities.<sup>299</sup> The Commission's events are highly successful and widely attended; this is largely because they are heavily community-centered, designed in close collaboration with the respective faith or heritage groups, and include an education component in advance of the event with all Commission participants to ensure that staff messaging and pronunciation are culturally competent and respectful.

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297. *Id.*

298. N.Y.C. COMM'N ON HUMAN RIGHTS 2018 ANNUAL REPORT, *supra* note 154, at 10.

299. #IAmMuslimNYC, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/i-am-muslim.page> [<https://perma.cc/66X5-5PU8>].



The Commission has also engaged in enforcement work in response to incidents of discrimination against members of MASAJIS communities. For example, in 2017, the Commission's LEB launched Commission-initiated investigations into large employers, including on behalf of airport workers at John F. Kennedy International Airport who were denied religious accommodations to pray during Ramadan.<sup>300</sup>

In 2016, after several violent attacks against Muslim leaders in New York City, the Commission launched a public awareness campaign entitled "I am Muslim NYC," to show support for Muslim New Yorkers and embrace religious diversity in New York City.<sup>301</sup> In 2017, the Commission also launched a broader campaign entitled "You Have Rights NYC," which affirmed the right of New Yorkers to live free of discrimination and harassment and included video testimonials from members of the public on successful law enforcement actions taken by the agency.<sup>302</sup> The campaign was accompanied by a series of community events to discuss race, faith, culture, and human rights in a variety of neighborhoods throughout New York City.<sup>303</sup> Furthermore, the Commission has built relationships with African Muslim leaders, and in collaboration with other agencies also launched a toolkit for government agencies and non-profits to improve cultural competency with faith-based communities.<sup>304</sup>

As a result of these efforts to build relationships and lift up and support communities under attack, numerous organizations have recognized the agency's work through various honors. Between 2017

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300. Press Release, N.Y.C. Comm'n on Human Rights, NYC Commission on Human Rights Charges Wheelchair Assistance Contractor at JFK International Airport for Violating the NYC Human Rights Law by Repeatedly Discriminating Against Muslim Employees (Jan. 25, 2017), <https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/CCHRPaxAssistRelease.pdf> [<https://perma.cc/75DN-SPKD>].

301. #IAmMuslimNYC, *supra* note 299. N.Y.C. COMMISSION ON HUM. RTS., #IAmMuslimNYC, <https://www1.nyc.gov/site/cchr/media/i-am-muslim.page> [<https://perma.cc/CF4X-USGU>] (last visited Nov. 10, 2019).

302. *Legal Rights for Immigrant and Religious Communities of Color in NYC*, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/you-have-rights.page> [<https://perma.cc/NLP7-PQP3>].

303. *Id.*

304. 2018 Press Releases, N.Y.C. COMMISSION ON HUM. RTS., <https://www1.nyc.gov/site/cchr/media/2018-press-releases.page> [<https://perma.cc/6CXW-DC9N>].

and 2018, the agency received the Arab-American Association of New York's Community Defender Award, the Commitment to Equal Justice Award from CAIR-NY, and the Muslim Bar Association of NY's Advocate of the Year award<sup>305</sup>, which recognizes recipients who have made strides advocating on behalf of Muslims in America.

#### K. Disability

In New York City, approximately one million residents, or 11.2 percent of the City's population, live with a disability.<sup>306</sup> Addressing disability discrimination has been a priority area for the Commission.

The NYCHRL is one of the strongest and most effective disability discrimination laws in the country. It protects individuals from discrimination in employment, housing, and places of public accommodation. The NYCHRL defines disability as any physical, medical, mental, or psychological impairment,<sup>307</sup> or a history or record of such impairment,<sup>308</sup> and includes a full range of sensory, mental, physical, mobility, developmental, learning, and psychological disabilities—whether they are visible and apparent or not. It prohibits disability discrimination in housing, employment, and public accommodations<sup>309</sup> as well as discriminatory harassment and bias-based profiling by law enforcement.<sup>310</sup>

The NYCHRL creates four general causes of action related to disability discrimination. First, it prohibits covered entities from discriminating against an individual based on disability or perceived disability.<sup>311</sup> Second, it requires that covered entities provide reasonable accommodations to individuals with disabilities to enable

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305. Mar. 22, 2017 Testimony of Carmelyn Malalis, Page 3.

306. See N.Y.C. OFFICE OF THE MAYOR, ACCESSIBLE NYC: AN ANNUAL REPORT ON THE STATE OF PEOPLE LIVING WITH DISABILITIES IN NYC 11 (2017), [http://www1.nyc.gov/assets/mopd/downloads/pdf/accessiblenyc\\_2017.pdf](http://www1.nyc.gov/assets/mopd/downloads/pdf/accessiblenyc_2017.pdf) [<https://perma.cc/EL97-RQA6>].

307. N.Y.C. ADMIN. CODE § 8-102(16)(b) (2018).

308. N.Y.C. ADMIN. CODE § 8-102(16)(a) (2018).

309. N.Y.C. ADMIN. CODE §§ 8-107(1), § 8-107(10) (2019).

310. N.Y.C. ADMIN. CODE §§ 8-602-8-604 (2019).

311. N.Y.C. COMM'N ON HUMAN RIGHTS, NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF DISABILITY 12 (2019), [https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR\\_LegalGuide-DisabilityFinal.2.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.2.pdf) [<https://perma.cc/H4SF-ZC8Z>] [hereinafter DISABILITY GUIDANCE].

them “to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.”<sup>312</sup> Third, it prohibits discrimination based on one’s “association” or “relationship” with an individual with an actual or perceived disability.<sup>313</sup> Fourth, in December 2017, the City Council passed Local Law No. 59 (2018), which creates a separate cause of action against covered entities that “refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation.”<sup>314</sup>

The Commission works to address disability discrimination through both pre-complaint intervention via a program called Project Equal Access, and through enforcement. Project Equal Access seeks to address common access issues in housing through pre-complaint intervention. The program helps provide an expedited and efficient solution to members of the public because access and accommodation needs are often urgent and time-sensitive. For instance, if an apartment building lacks a ramp for a tenant who uses a wheelchair, which effectively traps a resident inside their building, Project Equal Access can step in and attempt to secure the accommodation. If these pre-complaint efforts fail, the case is referred to LEB for investigation and assessment of damages. LEB also conducts regular testing to ensure that covered entities are providing accessibility to people with disabilities, including for instance, conducting testing at a local public hospital to confirm whether staff provided American Sign Language interpreting services for Deaf patients. The testing was conducted as part of an investigation into a complaint filed by a Deaf woman against Jamaica Medical Center after she alleged being denied American Sign Language interpreting services when visiting the hospital’s emergency room.<sup>315</sup> As part of the settlement with the Commission, the hospital agreed to pay \$22,500 in emotional distress damages to the complainant and to overhaul its policies relating to language access, reasonable accommodations for people with disabilities, and the provision of sign language interpreters in both emergent and appointment-based interactions with patients. The

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312. N.Y.C. ADMIN. CODE § 8-107(15)(a).

313. N.Y.C. ADMIN. CODE § 8-107(20).

314. N.Y.C. ADMIN. CODE § 8-107(28)(a).

315. See *2018 Settlement Highlights*, *supra* note 179.

hospital also agreed to provide comprehensive anti-discrimination training to staff and agreed to Commission monitoring for a period of three years.<sup>316</sup>

Under Commissioner Malalis, the Commission has also secured a major legal victory in the New York Court of Appeals on its interpretation of disability accommodation law with respect to housing providers. In the case, the complainant, Irene Politis, came to the Commission seeking a reasonable accommodation to have her landlord install a wheelchair ramp to her first-floor apartment.<sup>317</sup> Her landlord insisted that installing the ramp was structurally impossible.<sup>318</sup> During investigation, the Commission proposed converting a window into a door and adding a ramp, a conversion that the landlord had previously completed in a different but similar building.<sup>319</sup> At administrative court proceedings, the landlord and the Commission disagreed about the feasibility of the conversion and whether the landlord had met its high burden under the City Human Rights Law to prove undue hardship (the landlord did not present evidence about the financial hardship, if any, of such conversion), and the ALJ sided with the landlord.<sup>320</sup> The Commission declined to adopt the ALJ's recommendation and instead ordered the landlord to install the ramp, awarded Ms. Politis \$75,000 in damages, and imposed a \$125,000 civil penalty when it issued a Decision and Order.<sup>321</sup> The case was ultimately appealed to the New York Court of Appeals, which in 2018, upheld the Commission's decision and ruled against the landlord.<sup>322</sup> The case was pivotal in that it reinforced that under the NYCHRL, respondents must provide evidence of actual "undue hardship" prior to denying a reasonable accommodation to an individual with a disability.

Under Commissioner Malalis, the Commission has also settled numerous cases of disability discrimination, summaries of

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316. *See id.*

317. *See* Politis v. Marine Terrace Holdings, LLC, OATH Index No. 11-1673/74, 2012 WL 1657556, at \*8 (N.Y.C. Comm'n on Human Rights Apr. 24, 2012) (rejecting the Administrative Law Judge's recommendation and report and finding that the Administrative Law Judge did not properly apply NYCHRL).

318. *See id.*

319. *See id.*

320. *See id.*

321. *Id.* at \*17.

322. Matter of Marine Holdings, LLC v. N.Y.C. Comm'n on Human Rights, 31 N.Y.3d 1045, 1047 (N.Y. 2018).

which are available on its website.<sup>323</sup> While these settlement summaries are a useful technique to alert covered entities of their obligations and people with disabilities of their rights, disability accommodations continued to be an area of great confusion to all. To that end, the Commission decided to release an extensive disability legal enforcement guidance in 2016 outlining the protections for New Yorkers with disabilities in the NYCHRL and the differences between the City's law and the Americans with Disabilities Act, which was a massive undertaking and prepared in consultation with the New York City Mayor's Office for People with Disabilities and disability advocacy groups.<sup>324</sup> The Commission's detailed guidance contains numerous examples of discrimination based on disability, hypotheticals, addresses when medical documentation is needed to support an accommodation request, and provides sample notices, policies, and request forms. The guidance has been critical in enforcing its work to end disability discrimination in New York City and provide accessibility to people with disabilities.

#### CONCLUSION

Under the leadership of Commissioner Malalis, the Commission has had a powerful re-awakening as a civil rights powerhouse and has demonstrated the impact of robust local enforcement of civil and human rights law. Despite ongoing issues of capacity that are common to many civil rights institutions, the agency has nonetheless played a critical role in strengthening the NYCHRL, sharpening its investigatory and enforcement functions, and listening and responding to New Yorkers on the issues they face under the Trump administration and beyond. The Commission has become a credible venue for advocacy groups and attorneys and a reputable venue for members of the public to safely interact with government. Through public campaigns, reports, settlements, litigation, hearings, guidance documents, rules, amendments, focus groups, and surveys, and most importantly, a diverse and committed staff, the Commission has demonstrated that national change can originate at the local level, and the vital role that anti-discrimination agencies play in ensuring equal opportunity for all Americans and prospective Americans. With committed staff, vision, and willpower, the

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323. *2019 Settlements*, *supra* note 60.

324. *See* DISABILITY GUIDANCE, *supra* note 311, at 6.

Commission's key to success has been to embrace a holistic response to addressing discrimination, using all of the various tools and programmatic areas at its disposal and being hyper-aware of the current environment. Through this approach, the agency has helped to further the cause of civil and human rights, regardless of ongoing challenges related to resources and capacity that impact all governmental agencies and demonstrated the power and possibility of local anti-discrimination agencies in the age of Trump and beyond.