

**ALERTS**

## Accommodations for Disabilities Under the New York City Human Rights Law

**November 26, 2013**

The Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005) (the “Restoration Act”) amended the New York City Human Rights Law (“NYCHRL”) by requiring that its provisions “be construed independently from similar or identical provisions of New York State or Federal statutes.” Thus, in *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78 (2011), the New York Court of Appeals declared that the NYCHRL should be interpreted “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.”

For employers in New York City, the presumption of a broad, pro-plaintiff reading of the NYCHRL is likely to have considerable significance in the disability discrimination context, as demonstrated by the Court of Appeals’ recent decision in *Romanello v. Intesa Sanpaolo*, No. 152, 2013 N.Y. LEXIS 2755 (Oct. 10, 2013). In *Romanello*, the plaintiff worked as an executive at his employer’s financial services firm for approximately 25 years before being diagnosed with multiple medical disorders, including depression. After the employee missed almost five months of work, his employer informed him that his FMLA leave would soon expire and that it would “appreciate knowing whether he intends to return to work or abandon his position.” In response, the employee’s counsel told the employer of the employee’s illness and that the illness prevented the employee “from working in any capacity.” The employee’s counsel also stated that his client had not “at any time evinced or expressed an intention to abandon his position,” and that his return-to-work date was “indeterminate.” The employer apparently construed the employee’s response as a request for an indefinite leave of absence, which courts

previously had held to be unreasonable, both as a matter of federal and state law. The employer terminated the employee's employment.

The employee then commenced an action claiming, among other things, that the employer had discriminated against him on the basis of his disability in violation of the New York State Human Rights Law ("NYSHRL") and the NYCHRL. After losing on his disability claim in the lower courts, the employee appealed to the Court of Appeals. Consistent with prior decisions under the Americans with Disabilities Act ("ADA") and the NYSHRL, the state high court confirmed that "indefinite leave is not considered a reasonable accommodation" under the NYSHRL. However, the Court stated, unlike "the State HRL (as well as the ADA) . . . there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of 'reasonable accommodation' under the [NYCHRL]." *Id.* at \*4 (internal citations omitted).

The Court of Appeals held that an employer has a higher burden of proof under the NYCHRL. Under both the ADA and the NYSHRL, the employee has the burden of proving that a reasonable accommodation exists that would allow the individual to perform the essential functions of the job. The *Romanello* court reasoned, however, that unlike its federal and state law counterparts, the NYCHRL "definition of 'disability' does not include the term 'reasonable accommodation' or the ability to perform a job in a reasonable manner. Rather, the [NYCHRL] defines 'disability' solely in terms of impairments." *Id.* at \*6. The NYCHRL "provides an affirmative defense if the employee cannot, with reasonable accommodation, satisfy the essential requisites of the job." *Id.* Therefore, the Court continued, under the NYCHRL "the employer, not the employee, has the 'pleading obligation' to prove that the employee could not, with reasonable accommodation, satisfy the essential requisites of the job." *Id.* The Court of Appeals reinstated the employee's cause of action for disability discrimination under the NYCHRL, because the employer did not meet its pleading or proof burden.

These significantly higher pleading and proof standards for employers not only change how employers will respond to claims under the NYCHRL in their pleadings, but also will make it more difficult for employers to obtain summary judgment dismissing claims under the NYCHRL. The Court's interpretation of the NYCHRL also highlights the importance of exploring possible accommodations with disabled employees, documenting

carefully the steps taken during the necessary “interactive process” between the employee and the employer, and ensuring that adverse employment decisions with respect to disabled employees are justified.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the following attorneys: Mark E. Brossman, Ronald E. Richman and Holly H. Weiss.

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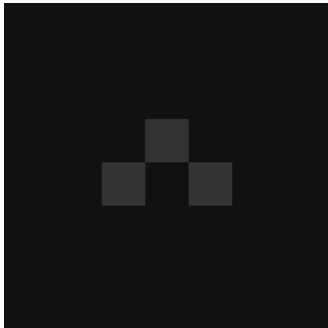
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