UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-1720(L), 15-1777

Caption [use short title]

Motion for: Leave to file Amicus Curiae Brief

Chauca

v.

Park Management Systems, LLC

Set forth below precise, complete statement of relief sought:

The National Employment Lawyers Association, New York Affiliate ("NELA/NY") seeks leave of court to file the accompanying amicus curiae brief in support of Plaintiff-Appellant.

MOVING PARTY: NELA/NY
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Park Management Systems LLC, et a

MOVING ATTORNEY: Joshua Friedman

OPPOSING ATTORNEY: Arthur H. Forman

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: The Honorable Eric N. Vitaliano

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
s/ Joshua Friedman **Date:** 1/11/16

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

15-1720-cv(L), 15-1777-cv(XAP)

United States Court of Appeals

for the

Second Circuit

VERONIKA CHAUCA,

Plaintiff-Appellant,

– v. –

JAMIL ABRAHAM, Individually, PARK MANAGEMENT SYSTEMS, LLC, AKA Park Health Center, ANN MARIE GARRIQUES, Individually,

Defendants-Appellees.

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

MOTION OF NELA/NY FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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On Behalf of Amicus Curiae:

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DECLARATION OF JOSHUA FRIEDMAN PURSUANT TO 28 U.S.C. Section 1746 UNDER THE PENALTY OF PERJURY

I am the President of National Employment Lawyers Association, New York affiliate. I make this declaration based on personal knowledge.

Pursuant to Federal Rule of Appellate Procedure 29(b), prospective *amicus curiae* respectfully moves the Court for leave to file the accompanying brief of National Employment Lawyers Association, New York affiliate, as *amicus curiae,* in support of plaintiff-cross-appellant, and a new trial on punitive damages under the New York City Administrative Code. Plaintiff-Cross-Appellant consented to this a*micus* filing. Defendant-Appellant failed to perfect its appeal, which this Court, accordingly, dismissed on October 6, 2015. *See* 2d Cir. Dkt. Entry 24. *Amicus* notified Defendant-Appellant of NELA/NY's intention to file an *amicus* brief; however, Defendant-Appellant has not responded, necessitating the present Motion for leave.

Based on the background and interest of the National Employment Lawyers Association, New York Affiliate ("NELA/NY"), *amicus* respectfully requests the Court grant this Motion for leave. In support of the present Motion, *amicus* states the following:

BACKGROUND

1. *Amicus* is the National Employment Lawyers Association/New York

("NELA/NY"), the New York affiliate of the National Employment Lawyers Association ("NELA").

2. NELA is a national bar association dedicated to the vindication of individual employees' rights. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 3000 member attorneys and 67 state and local affiliates who focus their expertise on employment discrimination, employee benefits, and other issues arising out of the employment relationship.

3. NELA/NY, incorporated as a bar association under the laws of New York State, has approximately 400 members and is one of NELA's largest local affiliates. Among NELA/NY's activities and services include the publication of a quarterly newsletter, continuing legal education through several conferences a year, and a referral service for employees seeking legal advice and/or representation. Through its various committees, NELA/NY also seeks to promote more effective legal protections for employees.

4. In addition to the daily participation of its members in employment cases, NELA/NY has filed numerous *amicus* briefs in this Court and the New York State Court of Appeals in cases presenting important questions involving wage rights, anti-discrimination laws, employment benefits, and other critical issues that impact the rights of workers.

INTERESTS

5. This case is important to our members and to the employees for whom they advocate in New York City, where most of our members work and reside.

6. The construction by this Court of the the New York City Administrative Code, 8-107(1) et seq (the "City Law"), has a direct impact on our ability to represent our clients. We wish to do all we can to deter discrimination consistent with our mission statement.

7. As discussed herein, the punitive damages provisions of the City Law, are an integral part of the statutory scheme designed by the City Council to protect City residents and employees, from discrimination.

8. It is important to NELA/NY, our members and their clients, that the City Law be given a liberal and independent construction.

CONCLUSION

9. NELA/NY respectfully requests leave to file an *amicus curiae* brief in this matter.

WHEREFORE, the undersigned counsel respectfully requests the Court grant its motion for leave.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Mamaroneck, New York
January 11, 2016

Respectfully submitted,

/s/ Joshua Friedman

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AMICUS BRIEF

15-1720-cv(L), 15-1777-cv(XAP)

United States Court of Appeals

for the

Second Circuit

VERONIKA CHAUCA,

Plaintiff-Appellant,

– v. –

JAMIL ABRAHAM, Individually, PARK MANAGEMENT SYSTEMS, LLC, AKA Park Health Center, ANN MARIE GARRIQUES, Individually,

Defendants-Appellees.

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

BRIEF OF AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT REQUESTING A TRIAL ON PUNITIVE DAMAGES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule Appellate Procedure 29(c), *Amicus Curiae* National Employment Lawyers Association/New York states that it is a non-profit corporation with no parent corporation and no publicly-held corporation owns more than 10% of its stock or membership interests.

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This brief is authored by the volunteer members of the NELA/NY Amicus Committee and its submission is fully funded by NELA/NY. No party contributed to the drafting or funding of this brief.

THE INTERESTS OF THE AMICUS CURIAE

NELA/NY is the New York affiliate of the National Employment Lawyers Association ("NELA"), a national bar association dedicated to the vindication of the rights of individual employees. NELA is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4000 member attorneys and 69 state and local affiliates who focus their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship. With approximately 400 members, NELA/NY is NELA's second largest affiliate.

NELA/NY advances and encourages the professional development of its members through networking, educational programs, publications and technical support. NELA/NY also promotes the workplace rights of individual employees through legislation, a legal referral service, filing briefs as *amicus curiae* and other activities, with an emphasis on the special challenges presented by New York's employment laws.

NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation.

Our members advance these goals through representation of employees who have been discriminated and retaliated against, including employees with claims under the New York City Administrative Code. NELA/NY has filed numerous *amicus* briefs in this Court and the New York State Court of Appeals in cases that raise important questions of anti-discrimination law. The aim of this participation has been to highlight the practical effects of legal decisions on the lives of working people.

The present case is important to our members and to the employees for whom they advocate in New York City, where most of our members work and reside.

The construction by this Court of the the New York City Administrative Code, 8-107(1) et seq. (the "City Law"), has a direct impact on our ability to represent our clients. We wish to do all we can to deter discrimination consistent with our mission statement.

As discussed herein, the punitive damages provisions of the City Law, are an integral part of the statutory scheme designed by the City Council to protect City residents and employees, from discrimination.

It is important to NELA/NY, our members and their clients, that the City Law be given a liberal and independent construction.

SUMMARY OF ARGUMENT

The district court refused to charge the jury on punitive damages under N.Y.C. Admin. Code (the "City Law") because it apparently conflated the standard for punitive damages under Title VII of the Civil Rights Act of 1964 with the very different standard mandated by the City Law.

The City Law, Section 8-107(13 requires that a jury be charged on punitive damages, in every case, so long as the plaintiff has established employer liability, which can be based solely on the action of an employee. Plaintiff-Appellant was discharged by an employee because of her pregnancy.

The district court's use of the Title VII scienter standard to determine whether to charge punitive damages under the City Law, in place of the tightly integrated, detailed and complete statutory scheme of Section 8-107(13), violated established rules of construction, contravened the plain language of the City Law and thwarted its broad remedial purpose.

ARGUMENT

The district court refused to charge the jury on punitive damages under the City Law),[1] because "[t]here is no showing of malice, reckless indifference, that there was an intent to violate the law. They may have violated the law, which is what you are going to try to prove, but there is certainly no evidence of intent." Trial Transcript 375/5-9.[2] By imposing this standard, the court ignored the manifest differences between the fundamental approach of Title VII, the federal statute governing gender discrimination, and the City Law. These fundamental

[1] *See generally* Plaintiff's counsel's colloquy with the trial court on the separate standard under the City Law. Trial Transcript 373/2-375/15.

[2] The trial judge stated several times he would not charge anything which is not in *Sands*. Hon. Leonard Sand is the co-author of *Modern Federal Jury Instructions*. Trial Transcript 366/19-22; 372/6-12.

differences were made even more clear by the Restoration Act of 2005, which "notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its state and federal counterparts, (b) all provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, and (c) cases that had failed to respect these differences were being legislatively overruled." *Loeffler v. Staten Island Univ. Hosp* 582 F.3d 268, 278 (2d Cir. 2009), citing *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 66-69, (1st Dep't 2009).

In the present case, the district court was plainly relying on to the punitive damages standard under Title VII, which requires proof that "respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 USC 1981a(b)(1).

As the Supreme Court explained in *Kolstad v. ADA*, 527 U.S. 526, 534 (1999):

> The very structure of § 1981a[3] suggests a congressional intent to authorize punitive awards in *only a subset of cases* involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while § 1981a(b)(1) requires plaintiffs to make an additional "demonstration" of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability -- one for establishing a right to

[3] Section 1981a amended Title VII to make compensatory and punitive damages available.

> compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award. [emphasis added]

The City Law contains its own standards for the imposition of liability, and punitive damages, which are clearly articulated, and very different from Title VII's standards. The district court erred in ignoring these standards.

In order to fully analyze the fundamental difference between Title VII and the City Law, it is necessary first to describe the various interlocking provisions of the City Law.

N.Y.C. Admin. Code (the "City Law"), § 8-107(1)(a), prohibits employment discrimination on the basis of gender.[4]

City Law § 8-502(a) provides that any person aggrieved by an unlawful practice under 8-107 "shall have a cause of action . . . for damages, including punitive damages."

As the New York State Court of Appeals noted in *Zakrzewska v. New School*, 14 N.Y.3d 469, 479 (N.Y. 2010), "subdivision (13) of section 8-107 of the NYCHRL creates an interrelated set of provisions to govern an employer's liability for an employee's unlawful discriminatory conduct in the workplace."

Section 8-107(13)(b) provides that an employer "shall be liable" for an

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[4] Pregnancy discrimination is a form of gender discrimination. *Krause v. Lancer & Loader Grp.,* LLC, 2013 NY Slip Op 23142, ¶ 5, 40 Misc. 3d 385, 392, 965 N.Y.S.2d 312, 318 (Sup. Ct.)("'distinctions based solely upon a woman's pregnant condition constitute sexual discrimination'"), *quoting Elaine W. v Joint Disease N. Gen. Hosp.,* 81 NY2d 211, 216 (1993)

unlawful discriminatory practice based on conduct of an employee, which is in violation of subdivision one[5] . . .of this section. Notably, the City Council did not create a heightened scienter requirement, as Section 1981a did, for the imposition of punitive damages. Section 8-107(13)(b) contains all of the state of mind requirements, and other elements, for a private claim of employment discrimination. If (13)(b)(1), (b)(2) or (b)(3) is satisfied, the court is required to charge on punitive damages.

Section 8-107(13)(b)(1) provides that employers are strictly liable for discrimination by employees who exercise supervisory or managerial responsibility. Section 8-107(13)(b)(2) provides that an employer is liable for the discrimination of an employee if it knew of the discriminatory conduct and acquiesced, or failed to take appropriate corrective action. Section 8-107(13)(b)(3) provides that an employer is liable for the discriminatory conduct of an employee if it should have know of the employee's conduct.

The City's Law's more rigorous approach to employer liability is fully consistent with its provision that punitive damages are available in all cases under Subsection (13)(b), subject to mitigation to the extent that the employer proves it took certain well-defined steps to prevent unlawful conduct. Section 8-107(13)(d) states that where liability has been established pursuant to 8-107(13)(b), and is

[5] Subdivision one includes § 8-107(1)(a), which prohibits gender discrimination.

based solely on the conduct of an employee, the employer "shall be permitted" to prove that it enforced certain "policies, programs and procedures," to prevent discrimination, and that it had a clean, or relatively clean record, concerning discrimination.

Subsection (13)(d) comes into play when the violation is due solely to the action of an employee or agent.[6] An employer may prove that, before the conduct giving rise to liability, it had:

> (1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:
>
> > (i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;
> >
> > (ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;
> >
> > (iii) A program to educate employees and agents about unlawful discriminatory practices under local, state and federal law; and
> >
> > (iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and

[6] When Garriques called plaintiff back, she said "we no longer need your services." (JA 82). Garriques then "just hung up the phone." *Id.*

> (2) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

Section 8-107(13)(d).

As set forth in Section 8-107(13)(e), if liability is established as a result of discrimination by an employee, these factors "*shall be considered in mitigation of the amount of . . . punitive damages* which may be imposed pursuant to chapter . . . five[7] of this title and shall be among the factors considered in determining an employer's liability under subparagraph three[8] of paragraph (b) of this subdivision." [emphasis added]

The New York Court of Appeals explained 8-107(13)(e) as follows:

> Regarding the first two instances [8-107(13)(b)(1) and (b)(2)], an employer's antidiscrimination policies and procedures may be considered "in mitigation of the amount of civil penalties or punitive damages" recoverable in a civil action . . . As a result, even in cases where mitigation applies, compensatory damages, costs and reasonable attorneys' fees are still recoverable. Further, an employer's antidiscrimination policies and procedures--which are at the heart of the Faragher-Ellerth defense--shield against liability, rather than merely diminish otherwise potentially recoverable civil penalties and punitive damages, only where an employer should have known of a non-supervisory employee's unlawful discriminatory acts.

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[7] Referring to 8-502(a) which provides the aggrieved "shall have a cause of action . . . for damages, including punitive damages."

[8] Subparagraph three, or 8-107(13(b)(3), provides the weakest state of mind requirement, proof that the employer should have known of the employee's discriminatory conduct. In that instance, only, the employer is entitled to prove the factors in Subsection (13(d), as an affirmative defense to liability.

Zakrzewska, 14 N.Y.3d at 479.

As the Court of Appeals recognized:

> Unlike state law . . . subdivision (13) of section 8-107 of the *NYCHRL creates an interrelated set of provisions* to govern an employer's liability for an employee's unlawful discriminatory conduct in the workplace. This legislative scheme simply does not match up with the Faragher-Ellerth defense.

Id. The Court of Appeals found that the language of subsection (13) was "unambiguous" and "plain. . . . " *Id.* The Court of Appeal's decision in *Zakrzewska* is a further illustration of the New York City Council's decision to deliberately create an alternate framework to that of Title VII, through Subsection (13). There is a clear distinction between the two laws when it comes to the standards for employer liability, with the City Law imposing strict liability on employers for the actions of persons exercising supervisory authority, in an effort to more strongly encourage employers to take preventative measures.

The instant case presents the same basic question which the Court of Appeals already answered in the negative in *Zakrzewska*:[9] should the state of mind requirements under Title VII be judicially imposed on the carefully drawn framework created by the City Council for liability and punitive damages in Subsection (13)?

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[9] *Zakrzewska* answered in the negative a question certified by this Court to the New York Court of Appeals, whether the Faragher/Ellerth affirmative defense available in Title VII cases of supervisor harassment, was applicable in cases of supervisor harassment arising under 8-107(13).

The differences between the statutes are stark. For example, the Supreme Court in *Kolstad* construed Section 1981a(b)(1) to require proof that a senior employee discriminated against the plaintiff. The Court explained that was necessary because—taking guidance from the Restatement of Torts—to impute a state of mind to an employer, the discriminatory conduct had to be that of a manager. *Kolstad*, 527 U.S. at 543. The City Law instead looks to the policies and procedures of the employer, to determine whether the employer's conduct mitigates the imposition of punitive damages. *Id.* Subsections (13)(d)(1) and (d)(2).[10] The City Law is concerned with what the employer actually did to prevent discrimination—to lesson or avoid punitive damages—rather than the "state of mind" of its employees.

That the City Law allows the employer to prove the factors in (13)(d) when the violation is based "solely" on the conduct of an employee or agent, is a further in indicium of the fact that the Council intended no separate proof of state of mind, other than what it set forth in (13)(b).[11]

In addition, imposing federal standards on the City Law, would thwart the goals of the statute. When it passed the amendments in 1991 that make up

[10] It is a familiar rule of statutory construction that where the legislature "has provided an extensive list" of criteria to be considered by courts, such expression "indicates an exclusion of others." *Morales v. Cty. of Nassau*, 94 N.Y.2d 218, 224, (1999)

[11] Where the Council required proof of an employer's scienter, it included it. See 8-126 (allowing double the civil penalty where the violation is a result of "the respondent's willful, wanton or malicious act."). 8-126 was a part of the original 1991 amendments.

Subsection (13), the City Council consciously chose a statutory scheme more protective of employee rights than federal law, a scheme that would motivate employers to take preventative steps before discrimination occurred. The decision not to require proof of a higher level of culpability, as a condition of imposing punitive damages, was not an accidental omission. As the Court of Appeals observed in *Zakrzewska*, the statutory history makes clear that the City Council acted with purpose in passing Section (13). It intended all of its component parts to work together:

> The New York City Council adopted section 8-107 (13) in 1991 as part of a major overhaul of the NYCHRL. In a side-by-side comparison of then-current law with the proposed new law, the Report of the Council's Committee on General Welfare describes new section 8-107 (13) as providing for:
>
> > "[s]trict liability in employment context for acts of managers and supervisors; also liability in employment context for acts of co-workers where employer knew of act and failed to take prompt and effective remedial action or should have known and had not exercised reasonable diligence to prevent. Employer can mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken" (1991 NY City Legis Ann, at 187 [emphases added]).

14 N.Y.3d at 480.

Under 8-107(13), once liability is established under Subsection (13)(b) based on discrimination by an employee, or agent, the case must go to the jury for determination of punitive damages, and mitigation. There is simply no absolute

safe harbor from punitive damages, such as the one the Supreme Court created, in *Kolstad*, 527 at 545 (1999)("in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII").

The City Council gave the Commission on Human Rights the power to create a safe harbor, in 8-107(13)(f),[12] but after 25 years, the Commission has never exercised it.[13]

In *Thompson v. Am. Eagle Airlines, Inc.*, 99 Civ. 4529 (JGK), 2000 U.S. Dist. LEXIS 14932 (S.D.N.Y. Oct. 4, 2000) (denying summary judgment on plaintiff's punitive damages claim under the City Law), the court rejected defendant's attempt to import the *Kolstad* standards, to escape a jury trial on punitive damages, under the City Law. The court noted that defendants "argue that

[12] Subsection 107(13)(f) provides that: "The commission may establish by rule policies, programs and procedures which may be implemented by employers for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors. Notwithstanding any other provision of the law to the contrary, an employer found to be liable for an unlawful discriminatory practice based solely on the conduct of an employee, agent or person employed as an independent contractor who pleads and proves that such policies, programs and procedures had been implemented and complied with at the time of the unlawful conduct shall not be liable for any civil penalties which may be imposed pursuant to this chapter or any civil penalties or punitive damages which may be imposed pursuant to chapter four or five of this title for such unlawful discriminatory practice."

[13] Plaintiff-Appellant's brief discusses "antidiscrimination policies, programs, and procedures established by the City Human Rights Commission." *Id.* at 19. As discussed, the Commission has never exercised the authority to establish such policies, programs, and procedures. Consequently, there is no safe harbor under the City Law, and a plaintiff who has proved a violation "based solely on the conduct of an employee, agent, or independent contractor," is entitled to have the jury charged on the mitigation factors.

they are entitled to the benefit of the principle articulated by the Supreme Court in" *Kolstad*. *Id.* at *32. While noting parallels with Title VII, the court held that "the analysis under federal anti-discrimination laws cannot be used in those cases where the statutes differ." *Id.* at *33.

Thompson also rejected the argument that the statute authorized the court to dismiss plaintiff's punitive damages claims, because the defendants had proved that they had implemented the policies and procedures set forth in Subsection (13)(d). The court found that "[i]n view of the explicit language that these factors are only to be considered as factors in mitigating punitive damages, they are not a complete defense sufficient to strike the claim for punitive damages on a motion for summary judgment." *Id.* at *32.

The court also held that no safe harbor existed under the City Law, because the Commission had never promulgated a rule, pursuant to 8-107(13)(f). *Id.* at *31. That is still the case.

Similarly, in *Katz v. Adecco United States, Inc.*, 845 F. Supp. 2d 539, 552 (S.D.N.Y. 2012), defendant argued it was entitled to strike plaintiff's demand for punitive damages under the City Law, because the managing director who created an employment application had no idea that it might violate the law. Rejecting the argument that the City Law required proof of scienter, as does federal law, the court held:

> Although there is some support for this position in the case law,[14] these cases are distinguishable from this case, as explained below, and were decided prior to the Local Civil Rights Restoration Act of 2005, which requires that the NYCHRL be construed liberally . . .regardless of whether federal . . . laws, including those laws with provisions comparably-worded to provisions of the title, have been so construed.

845 F. Supp. 2d at 552 [citations and quotes omitted] The court further held that the only way defendant could avoid a jury trial on punitive damages, was if it showed that the discrimination was committed solely by an employee, and it had complied with the policies and procedures established by the Human Rights Commission under 8-107(f). As discussed, such policies and procedures have never been promulgated by the Commission.

The *Katz* court relied on *Gabel v. Richards Spears Kibbe & Orbe LLP,* 615 F. Supp. 2d 241 (S.D.N.Y. 2009), in which the district judge denied a motion *in limine* to preclude plaintiff from pursuing her punitive damages claim. In denying the motion, the court held that: "whether punitive damages are available under federal law and whether they are available under the New York City Human Rights Law are, as my colleague Judge Koetl concluded in *Thompson v. Am. Eagle Airlines,* . . . wholly separate questions" 2000 WL 1505972 at *10-11.

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[14] The court was referring, *inter alia,* to *Farias v. Instructional Systems, Inc.,* 259 F.3d 91 (2d Cir. 2001). *Farias* held that "'[t]he Administrative Code does not provide a standard to use in assessing whether [punitive] damages are warranted.' Weissman, 214 F.3d at 235." The City Law plainly does provide a standard for juries to use in assessing whether punitive damages are warranted. Amicus Curiae respectfully requests that this Court should take this opportunity to hold that *Farias* was overruled by the Restoration Act.

CONCLUSION

In conclusion, the City Council intentionally enacted Subsection (13) expressly to provide greater incentives to employers to abide by the law. The differences from federal law were intentional. The 1991 Committee Report to the full Council stated that approving the new law would:

> put the city's law at the forefront of human rights laws. Faced with restrictive interpretations of human rights laws on the state and federal levels, it is especially significant that the city has seen fit to strengthen the local human rights law at this time. Particular attention should be given to section 8-130 of Proposed . . . No. 465-A which provides that, "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." It is imperative that restrictive interpretations of state or federal liberal construction provisions are not imposed upon city law.

Local Law Bill Jacket, Local Law 39 of 1991, Report of the Legal Division, Committee on General Welfare at 12-13.

It is clear that from the legislative history that the City's Council's emphasis on deterrence, which rewards actions taken by employers to prevent discrimination by allowing them to mitigate punitive damages, was an intentional and carefully crafted departure from the policy and procedure dictated by Title VII.

Arguably, by requiring that the jury be charged on punitive damages, and the employer's proof of mitigation, in every case where the court determines that the "liability of an employer has been established pursuant to this section [8-107] and is based solely on the conduct of an employee, agent, or independent contractor."

the City Council chose to give the jury a greater role than it plays in Title VII cases. However, this role is not without limitation, since district courts retain their traditional powers to police excessive punitive damage awards, by ordering remittitur, or new trials.

In the present case, the question of whether the employer proved the factors necessary for mitigation of punitive damages is a question for the jury. A new trial on punitive damages is required. The jury should be charged based on the criteria set forth in 8-107(13)(d).

DATED: Mamaroneck, New York
January 11, 2016

Respectfully submitted,

/s/ Joshua Friedman

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as it contains 3813 words, excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii).

This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6), as it has been prepared in a proportionally spaced typeface in 14-point, Times New Roman font.

DATED: Mamaroneck, New York
January 11, 2016

Respectfully submitted,
/s/ Joshua Friedman

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