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DIGNITY AND NON-DISCRIMINATION: THE REQUIREMENT OF "REASONABLE ACCOMMODATION" IN DISABILITY LAW

James J. Weisman*

The New York City Human Rights Law prohibits discrimination against people with disabilities.¹ In 1991, the City Council amended the law and adopted the basic premise of the federal Americans with Disabilities Act (the "ADA"):² that it is a discriminatory practice, not only to exclude or provide less service or opportunity to individuals because of their disabilities, but also to fail to make "reasonable accommodation[s]" for individuals with physical or mental disabilities.³

This "active," rather than "passive," form of non-discrimination frustrates Robert Hammel because apparently he believes, mistakenly, that it creates a preference for people with disabilities.⁴ His criticism of the Human Rights Law's provisions which protect people with disabilities from discrimination fall essentially into two areas—the statute's broad definition of "disability"⁵ and the difficulty associated with interpreting a law that requires accommodation of disability, not by creating a preference, but by ensuring equal opportunity.

Mr. Hammel begins by forcing his hypothetical anthropologist from Mars⁶ to draw incorrect conclusions from his observations of our society. His Martian observes parking spaces, buildings, street corners, oral presentations and work places accessible to people with disabilities and concludes that people with disabilities are "entitled to have spent on their behalf many resources that are not made available to the non-disabled" and that "the disabled enjoy

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1. NEW YORK, N.Y., ADMIN. CODE § 8-101 (1996).

2. 42 U.S.C. § 12101 (1994).

3. NEW YORK, N.Y., ADMIN. CODE § 8-107(15)(a).

4. See Robert Hammel, *Some Reflections on New York City's Disability Law*, 23 FORDHAM URB. L.J. 1195, 1197 (1996).

5. NEW YORK, N.Y., ADMIN. CODE § 8-102(16)(a).

6. See Hammel, *supra* note 4, at 1196.

... a *special status* that allows them to claim a greater percentage of society's resources than can their non-disabled counterparts."⁷

The Martian anthropologist would be more apt to conclude that in our society, persons with disabilities enjoy no special status. We expect them to work and to participate equally and fully in all societal activity. Virtually all persons use cars, buses and elevators, enter buildings, attend lectures, and work for a living. Accommodating people with disabilities simply gives them the means to participate in our society. Accordingly, the Martian anthropologist would conclude that there is little distinction between those with and without disabilities.

After conducting research, the Martian might find Mr. Hammel's article, and thus be surprised to learn that the author hypothesized that he would conclude that the disabled (like American military veterans) receive preferences, although in fact he found none. Providing the means for persons with disabilities to use the same facilities as persons without disabilities is not preference, it is equal treatment. When blacks moved to the front of the bus, they were not being afforded a privilege. Furthermore, the Martian would wonder why Mr. Hammel believed the societal status quo, that apparently changed due to the non-discrimination law, kept disabled persons unemployed or underemployed, uneducated, poor, and without the ability to travel on transit systems intended to serve everyone.

There is little animus associated with discrimination based on disability. Society ignores rather than loathes people with disabilities. Moreover, in order to obtain a benefit or an opportunity equal to people without disabilities, it may be necessary to modify policies, practices and architecture. The City's Human Rights Law requires these modifications, or "accommodations" for persons with disabilities, when they are reasonable, and it takes pains to provide a framework for determining reasonableness.⁸

Mr. Hammel contorts the non-discrimination obligation through misinterpretation of the statutory mandate. He states, in pertinent part, that

"reasonable accommodation" is only required in conjunction with a finding that illegal discrimination has occurred. In other words, to prevail under the statute, there must be a finding of discrimination (although at the same time the statute in effect

7. *Id.* at 1197 (emphasis added).

8. NEW YORK, N.Y., ADMIN. CODE § 8-102(18).

swallows its own tail by also providing that failure to provide a reasonable accommodation itself constitutes discrimination).⁹

Since the City Council amended the law in 1991, reasonable accommodation has been the norm. It is expected and required. Certainly it is not "only required in conjunction with a finding that illegal discrimination has occurred."¹⁰ Making such reasonable accommodation is the legal equivalent of disregarding race as an employer, proprietor of a place of public accommodation, or landlord.

Mr. Hammel also discusses the difference between the ADA's and the Human Rights Law's definitions of "disability." The City's Human Rights Law prohibits discrimination on the basis of "an impairment"¹¹ while the federal statute prohibits discrimination on the basis of a "substantial impairment."¹² Assuming that employers attempt to hire the person most qualified and capable, Mr. Hammel makes a point which leads readers nowhere — that under the federal law, employers are free to discriminate on the basis of impairments that are not substantial after inquiry about the same.¹³ Why would an employer want to inquire about and to deny employment on the basis of impairments that are not substantial? Somehow, Mr. Hammel has reached the conclusion that the City's Human Rights Law restricts employers unnecessarily. Mr. Hammel and employers interested in asking questions of applicants about insubstantial matters can relax despite the City Human Rights Law's proscription of employer inquiry about insubstantial impairments. Many other insubstantial reasons to deny employment remain available, such as the applicant's favorite TV shows, and what the applicant did on his summer vacation.

The ADA requires employers to consider whether or not the applicant can perform the essential functions of a job, with or without reasonable accommodation.¹⁴ If so, neither the disability nor the need to make reasonable accommodation can be a basis for denying employment provided the applicant is the most qualified. This method of applicant analysis is as applicable to the City's "impairment" standard as it is to the federal "substantial impairment" standard.

9. See Hammel, *supra* note 4, at 1198-99 n.7.

10. *Id.*

11. NEW YORK, N.Y., ADMIN. CODE § 8-102(16).

12. 42 U.S.C. § 12102(2).

13. See Hammel, *supra* note 4, at 1205-06.

14. 42 U.S.C. § 12112(a). See also 42 U.S.C. § 12111(8) (defining "qualified individual with a disability").

Inquiry into whether the applicant is capable of performing essential job functions with accommodation also eliminates other problems. Mr. Hammel provides several fact patterns and attempts to show how difficult the City's Human Rights Law is to apply. If the employer first established essential job functions for the available position, these cases could be dealt with fairly and forthrightly. For example, one applicant types forty five words per minute and attributes his inability to type fifty words per minute to disability, while another applicant types fifty words per minute. Is typing fifty words per minute an essential job function? Assuming it is, is there an accommodation, which is reasonable, which will permit the disabled applicant to type fifty words per minute? If not, he cannot perform the essential functions of the job, and therefore not hiring him on the basis of disability is not an unlawful discriminatory practice, because his disability is "job related."¹⁵

Mr. Hammel would have us believe that an employer is "on notice" that this applicant is disabled, because although the applicant states he is well motivated, he can type only forty five words per minute. It could be argued that this is due to an impairment of the musculoskeletal system. While a complaint of that nature would almost certainly be considered frivolous, and dismissed as such, if typing fifty words per minute is an essential job function, the presence of a disability does not eliminate this requirement for employment. The disability merely triggers the inquiry into whether an accommodation could render this applicant capable of performing essential job functions.

In his section on Remedies, Mr. Hammel describes the New York City Human Rights Commission (the "Commission")'s activities in remedying accessibility problems. The Commission has ordered landlords and proprietors of places of public accommodation to remove barriers (install ramps) to accommodate disabilities. Newly disabled tenants have also been able to relocate to ground floor apartments in walk-up buildings as reasonable accommodations.¹⁶

Mr. Hammel discusses the hypothetical Smith case¹⁷ and describes a situation which is currently before the Commission.

15. 42 U.S.C. § 12112(b)(6). "Job related" as defined in the EEOC Title I Technical Assistance Manual means that a qualification, test, or other selection criterion which screens an individual with a disability or a class of individuals based on disability, must be a legitimate measure or qualification for the *specific* job it is being used for. It is not enough that it measures qualifications for a general class of jobs.

16. See Hammel, *supra* note 4, at 1212.

17. *Id.*

Smith wants to be relocated by the New York City Housing Authority from an apartment in the Bronx to one in Manhattan, in order to be close to his doctor.¹⁸ Interestingly, it is currently the practice of the Housing Authority to consider medical need in determining locales in which eligible tenants should be placed and/or to which they can be transferred. The Housing Authority is already accommodating people in Smith's circumstances.¹⁹ Both the Fair Housing Amendments Act of 1988²⁰ and Section 504 of the Rehabilitation Act of 1973²¹ require reasonable accommodation. The City's Human Rights Law did not take the Housing Authority by surprise. Therefore, it is likely that the dispute is based not on the nature of Smith's request, but on his credibility. Medical need and not convenience, impairment and not pretense, must be the criterion. Moreover, Smith's request must be viewed within the context in which it was made. While all Housing Authority tenants must be "eligible" and meet eligibility criteria, the Housing Authority imposes a complicated set of priorities over eligible tenants on waiting lists who are routinely skipped because, while they have seniority, their needs are not the most acute and/or they do not fall into a high priority category.

Conclusion

Mr. Hammel concludes by assuming, incorrectly, that the disabled want their needs met.²² Disability rights laws, and the disability rights movement, however, seek equal opportunity for people with disabilities to meet their own needs.

Mr. Hammel states several times in his article that identical treatment of whites and blacks, and identical treatment of protected classes yield nondiscriminatory results when considering "race model" civil rights statutes.²³ This argument skips lightly over "disparate impact"-type civil rights statutes such as the City's Human Rights Law. This law makes it a discriminatory practice to treat protected classes the same as unprotected classes if (i) such treatment is detrimental to the protected group, and (ii) alternative

18. *Id.* at 1212-13.

19. See The New York City Housing Authority's Tenant Selection and Assignment Plan (excerpts in Appendix, *infra*).

20. 42 U.S.C. § 3604(3)(B) (1994).

21. 29 U.S.C. §§ 701(a)(4), 794 (1994).

22. See Hammel, *supra* note 4, at 1217.

23. *Id. passim.*

policies could be adopted which do not undermine significant business objectives which would eliminate the detrimental result.²⁴

Unramped curbs and inaccessible buses have a disparate, negative impact on the mobility-impaired portion of the population. Accessible buses and ramped curbs do not bear a significant relationship to a significant business objective to render legitimate this disparate negative impact.

Denying admission to public places on the basis of race or disability is an example of the type of discrimination Mr. Hammel is comfortable redressing. Both the ADA and the Human Rights Law require more complicated analyses of wrongs and remedies and provide redress for more subtle forms of discrimination.

Perhaps Mr. Hammel is correct when he states that the definition of "disability," that is, "an impairment," is too broad. Because reasonable accommodation is all that the City Human Rights Law requires of employers, landlords and proprietors of places of public accommodation, claims brought under the law will result in reasonable responses to insubstantial impairment. These accommodations will probably be inexpensive and uncontroversial. If, however, the Commission is overwhelmed by a flood of "discrimination based on insubstantial impairment" cases, although the Commission has merely required reasonable accommodation, the City Council may have to amend the statute to further clarify the term "disability" to parallel the ADA's "substantial" impairment language.

Mr. Hammel's anthropologist from Mars concludes that the Human Rights Law's provisions were drafted to "help the disabled."²⁵ This conclusion is somewhat accurate but only in so far as being afforded the same rights and opportunities as those in unprotected classes, is "help." Helping the disabled, as Mr. Hammel points out, is altruistic.²⁶ It can also be patronizing, stigmatizing, and unnecessary, and can create a society in which those helped are treated as inferiors, provided less education and employment opportunities, and remain dependent on the altruism and help. Reasonable accommodation—that is, non-discrimination—is all the "help" the law need provide.

24. NEW YORK, N.Y., ADMIN. CODE § 8-107(17)(a)(2).

25. See Hammel, *supra* note 4, at 1217.

26. *Id.*

Appendix

The New York City Housing Authority's Tenant Selection and Assignment Plan

I. Introduction

The New York City Housing Authority has adopted this Tenant Selection & Assignment Plan (the "TSAP" or "Plan") to assure that it receives and processes applications for conventional public housing efficiently and in accordance with the laws.

II. The Application

To be considered for conventional public housing each applicant must complete the Housing Authority's printed application. Applicants will be asked to select a first and second borough in which they wish to live, but may not request that their application be assigned to a particular project, defined as any conventional public housing building or group of buildings at which apartments are assigned from a single pool of certified applicants. Applicants who enter a project name in the space designated for the borough selections shall be deemed to have selected the borough in which the project is located. Applicants who fail to choose a borough shall be deemed to have chosen their borough of residence.

Upon receipt, each application shall be date and time stamped. Applications may be received and stamped both at the Housing Application's office and at its satellite offices. Applications will then be reviewed and assigned a priority code which identifies the applicant's need for housing, and the information on the application and its priority will be entered into the Housing Authority's computer data base. Information contained in applications assigned to priority codes 0 through 4 will be entered . . .

B. Transfer Priorities

Good causes for transfer, and their priority codes are:

Code 0

Tenants who are:

Displaced due to project renovation.

Displaced because their apartment is needed for project use.

Living in underoccupied apartments pursuant to Housing Authority standards (e.g., one person living in a two-bedroom apartment). If a tenant who is living in an underoccupied apartment

refuses to request a transfer to an apartment within the tenant's current project, the Housing Authority shall offer that tenant any apartment of the appropriate size within the current project or another project.

The three categories of transferees described above may choose any project whether or not it is designated as anticipating vacancies on the Interviewer's Guide. After approval, these transfer requests shall be certified to the Command Center for assignment to the chosen project.

Code 1

Tenants who are:

Victims of domestic violence or intimidated witnesses/victims.

Suffering a rent hardship. (Applies only to projects with income restrictions including projects which are not defined as conventional public housing projects.)

Victims of a traumatic incident in their project.

The three categories of transferees described above may choose only the borough to which they would like their request assigned. After approval, the transfer request shall be certified to the Command Center for assignment.

Asking to return to a project from which they were displaced due to project renovation. (Tenants qualify for this transfer only if they request it within six months of the completion of the renovation which caused their displacement.)

The above category of transferees shall be certified to the Command Center for assignment to their original project.

Related to a family member who dies in the apartment at which such tenant resides.

The above category of transferees may choose to transfer within their current project. If these transferees wish to leave their current project, or their current project cannot accommodate their need for a transfer, they may choose only the borough to which they would like their transfer request assigned. After approval, such transfer requests shall be certified to the Command Center for assignment.

Code 5

Tenants who are:

"Extremely Overcrowded" based on the approved occupancy of the apartment.

Involved in long-term friction between neighbors.

The two categories of transferees described above must choose their current project, unless the project contains no apartments of

the size required, or an intra-project transfer will not resolve the friction, or it would likely take more than two years for an apartment of the appropriate size to become available. In these cases transferees who need who need "Larger Apartments" may choose only the borough in which they wish to live (these requests shall be certified to OCD); those who need "Smaller Apartments" may choose any project designated as anticipating vacancies on the Interviewer's Guide (these requests shall be certified to the selected project).

In need of medical care not available within a reasonable distance of the project.

Transferees who show that the medical care is available only at a specific facility not within a reasonable distance, shall not be permitted to choose a project. Rather, the Housing Authority shall assign them to a project near that facility, whether or not the project is designated as anticipating vacancies on the Interviewer's Guide. When the medical care is not limited to a specific facility, transferees who need "Larger Apartments" may choose only the borough in which they wish to live (these requests shall be certified to OCD, which shall assign them to projects near the appropriate facilities); those who need "Smaller Apartments" may choose a project designated as anticipating vacancies on the Interviewer's Guide which is within a reasonable distance of a facility where the required care is available (these requests shall be certified to the selected project).

Seriously ill and desire to continue critical care treatment with a doctor or hospital with which the tenants have a long-term relationship where travel to that doctor or hospital now imposes a hardship.

The above category of transferees shall not be permitted to choose a project. Rather, the Housing Authority shall assign then to project near the doctor or hospital, whether or not the project is designated as anticipating vacancies on the Interviewer's Guide.

In need of continuing home health care which no household member can provide and that is not available near the project.

In need of continuing child care to enable a family member to work, which no household member can provide, which is not available near the project.

Transferees who show that a relative will provide the health or child care shall not be permitted to choose a project. If the relative lives in a Housing Authority project, the Housing Authority shall assign the transferee to that project, whether or not it is designated

as anticipating vacancies on the Interviewer's Guide. Otherwise, the Housing Authority shall assign the transferee to a project near that relative, whether or not the project is designated as anticipating vacancies on the Interviewer's Guide.

Transferees who do not have relatives who will provide the required care and who need "Larger Apartments" may choose only the borough in which they wish to live (these requests shall be certified to OCD, which shall assign them to projects near appropriate providers or facilities); those who need "Smaller Apartments" may choose a project designated as anticipating vacancies on the Interviewer's Guide . . .