

Background on Discriminatory Harassment Under NYC Human Rights Law¹ **March 2017**

Introduction

The United States is a proud kaleidoscope of individuals from diverse racial and ethnic backgrounds, with various religious beliefs and sexual orientations, and of myriad ages and nationalities. Nowhere is this more apparent than in New York City, which has long been an entry point for immigrants and a beacon of tolerance and opportunity for various minority communities. While the mingling of so many groups fosters greater open-mindedness and acceptance, it can also give rise to friction on occasion. In the past several decades, the city government has sought to supply a means of deterring offensive and discriminatory acts and providing amends for those that occur. It does so through the New York City Human Rights Law (“HRL”) and the City Commission on Human Rights (“City Commission”). Over the years, the HRL has grown and changed to address new waves of intolerance and bigotry in the workplace and in public and private housing. One significant and relatively recent development was the addition of a private right of action for any person who experienced discriminatory harassment, regardless of the context. Such aggrieved persons could adjudicate discriminatory harassment complaints before the City Commission or in a state court. Since its passage, however, the discriminatory harassment portion of the HRL has not been substantively interpreted by either the City Commission or state courts. In light of the recent spike in complaints of discriminatory harassment received by the City Commission, this memorandum explores how state courts in particular might handle a discriminatory harassment claim under the City Human Rights Law based on the ways other courts have dealt with relevant First Amendment issues and analogous civil and criminal statutes.

Summary of Conclusion

A plaintiff bringing a discriminatory harassment claim under the HRL in state court will likely need to show (1) defendant’s attempted or actual interference (2) with plaintiff’s rights secured by the federal or state constitution or laws (3) via threats, intimidation or coercion and (4) motivated in whole or in part by plaintiff’s membership in a protected class. The discriminatory harassment provision of the HRL, and the definition of “threats, intimidation or coercion” under this provision, coexists with First Amendment protection of speech. Thus, claims based on conduct contemplated in the HRL and not protected by the First Amendment are more likely to succeed without falling prey to constitutional challenges. Based on First Amendment jurisprudence to date, this includes fighting words and true threats, as determined from not only the speech or conduct at issue, but also the full context surrounding it.

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Background

Human rights law in New York City dates back to the 1950s, when the passage of two Local Laws banned discrimination in private housing and created a city agency devoted to eliminating bigotry and promoting equal rights.² During the next decade, these laws were updated and incorporated into the city's administrative code as the Human Rights Law of the City of New York.³ Under the HRL, the Commission on Intergroup Relations (later the City Commission on Human Rights) was empowered to combat discrimination based on race, sex, age, and national origin in the context of housing, employment, or public accommodations.⁴ Over the next several years, the Commission's powers were expanded to cover discrimination in employment, housing, or public accommodations based on religion, age, disability, alienage, and sexual orientation, as well as other protected classes.⁵

In 1991, New York City passed comprehensive reforms to the HRL to "provide additional protection against systemic discrimination [and] prohibit discriminatory harassment."⁶ Notably, the amendment added Chapter 5 of the HRL allowing aggrieved persons to bring their HRL claims, which had thereto been exclusively adjudicated in administrative proceedings before the City Commission, into state court. The Committee Report for the 1991 amendments notes that "a judicial forum is an appropriate alternative forum for the enforcement of discrimination laws."⁷ The statute of limitations for HRL claims in state court is three years, as opposed to the one year deadline for claims brought before the Commission.⁸ Claimants must elect to use one of the two available fora; however, if a claim is dismissed by the City Commission for administrative convenience, it may be brought in state court and the statute of limitations will be tolled.⁹ Chapter 5 provides that claimants bringing civil actions in state court may seek equitable relief and appropriate monetary damages, including punitive damages.¹⁰ Moreover, this Chapter allows the court, in its discretion, to award costs and reasonable attorney's fees to prevailing parties.¹¹

To combat discrimination in the form of "threats, harassment, or intimidation by persons who are not employers, owners of housing accommodations, or persons who operate public accommodations," a new chapter on Discriminatory Harassment was also added to the HRL. This chapter contains a provision allowing the pursuit of damages or injunctive relief when:

"[A] person interferes by threats, intimidation or coercion or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any person of rights secured by the constitution or laws of the United States, the constitution

² See New York, N.Y., Local Law No. 80 (Dec. 30, 1957); New York, N.Y., Local Law No. 55 (June 3, 1957).

³ See New York, N.Y., Local Law No. 97 (Dec. 13, 1965).

⁴ See *id.*

⁵ See Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, 23 *Fordham Urb. L.J.* 983, 987-88 (1995).

⁶ Committee Report of Committee on General Welfare for Local Law 39/1991 at 35

⁷ Committee Report at 34.

⁸ N.Y.C. Admin. Code § 8-502(d).

⁹ N.Y.C. Admin. Code § 8-502(a)-(b), (d).

¹⁰ N.Y.C. Admin. Code § 8-502(a).

¹¹ N.Y.C. Admin. Code § 8-502(f).

or laws of this state, or local law of the city and such interference is motivated in whole or in part by the victim's actual or perceived race, creed, color, national origin, gender, sexual orientation, age, whether children are, may, or would be residing with such victim, marital status, partnership status, disability, or alienage or citizenship status"¹²

This amendment to the HRL prohibits persons from the following actions, which constitute discriminatory harassment if motivated in whole or in part by the victim's actual or perceived characteristics as listed above:

"a) No person shall by force or threat of force, knowingly injure, intimidate or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the constitution or laws of the United States or local law of the city

b) No person shall knowingly deface, damage or destroy the real or personal property of any person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the constitution or laws of this state or by the constitution or laws of the United States or local law of the city"¹³

Those who violate the above strictures are liable for civil penalties up to one hundred thousand dollars (including punitive damages) and may recover costs and reasonable attorney's fees, as noted above.¹⁴

A Note on Attorney's Fees and Punitive Damages

Allowing recovery of both punitive damages and attorney's fees under the HRL serves important policy objectives. The goals behind imposition of punitive damages (i.e. damages that punish the defendant beyond merely requiring him or her to make the plaintiff whole) are punishment and deterrence.¹⁵ The potential for punitive damages under the HRL accomplishes both of these goals. First, it punishes reprehensible behavior. Second, it appropriately increases the cost of engaging in that behavior in light of the fact that people who do so often escape liability, for instance by virtue of doing so anonymously. Theoretically, in situations where injurers may escape liability for their actions, "the level of liability imposed on them when they are found liable needs to exceed compensatory damages so that, on average, they will pay for the harm that they cause."¹⁶ Otherwise, the cost of engaging in that behavior would be inadequate to achieve deterrence.

¹² N.Y.C. Admin. Code § 8-602(a)

¹³ N.Y.C. Admin. Code § 8-603(a)-(b).

¹⁴ N.Y.C. Admin. Code § 8-603(c).

¹⁵ See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harvard L. Rev. 869, 873 (1998).

¹⁶ *Id.* at 874.

In New York, the right to recover attorney’s fees from an opponent in litigation must be articulated in a statute, rule of court, or agreement between the parties.¹⁷ The HRL provides for recovery of costs and reasonable attorney’s fees at the judge’s discretion when the plaintiff is the prevailing party.¹⁸ Fee awards for civil rights cases are calculated by determining the “lodestar” amount—the number of hours reasonably expended on litigation multiplied by a reasonable hourly rate—and adjusting it based on equitable considerations, including the results obtained.¹⁹ As the Senate stated in its Report on the Civil Rights Attorney’s Fees Awards Act of 1976, incorporating the potential recovery of attorney’s fees into civil rights laws is crucial because these laws often depend heavily on private enforcement.²⁰ Allowing fee awards incentivizes attorneys to take on claims under the HRL, especially considering the likelihood that prevailing plaintiffs may only receive nominal damages that are far from enough to cover payment for their attorneys.²¹

Applicable First Amendment Jurisprudence and Analogous State Law

To date, New York state courts have not substantively explored the contours of the HRL’s discriminatory harassment provisions. To the extent that these provisions are mentioned in HRL caselaw, it is within a cursory discussion of auxiliary claims made alongside or in the alternative to a primary claim focusing on discrimination in one of the three contexts on which the HRL originally focused: employment, housing, or public accommodations. The City Commission also has not had occasion to construe the discriminatory harassment provisions of the HRL. It is easier to predict how certain aspects of these provisions will be treated relative to others. For instance, courts will likely investigate the relation between membership in a protected class and the intent underlying the alleged harassment in a manner similar to their analysis under other provisions of the HRL. Determining whether the alleged harassment interferes with legal rights will involve a case by case analysis of specific constitutional provisions or laws at the federal or state level, with a potential question as to whether common law rights are included. However, the interpretation of “threats, intimidation or coercion” is much more uncertain. The way courts have analyzed alleged “threats, intimidation or coercion” in the context of First Amendment challenges, claims under analogous anti-harassment statutes in other states, and hate crime cases may assist in predicting how New York courts will engage with the discriminatory harassment provisions of the HRL.

A. First Amendment Concerns

Claims under the HRL’s discriminatory harassment provision should take into account the potential conflict with the First Amendment of the U.S. Constitution, as well as analogous protections in state constitutions. Federal First Amendment jurisprudence illuminates the

¹⁷ See, e.g., *Mount Vernon City School Dist. v. Nova Cas. Co.*, 19 N.Y.3d 28 (2012).

¹⁸ See HRL § 8-502.

¹⁹ See *Hensley v. Eckhart*, 461 U.S. 424, 433-34 (1983); *Shannon v. Fireman’s Fund Ins.Co.*, 156 F. Supp. 2d 279, 290-306 (S.D.N.Y. 2001) (applying the *Hensley* calculus in the context of a claim under the HRL).

²⁰ See, e.g., S. Rep. No. 1101, 94th Cong., 2d Sess. 1976, at 2 (“[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.”).

²¹ See, e.g., *McGrath v. Toys “R” Us, Inc.*, 3 N.Y.3d 421 (2004).

contours of how constitutional protection applies to discriminatory or potentially threatening speech. Since courts typically interpret state law to avoid conflict with the Constitution,²² both civil and criminal state restrictions on discriminatory harassment mainly operate within these contours. The First Amendment generally guards against government restriction of speech, including expressive conduct, based on disapproval of the content of that speech.²³ However, limitations on this protection are permitted for categories of speech that have “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁴ The line between speech protected by the First Amendment and speech for which the interest in order and morality justifies suspending these protections is not always obvious. The overlap between speech that both constitutes discriminatory harassment and is not protected under the First Amendment is likely made up largely of true threats and fighting words.

Discriminatory harassment by way of speech or expression is not protected by the First Amendment if it is considered a “true threat.”²⁵ These are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²⁶ When determining that a statement constitutes a true threat, “[a] court must be sure that the recipient is fearful of the execution of the threat by the speaker.”²⁷ Without some aspect of threatened violence, “offensive and coercive speech is protected by the First Amendment.”²⁸ Thus, “speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”²⁹ In other words, “mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.”³⁰

To ascertain whether a statement constitutes a threat unprotected by the First Amendment, courts look at “how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm.”³¹ Whether the allegedly threatening statement was communicated publicly or privately does not alter its constitutional status—threats are “unprotected by the First Amendment however communicated.”³² Neither does the speaker need to convey that they personally will commit some act of violence against the recipient; a court “can still reasonably find a true threat even where the communication is more ambiguous,” such as an anti-abortion activist’s statement that “someone” would place

²² See, e.g., Richard A. Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. Chi. L. Rev. 800, 814-15 (1983).

²³ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Texas v. Johnson*, 491 U.S. 397 (1989).

²⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²⁵ See *Watts v. United States*, 394 U.S. 705, 708 (1969).

²⁶ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

²⁷ *New York ex rel Spitzer v. Operation Rescue Nat’l*, 273 F.3d 184, 196 (2d Cir. 2001).

²⁸ *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1073 (9th Cir. 2002), citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

²⁹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

³⁰ *Id.* at 927.

³¹ *Planned Parenthood*, at 1076.

³² *Id.*, quoting *Madsen*, 512 U.S. at 753.

explosives under a doctor's car.³³ Context is critical in judging whether a statement is a true threat rather than protected speech.³⁴ In a recent Ninth Circuit case, *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, the court held that "threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners."³⁵

Largely due to this focus on surrounding context, the term "true threats" has a wider application than just words or conduct that obviously portend imminent harm. Recently, Courts of Appeal have had to consider how the First Amendment applies to situations where threatening statements are not directly communicated in such a way that both the imminence of violence and its source are explicit. The context surrounding these alleged threats has been crucial to determining whether they are constitutionally protected speech. In *Planned Parenthood of Columbia/Willamette*, for instance, anti-abortion activists made posters containing doctors' names and likenesses in the form of "WANTED" signs.³⁶ The Ninth Circuit held that this was not protected speech in part because of the surrounding context; other doctors whose likenesses appeared on similar "WANTED" signs were subsequently murdered.³⁷ The Second Circuit evaluated a situation in *United States v. Turner* where a radio host posted Seventh Circuit judges' names and addresses on his website, along with various statements about which of them "deserve[d] to be killed."³⁸ In light of a previous post implying a connection between his excoriation of another judge and the murder of her family members shortly thereafter, the court determined that the posts were not constitutionally protected. In *United States v. Wheeler*, the Tenth Circuit analyzed defendant's Facebook posts exhorting his "religious operatives" to kill the children of a police officer who had issued the defendant a DUI in the context of recent school shootings.³⁹ This context, coupled with the imperative directed towards a specific group rather than an unknown third party, contributed to the court's decision that the posts were not protected by the First Amendment.⁴⁰ This emphasis on context to interpret whether conduct constitutes a threat broadens the scope of unprotected speech beyond statements or conduct that directly presage imminent violence.

The government may also place restrictions on so-called "fighting words" without violating the First Amendment.⁴¹ These include such "personally abusive epithets which, when addressed to the ordinary citizen, are . . . inherently likely to provoke violent reaction."⁴² To be considered "fighting words," speech must typically be commonly used provocatively and directed towards the listener or a certain group of people to which the listener belongs.⁴³ New York courts have considered several cases where constitutional analysis of fighting words and

³³ *U.S. v. Dillard*, 795 F.3d 1191, 1200-01 (10th Cir. 2015).

³⁴ *Id.*, quoting *Watts*, at 708.

³⁵ *Id.* at 1075.

³⁶ *Planned Parenthood*.

³⁷ *Id.*

³⁸ 720 F.3d 411, 422 (2013).

³⁹ 776 F.3d 736, 745 (2015).

⁴⁰ *Id.* at 745-46.

⁴¹ *Id.*; see also *Cohen v. California*, 403 U.S. 15, 20 (1971).

⁴² *Cohen*, 403 U.S. at 20.

⁴³ *Id.*

threatening speech went hand in hand. In *People v. Dietze*, the court held an old version of the criminal harassment statute unconstitutionally overbroad, stating that “[a]t the least, any proscription of pure speech must be sharply limited to words which, by their utterance alone, inflict injury or tend naturally to evoke immediate violence or other breach of the peace.”⁴⁴ In the same vein, the court considering *In re Shane EE* found that, “[i]n addition to threatening physical harm, the language at issue here is so personally and racially offensive that it was ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’”⁴⁵ This case involved a student telling a fellow student he had “a gun with [her] name on it” in conjunction with various racial slurs, including the n-word.⁴⁶ The facts in *In re Shane EE* supported a finding that the speech in question constituted both fighting words and a true threat. However, the either-or construction used by the Court of Appeals in *Dietze* reinforces the existence of situations where discriminatory speech fails the true threat analysis but is still considered outside the bounds of First Amendment protection because it constitutes “fighting words.”

B. Similar Provisions in the HRL and Other State Laws

1. Section 8-107 of the HRL

The HRL contains another provision with language extremely similar to the discriminatory harassment provision that begins Chapter 6. Section 8-107(19) states:

“It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section.”

Though this provision has not enjoyed plentiful judicial interpretation by any means, New York courts have explored it to a greater extent than they have the discriminatory harassment provisions. These courts have repeatedly indicated a requirement that plaintiffs allege a threat in order to state a claim for a violation of Section 8-107(19).⁴⁷ The Second Circuit defines a “threat” as “the creation of ‘an impression of impending injury.’”⁴⁸ Cases stating this requirement cite to *Montanez v. New York City Housing Authority*, where the First Department considered a defendant’s motion for summary judgment on several claims including one under Section 8-107(19).⁴⁹ However, rather than holding that a plaintiff must allege a threat in order to state a claim under this section, the court in that case merely noted that the plaintiff raised questions of fact as to whether there were threats to eliminate his reasonable accommodations in

⁴⁴ 75 N.Y.2d 47, 52 (1989), citing *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) and *Gooding v. Wilson*, 405 U.S. 518 (1972).

⁴⁵ *In re Shane EE*, 851 N.Y.S.2d 711, 714 (3d Dep’t 2008), quoting *Chaplinsky*, 315 U.S. at 574.

⁴⁶ *Id.*

⁴⁷ See, e.g., *Poolt v. Brooks*, 2013 WL 323253, at *16 (Sup. Ct. N.Y. Cnty. 2013); *Rosas v. Balter Sales Co.*, 2015 WL 12915807, at *12 (S.D.N.Y. 2015); *Sletten v. LiquidHub, Inc.*, 2014 WL 3388866, at *5 (S.D.N.Y. 2014).

⁴⁸ *Sletten*, 2014 WL 3388866, at *5, citing *United States v. Davila*, 461 F.3d 298, 302 (2d Cir. 2006).

⁴⁹ 5 A.D.3d 314 (1st Dep’t 2004).

violation of Section 8-107(19).⁵⁰ Thus, this line of cases should not necessarily be taken to mean that stating a claim under Section 8-602 similarly requires alleging a threat to the exclusion of incidents more in line with coercion or intimidation. That being said, the First Amendment caselaw discussed in the previous Part indicates that claims alleging threats may be more likely to withstand constitutional challenges.

2. Provisions of New York's Penal Code

State penal code provisions for hate crimes may shed light on the type of activity contemplated by civil statutes meant to protect against discriminatory harassment. The actions covered in the penal code are criminal and therefore serve to highlight a certain threshold. Beyond this threshold, actions are considered hate crimes and likely satisfy the requirements of the lesser offense of civil discriminatory harassment. However, the HRL's discriminatory harassment provisions also extend to activity that falls short of the hate crimes contemplated in the New York Penal Code. Both California and Massachusetts have provisions in their respective penal codes analogous to their civil provisions (which are discussed below) that protect individuals' rights from interference by threat, intimidation, or coercion.⁵¹ However, the New York Penal Code's provision on hate crimes does not mirror the language of the HRL in the way California's and Massachusetts' hate crime laws do. The New York Penal Code defines a hate crime as the commission of a specified offense because of a belief or perception regarding a protected class or against a victim selected in whole or in part because of their membership in a protected class.⁵² The statute goes on to define "specified offense" as any of several offenses defined in the Penal Law, including coercion in the first and second degrees, harassment in the first degree, and aggravated harassment in the second degree.⁵³

The Penal Law defines coercion in the second degree as when a person:

"compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or compels or induces a person to join a group, organization or criminal enterprise which such latter person has a right abstain from joining by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will:

1. Cause physical injury to a person; or
2. Cause damage to property; or
3. Engage in other conduct constituting a crime; or
4. Accuse some person of a crime or cause criminal charges to be instituted against him or her; or

⁵⁰ *Id.*

⁵¹ See Cal. Penal Code § 422.6; 265 Mass. Gen. L. Ann. § 37.

⁵² See N.Y. Penal Law § 485.05(1)(a)-(b).

⁵³ See N.Y. Penal Law § 485.05(3)

5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
8. Use or abuse his or her position as a public servant by performing some act within or related to his or her official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships.”⁵⁴

Coercion in the first degree is the commission of coercion in the second degree in conjunction with instilling a fear in the victim of physical injury or property damage.⁵⁵ A key distinction between the penal code’s definition of coercion and the meaning of coercion in the HRL’s discriminatory harassment provision (other than the degree of behavior proscribed) is that the state must show that the victim subjectively experienced fear as described above, whereas claims under the HRL likely require showing that a reasonable person would perceive an action as coercion interfering with their legal rights. Typically, coercion in the first degree is “charged whenever the method of coercion was to instill a fear of injury to a person or damage to property,” whereas coercion in the second degree is used as a “safety-valve feature in the event an unusual factual situation should develop where the method of coercion is by threat of personal or property injury, but for some reason lacks the heinous quality the Legislature associated with such threats.”⁵⁶

The Penal Code defines harassment in the first degree as when a person:

“ . . . intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.”⁵⁷

⁵⁴ N.Y. Penal Law § 135.60.

⁵⁵ N.Y. Penal Law § 135.65.

⁵⁶ *People v. Finkelstein*, 28 N.Y.3d 345 (2016).

⁵⁷ N.Y. Penal Law § 240.25.

Showing a reasonable fear of physical injury is important for upholding a conviction of harassment in the first degree. For instance, in *People v. Feliciano*, a harassment conviction was vacated because showing repeated, unwanted encounters between defendant and complainant without “any offensive or threatening gestures” or “abusive . . . tone and content” was insufficient to support a finding that complainant reasonably feared physical injury.⁵⁸

Whereas behavior at the level of harassment in the first degree is “exclud[ed] from the protections of freedom of speech of both the federal and New York constitutions,”⁵⁹ aggravated harassment in the second degree occupies a more uncertain space. The provision on aggravated harassment in the second degree was recently held unconstitutionally overbroad by the New York Court of Appeals in *People v. Golb*.⁶⁰ Prior to this ruling, activity for which an aggravated harassment conviction was upheld included letters threatening physical injury⁶¹ and repeated phone calls and voicemails that interfered with a doctor’s medical practice.⁶²

These criminal statutes are useful for identifying one extreme of conduct that helps flesh out the meaning of “threats, intimidation or coercion” in the HRL’s discriminatory harassment provisions. However, the scope of behavior to which these HRL provisions apply is broader than the criminal behavior described above.

C. Analogous Laws in Other States

The discriminatory harassment provisions in the HRL are “derived from similar laws in Massachusetts and California.”⁶³ Accordingly, judicial treatment of these analogous statutes may prove instructive in predicting how New York courts approach discriminatory harassment claims under the HRL.

1. California’s Bane Act

The California law to which the Committee Report refers is the Bane Act, found at California Civil Code § 52.1:

“(a) If a person or persons, whether or not acting under the color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief. . . .

⁵⁸ 2002 WL 338123 (1st Dep’t 2002).

⁵⁹ *People v. Yablov*, 183 Misc.2d 880, 881 (Crim. Ct. N.Y. Cnty. 2000).

⁶⁰ 23 N.Y.3d 455 (2014).

⁶¹ *People v. Price*, 178 Misc.2d 778 (Crim. Ct. N.Y. Cnty. 1998).

⁶² *People v. Miguez*, 147 Misc.2d 482 (Crim. Ct. N.Y. Cnty. 1990).

⁶³ Committee Report at 35.

“(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured”⁶⁴

Although the language in the Bane Act regarding threats, intimidation, or coercion that interferes with the exercise of one’s rights is mirrored in the HRL’s discriminatory harassment provision, the Bane Act’s purview is not limited to actions taken with a discriminatory motive or effect.⁶⁵ For instance, many Bane Act cases deal with claims involving police interference with the complainant’s 4th Amendment rights in the event of allegedly unlawful searches or arrests.⁶⁶ The Bane Act was enacted in conjunction with the Ralph Act, which sets forth various rights to be protected by California state law, including the right to be free from violence or intimidation due to membership in a protected class.⁶⁷ The Bane Act also contains a subsection providing that:

“Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons . . . [who] reasonably fear that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.”⁶⁸

This subsection effectively codifies First Amendment jurisprudence, as discussed in Part A. Claims under the Bane Act require a plaintiff to show “(1) intentional interference or attempted interference with a state or federal constitutional or legal right, and (2) the interference or attempted interference was by threats, intimidation or coercion.”⁶⁹ The test for analyzing allegations of threats, intimidation or coercion is whether “a reasonable person, standing in the shoes of the plaintiff, [would] have been intimidated by the actions of the defendant and have perceived a threat of violence.”⁷⁰ Though no Bane Act case has defined the scope of the laws

⁶⁴ Cal. Civ. Code § 52.1(a)-(b).

⁶⁵ The Bane Act lacks the language found in the HRL requiring that covered actions be motivated in part or whole by the victim’s actual or perceived belonging to a protected class. *See also Venegas v. County of Los Angeles*, 32 Cal. 4th 820 (2004) (holding that § 52.1 does not require proof of discriminatory intent nor a showing that the plaintiff is part of a protected class).

⁶⁶ *See, e.g., Liberal v. Estrada*, 632 F.3d 1064 (9th Cir. 2011); *Washburn v. Fagan*, 331 Fed App’x 490 (9th Cir. 2009).

⁶⁷ *See* Cal. Civ. Code § 51.7.

⁶⁸ Cal. Civ. Code § 52.1(j).

⁶⁹ *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 67 (2015); *see also Jones v. Kmart Corp.*, 17 Cal.4th 329, 334 (1998); *Harding v. City & County of San Francisco*, 602 Fed. App’x 380, 384 (9th Cir. 2015).

⁷⁰ *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1289 (9th Cir. 2001).

under which interference with one's rights would constitute a violation, the California Supreme Court construed a similar provision to refer to both statutory and common law.⁷¹

2. *The Massachusetts Civil Rights Act*

Two sections of the Massachusetts Civil Rights Act ("MCRA") also bear great similarity to the HRL's discriminatory harassment provisions. The MCRA was passed by the Massachusetts legislature to provide "enhanced protection of civil rights" at a time when "[d]eprivations of secured rights by private individuals using violence or threats of violence were prevalent."⁷² The first section of note is section 11H, which states:

"Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured."⁷³

The next section, 11I, goes on to say:

"Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of this commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory monetary damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court."⁷⁴

Under the MCRA, a plaintiff "must prove that (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the commonwealth, (2) has been interfered with, or attempted to be interfered with, and (3) the interference or attempted interference was by 'threats, intimidation, or coercion.'"⁷⁵ Like the HRL, the MCRA is afforded liberal construction.⁷⁶

⁷¹ See *Rojo v. Klinger*, 52 Cal. 3d 65, 75-76 (1990) (interpreting the use of "laws of this state" in the state's Fair Employment and Housing Act).

⁷² *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822 (1985).

⁷³ 12 Mass. Gen. L. Ann. § 11H.

⁷⁴ 12 Mass. Gen. L. Ann. § 11I.

⁷⁵ *Haufler v. Zotos*, 446 Mass. 489, 504 (2006).

⁷⁶ See *Batchelder v. Allied Stores Corp.*, 393 Mass. at 822 (noting that, as a remedial statute, the MCRA "is entitled to liberal construction of its terms"); see also 2005 Local Civil Rights Restoration Act (instructing courts to consider the HRL independently from state and federal counterparts, such that the latter serve as a floor rather than a ceiling).

Massachusetts courts have not adopted “a comprehensive definition of the words ‘threats, intimidation or coercion.’”⁷⁷ Generally, “threat” is understood to involve “the intentional exertion of pressure to make another fearful or apprehensive of injury or harm.”⁷⁸ “Intimidation” is taken to mean putting one “in fear for the purpose of compelling or deterring conduct.”⁷⁹ “Coercion” refers to “the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.”⁸⁰ In considering claims under the MCRA, judges apply the reasonable person standard.⁸¹ For instance, defendants’ use of their bodies and bicycle locks to prevent plaintiffs from entering and leaving medical facilities to obtain abortions was considered sufficiently threatening or intimidating to a reasonable person seeking to use those facilities.⁸² In *Batchelder v. Allied Stores Corp.*, the Massachusetts high court considered a uniformed security officer’s order to stop distributing political handbills—an order to which the plaintiff objected even though he complied—to be “sufficient intimidation or coercion to satisfy the statute.”⁸³ In *Bell v. Mazza*, defendants’ statements that they would “do anything at any cost” to prevent plaintiffs’ construction of a tennis court, as well as defendants’ formation of an association to pursue this goal, was considered sufficiently threatening and intimidating to support a claim of interference with property rights under the MCRA.⁸⁴ The statute’s protection also extends to coercion via economic pressure in certain circumstances.⁸⁵

The high court has indicated that for plaintiffs to properly allege threats in MCRA claims, they must allege either “an individualized threat” directed towards one or a class of persons or “a threat of serious harm.”⁸⁶ Behavior that, according to Massachusetts courts, does not constitute threats, intimidation or coercion under the MCRA includes “limited verbal posturing and huffing and puffing” not accompanied by further actions,⁸⁷ “lecturing, counselling, picketing, signing and praying at or near clinics” without trespassing or obstructing access to those clinics,⁸⁸ and “merely recommending interference with [plaintiff’s] right” without actually pursuing or threatening to pursue that interference.⁸⁹ In effect, though this is not explicitly stated, these decisions build in First Amendment limits to the breadth of the MCRA.

3. Takeaways for New York Courts

⁷⁷ *Planned Parenthood League of Mass., Inc. v. Blake*, 417 Mass. 467, 473 (1994).

⁷⁸ *Id.* (collecting cases).

⁷⁹ *Id.* (collecting cases).

⁸⁰ *Id.* (citing *Deas v. Dempsey*, 403 Mass. 468, 471 (1988)).

⁸¹ *Id.*

⁸² *Id.* at 476.

⁸³ 393 Mass. at 823.

⁸⁴ *Bell v. Mazza*, 394 Mass. 176, 183-84 (1985).

⁸⁵ See *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 647-48 (2003) (providing examples of federal civil rights cases where economic pressure resulted in the type of coercion proscribed by the MCRA, such as threats of eviction or termination).

⁸⁶ *Bally v. Northeastern University*, 403 Mass. 713, 719 (1989).

⁸⁷ See *Glovsky v. Roche Bros. Supermarkets, Inc.*, 469 Mass. 752, 764 (2014) citing *Kennie v. Natural Resource Dep’t of Dennis*, 451 Mass. 754, 765 (2008).

⁸⁸ See *Glovsky*, 469 Mass. at 764, citing *Blake*, 417 Mass. at 476 n. 9.

⁸⁹ See *Glovsky*, 469 Mass. at 764, citing *Walsh v. Lakeville*, 431 F. Supp. 2d 134, 150 (D. Mass. 2006).

As noted above, a key distinction between the discriminatory harassment provisions of the HRL and the California and Massachusetts provisions is the greater breadth of conduct covered by the latter two statutes. Even though both laws were passed in response to escalating hate crimes, neither California’s Bane Act nor Massachusetts’ law contains a qualifying requirement that the actions that interfere or attempt to interfere with an aggrieved person’s rights be motivated in whole or part by that person’s membership in a protected class. The HRL enjoys greater harmony with the MCRA as opposed to the Bane Act in that the latter contains a specific provision stating that mere speech without a threat of violence does not rise to the conduct proscribed by the statute. Neither the HRL nor the MCRA contain language limiting the actions or behavior that may be considered threatening, intimidation, or coercive. However, as noted in Part A, the First Amendment question arises regardless of whether it is explicitly incorporated into the statute. The Massachusetts cases discussed above demonstrate the implicit effect of First Amendment limitations. In particular, cases like *Batchelder*—where the court noted the effect of an officer’s uniform in its analysis—reveal that context is crucial to the determination whether alleged discriminatory harassment is actionable, just as it is crucial to the determination whether speech is constitutionally protected.

Courts in both California and Massachusetts apply the reasonable person standard to assess plaintiffs’ alleged perception of threats, intimidation, or coercion. This, coupled with the similar use of the reasonable person standard for HRL claims other than discriminatory harassment, indicates that New York courts would apply such a standard to discriminatory harassment claims.⁹⁰ However, California courts’ interpretation of “threats, intimidation or coercion” is mainly limited to the 4th Amendment context, in which the meaning of these terms is informed by the intimidation and coercion inherent in search and seizure. Since Massachusetts courts have evaluated the meaning of “threats, intimidation or coercion” in MCRA claims more analogous to the activity contemplated by the HRL, their treatment of the MCRA better illuminates how New York courts may interpret this aspect of the HRL’s discriminatory harassment provisions.

New York City HRL Discriminatory Harassment Claims in State Court

The discussion of California’s Bane Act and Massachusetts’ Civil Rights Act yield insight on the elements a court would likely require a plaintiff to prove for a discriminatory harassment claim under the HRL. A plaintiff will probably need to show (1) defendant’s attempted or actual interference (2) with plaintiff’s rights secured by the federal or state constitution or laws (3) via threats, intimidation or coercion and (4) motivated in whole or in part by plaintiff’s membership in a protected class. In evaluating the third listed element, New York courts will likely consider whether a reasonable person would perceive the actions described by the plaintiff as “threats, intimidation or coercion.” As the MCRA caselaw demonstrates, there is a wide range of activity that could be considered threatening, intimidating, or coercive; this range

⁹⁰ See, e.g., *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 116 (2d Cir. 2013) (using reasonable person standard to evaluate plaintiff’s employer retaliation claim under the HRL); *Gallo v. Alitalia-Linee Aeree Italiane-Societa per Azioni*, 585 F. Supp. 2d 50, 536 (S.D.N.Y. 2008) (using reasonable person standard to evaluate hostile work environment claim under the HRL).

includes demands from security or police officers, sweeping statements by opponents of a construction project that they will “do anything” to stop its progress, and physical crowding and blocking of access to medical facilities by anti-abortion protesters.

First Amendment protection of speech must also be taken into consideration. In addition to the range of speech or expression that could be considered “threats, intimidation or coercion” under the HRL, there is a range of speech or expression that is also considered unprotected by the First Amendment. These ranges overlap, but are not the same. Discriminatory harassment claims based on events falling within both ranges are more likely to survive constitutional challenges. The range of unprotected speech and expression consists mainly of true threats, which engender some fear of impending violence, and fighting words that are likely to evoke a violent reaction or some other breach of the peace. To ascertain whether speech constitutes a true threat, courts analyze whether the speaker could reasonably foresee that the listener would interpret their statement as containing a serious intent to do harm. However, true threats are not limited to those directly stated in speech or by conduct; courts take into account the entire factual context surrounding the alleged threat, including prior events and the reaction of the listeners or witnesses. In determining whether speech constitutes fighting words, courts consider whether the speech in question is of a nature commonly used to provoke and whether it was directed at the listener or at a group to which the listener belongs.

Conclusion

In light of the foregoing information, it is likely that New York courts will construe the discriminatory harassment provisions of the HRL to cover the following actionable speech or expression:

- Speech or expression that constitutes a “true threat” that evokes fear of impending violence in the listener, in accordance with First Amendment jurisprudence.
- Speech or expression that may be considered “fighting words” capable of eliciting a violent reaction in the listener or some other breach of the peace on their part, in keeping with First Amendment caselaw.

The scope of speech or conduct described above is likely to be considered actionable under the HRL as well as unprotected by the First Amendment. There are still boundary questions with respect to when speech does or does not constitute either a true threat or fighting words; the full scope of speech or conduct covered by these terms is not written in stone. However, while speech or conduct around and outside of these boundaries could be actionable under the HRL to some extent, claims based on that speech or conduct are much more likely to succumb to constitutional challenges. Thus, instances of discriminatory harassment that align more squarely with the speech and conduct that existing caselaw has identified as unprotected speech (as described above) offer the greatest potential for test cases to begin to flesh out these provisions of the HRL.