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COURT OF APPEALS

STATE OF NEW YORK

MAKINEN,

Respondent,

-against-

No. 104

CITY OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York
September 5, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL G. FEINMAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar is
2 appeal number 104, Makinen v. City of New York.

3 Counsel.

4 MS. PARK: Good afternoon, Your Honors. My name
5 is Kathy Park. I represent the defendant. I'd like to
6 request two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: You may have two minutes.

8 MS. PARK: The only reasonable interpretation of
9 the City Human Rights Law is that it forecloses a plaintiff
10 from bringing a disability discrimination claim based
11 purely on a mistaken perception of ongoing alcoholism.

12 JUDGE GARCIA: But what would be the purpose of
13 that? Why wouldn't they do that?

14 MS. PARK: Well, two-fold. First, if you
15 understand what the city's council intended to accomplish,
16 specifically with Section 8-107(a), which is the foundation
17 for - - - for plaintiff's claim, that's the provision that
18 bars discrimination based on an "actual or perceived"
19 disability. What those - - - what that provision or what
20 that language accomplishes is that it identifies the
21 discriminatory motivations that are prohibited under the
22 statute. And it ensures that even if a defendant is
23 factually mistaken about its - - - his or her perception,
24 if that defendant holds or harbors that motivation that is
25 prohibited under the statute, then that - - - that is

1 actionable discrimination.

2 Here, the motivation that defen- - - - that
3 defendants are - - - are - - - or that plaintiffs are
4 claiming that defendants held is that it was just merely
5 based on a mistaken perception of alcoholism, and that's
6 not a motivation that's - - - that's forbidden under - - -
7 under the City Human Rights Law. It's not considered
8 discrimination.

9 JUDGE FAHEY: But it seems to me that an - - - it
10 seems to me that an administrative determination that may
11 have been made, arguably strongly, that it was incorrect.
12 That being the case, why wouldn't you challenge the
13 determination through an Article 78 rather than say a
14 person who is not disabled is disabled, in essence, and
15 seek for damages and a determination that the - - - the
16 allegation of calling someone disabled is damage worthy in
17 and of itself? So in other words, why not an Article 78
18 because that's - - - that's really how you challenge this?

19 MS. PARK: Certainly, we agree that an Article 78
20 would have been an appropriate vehicle for plaintiffs to
21 pursue here, and that would have been their - - - their
22 mechanism for challenging the mistaken diagnosis and just
23 completely elim - - - in challenging that determination.
24 They haven't done that here. And instead, what they're
25 doing is they're litigating a dispute over simply their

1 mistaken diagnosis in the form of a discrimination claim.
2 And as the City can - - -

3 JUDGE GARCIA: Let's give that hypothetical. So,
4 you know, in this case you - - - you know, in - - - in an
5 ordinary case, let's say, you perceive someone to be an
6 alcoholic. They've actually recovered, and you don't give
7 them a promotion because you say you're an alcoholic and
8 you will be unable to handle this work. But it actually -
9 - -in fact, they're recovered. They can sue under the
10 statute?

11 MS. PARK: It - - - I think that's right.

12 JUDGE GARCIA: But in this case where they
13 actually never were alcoholics and you perceive them to be
14 alcoholics and you take an action prohibited against the
15 statute you can't sue. And I don't - - -

16 MS. PARK: That - - -

17 JUDGE GARCIA: - - - understand why that would
18 ever be the result.

19 MS. PARK: That's the result because if you again
20 look to 8-107(a), that - - - that "actual or perceived"
21 language, which is where plaintiffs claim arises from is
22 about creating parity or ensuring that - - -

23 JUDGE GARCIA: Or you could look at it as saying
24 this is a class of people who are - - - it's not defining
25 the class who can bring the action. It's saying if you're

1 in this group that is an active alcoholic, let's call it,
2 you can't sue.

3 MS. PARK: Your Honor, if - - - if that were the
4 case, that would mean that the "actual or perceived"
5 language serves a different function for this one
6 particular context than it does for any type of
7 discrimination claim. And there's nothing in the
8 legislative history or the text of the statute that shows
9 that that was the - - - that was the intent of - - - of the
10 city council.

11 JUDGE GARCIA: But that is different, right? I
12 mean this section on alcoholism is different, especially
13 the perception part of it, right? Because, you know, let's
14 say I'm discriminating - - - you know, employer
15 discriminating based on sexual orientation and I perceive
16 that you are this particular orientation. I don't like it.
17 I discriminate against you. Here I perceive you to be an
18 alcoholic. There's something different about that, right?

19 MS. PARK: That's correct. And perhaps - - -
20 perhaps some may wish the city council to have been - - -
21 or the City Human Rights Law to provide a remedy in that
22 regard, but the - - - the reach of the City Human Rights
23 Law is still confined or defined by the language of the
24 statute. And as it stands, and the Second Circuit agreed
25 with us on this point, the plainest and most obvious

1 interpretation of these provisions is that it - - - it
2 permits an employee - - - employer to quote, "Take
3 appropriate action against an employee it believes, rightly
4 or wrongly, suffers from an alcoholism but is neither
5 recovered or recovering."

6 JUDGE STEIN: Well, let's assume - - - let's
7 assume that you're correct that - - - that the most obvious
8 interpretation is the one that - - - that you're promoting.
9 But isn't it - - - under - - - under the rules isn't - - -
10 don't we have to see if there's any reasonable way at all
11 that we can accept the plaintiff's interpretation? And if
12 there is, don't we have to under our - - - our rules of
13 interpretation, under the stat- - - - under what the - - -
14 the city council has repeatedly said every time they've
15 amended the statute that we are to interpret it as broadly
16 as possible in favor of plaintiffs? Don't we have to take
17 all that into consideration and look to whether there is a
18 possible interpretation that would make sense that would
19 extend coverage to these plaintiffs? And if we do that,
20 isn't there one?

21 MS. PARK: Your Honor is correct that there - - -
22 that this court does have to consider a - - - a reasonably
23 possible interpretation. But our position is that
24 plaintiff's inter- - - - plaintiff's construction is not a
25 reasonable one, at least not after you engage in

1 fundamental principles of statutory construction. The
2 broad construction provision in the City Human Rights Law
3 Section 8-130, it still requires courts to engage in - - -
4 to apply the canons of statutory construction. And when
5 you do that what plaintiffs have here is they - - - they're
6 departing from the most obvious or plain meaning of the
7 text and instead pressing a tortured reading of it where
8 you really have to go out of your way to - - -

9 JUDGE RIVERA: So - - - but is your point that
10 that Restoration Act requirement, that similar provisions
11 or comparably worded language in the text in this case - -
12 - in this case, refers to the definitional section, not - -
13 - not what you call the conduct section? Is that why you
14 get to where you're arguing?

15 MS. PARK: I think that's a different point than
16 the one I'm pressing now but I do agree that that one-way
17 ratchet rule under the Restoration Act, it only applies
18 when you're interpreting comparably worded federal or state
19 count - - - state stat- - - - state counterparts with
20 similar wording.

21 JUDGE RIVERA: Okay.

22 MS. PARK: And here you don't have that because
23 neither the ADA or the State Human Rights Law contains a
24 similarly worded provision regard- - - - confining the
25 definition of who is disabled in - - - in this context.

1 JUDGE RIVERA: But it has the other provision.
2 It has language that is similar if not identical to the
3 other provision.

4 MS. PARK: Well, it's - - - it does have - - -

5 JUDGE RIVERA: Isn't that the - - -

6 MS. PARK: The state - - - the state and federal
7 - - - the State Human Rights Law and the - - - and the ADA
8 does recognize that you can bring a claim - - - like a
9 regarded as claim or a claim based on - - - on a
10 perception. It doesn't actually contain the - - - the
11 "actual or perceived" language that - - - that the City
12 Human Rights Law contains, which through - - - on the face
13 of that language seems to make it clear that the city
14 council was intending to establish parity among these
15 claims.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. PARK: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel. Why didn't your
19 client bring an Article 78?

20 MS. JOSLIN: Good afternoon, Your Honor.

21 CHIEF JUDGE DIFIORE: Good afternoon.

22 MS. JOSLIN: I was not involved at the time an
23 Article 78 proceeding could have been commenced, so I - - -
24 I'm not in a great position to answer that question. But I
25 will state that although other options were before the

1 plaintiffs at the time, we don't believe - - - and it's
2 very strongly plaintiff's position - - - that they're not
3 required and that discrimination claim, which we believe is
4 entirely appropriate here, brings forth completely
5 different damages.

6 JUDGE RIVERA: Did they have an administrative
7 mechanism? Put aside the Article 78. Did they have an
8 internal administrative mechanism to challenge the
9 diagnosis?

10 MS. JOSLIN: The - - - no. The problem was once
11 - - -

12 JUDGE RIVERA: They are required to exhaust
13 administrative remedies.

14 MS. JOSLIN: They were required to - - - well,
15 they could have made certain decisions along the way which
16 would have landed them in the medical division. Once
17 they're in the medical division, they would have been told
18 something like you're going to do what the counseling
19 services unit told you to do or you're going to be
20 disciplined with up to 30 days suspension.

21 JUDGE RIVERA: So - - - so there's no
22 administrative mechanism whereby they can say it's an
23 incorrect diagnosis; I am not an alcoholic?

24 MS. JOSLIN: No, Your Honor. At that point, they
25 would have had to wait to be suspended or terminated and

1 then take it up either as an Article 78 or what we're doing
2 right now.

3 JUDGE WILSON: So would it be incorrect to read
4 the City Statute Section 8-102(16)(a) as allowing
5 discrimination against alcoholics, drug abusers, or other
6 substance abusers unless they are recovered?

7 MS. JOSLIN: Yes and no. So the definition is
8 broad. The definition of disability is broad, and then the
9 exception below it, which is paragraph (c), is a narrow
10 exception for those who are, in fact, alcoholics - - -

11 JUDGE RIVERA: Why - - - why is it an exception
12 as opposed to a clarification of the definition for this
13 particular category, substance abusers that include
14 alcoholics, drugs abusers, and so forth?

15 MS. JOSLIN: Well, the - - - the provision begins
16 with "in the case of", and it has been our position from
17 day one, and it still is, that "in the case of" means the
18 actual occurrence of alcoholism, drug addiction, or some
19 other substance abuse. So starting there, it is our
20 position that the statute lays out that you have to
21 actually have the occurrence in order for this exemption to
22 apply. If you don't have a case of alcoholism, then you
23 never get to the exemption and there's nothing to worry
24 about.

25 JUDGE RIVERA: All right.

1 MS. JOSLIN: You stick with your protection that
2 you've always had as a member of the protected category of
3 disability.

4 JUDGE RIVERA: Well, the - - - the statute is
5 about classes of potential victims. Let's put it that way,
6 right. So it's a classification. So isn't this provision
7 - - - it's definitional. You - - - you concede it is, I
8 think you must, that the definitions apply throughout the
9 statute because that's what definitions are for.

10 MS. JOSLIN: Yeah.

11 JUDGE RIVERA: Unless - - - unless there's
12 another provision that says the prior definition doesn't
13 apply here, definition applies throughout the statute.

14 MS. JOSLIN: That's correct, Your Honor.

15 JUDGE RIVERA: So these definitions are about the
16 class of victims that may proceed under the statute,
17 because I'm not even clear on why you have standing. But
18 we'll put that aside for one moment. So isn't this a
19 definition of the class of individuals that may bring an
20 action? Then you worry about what is the nature of the
21 action, which is her point. Then the nature of the action
22 is what's - - - what's the wrong that the employer did to
23 this group. But you first start out with fitting the class
24 - - -

25 MS. JOSLIN: Right. Are they protected.

1 JUDGE RIVERA: - - - of potential plaintiffs, of
2 claimants.

3 MS. JOSLIN: Exactly.

4 JUDGE RIVERA: Correct.

5 MS. JOSLIN: Right. Are they protected.

6 JUDGE RIVERA: Correct.

7 MS. JOSLIN: And we do have disability as a
8 protection. Disability includes mental impairments, which
9 thereafter includes alcoholism. So we are - - - we have a
10 protected category.

11 JUDGE RIVERA: But alcoholism is defined a
12 particular way, and you will concede that council was free
13 to define it as such.

14 MS. JOSLIN: Correct. But we don't agree - - -

15 JUDGE RIVERA: Right. They could have included
16 many other types of discrimination, many other kinds of
17 potential victims but they didn't. Why - - - why don't we
18 have to honor that, even in light of the Restoration Act?
19 Because this is an explicit choice by the council.

20 MS. JOSLIN: Your Honor, if we look at the
21 legislative history, which is somewhat tortured, but I
22 think it does help us understand that the definition is one
23 thing and an exemption is another. And here, there's a
24 very - - - there's a big difference between defining a
25 category of disability based on conduct and defining an

1 exemption from that protected class based on conduct.

2 JUDGE RIVERA: You're - - - you're defining a
3 group of claimants.

4 MS. JOSLIN: Correct.

5 JUDGE RIVERA: And your clients don't fit - - -
6 well, this is the argument, don't fit the group of
7 claimants.

8 MS. JOSLIN: They are not - - -

9 JUDGE RIVERA: Therefore, nothing else matters
10 because you're not covered by the statute.

11 MS. JOSLIN: I don't - - - I'm not sure that I
12 quite follow what you're saying, but I will do my best,
13 Your Honor. I apologize if I'm missing the mark.

14 JUDGE RIVERA: That's all right.

15 MS. JOSLIN: We have a perception claim which
16 does make this a little bit different.

17 JUDGE FAHEY: So let's say somebody calls me a
18 name, a pejorative name making reference to someone with a
19 disability. Would I have claim, then, if - - - if everyone
20 I worked with started referring to me that way?

21 MS. JOSLIN: Absolutely. You're perceived as - -
22 - as being a member of the protected class, and that is the
23 point of our - - -

24 JUDGE FAHEY: And - - - and the logic of that - -
25 - is there any limit to the logic of that - - - to that

1 perception? I mean there are other legal remedies. See,
2 assuming the equity of your case, which I think it's an
3 easy thing to do - - - in just basic fairness, I think it's
4 an easy thing to do that. The problem is is when there are
5 alternative remedies it's harder for us to get to the
6 equitable solution, and that's what leads me back to what
7 Judge DiFiore opened up with a question to you is if you
8 have these alternative remedies, you're asking us to really
9 torture the law here in - - - in pursuit of equity. Yet at
10 the same time, there are - - - there are other perfectly
11 rational remedies to you.

12 MS. JOSLIN: There were - - - there was one other
13 remedy. You're right. And we brought several others.

14 JUDGE FAHEY: Right. Right.

15 MS. JOSLIN: Some of which we've lost along the
16 way.

17 JUDGE FAHEY: Sure.

18 MS. JOSLIN: But we have left with a New York
19 City Human Rights Law and we believe it's still an
20 appropriate remedy. And if - - - if I may take a moment
21 and go through the legislatively history, it may help - - -
22 may help for me to - - - to express to you the point of how
23 this particular situation is helpful to us and not harmful.

24 So in 1977, the civil - - - the New York City
25 Council included recovered alcoholics as a protected

1 category. So right from then, 1970s, recovered alcoholics
2 were the category. So it was based on recovery. Then in
3 1981, they removed that altogether, and instead they
4 expanded the definition of handicapped. They expanded that
5 deposition - - - that definition to include mental
6 impairments, which thereafter was defined as including
7 alcoholism.

8 Now at the time they did that, they also included
9 a clarification or an exemption, if you will, that the
10 definition applies to those who are otherwise qualified to
11 perform the functions of their job. So that otherwise
12 qualified as added at the time they removed recovery from
13 the definition. Then they added "in the case of
14 alcoholism," the term otherwise qualified means recovering
15 and free of abuse. That is how the "in the case of
16 alcoholism" got thrown into the statute. It was actually
17 part of the requirement that the plaintiff be otherwise
18 qualified.

19 Now the interesting thing is in 1981, perception
20 wasn't even a claim. So if perception's not a claim, "in
21 the case of alcoholism" necessarily meant when you actually
22 have alcoholism because there was no perception claim even
23 existing. In 1991, though, they rehashed it a little bit
24 more, and in 1991 they expanded the disability definition
25 to be what it is currently in 18-102(16)(a). And they

1 added protected - - - they added perceived protected status
 2 as an additional element or additional avenue for recovery.
 3 When they did that, though - - - I'm trying to keep it slow
 4 - - - they removed the otherwise qualified requirement. So
 5 they had put it in 1981 and they added "in the case of
 6 alcoholism" otherwise qualified means you're recovering.
 7 But in 1991, they removed the otherwise qualified item - -
 8 -

9 JUDGE RIVERA: I think - - -

10 MS. JOSLIN: - - - and then - - -

11 JUDGE RIVERA: I think I can follow what you are
 12 suggesting, but aren't you still left with this definition?
 13 So that it - - - you have to be perceived as falling within
 14 the class and the class is explicitly defined in a way that
 15 excludes your clients, excludes someone who is not an
 16 alcoholic.

17 MS. JOSLIN: Your Honor, respectfully - - -

18 JUDGE RIVERA: You can see that it might be more
 19 difficult, right. I mean the - - - the council might
 20 itself see that the problem is not with someone being
 21 misdiagnosed as an alcoholic but with someone who is an
 22 alcoholic but is recovering and the employer, nevertheless,
 23 is unwilling to recognize the efforts at recovery, which is
 24 what the - - - the council is trying to - - - trying to
 25 protect that class and trying to recognize that effort at

1 recovery.

2 MS. JOSLIN: I understand, Your Honor. That is
3 one - - - that is one avenue that the council sought to
4 protect against. However, we have - - - our clients were
5 protected as being perceived alcoholics. There was no
6 question at the trial. There was no question to the jury
7 were they perceived as recovering alcoholics, were they
8 perceived as non-recovering - - -

9 JUDGE RIVERA: No. I - - - no.

10 MS. JOSLIN: So - - -

11 JUDGE RIVERA: Let me just try one more time. I
12 understand, but I - - - I think the point I'm trying to
13 make that I haven't necessarily heard you address is that
14 the statute doesn't include the class that you're referring
15 to. It could be that the council could change its mind and
16 include them, but it has not done so. It's defined this
17 group in a particular way, and it doesn't include the class
18 you're referring to.

19 MS. JOSLIN: Your Honor, respectfully - - -

20 JUDGE RIVERA: You're correct the ADA and - - -
21 and the state law does, but the City Human Rights Law does
22 not.

23 MS. JOSLIN: It does. It does because "in the
24 case of alcoholism" is an application provision. It's not
25 a definitional provision. It says that it does not apply

1 "in the case of alcoholism" unless they're in recovery.
2 There is a big difference. And I will suggest, Your Honor,
3 that there is one - - - at least one other place in the New
4 York City Human Rights Law that does the very same thing
5 with age, which is odd. But in 8-107(5)(e) and 8-
6 107(5)(g), the - - - it describes unlawful practices with
7 respect to real estate services. And it includes the
8 litany of protected categories that we're all familiar with
9 at this point, age, race, gender, disability and so on.

10 However, in the subset for (5)(g), it's another
11 applicability provision. And in that one it says these
12 protections do not apply to unemancipated persons under the
13 age of 18. So, Judge Rivera, to your point, there's not a
14 re-definition of age for that subset, but they did say
15 although age is a protected category, if you're an
16 unemancipated person under the age of 18, this particular
17 protection doesn't apply to you. And, Your Honor, in the
18 same we suggest that 8-107(16)(a) through (c) is the same
19 thing. You are protected in the outset. But you - - - if
20 you are, in fact, an alcoholic, it will not apply to you
21 unless you're in recovery and free of abuse.

22 CHIEF JUDGE DIFIORE: Thank you, Ms. Joslin.

23 MS. JOSLIN: Thank you, Your Honor.

24 CHIEF JUDGE DIFIORE: Ms. Park.

25 MS. PARK: Sure. Just a couple of brief points.

1 First, on whether there were internal administrative
2 mechanisms available to the plaintiffs, we submit that the
3 opportunity to present their case before the medical board,
4 which is comprised of physicians who will then review the
5 diagnosis and the treatment plan, that that was, indeed, an
6 internal administrative mechanism - - -

7 JUDGE STEIN: But the consequences of that were -
8 - - were pretty severe if - - - if they were not
9 successful.

10 MS. PARK: They had the - - - well, not so much
11 that if they were not successful but if they did not follow
12 the - - - the medical board's recommendation. But I will
13 note that one of the plaintiffs - - -

14 JUDGE STEIN: Well, that would mean that they're
15 unsuccessful - - -

16 MS. PARK: Well, Nardini - - - I will just note
17 that Nardini - - - there was no consequence for - - - for
18 taking - - - going through that vehicle. And Nardini is
19 one of the plaintiffs who actually did not - - - did not
20 even take that opportunity to go before the medical board.
21 As for whether 8-107 - - - the provisions in 8-107, the
22 provisions in 8-107, the subdivision - - - the provisions
23 that my adversary cites, whether that serves the same
24 function as 8-102(16)(c). I mean I'll just note very brief
25 - - - this is the first that I've heard this argument. But

1 8-107 is the not the definitions provision of the City
 2 Human Rights Law, so of course the provisions under - - -
 3 the subsections under that provision would not mean
 4 definitional terms. 8-102 is the definition - - - it's - -
 5 - it's titled definitions and it explains when the terms
 6 will be applied throughout the statute, which is why it's
 7 an opposite, the references to those subsections.

8 And finally, as for the legislative history, I'll
 9 just say very briefly it was the 1991 amendments when the
 10 "actual or perceived" language was inserted into the
 11 statute. It was that same amendment that - - - that
 12 configured the statute to what we know today as (16 - - -
 13 as 102(16)(c). And had - - - and in that same amendment -
 14 - - in those same amendments, the city council brought in
 15 the classes, protected classes, under the statute and could
 16 have easily, had it wished to, changed the definitional
 17 provision to allow for plaintiff's claims, but it did not.
 18 And certainly, plaintiffs are free to - - - or - - - or any
 19 - - - or anyone is free to bring these concerns back to the
 20 legislature or the city council and ask - - - and ask them
 21 to amend the statute based on these policy concerns. But
 22 as of now, as - - -

23 JUDGE STEIN: But it does seem to me that there's
 24 at least some arguable merit to the - - - to the position
 25 that when they started with all these amendments and then

1 they took something away and then they added something and
2 then they added the perceived that - - - that they may not
3 have realized what - - - what the consequences of that
4 would - - - would be.

5 MS. PARK: I mean, not if you understand - - - if
6 you - - - if we take the presumption that the city council,
7 in an enacting or amending language or adding language does
8 it intentionally, and with that understanding, it would be
9 a tortured reading of the statute to support plaintiff's
10 claims.

11 CHIEF JUDGE DIFIORE: Thank you, Ms. Park.

12 MS. PARK: Thank you.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Makinen v. City of New York, No. 104 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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