

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2016

5
6 (Argued: March 9, 2017 Decided: May 22, 2017)

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8 Docket Nos. 16-973-cv(L), 16-1080-cv(XAP)

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13 KATHLEEN MAKINEN, JAMIE NARDINI,

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15 *Plaintiffs–Appellees–Cross-Appellants,*

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17 v.

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19 CITY OF NEW YORK, RAYMOND W. KELLY, as Police Commissioner of the
20 City of New York, DANIEL J. SWEENEY, individually and in his official
21 capacity,

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23 *Defendants–Appellants–Cross-Appellees.**

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27 Before:

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29 SACK, LIVINGSTON, and LOHIER, *Circuit Judges.*

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31 We consider a provision of the New York City Human Rights Law
32 (“NYCHRL”) that defines only “recovering” or “recovered” alcoholics as
33 having a “disability.” See N.Y.C. Admin. Code § 8-102(16)(c). The United
34 States District Court for the Southern District of New York (Carter, L) held
35 that individuals regarded as untreated alcoholics may state a claim under the

* The Clerk of Court is directed to amend the caption as set forth above.

1 NYCHRL because analogous claims are available under New York State and
2 federal law. In the absence of authority from New York courts, we cannot
3 predict with confidence how the New York Court of Appeals would reconcile
4 the broad, remedial purpose of the NYCHRL with the specific language of
5 section 8-102(16)(c). Accordingly, we defer decision on this appeal and cross-
6 appeal in order to certify the following question: “Do sections 8-102(16)(c)
7 and 8-107(1)(a) of the New York City Administrative Code preclude a
8 plaintiff from bringing a disability discrimination claim based solely on a
9 perception of untreated alcoholism?”

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11 LISA F. JOSLIN, Gleason, Dunn, Walsh &
12 O’Shea, Albany, NY, *for Plaintiffs–*
13 *Appellees–Cross-Appellants.*

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15 KATHY CHANG PARK (Richard Dearing
16 and Devin Slack, *on the brief*), *for*
17 Zachary W. Carter, Corporation
18 Counsel of the City of New York, New
19 York, NY, *for Defendants–Appellants–*
20 *Cross-Appellees.*

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22 LOHIER, *Circuit Judge:*

23 In this disability discrimination case we consider a provision of the
24 New York City Human Rights Law (“NYCHRL”) that, as relevant to this
25 appeal, defines the term “disability” in a way that excludes alcoholics who
26 are not “recovered” or “recovering” from the protection of the statute. See
27 N.Y.C. Admin. Code § 8-102(16)(c). Plaintiffs Kathleen Makinen and Jamie
28 Nardini brought suit under the NYCHRL and its New York State and federal
29 counterparts alleging discrimination based on a mistaken perception that they

1 were alcoholics. The City of New York and the individual defendants, former
2 Commissioner Raymond W. Kelly of the New York City Police Department
3 (“NYPD”) and NYPD Sergeant Daniel J. Sweeney, argued principally that the
4 plaintiffs’ claims were barred by the plain text of the NYCHRL because the
5 plaintiffs were not (and were not perceived to be) recovered or recovering
6 alcoholics. On summary judgment and again on a post-trial motion after a
7 jury verdict partly in favor of the plaintiffs, the United States District Court
8 for the Southern District of New York (Carter, L) held that individuals
9 regarded as untreated alcoholics may state a claim under the NYCHRL
10 because analogous claims are available under both the New York State
11 Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 290 et seq., and the
12 Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq. The
13 defendants appealed, urging certification of the question to the New York
14 Court of Appeals.

15 In the absence of authority from New York courts, we cannot predict
16 with confidence how the New York Court of Appeals would reconcile the
17 broad, remedial purpose of the NYCHRL with the specific language of section
18 8-102(16)(c). Accordingly, we defer decision on this appeal and cross-appeal

1 in order to certify the following question: “Do sections 8-102(16)(c) and 8-
2 107(1)(a) of the New York City Administrative Code preclude a plaintiff from
3 bringing a disability discrimination claim based solely on a perception of
4 untreated alcoholism?”

5 **BACKGROUND**

6 Makinen and Nardini served as NYPD officers for several years, during
7 which each was referred to the NYPD’s Counseling Services Unit (“CSU”).
8 CSU offers treatment and rehabilitation for officers struggling with substance
9 abuse. Once an officer is referred to CSU with alleged alcohol-related
10 problems, a trained counselor conducts an intake interview and contacts
11 references to gather information regarding the officer’s reported alcohol use.
12 If an officer is diagnosed with an alcohol-related condition, CSU staff develop
13 a personal treatment plan, potentially consisting of educational videos,
14 counseling, Alcoholics Anonymous meetings, outpatient treatment, or
15 inpatient treatment. An officer who refuses treatment is referred to the
16 NYPD’s Medical Division, which may direct the officer to undergo treatment.
17 That direction constitutes an order with which the officer must comply or face
18 disciplinary action. The officer is entitled to challenge the disciplinary action

1 in administrative proceedings by filing a grievance with the agency that
2 oversees CSU or through an Article 78 proceeding. Otherwise, once an officer
3 is diagnosed with an alcohol-related problem, receipt by CSU of subsequent
4 evidence of alcohol consumption triggers a mandatory reassessment and,
5 potentially, further treatment.

6 Officers Makinen and Nardini were referred to CSU by an ex-husband
7 and an ex-boyfriend, respectively. Each received an alcohol-related diagnosis
8 and was directed to undergo treatment. As it turned out, the parties agree,
9 Makinen and Nardini were not actually alcoholics.¹ They filed suit in New
10 York Supreme Court, claiming primarily that the defendants mistakenly
11 perceived that they were alcoholics and discriminated against them on the
12 basis of that perceived disability, in violation of the NYCHRL, NYSHRL, and
13 ADA. The defendants removed the case to federal court and moved for
14 summary judgment. The District Court granted partial summary judgment in
15 their favor, leaving for a jury trial both plaintiffs' NYCHRL claims as well as
16 Makinen's NYSHRL and ADA claims. Makinen v. City of New York, 53 F.

¹ The jury necessarily rejected the defendants' affirmative defense that the plaintiffs were alcoholics and therefore unable to perform the essential duties of their jobs. See N.Y.C. Admin. Code § 8-107(15)(b).

1 Supp. 3d 676 (S.D.N.Y. 2014). A jury rejected Makinen’s State and federal
2 claims, but rendered a verdict in favor of both Makinen and Nardini on their
3 NYCHRL claims, awarding compensatory and punitive damages.

4 The defendants moved for a new trial and for judgment as a matter of
5 law, arguing that the NYCHRL does not extend to untreated alcoholism. The
6 District Court denied the motions in relevant part, Makinen v. City of New
7 York, 167 F. Supp. 3d 472 (S.D.N.Y. 2016), and the defendants appealed,
8 arguing that (1) the NYCHRL does not protect an employee who is perceived
9 to be an untreated alcoholic, (2) the District Court applied an incorrect
10 adverse employment action standard, and (3) the evidence did not support
11 Commissioner Kelly’s individual liability or the imposition of punitive
12 damages against Sergeant Sweeney. In this opinion, we address only the first
13 issue relating to untreated alcoholism, on which the plaintiffs’ NYCHRL
14 claims depend.²

² The plaintiffs cross-appeal the partial dismissal of their State and federal claims, including Makinen’s claim under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. We reserve decision on the issues that are the subject of the cross-appeal pending any response from the New York Court of Appeals on the certified issue.

1 **DISCUSSION**

2 Section 8-107(1)(a) of the NYCHRL prohibits employment
3 discrimination based on an “actual or perceived . . . disability.” N.Y.C.
4 Admin. Code § 8-107(1)(a). The statute defines “disability” as “any physical,
5 medical, mental or psychological impairment, or a history or record of such
6 impairment.” Id. § 8-102(16)(a). “In the case of alcoholism,” however, the
7 NYCHRL narrows the definition of “disability” so that it “shall only apply to
8 a person who (1) is recovering or has recovered and (2) currently is free of
9 such abuse.” Id. § 8-102(16)(c).

10 In view of section 8-102(16)(c), we consider whether a plaintiff may
11 state a claim under section 8-107(1)(a) if she is perceived to be an untreated
12 alcoholic. The defendants urge that the plain text of section 8-102(16)(c)
13 forecloses such a claim, as only recovered or recovering alcoholics are defined
14 as having a disability. Makinen and Nardini argue that the limitation in
15 section 8-102(16)(c) applies only “in the case of alcoholism” — that is, only
16 when a plaintiff in fact suffers from alcoholism, not when she is mistakenly
17 perceived to be an alcoholic.

1 The original 1981 Committee Report accompanying the passage of what
2 would become section 8-102(16)(c) explains that “only an individual who ‘is
3 recovering and currently free of abuse’” is “entitled to the law’s protection.”
4 1981 N.Y.C. Legis. Ann. at 28. Under this description, an employer may take
5 appropriate action under section 8-107(1)(a) against an employee it believes,
6 rightly or wrongly, suffers from alcoholism but is neither recovered nor
7 recovering (or is not “currently free of abuse”).

8 But this construction seems in tension with the New York City
9 Council’s stated intention of affording plaintiffs who sue under the NYCHRL
10 all of the protection guaranteed by comparable provisions of State and federal
11 law. The City Council passed the Local Civil Rights Restoration Act of 2005
12 out of a concern that the NYCHRL had been “construed too narrowly to
13 ensure protection of the civil rights of all persons covered by the law.” Local
14 Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85, at § 1 (Oct. 3,
15 2005) (“Restoration Act”). The City Council therefore provided as follows:

16 Interpretations of New York state or federal statutes with similar
17 wording may be used to aid in interpretation of the New York
18 City Human Rights Law, viewing similarly worded provisions of
19 federal and state civil rights laws as a floor below which the
20 City’s Human Rights law cannot fall, rather than a ceiling above
21 which the local law cannot rise.

1 Id. The City Council also amended Administrative Code section 8-130 to
2 emphasize the NYCHRL’s “uniquely broad and remedial purposes,” id. § 7,
3 and more recently amended the section again to clarify its intent to foster
4 jurisprudence “maximally protective of civil rights in all circumstances,”
5 N.Y.C. Local Law No. 35, at § 1 (Mar. 28, 2016). We have understood the
6 Restoration Act to create a “one-way ratchet” that requires us to construe the
7 NYCHRL “more liberally” than its State and federal counterparts. Loeffler v.
8 Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009) (quotation marks
9 omitted); see also Albunio v. City of New York, 16 N.Y.3d 472, 477–78 (2011)
10 (requiring that the NYCHRL be construed “broadly in favor of discrimination
11 plaintiffs, to the extent that such a construction is reasonably possible”).

12 The relevant State and federal counterparts in this case—the NYSHRL
13 and ADA—treat alcoholism as an impairment that can form the basis of a
14 disability discrimination suit. See McEniry v. Landi, 84 N.Y.2d 554, 558–59
15 (1994) (NYSHRL); Reg’l Econ. Cmty. Action Program, Inc. v. City of
16 Middletown, 294 F.3d 35, 46 (2d Cir. 2002) (ADA), superseded by statute on
17 other grounds, ADA Amendments of 2008, Pub. L. No. 110–325, 122 Stat.
18 3553. Both statutes also prohibit discrimination on the basis of a perceived

1 impairment. See N.Y. Exec. Law § 292(21)(c); 42 U.S.C. § 12102(1)(C), (3)(A).
2 But neither statute is limited to recovering or recovered alcoholics. See N.Y.
3 Exec. Law §§ 292(21)(a), 296(1)(a); 42 U.S.C. §§ 12102, 12114.³

4 On the one hand, as the plaintiffs argue, because the NYSHRL and
5 ADA prescribe a floor below which employee protections may not fall, the
6 NYCHRL should not be interpreted to exclude untreated alcoholics. On the
7 other hand, we recognize that neither the NYSHRL nor the ADA contains a
8 “similarly worded provision[],” Restoration Act § 1, comparable to the
9 NYCHRL’s limitation on the definition of disability in the form of alcoholism.
10 Insofar as the text of section 8-102(16)(c) specifically differs from that of its
11 State and federal counterparts, we are arguably constrained by the text, since
12 the “one-way ratchet,” Loeffler, 582 F.3d at 278, operates only “to the extent
13 that such a construction is reasonably possible,” Albunio, 16 N.Y.3d at 477–78.

³ We recognize that both the NYSHRL and the ADA require a plaintiff to demonstrate as an element of her claim that she was able to perform the essential duties of her job with or without a reasonable accommodation. See Jacobsen v. N.Y.C. Health & Hosps. Corp., 22 N.Y.3d 824, 834 (2014) (NYSHRL); McMillan v. City of New York, 711 F.3d 120, 125 (2d Cir. 2013) (ADA). But under the NYCHRL, whether an employee can perform the “essential duties” of her job arises only as an affirmative defense available to the employer. Jacobsen, 22 N.Y.3d at 835. Accordingly, the question here is whether a plaintiff who sues under the NYCHRL can establish a prima facie case of discrimination based only on a perception of untreated alcoholism and an employment action causally linked to that perception.

1 The defendants point us to Zakrzewska v. New School, where the New York
2 Court of Appeals construed the “unambiguous” text of section 8-107 of the
3 NYCHRL “to give effect to its plain meaning” even though the City law did
4 not “match up” with State law. 14 N.Y.3d 469, 479 (2010) (quotation marks
5 omitted). But Zakrzewska is somewhat inapposite, as it held that the
6 NYCHRL’s plain language foreclosed an employer’s affirmative defense
7 rather than a plaintiff’s cause of action. See id. The decision therefore
8 comported with the City Council’s support of employees under the “uniquely
9 broad and remedial” NYCHRL. See Restoration Act § 7. No New York court
10 decision of which we are aware, however, addresses either the specific
11 question here or an analogous provision of the NYCHRL that on its face
12 provides narrower protection for employees than is required under State or
13 federal law.

14 CERTIFICATION

15 Second Circuit Local Rule 27.2 permits us to certify to the New York
16 Court of Appeals “determinative questions of New York law [that] are
17 involved in a case pending before [us] for which no controlling precedent of
18 the Court of Appeals exists.” N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a);

1 see also N.Y. Const. art. VI, § 3(b)(9). “In deciding whether to certify a
2 question, we consider: (1) the absence of authoritative state court
3 interpretations of [the law in question]; (2) the importance of the issue to the
4 state, and whether the question implicates issues of state public policy; and
5 (3) the capacity of certification to resolve the litigation.” Georgitsi Realty,
6 LLC v. Penn-Star Ins. Co., 702 F.3d 152, 158 (2d Cir. 2012) (quotation marks
7 omitted). Here, each factor favors certification.

8 First, as we have explained, no State court has addressed whether
9 sections 8-102(16)(c) and 8-107(1)(a) permit a plaintiff to bring a disability
10 discrimination claim based solely on a perception that the plaintiff suffered
11 from untreated alcoholism. This factor weighs heavily in favor of
12 certification: “New York has a strong interest in deciding the issue certified
13 rather than having the only precedent on point be that of the federal court,
14 which may be mistaken.” Carney v. Philippone, 332 F.3d 163, 172 (2d Cir.
15 2003) (quoting Great N. Ins. Co. v. Mount Vernon Fire Ins. Co., 143 F.3d 659,
16 662 (2d Cir. 1998)).

17 Second, “the question identified for certification presents important
18 issues of New York law and policy.” Doe v. Guthrie Clinic, Ltd., 710 F.3d 492,

1 497–98 (2d Cir. 2013) (quotation marks omitted). Both section 8-102(16)(c) and
2 the Restoration Act reflect careful policy judgments. The former arguably
3 seeks to protect only recovering alcoholics, while the latter seeks to ensure
4 that employees with disabilities do not receive less protection under City law
5 than they receive under State and federal law. A New York court should
6 determine in the first instance which of these judgments ought to prevail in
7 the event they conflict. See Chauca v. Abraham, 841 F.3d 86, 94 (2d Cir. 2016).
8 The question presented also broadly affects the viability of employer-
9 sponsored rehabilitation programs in New York, has practical ramifications
10 for the NYPD in particular, and is likely to recur, see MacShane v. City of
11 New York, No. 06-CV-06024, 2015 WL 1298423, at *22 (E.D.N.Y. Mar. 23,
12 2015).

13 Finally, if on certification the New York Court of Appeals determines
14 that the plaintiffs cannot state a claim for relief based on a perception of
15 untreated alcoholism, that decision would entitle the defendants to judgment
16 as a matter of law and render moot the remaining issues in the defendants'
17 appeal.

1 **CONCLUSION**

2 For the foregoing reasons, we certify the following question to the New

3 York Court of Appeals:

4 Do sections 8-102(16)(c) and 8-107(1)(a) of the New York City
5 Administrative Code preclude a plaintiff from bringing a
6 disability discrimination claim based solely on a perception of
7 untreated alcoholism?

8 In certifying this question, we understand that the New York Court of
9 Appeals may reformulate or expand the certified question as it deems
10 appropriate.

11 It is hereby ORDERED that the Clerk of this Court transmit to the Clerk
12 of the New York Court of Appeals a certificate in the form attached, together
13 with a copy of this opinion and a complete set of briefs, appendices, and the
14 record filed by the parties in this Court. This panel will retain jurisdiction to
15 decide the case once we have had the benefit of the views of the New York
16 Court of Appeals or once that court declines to accept certification. Finally,
17 recognizing that the defendants have indicated their willingness to expedite
18 proceedings before the New York Court of Appeals, see N.Y. Comp. Codes R.
19 & Regs. tit. 22, § 500.17(b), we order the parties to bear equally any fees and

1 costs that may be requested by the New York Court of Appeals. Decision is
2 RESERVED.

3 **CERTIFICATE**

4 The foregoing is hereby certified to the Court of Appeals of the State of
5 New York pursuant to Second Circuit Local Rule 27.2 and New York Codes,
6 Rules, and Regulations title 22, § 500.27(a), as ordered by the United States
7 Court of Appeals for the Second Circuit.