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# Civil Rights: People v. Dieppa

# CIVIL RIGHTS

*N.Y. CONST. art. I, § 11:*

*No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.*

## CRIMINAL TERM

### *KINGS COUNTY*

People v. Dieppa[115]
(decided June 25, 1993)

Defendant sought to set aside his conviction for two counts of discrimination in criminal violation of Civil Rights Law section 40-c(2),[116] originally adopted as article I, section 11 of the New York State Constitution.[117] In this case of first impression, the court, in denying defendant's motion to set aside the verdict[118] held that the defendant's acts of striking and

115. 158 Misc. 2d 584, 601 N.Y.S.2d 786 (Sup. Ct. Kings County 1993).

116. N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 1992). Section 40-c(2) provides that:

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

*Id.*

117. N.Y. CONST. art. I, § 11. Article I, § 11 provides in relevant part:

> No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

*Id.*

118. *Dieppa*, 158 Misc. 2d at 585, 601 N.Y.S.2d at 787. At the conclusion of all of the evidence, defendant moved, pursuant to New York Criminal

stabbing complainant, a store employee, as well as calling him a "filthy Jew," interfered with the exercise of the complainant's civil rights, and were criminal within Civil Rights Law section 40-c(2).[119]

The evidence at defendant's trial established that over a period of several months, defendant, a customer at the complainant's store, had engaged in verbal harassment of the complainant by yelling obscenities and religious epithets at him.[120] On January 10, 1992, the defendant entered the store, "struck [the complainant] in the head with a bottle, . . . and stabbed him in the back with a sharp object."[121]

On February 6, 1992, just a little while after being released from the hospital, although still unable to work, the complainant visited the store.[122] During his visit, defendant appeared outside and threw a garbage can through the window.[123] Again, defendant shouted religious epithets and obscenities at the

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Procedure Law § 290.10, to have his case dismissed. *Dieppa*, 158 Misc. 2d at 585, 601 N.Y.S.2d at 787; N.Y. CRIM. PROC. LAW § 290.10 (McKinney 1993). § 290.10 provides in relevant part:

> At the conclusion of the people's case or at the conclusion of all the evidence, the court may . . . (a) issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense, or (b) reserve decision on the motion until after the verdict has been rendered and accepted by the court.

*Id.* The court reserved decision, and the case was submitted to the jury. After the verdict, defendant renewed his application pursuant to § 330.30 of the New York Criminal Procedure Law. *Dieppa*, 158 Misc. 2d at 585, 601 N.Y.S.2d at 787. Section 330.30 provides that "[a]t any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof . . . ." N.Y. CRIM. PROC. LAW § 330.30 (McKinney 1994).

119. *Dieppa*, 158 Misc. 2d at 589-90, 601 N.Y.S.2d at 790; N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 1992).

120. *Dieppa*, 158 Misc. 2d at 585, 601 N.Y.S.2d at 787. The complainant, Mr. Mohibi, was a native of Afghanistan. Among other names, defendant repeatedly called Mr. Mohibi a "filthy Jew." *Id.*

121. *Id.* Mr. Mohibi suffered, among other injuries, a punctured lung, and was in the hospital for an extended period of time. *Id.*

122. *Id.*

123. *Id.*

complainant, threatening to kill him if Mr. Mohibi called the police.[124] Shortly after, defendant was arrested.[125]

At trial, defendant was acquitted of charges of assault in the first degree and criminal possession of a weapon in the fourth degree, pertaining to the January 10th incident.[126] However, defendant was found guilty of two counts of discrimination under Civil Rights Law section 40-c(2), based upon the two incidents that occurred on January 10 and February 6th.[127] Additionally, defendant was also convicted of one count of aggravated harassment in the second degree, based upon the January 10th incident.[128]

The court, in determining whether to set aside the verdict, first had to determine whether or not the acts of the defendant constituted a criminal violation of Civil Rights Law section 40-c(2).[129] The court stated that, based on New York Penal Law section 240.25,[130] the defendant's striking and stabbing of the

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 585, 601 N.Y.S.2d at 786; N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 1992).

128. *Dieppa*, 158 Misc. 2d at 586, 601 N.Y.S.2d at 787.

129. *Id.*; N.Y. CIV. RIGHTS LAW § 40-c(2).

130. At the time of the trial, New York Penal Law § 240.25 stated:

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or
2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
3. He follows a person in or about a public place or places; or . . . .
5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation.

N.Y. PENAL LAW § 240.25 (McKinney 1989); The *Dieppa* court noted however, that Penal Law § 240.25 has since been significantly amended, and is now substantively Penal Law § 240.26. *Dieppa*, 158 Misc. 2d at 586-87 n.1, 601 N.Y.S.2d at 788 n.1; N.Y. PENAL LAW § 240.26 (McKinney 1994). New York Penal Law § 240.26 states:

complainant on January 10, and threatening to kill him on February 6, "easily" fulfilled the elements of harassment as defined by the Penal Law.[131] However, they noted that Civil Rights Law section 40-c(2) requires not only harassment, but also a showing that the "defendant's acts were committed because of the complainant's race, creed, color, national origin, sex, marital status or disability, as perceived by defendant."[132] Furthermore, the defendant must have had "an intent to discriminate against [the victim] in the exercise of his civil rights."[133]

The court stated that defendant's act of calling the complainant a "filthy Jew" and a "fucking Jew," even though the complainant time and again protested that he was not Jewish, established that defendant committed the acts because of what he believed to be the complainant's religious and ethnic background to be.[134] The court relied on the holding in *People v. Grupe*,[135] where the court held that intent can be inferred from a defendant's mere perception of a complainant's religion, even if it is incorrect.[136]

However, while this element was easily satisfied, the court had a more difficult time determining whether or not there was discrimination in the exercise of the employee's civil rights. In deciding this controversial issue, the court discussed the history

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A person is guilty of harassment in the second degree when, with intent to harass, annoy, or alarm another person:

1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
2. He or she follows a person in or about a public place or places; or
3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment in the second degree is a violation.

N.Y. PENAL LAW § 240.26 (McKinney 1994).

131. *Dieppa*, 158 Misc. 2d at 587, 601 N.Y.S.2d at 788.

132. *Id.*

133. *Id.*

134. *Id.*

135. 141 Misc. 2d 6, 532 N.Y.S.2d 815 (Crim. Ct. New York County 1988).

136. *Id.* at 9, 532 N.Y.S.2d at 818.

of Civil Rights Law section 40-c.[137] It noted that when Penal Law section 240.25 was passed to "better implement" the policy expressed in the New York Constitution, article I, section 11, and later, in Civil Rights Law section 40-c, no exact definition was given to the term "civil rights."[138] It therefore adopted the meaning that was set forth by the New York Court of Appeals, in *People v. Kern*,[139] that civil rights are "'those rights which appertain to a person by virtue of his citizenship in a state or community.'"[140] It also commented that the Civil Rights Clause was not self-executing,[141] but only prohibits discrimination of

137. *Dieppa*, 158 Misc. 2d at 587, 601 N.Y.S.2d at 788; Civil Rights Law § 40-c was originally adopted as article I, section 11 of the New York State Constitution. Memorandum from William T. Andrews to Hon. Herbert H. Lehman (Apr. 18, 1941), *in* Bill Jacket to 1941 N.Y. Laws 910. Two years later, the legislature amended the Penal Law, adding article 67 "Discrimination" *Id.* Article 67 was substantially similar to the language used in article I, § 11 of the New York State Constitution. The amendment to the Penal Law was introduced to enhance the policy of article I, of the New York State Constitution by providing for "punitive provisions." *Id.* Assemblyman William T. Andrews the amendment's sponsor, in a memorandum to then governor Lehman, explained the purpose behind the amendment. *Id.* at 10-14. In it he wrote "[t]hat the term 'civil rights' has no fixed or absolute definition." *Id.* at 13. The courts, employing the same interpretation methodology, had defined "civil rights" as including some rights while excluding others. *Dieppa*, 158 Misc. 2d at 587, 601 N.Y.S.2d at 788. Andrews concluded that, at the current time, it was not advisable "to have our Legislature attempt a definition of the term." Bill Jacket to 1941 N.Y. Laws 910. In 1965, when the Penal Law of 1965 was enacted, repealing and superseding the Penal Law of 1909, article 67 was omitted and now makes its home in § 40-c & 40-d of the Civil Rights Law.

138. *Dieppa*, 158 Misc. 2d at 587-88, 601 N.Y.S.2d at 788-89.

139. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) .

140. *Dieppa*, 158 Misc. 2d at 588, 601 N.Y.S.2d at 789 (quoting *Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653 (quoting 4 Rev. Record of N.Y. State Const. Convention, 1938, at 2626 (statement of delegate H. E. Lewis))).

141. *See* Chittenden v. Wurster, 152 N.Y. 345, 396, 46 N.E. 857, 874 (1897). ("[A] Constitutional provision is self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected or the duty imposed may be enforced.") (O'Brien, J., dissenting) (citation omitted).

rights provided by another statute.[142] Finally, the court observed that, in the years since the passage of the Civil Rights Law, the New York legislature "has given frequent consideration to protecting the 'civil rights' of citizens."[143] It noted that such statutes have been broadly construed so as to encompass as many rights as possible.[144] Thus, the court concluded in consideration of such construction, that defendant's interference with the complainant's right to work in the store, based upon defendant's perception of the complainant's religion, even though incorrect, was in fact proscribed behavior under Civil Rights Law section 40-c.[145]

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142. *Dieppa*, 158 Misc. 2d at 588, 601 N.Y.S.2d at 789; *see also Kern*, 75 N.Y.2d at 651, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653 (stating that the Civil Rights Law "prohibits discrimination only as to civil rights which are 'elsewhere declared'"); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 531, 87 N.E.2d 541, 548 (1949) ("Obviously such rights are those elsewhere declared."), *cert. denied*, 339 U.S. 981 (1950).

143. *Dieppa*, 158 Misc. 2d at 588-89, 601 N.Y.S.2d at 789. The Court provided as an example, Executive Law § 291. Section 291 provides in relevant part:

> 1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sex or marital status is hereby recognized as and declared to be a civil right.
> 2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sex or marital status, as specified in section two hundred ninety-six of this article, is hereby recognized and declared to be a civil right.

N.Y. EXEC. LAW § 291 (1-2) (McKinney 1993).

144. *Dieppa*, 158 Misc. 2d at 589, 601 N.Y.S.2d at 789; *see, e.g.*, People v. Holiday Inns, Inc., 656 F. Supp. 675, 682 (W.D.N.Y. 1984) (holding applicable under Civil Rights Law § 40-c a claim for "invidious gender discrimination in employment"); Ganguly v. New York State Dep't of Mental Hygiene-Dunlap Manhattan Psychiatric Ctr., 511 F. Supp. 420 (S.D.N.Y. 1981). The court stated that the Civil Rights Law does not provide jurisdiction over plaintiff's employment discrimination claim. However, the court noted that it was not "imply[ing] that plaintiff's claims [were] insufficient to establish causes of action under . . . the Civil Rights Law." *Id.* at 429 n.4; Salonen v. Barbella, 65 A.D.2d 753, 755, 409 N.Y.S.2d 759, 761 (2d Dep't 1978) (applying Civil Rights Law § 40-c to voting).

145. *Dieppa*, 158 Misc. 2d at 589, 601 N.Y.S.2d at 789.

Furthermore, the court determined that the statute's language was clear and unambiguous, and therefore, its meaning must be "given full effect."[146] The *Dieppa* court found that Civil Rights Law section 40-c "on its face" clearly states that "all persons are protected from harassment or discrimination in the exercise of their civil rights."[147] Therefore, defendant's repeated threats and physical abuse of the complainant, because of his perceived race or creed, provide a "factual basis" for the jury's determination that defendant interfered with and affected the complainant's exercise of his civil rights.[148]

Had defendant's case been brought in Federal court, however, the result would not have been the same. While both Civil Rights Law section 40-c,[149] and its Federal counterpart, 18 U.S.C. § 242,[150] protect a person's civil rights subject to criminal prosecution, there are significant differences between the two.

First, 18 U.S.C § 242 applies only to those persons acting "under color of any law, statute, ordinance, regulation, or custom."[151] However, Civil Rights Law section 40-c does not require state participation.[152] Here, the defendant was not acting

146. *Id.* (citation omitted).

147. *Id.*; N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 1992).

148. *Dieppa*, 158 Misc. 2d at 589, 601 N.Y.S.2d at 789-90.

149. N.Y. CIV. RIGHTS LAW § 40-c(2).

150. 18 U.S.C. § 242 (West 1969). This statute provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of this color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

*Id.*

151. *Id.*

152. N.Y. CIV. RIGHTS LAW § 40-c(2). Section 40-c(2) simply prohibits discrimination based on "race, creed, color, national origin, sex, marital status, or disability." *Id.*

under color of law.[153] Rather, he was acting in his personal capacity when he performed the acts against the complainant.[154] The Federal statute would therefore be inapplicable to the defendant in this case.

Next, the Federal statute protects persons from the deprivation of a right, privilege or immunity protected by the Constitution or by federal law.[155] Harassment is not specifically set forth, as it is in New York's counterpart, section 40-c(2) of the Civil Rights Law.[156] Therefore, unless the form of harassment inflicted upon the employee deprived him of one of these rights or privileges, it would not be covered by the Federal statute.

The federal statute, unlike the New York statute, covers acts committed under color of state law that deprive persons of a right, privilege, or immunity protected by the Constitution, or acts committed because of a victim's color, race, or national origin.[157] Here, defendant acted against the complainant because of complainant's perceived religious affiliation. Although religion is a right protected by the Constitution,[158] the defendant was not

153. *But see* United States v. Price, 383 U.S. 787 (1966). The Court held that "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agent." *Id.* at 794. Further, the court held that private persons who participated in the murder of three men with local law enforcement officials, acted under color of state law even thought they were not law enforcement officials themselves. *Id.* at 794-95. Therefore, under *Price*, if defendant had acted with someone else who was acting under color of state law, defendant could then be prosecuted under § 242.

154. There is nothing to indicate that the defendant was in any way acting on behalf of the state. Instead, the facts indicate that defendant was merely "a frequent customer of the fast food store" where Mr. Mohibi worked. *Id.* at 585, 601 N.Y.S.2d at 787.

155. 18 U.S.C. § 242.

156. The statute mentions "rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," but not specifically harassment. *Id.*

157. *Id.*

158. The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

acting under color of state law. Thus, the federal statute would be inapplicable to the case at bar. Therefore, while defendant's conviction in state court was upheld, the same result would not have occurred had defendant been prosecuted in federal court.