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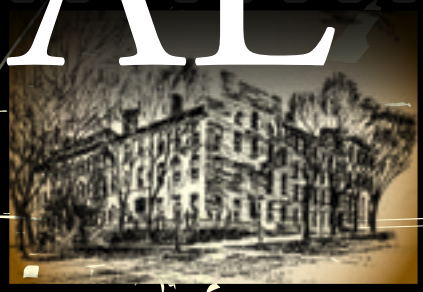

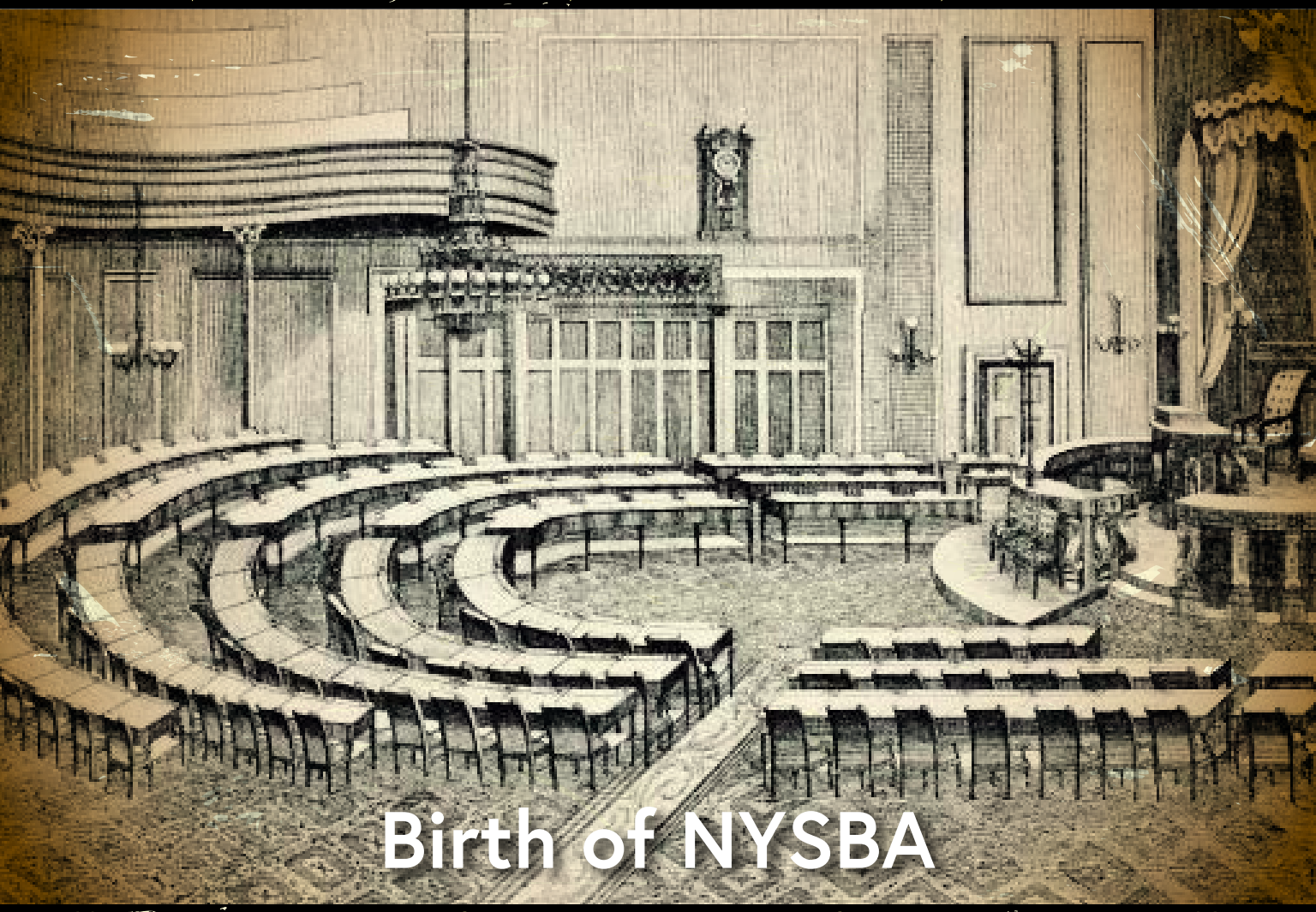

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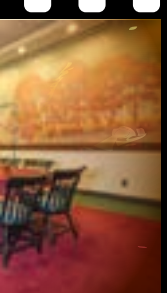

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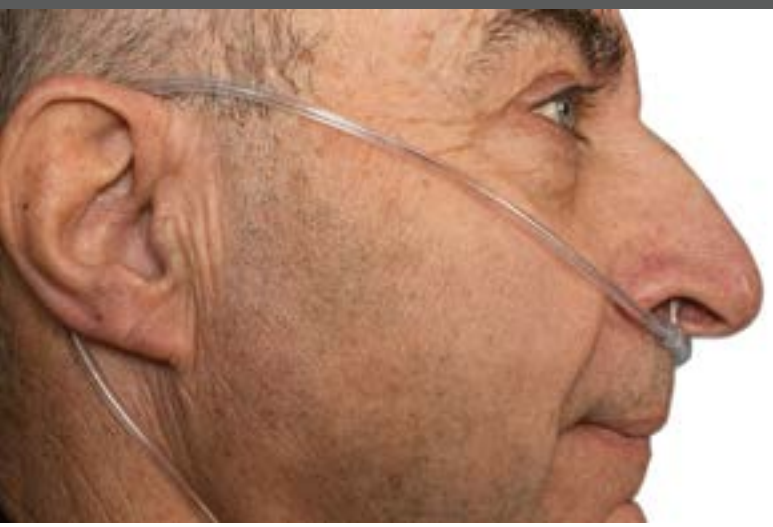
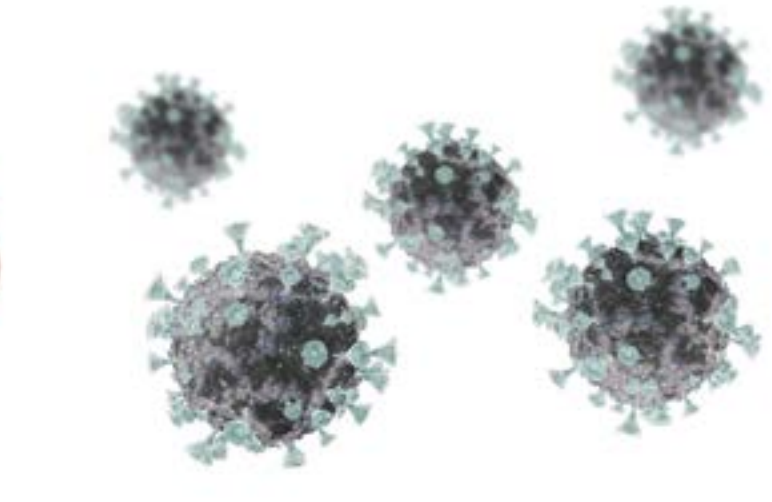
A Pension Law Pandemic: The Need for a COVID-19 Presumptive Bill To Protect Disabled Front-Line Workers

By Chet Lukaszewski





New York's essential workers are in dire need of a COVID-19 presumptive law to help secure disability pension protections they are being denied. When COVID-19 first struck, and most New Yorkers quarantined, socially distanced and went remote, municipal and civil service workers were required to go to work out on the front lines, and have continued to do so ever since, thereby placing them at a greater risk for COVID-19 exposure and infection than the general public. Many have died, and many more have and continue to become seriously ill. New York could not have gotten through the pandemic without these workers. They include emergency responders like police, fire and EMS, as well as essential workers such as bus drivers, child welfare agents and maintenance personnel. The Legislature must act to protect these essential workers when they are rendered disabled for their jobs by COVID-19 by enacting a presumptive law – in keeping with those previously passed, including one for 9/11 responders – to ensure they receive the disability retirement benefits they deserve.

Numerous presumptive laws have been enacted over the years, upon the realization that specific groups of state and city workers were being disabled as a result of performing their standard job duties, but proof of line-of-duty causation was not possible in seeking disability retirement. Said laws include the "Heart Bill," the "Lung Bill," the "Cancer Bill," the "Infectious Disease Law," and the "World Trade Center Presumptive Law," as they are commonly referred to by those whom they protect (along

with several others that have smaller applications[1]). These laws offer select civil service and municipal workers who become disabled, and must apply for disability pensions, a presumption that specific disabling conditions were the result of their line-of-duty efforts. Many such workers chose their occupations based in part upon a confidence that if disabled by a line-of-duty accident, they and their families would receive disability pension protections. Not only do we owe it to those who have been disabled by COVID-19 to act now, but we must also ensure that highly qualified candidates will continue to fill these essential jobs, knowing they will never be abandoned in a time of need, and they and their families will be protected.

Since the pandemic began, thousands of front-line workers have been rendered permanently disabled for the full-duty requirements of their job titles by the permanent effects of COVID-19. Many are now being denied disability pensions. The New York City and State retirement systems are asserting there is a lack of proof that virus contraction occurred in the line of duty. Lawmakers must act, as they did in the aftermath of 9/11, when they realized that first responders were falling ill, but those getting sick could not provide absolute proof it was a result of their World Trade Center line-of-duty toxic exposures, and as they did in 2020 in response to hundreds of workers dying, with the enactment of a COVID-19 death benefits law. A presumptive pension law for front-line workers who have contracted COVID-19 must be passed to protect those who were put at risk simply by being compelled to do the work all New Yorkers rely on, and who, as a result of contracting COVID-19, are now permanently incapable of doing their jobs.

The first presumptive pension law was passed in New York in 1970, after it was demonstrated that police officers and firefighters were developing heart problems at a far greater rate than the general public; the law was and remains known as the "Heart Bill" (General Municipal Law § 207-k). The legally stated intent of the Heart Bill, which has been expanded over the years to protect other emergency service job titles like EMS and corrections, is to protect members of high-risk occupations whose work involves extraordinary job stress.[2] The law, like those that followed, creates a presumption of causation when a member of service is rendered permanently disabled for their job and must apply for disability retirement. The retirement system can rebut the presumption with "competent evidence." Nevertheless, the presumption is invaluable in assisting workers in making a causal connection between a disability and their line-of-duty efforts.

In a Heart Bill case, if a protected individual develops a disabling cardiac condition while still an active member of service, it is presumed to be the result of their employment and the omnipresent job stress it entails. If the presumption is not rebutted by the retirement system, an accidental "line-of-duty" disability retirement pension is granted.[3] The law is also applied when a member of service dies of a heart ailment while still employed and their family seeks accidental line-of-duty death benefits. As with conditions of the heart, and the other ailments for which presumptive laws were enacted, with COVID-19 there can be no absolute proof of causation. However, there is no denying that essential workers have been placed at a much higher risk for COVID-19 exposure than most "civilian" job titles and ought to be protected in the same manner as has occurred over the years in analogous situations.

The World Trade Center Presumptive Law, or WTC Law (Retirement and Social Security Law § 2(36)), offers first responders diagnosed with recognized WTC ailments such as asthma, RADS, GERD, PTSD, certain cancers and more, the presumption of a causal connection between their illnesses and their line-of-duty efforts, if they were present at the WTC site within the first 48 hours of the 9/11 attacks, when the air was the most toxic; performed 40(+) hours of line-of-duty efforts at the site or other WTC locations like the morgue or landfill, doing rescue, recovery or clean-up work, or were exposed to the WTC dust in other ways such as working on contaminated vehicles. (The WTC Law, unlike other presumptive laws, applies to active and retired members of service.) The "Lung Bill" (General Municipal Law § 207-q), which greatly mirrors the Heart Bill, was enacted when it was realized that firefighters were developing respiratory disabilities at an alarmingly high rate. The "Cancer Bill" (General Municipal Law § 207-kk) was created based upon the high rate of cancer in firefighters resulting from their exposures to carcinogens on a regular basis in their normal course of duty during their careers. The "Infectious Disease Law" (General Municipal Law § 207-p), to which a "COVID Bill" would be in a similar vein, protects EMTs, paramedics, police officers and firefighters who contract HIV, tuberculosis or hepatitis, "where the employee may have been exposed to a bodily fluid of a person under his or her care or treatment, or while the employee examined, transported, rescued or otherwise had contact with such person, in the performance of his or her duties" – a disturbingly common occurrence, which thereafter can have disastrous health consequences. New York's front-line workers are being rendered disabled by COVID-19 and are being told by their pension agencies there is no proof they contracted the virus in the line of duty. They, too, need a presumptive law to secure the pension protections they deserve.

In 2020, the Legislature enacted a COVID-19 line-of-duty death benefits law to assist the decedents of essential workers who lost their lives to COVID-19, in seeking accidental death benefits from their retirement system

(Chapter 89 of the Laws of 2020; S.8427/A.10528). However, it has not yet enacted a disability pension law for those whose health has been forever altered by the virus. The "COVID-19 Death Law" included very specific guidelines, applying only to:

> (A Retirement System) Member who died on or before December 31, 2022 (extended from December 31, 2020), or a Retiree who retired between March 1, 2020 and June 30, 2020 and died prior to September 29, 2020, where such Member/Retiree reported for work outside their home and contracted COVID-19 within 45 days after their last day of work, and whose death was caused by COVID-19 or where COVID-19 contributed to such Member/Retiree's death. Amounts payable are reduced by payments of any Ordinary Death Benefits or option benefit paid to another statutory beneficiary . . . . The deceased Member/Retiree must have contracted COVID-19 as confirmed by a positive laboratory test or as diagnosed before or after the Member/Retiree's death by a licensed, certified, registered, or authorized physician, nurse practitioner, or physician's assistant in good standing. COVID-19 must have caused or contributed to such Member/Retiree's death as documented on the Member/Retiree's death certificate. In the alternative, a licensed, certified, or authorized physician, nurse practitioner, or physician's assistant in good standing may certify within a reasonable degree of medical certainty that COVID-19 caused or contributed to the Member/Retiree's death.

The Legislature would obviously create guidelines in a COVID-19 presumptive pension law, similar to those in the death law and other presumptive laws.

Presumptive laws are essential in disability pension matters where there can be no absolute proof of causation. In each instance one was enacted, it was determined that specific individuals working in public service were being rendered disabled by specific ailments but could not prove it was a result of their line-of-duty efforts. The laws were passed to ensure those workers whose line-of-duty efforts benefit the general public are not denied line-of-duty disability retirement pensions. The Court of Appeals specifically stated in *O'Marah v. Levitt*:

> [T]he purpose of a statute providing for accident disability retirement is to assure the availability of such benefits to an employee who is permanently incapacitated as a result of injuries received in the line of duty. The statute should be so construed as to carry out the desired objective as fairly and reasonably as possible.[4]

A COVID-19 presumptive pension law would be analogous to those that have come before it.

In a disability pension matter involving state and city workers, the applicant has the burden of proving to their pension agency that they are permanently disabled for full duty, and also the cause of the disability.[5] As set forth by the Court of Appeals in *Borenstein v. New York City Employees' Retirement System*,[6] there are two stages in the disability pension application process: (1) Medical board's fact-finding process to determine the "threshold matter" of "whether the applicant is actually 'physically or mentally incapacitated for the performance of city-service;'" and (2) the "recommendation to (an administrative board such as) the Board of Trustees as to whether the disability was 'a natural and proximate result of an accidental injury received in such city-service.'"[7] Under the *Borenstein* standard, medical boards are given great deference in determining whether an applicant is disabled for their job – the first hurdle an applicant must overcome in seeking disability retirement. Thus, only truly deserving applicants are approved for disability pensions.

If a permanent disability for full duty is found to exist, then the agencies' administrative board has the ultimate authority to determine causation, as established by the Court of Appeals in *Meyer v. Board of Trustees*[8] and *Canfora v. Board of Trustees.*[9] When such a board does not find that a member's disability is causally related to a service-related "accident," or is deadlocked on the issue, the Court of Appeals held in *City of New York v. Schoeck*[10] that the applicant is denied accident disability retirement (ADR) and, if eligible, is retired on a lesser ordinary disability retirement (ODR) pension. However, workers are often not eligible for ODR and wind up being "medically separated" (terminated under the civil service law for a medical inability to return to full duty) from service, without a pension.[11] New York's frontline workers who are rendered disabled for their jobs by COVID-19 deserve ADR pensions.

The Court of Appeals, in *Lichtenstein v. Board of Trustees,*[12] *McCambridge v. McGuire*[13] and *Starnella v. Bratton*,[14] defined an "accident" for disability purposes as a "sudden, fortuitous mischance, out of the ordinary and injurious in impact," with "sudden fortuitous mischance" being generally interpreted as "unexpected." It further established therein and reiterated, in *Walsh v. Scoppetta*[15] and *Kelly v. DiNapoli*,[16] that an "accident" must occur in the performance of one's job duties and cannot be a general risk of the work performed. It would seem that being required to go to work and being placed at risk for exposure to a never-before-seen, highly contagious, extremely dangerous virus, during a once in a lifetime pandemic, where essentially the entire country and, to a large degree, the world went into lockdown and quarantine, would fit the definition of an "accident" for disability pension purposes.

If a COVID-19 presumptive law is not enacted, many civil service and municipal workers will be left without a pension, and many others will only receive a much lower level of pension than they would if disabled in the line of duty in a more conventional and less unexpected and out of the ordinary manner than falling ill to a virus that has caused the worst pandemic in modern times. This should not be allowed to happen. As they did in the years following the 9/11 attacks, lawmakers should act to provide ADR where they might have been allowed ODR disability pension benefits or, in some cases, none at all, to essential workers who have suffered serious permanent health effects from COVID-19.

The Court of Appeals' earliest presumptive law decision, *Uniformed Firefighters Association, Local 94 v. Beekman,*[17] recognized the need for the Heart Bill and the presumption it creates to benefit emergency responders. As with the police officers and firefighters stricken by heart issues therein, current frontline workers are placed at a constant risk of contracting COVID-19 in the line of duty and have been every day they have gone to work since the pandemic started. We must not forget that at the start of the pandemic, the virus was at its most dangerous, as we knew very little about it or how to treat those who contracted it; it was the first and strongest variant; and there were no vaccines or immunities developed. Moreover, those workers have always believed that if disabled by their line-of-duty efforts, they would receive the appropriate disability pension protections.

The Court of Appeals' most recent presumptive law decision, *Bitchatchi v. Board of Trustees*,[18] instructed that the WTC Law be applied in a manner highly favorable to 9/11 responders, based upon their being put in harm's way in the line of duty and the serious health consequences that had resulted, but it also noted that retirement systems do have the power to rebut the law's presumption, so as to ensure only deserving applicants receive the protections of the law. If a COVID-19 presumptive law is passed, the retirement systems will surely have the ability to rebut the law's presumption and deny ADR in cases they feel do not fit the criteria specified therein. Perhaps the systems will be permitted to rebut by showing that the applicant was on a vacation or medical or other type of leave when contraction of the virus likely occurred. Perhaps they will have the ability to deny by establishing it is an underlying or preexisting condition by which the applicant is disabled and/or, without said condition, they likely would not have been rendered disabled by contracting COVID-19. The Legislature has the power and the experience in creating such guidelines and criteria in laws of this type to ensure that only deserving applicants will receive the intended protections and benefits. Regardless of what those might be, the time has come for a presumptive law to be enacted, as retirement systems cannot be permitted, as noted by the *Bitchatchi*

court, to deny COVID-19 disability retirement applications by relying solely on the absence of proof of line-of-duty causation.

The guidelines put in place by lawmakers will also limit the law's economic impact on taxpayers. Funding for public pension funds comes from three sources: employee contributions, employer contributions and investment earnings. Employer contributions can be seen as taxpayer monies, as that is what funds said agencies in large part. However, generally, these monies are budgeted for by employers, like police and fire departments, and other city and state agencies, and when the financial markets are strong, employer contributions are reduced as more money is generated by investments. Moreover, following the dot-com bubble "bursting" in 2000 and the financial crisis of 2008, protections were put in place and new pension "tiers" were created to mitigate the effects of financial downturns and lessen the financial burden of public pension systems on the general public. Thus, if a COVID-19 bill were enacted and additional ADR pensions were paid as a result, it would not result in a drastic tax increase and/or loss of services based upon employers' budget monies having been drawn away from operational funding to be allotted to pension contributions.

In March of 2022, a bill was introduced in the United States Senate, seeking to help those living with "long COVID" symptoms. The Comprehensive Access to Resources and Education (CARE) for Long COVID Act, referred to as the Care for Long COVID Act, seeks to expand COVID-19 "long hauler" research and improve access to treatment for those suffering from the lingering effects of the disease.[19] The bill's sponsors have said research indicates more than half of COVID-19 sufferers experience lingering symptoms, including neurological, cardiovascular, respiratory and mental health symptoms, months after their initial infection.[20] For many, their symptoms have lasted well over a year, and even longer, and the virus has resulted in permanent deleterious health effects. If enacted into law, the federal government will accelerate COVID-19 research, improve treatment efficacy, educate long haulers, medical providers and the public, facilitate information sharing and agency coordination, and develop partnerships to provide various forms of assistance to sufferers and their families. These would be excellent broad general steps in helping those whose health has been greatly impacted by COVID-19. However, the State of New York must itself act, to give direct and specific assistance to our workers who were placed in harm's way and became sick and disabled for their jobs by the virus.

Disabled state and city workers currently cannot secure disability pensions based upon the impossibility of providing absolute proof they contracted COVID-19 while on the job. Lawmakers must act to protect these individuals upon whom all New Yorkers rely, who have been rendered incapable of doing their jobs by this terrible virus. Those who went to work to serve the public during the pandemic, whose lives and health have been forever altered, deserve to receive accident disability retirement pensions. Without a presumptive pension law, it seems they likely will not. That is unacceptable and sends a dangerous message to others considering entering into such occupations, which thereby puts all New Yorkers at risk. As was done for 9/11 responders, and those in need of such protections by prior laws of its type, a COVID-19 presumptive bill must be enacted so no disabled frontline worker is denied the appropriate disability pension benefits.

Chester Lukaszewski has over 20 years of disability pension law experience. He formed Chet Lukaszewski in 2008. He has assisted hundreds of clients seeking disability retirement benefits and litigated a case in the New York State Court of Appeals that decided how the World Trade Center presumptive law should be applied.

Endnotes

1. General Municipal Law (GML) § 207k ("The Heart Bill") was amended to include certain types of strokes suffered by members of police and fire departments in certain cities, and GML § kkk was enacted to apply to Parkinson's disease for fire department members in cities with a population over one million.

2. *See Uniformed Firefighters Ass'n, Local 94 v. Beekman*, 52 N.Y.2d 463, 472–73 (1981); *see also Lunt v. Ward*, 159 A.D.2d 404 (1st Dep't 1990); *Lunt v. Kelly*, 227 A.D.2d 200 (1st Dep't 1996), *app. dismissed*, 89 N.Y.2d 981 (1997), *app. denied*, 90 N.Y.2d 803 (1997).

3. *Id.*; *see also McCarthy v. Board of Trustees*, 306 A.D.2d 156 (1st Dep't 2003); *Bitchatchi v. Board of Trustees, Et al.*, 20 N.Y.3d 268 (2012); *Ploss v. Kelly*, 113 A.D.3d 531 (1st Dep't 2014).

4. 35 N.Y.2d 595, 597 (1974).

5. *See Evans v. City of New York*, 145 A.D.2d 361 (1st Dep't 1998); *see also Archul v. Board of Trustees*, 93 A.D.2d 716 (1st Dep't 1983), *aff'd*, 60 N.Y.2d 567 (1983); *Christian v. New York City Employees' Ret. Sys.*, 83 A.D.2d 507 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 841 (1982).

6. 88 N.Y.2d 756 (1996).

7. *Id.* at 760–61.

8. 90 N.Y.2d 139 (1997).

9. 60 N.Y.2d 347 (1983).

10. 294 N.Y. 559 (1945).

11. *See also Meyer* at 144–45; *Hallihan v. Ward*, 169 A.D.2d 542 (1st Dep't 1991).

12. 57 N.Y.2d 1010 (1982).

13. 62 N.Y.2d 563 (1984).

14. 92 N.Y.2d 836 (1998).

15. 18 N.Y.3d 850 (2011).

16. 30 N.Y.3d 674 (2018).

17. 52 N.Y.2d 463 (1981).

18. 20 N.Y.3d 268 (2012).

19. *Sen. Tim Kaine, Who Has Long COVID, Introduces Bill to Help Long Haulers*, Time, Mar. 3, 2022, https://time.com/6154397/tim-kaine-long-covid-19-bill.

20. Senator Tim Kaine Press Release: *Kaine, Markey & Duckworth Introduce Bill to Help People Living With Long COVID*, Mar. 2, 2022, https://www.kaine.senate.gov/press-releases/kaine-markey-and-duckworth-introduce-bill-to-help-people-living-with-long-covid.