

Memo

To: Judiciary Committee
From: Robert J. Brothers, Jr., Executive Director
Date: March 23, 2011
Re: **HB 6616, AN ACT CONCERNING THE EVIDENTIARY STANDARD
FOR PUNITIVE DAMAGE AWARDS**

The Commission **OPPOSES** changing the standard from “preponderance of the” evidence to “clear and convincing” evidence for purposes of an award of punitive damages in state court.

The standard of review for Commission cases both before the Office of Public Hearing and in state court is a preponderance of the evidence. The changing of this standard to “clear and convincing” would elevate these cases to a level not intended by state court. In Kelo v. City of New London, 268 Conn. 1 (2004) the weight of such a high standard is explained

The clear and convincing standard traditionally applies in civil cases “to protect particularly important individual interests” (Internal quotation marks omitted.) State v. Rizzo, 266 Conn. 171, 211 n. 22, 833 A.2d 363 (2003), quoting Addington v. Texas, 441 U.S. 418, 424, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). “[I]n cases governed by this burden, because *147 society regards the individual interests involved to be very important, and because society imposes most of the risk of error on the party so burdened, we also require a very high degree of subjective certitude for the burden to be satisfied: the fact finder must be persuaded to a high degree of probability

To contrast, in footnote 8 of Kelo, it states the , “[t]he standard of proof in the typical civil case between private parties, i.e., **preponderance of the evidence**. In the typical civil case, society is minimally concerned with the outcome, and the litigants share the risk of error in roughly equal fashion. E.g., State v. Rizzo, *supra*, 266 Conn. at 210, 833 A.2d 363. In such a case, “we require only a modicum of subjective certitude on the part of the fact finder: [as] long as the fact finder is persuaded that the plaintiff’s assertions are probably more true-by no more than a ratio of fifty-one to forty-nine-the plaintiff has met his burden of persuasion.”

Making the standard higher for an award of punitive damages would have a discouraging effect on potential litigants. Damage awards are often low for discrimination cases, particularly housing discrimination cases. The higher burden of this change to the statute could discourage cases from being settled. Further, use of punitive damages as a deterrent to Respondents could be damaged if the standard is increased.