

Attachment to Testimony of Tanya A. Hughes and Cheryl A. Sharp

A. INTRODUCTION.

For many years courts have understood that "[d]iscrimination presents a peculiar difficulty of proof." CHRO v. Carbone, 6 Conn. Cir. Ct. 179, 184 (1970). In Reliance Ins. Co. v. CHRO, 172 Conn. 485, 488-89 (1977), our Supreme Court recognized that discrimination is difficult to prove, because most people would not admit in response to a direct question that they discriminate:

Racial discrimination is an intangible and for the most part can be established only through inference. It is not a packaged item which carries a label describing its contents, which may be exposed to public view. It is essentially subjective, with its roots and symptoms buried within the recesses of heart and mind. One who indulges in discrimination does not usually shout it from the housetops. All too frequently persons publicly announce abhorrence of racial prejudice while privately practicing it. In this type of proceeding, therefore, greater latitude is accorded the tribunal to draw inferences from words and deeds than in cases where overt acts need be established.

The proposed changes in case processing in RB 468 would make it harder for a complainant to prove his or her case, which is hard enough to do under the current system for the reasons mentioned. They would make it harder by adopting an unduly high standard for the case assessment review standard 3. They also would weaken the CHRO's ability to investigate complaints by imposing time restrictions on the length of fact-finding conferences, quite possibly depriving the complainant of due process of law, and certainly undermining confidence in the quality of agency decision-making. I have addressed each proposal in more detail below.

1. Increasing the time for a respondent in a non-housing case to answer a complaint from 30 to 45 days.

Just this past session the General Assembly, at the CHRO's request, shortened several time periods for the CHRO to act (service of the complaint, conducting the case assessment review). The thought behind the changes was to expedite the CHRO's handling of a case early in the process. Saving time in the early part of case processing leads to faster resolution of complaints. This proposal would undo much of the gains made in P.A. 15-249 (35 days) by adding more than two weeks (15 days) to a complaint's initial processing time. That is unhelpful.

An answer is a very basic document. It need only "admit, deny or plead insufficient knowledge" of the allegations of the complaint (Section 46a-54-43a of the CHRO's regulations). A respondent in a non-housing case may ask for a 15-day extension in the event a complaint cannot be answered in 30 days. P.A. 15-249 removed the requirement that a respondent provide good cause to support a request for extension. In effect a respondent already enjoys a 45-day period in which to answer. Some respondents already take advantage of the extra 15 days. A further loosening the time for answering a complaint is not warranted. To put things in perspective, a respondent in a housing discrimination case has only 10 days to answer and there is no provision for an extension (CONN. GEN. STAT. Sec. 46a-83).

2. Amending case assessment review standard 3.

The proposal would replace current case assessment review standard 3 ("there is no reasonable possibility that investigating the complaint will result in a finding of reasonable cause") with a new one ("unable to determine whether the information provided by the complainant and the respondent sets forth that a discriminatory practice has occurred").

A discrimination case can't be proved on the papers, as our judiciary has made plain. The proposed standard would require just that, however. The only material that the CHRO would review would be documentary: "the complaint, the respondent's answer and the responses to the commission's requests for information, and the complainant's comments, if any, to the respondent's answer and information responses." Discrimination cases nearly always come down to credibility. To assess credibility, witnesses must be seen and heard.

The CHRO applies three standards of increasing exactitude during its processing of a complaint. As cases move through the system the standards tighten: (1) the three case assessment review (CAR) standards at CAR; (2) the reasonable cause standard during the investigation (defined in CONN. GEN. STAT. Sec. 46a-83(f)); and (3) the standard used at public hearing in CONN. GEN. STAT. 46a-86(a) (the "presiding officer finds that a respondent has engaged in any discriminatory practice").

The proposed standard looks little different from the CHRO's public hearing standard and would have the same practical effect - a preponderance of the evidence standard would be required for the complainant to prevail. The significant difference, however, is that the public hearing standard is used only after there has been discovery, examination and cross-examination of witnesses and the filing of motions and briefs. In other words, there has been due process. A case assessment review on the other hand is conducted by looking

only at documents, all or most all of which are in the respondent's possession. Respondents hold the information (payroll and attendance records, personnel files, etc.) and I am concerned that this standard perhaps unintentionally creates an incentive to withhold it.

The proposed standard also creates anomalies. By imposing a preponderance of the evidence standard as the new CAR standard 3, the lower investigatory standard of reasonable cause - and indeed the investigation itself - becomes compromised. It is the role of an Administrative law judge and not an investigator to "conclude that the information submitted by the parties establishes violations of the statutes". The appropriate role of an investigator is to be neutral and to gather evidence to make a determination of reasonable cause or no reasonable cause. The CAR process is an initial assessment of the case that does not require the expenditure of an exorbitant amount of resources from the Complainant, Respondent or CHRO's side. A case where the CHRO concludes that there are "violations of the statutes" automatically means there is reasonable cause. "Reasonable cause . . . require[s] a lesser showing than the preponderance of the evidence standard". Adriani v. CHRO, 220 Conn. 307, 319 (1991). Likewise, the public hearing would be superfluous, because the public hearing standard is a variant of the proposed CAR 3 standard; both would require a preponderance of the evidence for the complainant to prevail. This would intrude on the role of the CHRO's human rights referees.

For CAR to work properly what is needed is a standard like the current "no reasonable possibility" standard, a standard less exacting than reasonable cause and certainly far less exacting than a preponderance of the evidence.

3. Making mediation voluntary instead of mandatory.

Mediation is one of the success stories of the new CHRO. Mediation has been mandatory for at least 20 years and has produced excellent results. Our closure rates due settlement are among the highest in the country. About 30% of our cases settle at mediation if I am remembering correctly and in excess of 40% of our closures are due to settlement. Not only do the parties appreciate the value of a negotiated agreement, they also understand that they are in charge of the process. Parties are only required to attend. They are not required to make or accept an offer. I have personally mediated cases where the parties have stated at the outset that they have no interest in settlement. Not every case of course, but through a bit of hard work these cases can and do settle.

The CHRO holds mandatory mediations in its cases much as courts do in theirs, and for the same general reasons. There is a "strong public policy of promoting settlement of disputes." Miko v. CHRO, 220 Conn. 192, 209 (1991); Ierardi v.

CHRO, 15 Conn.App. 569, 584 n.8, cert. denied, 209 Conn. 813 (1988) (conciliation "should always be available to the parties, whether or not probable cause is determined"). Forcing cases to go to trial or investigation would overtax the system and lead to backlogs. Litigation benefits attorneys, rarely the parties. Even if a case does not settle, the parties appreciate that mediation is an opportunity to keep their litigation costs down.

Settlements remove cases from inventory. Making mediation voluntary will lead to additional cases that must go to full investigation. Investigations are labor intensive. It takes only a few hours to conduct a mediation; it probably takes a week or so to investigate a complaint. Some complainants already have an incentive to not settle: they use the CHRO's investigatory process as a means of obtaining free discovery. Just after fact-finding, they will request a release of jurisdiction and file a civil action in court. This proposal would incentivize respondents to decline to participate in mediation. This may be fine from a respondent's point of view, but it would lead to increased processing times and erode recent gains in reducing our inventory. Allowing respondents (or complainants) to force the CHRO to conduct full investigations will result in a fiscal note having to be attached to this proposal.

4. Limiting Fact-Finding to 7 hours and 1 day unless otherwise agreed and not sequestering the Respondent's witnesses when the Complainant is questioned.

This proposal would change the whole dynamic of how cases are heard. The Connecticut Supreme Court has held that the CHRO must conduct a full and complete investigation before it can apply the reasonable cause standard. Adriani v. CHRO, 220 Conn. at 319. The CHRO rarely conducts fact-findings of 7 hours, but does sometimes need to go beyond one day. This may be because the names of new witnesses have come forward at the fact-finding from the complainant, the respondent or both, or for the simple reason that not all persons are able to meet at the same place on the same date. In any event, the investigator should pace the flow of the proceedings and not answer to an arbitrary time limit.

The right to use the adjudicatory processes of a state antidiscrimination agency like the CHRO is a property interest protected by the due process clause of the Fourteenth Amendment. Logan v. Zimmerman, 455 U.S. 422, 428-30 (1982). The U.S. Supreme Court has cautioned that state antidiscrimination agencies cannot extinguish this right by applying arbitrary deadlines. Limiting testimony to 7 hours (why not a full 8 hours, etc.?) is arbitrary. It punishes a complainant because a case is complex and would force the CHRO to make impossible

choices as to what witnesses will be heard, which left out. I don't know of any system that lets a litigant have veto power over what evidence a trier of fact may consider. I also worry that an artificial deadline unintentionally encourages parties (both the complainant and the respondent) to engage in conduct that might delay or obstruct the fact-finding, as the investigator would be precluded from scheduling follow-up days of fact-finding.

Adriani found the investigation to be complete, because the CHRO "interviewed thirteen people, including the plaintiff, his attorneys, the plaintiff's supervisor and other...employees". Id. It is highly doubtful that all 13 individuals could have been contacted on the same day. This proposal undercuts Adriani's insistence that the CHRO conduct thorough investigations.

Not sequestering the respondent's witnesses when the complainant is questioned at the fact-finding conference again limits an investigator's discretion into the conduct of a hearing. There are times when sequestration can be necessary. Having a victim of sexual harassment sit in a small room with the alleged harasser across the table can be beyond intimidating.

5. Having the CHRO grant a release if there is a pending civil action or arbitration between the parties upon the request of a complainant or respondent.

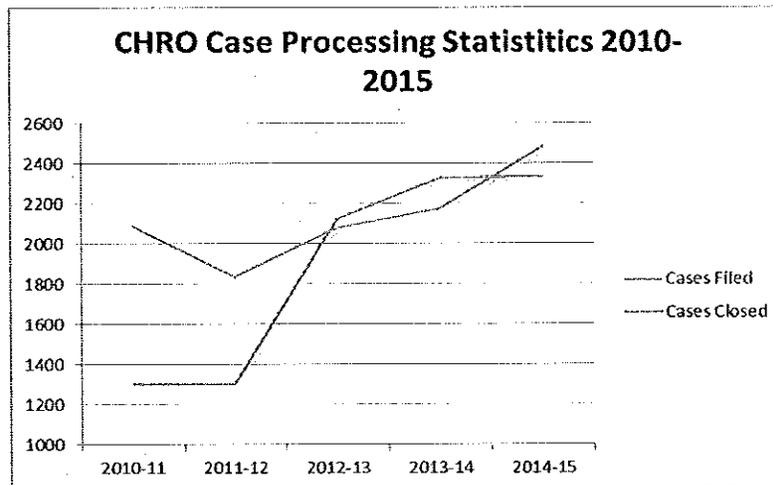
A complainant can request a release of jurisdiction once the CAR is completed, so this proposal gives a complainant nothing a complainant does not already have. It is the respondent who would benefit, because a respondent can never unilaterally steer an employment, credit and public accommodation case away from the CHRO without the complainant's consent. Because it is the complainant's cause of action we are talking about, it seems unfair that a respondent could make an election of forum that a complainant has not made and presumably does not want to make. The way this is drafted though there is no requirement that the CHRO actually issue a release. I don't agree with this proposal, but it is good we have discretion as to whether we issue it. Various courts have acknowledged that the CHRO (or the EEOC, the CHRO's federal counterpart) is a separate party and may have interests in addition to a complainant's. CHRO v. Cheshire Bd. of Education, 270 Conn. 665, 682-84 (2004); Williams v. CHRO, 257 Conn. 258, 289 (2001); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

B. CONCLUSION.

With the full support of the General Assembly (138-0 vote in the House; 36-0 vote in the Senate), procedural reforms proposed by the CHRO were adopted

into law by P.A. 11-237. P.A. 11-237 revolutionized CHRO case processing in a number of ways. Of particular relevance, it emphasized the importance of early mediation and made mediation a separate step in the process, independent of the investigation. Mediating cases early means that a complainant's damages are not as acute, considerably brightening the prospects of a negotiated settlement. Separating mediation from investigation means that respondents (and complainants represented by counsel) are spared the litigation costs associated with preparing their cases for fact-finding.

While P.A. 11-237 has many moving parts, the emphasis on mediation—as both a measure to tame an out-of-control inventory and as an income generator for the General Fund—is P.A. 11-237's true lynchpin. In the prior year, the CHRO received 2,087 complaints but only managed to close 1,299. This was a time when mediation was treated perfunctorily, as a quick prelude to the investigation. Mediations and investigations were scheduled back-to-back. The parties came to the mediation with their witnesses in tow and their game faces on. In the year immediately following P.A. 11-237, the CHRO closed an astonishing 2,121 cases, while taking in 2,073. This marks a 63% increase in case closures due almost entirely to P.A. 11-237.



Increased speed and efficiency continues. As the following chart makes clear, case closures have risen greatly. In 2014-15, the CHRO closed a total of 2,334 cases, nearly double the number closed four years earlier.

The point of such a rapid increase in closures should not be lost. The CHRO earns federal dollars from the U.S. Equal Employment Opportunity Commission (EEOC) on a per case basis for each case we close that is also jurisdictional with the EEOC under federal law. The money the CHRO earns goes to the General Fund. I have no hesitancy in saying that the proposed changes will result in a decrease in federal revenue.

The proposed changes will do away with much of the progress the CHRO has made and undermine the efforts of the agency to eliminate discrimination in the state through enforcement, education and advocacy. For example, there were 397 cases that were withdrawn with settlement in 2010-11. A withdrawal with settlement is a shorthand way of saying that the parties were able to reach a negotiated settlement. Occasionally the parties are able to do this on their own, more often with the assistance of the CHRO. In 2012-13, that number jumped to 881. That is over double the number of cases. I attribute the improved numbers to (1) our post-P.A. 11-237 emphasis on mediation and (2) management's insistence that all attorneys and investigators undergo a mediation certification program to learn the techniques and strategies of effective mediation. Thanks to these closures, the parties were able to save the time and expense of a full investigation. If mediation were made voluntary (or deemphasized as it was in 2010), the number of settlements would drop, costs would increase for all parties and income for the General Fund would quickly spiral downward.

In 2010-11, releases of jurisdiction were given to 276 complaints. This number jumped to 458 in 2012-13. Again, that is almost double the number of cases that were able to be cleared out without having to go through all that a full and complete investigation requires. The percentage of cases where complainants ask for a release of jurisdiction has remained relatively flat. The real reason for the increase in releases of jurisdiction is due to another device created by P.A. 11-237, early legal intervention (ELI). ELI allows for the Legal Division, at the request of a complainant, respondent or the CHRO itself, to determine how to process a case. This means that a respondent who does not like the decision at CAR and who is unwilling to settle in mediation can avoid the costs of investigation by requesting ELI. This system allows fairness and thoroughness for complainants, speed and flexibility for respondents and administrative efficiency for the CHRO.

The current system does not need the kind of changes that are proposed. The CAR standards work. Even though the CHRO retains more cases at CAR than 20 years ago, paradoxically the number of case closures has increased dramatically. (This is despite a significant decrease in staffing.) Early, mandatory mediation and ELI have succeeded in taming the case inventory beast. Since 2011, the CHRO has built a solid track record in terms of understanding what parts of its process need to be adjusted and what parts of its process need to stay. Procedural initiatives (like P.A. 11-237, P.A. 15-249 and a bill to be raised in the Judiciary Committee this session regarding the public hearing process), a change in management and an emphasis on production have

led to a remarkable turnaround. We are about to go from 60% of our inventory being aged (a case being open two years from date of filing) to less than 5%. The CHRO is not the same agency it was just a few years ago.