



Testimony of Eric W. Gjede
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 Before the Program Review & Investigations Committee
 September 21, 2016

**Testifying on PRI's study re:
 COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES: DISCRIMINATION COMPLAINT PROCESSING**

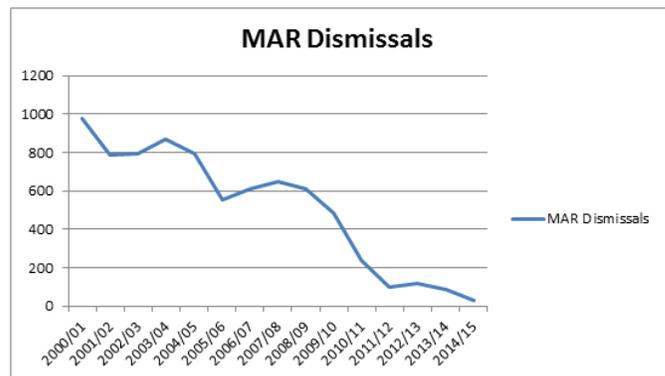
Good afternoon Senator Fonfara, Representative Carpino, Senator Kissel, Representative Mushinsky and members of the Program Review & Investigations Committee. My name is Eric Gjede and I am assistant counsel at the Connecticut Business and Industry Association (CBIA), which represents thousands of large and small companies throughout the state of Connecticut.

CBIA applauds the Program Review & Investigations committee and staff members for conducting this study. The Commission on Human Rights & Opportunities employment discrimination complaint process has been the source of increasing frustration for the business community. I'm here today to testify regarding some of the reasons for our frustration, as well as to make recommendations on how to improve the process for both claimants and respondents.

The business community is deeply concerned about shifts in the treatment of employment discrimination claims at the Commission on Human Rights and Opportunities. While CHRO has historically been plagued with a backlog of cases, the commission has chosen to deal with the problem by changing their case review standards without legislative approval, and then more recently, using the legislature to mandate that parties to a claim engage in time-consuming and costly mediations at the onset of the claim. It is our belief that in many instances, the commission has reduced their caseload not through quicker and more equitable outcomes, but rather through making the process so onerous that respondents are forced to settle meritless claims.

In 1994, the legislature added a "Merit Assessment Review" standard to the CHRO claim process. At that time, the backlog of cases at CHRO was significant. The Merit Assessment Review standard allowed for the expeditious dismissal of frivolous cases, provided such a complaint "(1) failed to state a claim for relief or is frivolous on its face, (2) the respondent is exempt from the provisions of the chapter, or (3) there is no reasonable possibility that investigating the complaint will result in a finding of reasonable cause."

Fiscal Year— June to June	Number of MAR Dismissals for No Possible Reasonable Cause Finding	Total Case Closures	Percentage (rounded)
2000-2001	975	2193	44%
2001-2002	786	2159	36%
2002-2003	794	2215	36%
2003-2004	866	2368	37%
2004-2005	795	2258	35%
2005-2006	553	2167	26%
2006-2007	610	2168	28%
2007-2008	651	2397	27%
2008-2009	610	2118	29%
2009-2010	483	1761	27%
2010-2011	237	1299	18%
2011-2012	96	1625	6%
2012-2013	116	2121	5%
2013-2014	86	2327	4%
2014-2015	31	2334	1%

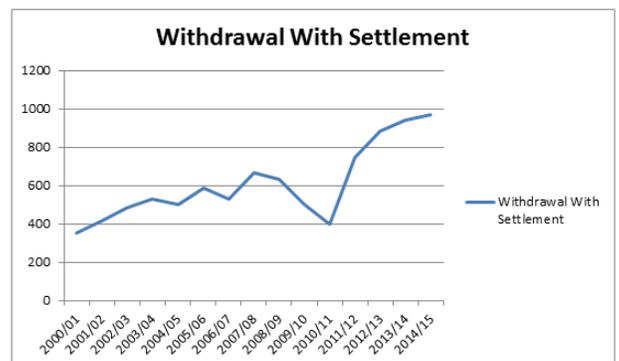


Public Act 11-237 made various changes to the CHRO process. The purpose of the act was to expedite the processing of cases by focusing on mediation and early legal intervention. CHRO noted that they had, years prior, shifted away from dismissing cases under the case/merit assessment review standards and now focused on mediation. However, there was no legislative approval for this change in standards. This shift resulted in many frivolous cases being retained that normally would have been dismissed on initial review, which created greater backlog for legitimate claims.

In October 2015, the CHRO proposed, and the legislature agreed, to change the name from “Merit Assessment Review” to “Case Assessment Review.” According to CHRO, this was done to eliminate the misperception that passing through this initial phase is an indication of the strength of the case. Indeed, the CHRO had for years ceased conducting any “Merit” review as originally intended when the Merit Assessment Review standard was adopted in 1994. In fact, at this point in time, despite no change in their statutory review standard, only 1% of cases were being dismissed under the merit assessment review process, down from 44% in 2000. Thus, employers have virtually no chance of getting a case expeditiously dismissed under the “Merit” now “Case” Assessment Review process regardless of the frivolity of the claim.

Fiscal Year— June to June	Total Case Closures	Cases Withdrawn With Settlement	Percentage of cases settled
2000-2001	2193	350	16%
2001-2002	2159	412	19%
2002-2003	2215	481	22%
2003-2004	2368	529	22%
2004-2005	2258	501	22%
2005-2006	2167	587	27%
2006-2007	2168	531	24%
2007-2008	2397	669	28%
2008-2009	2118	630	30%
2009-2010	1761	503	29%
2010-2011	1299	397	31%
2011-2012	1625	746	46%
2012-2013	2121	881	42%
2013-2014	2327	941	40%
2014-2015	2334	968	41%

While CHRO had long ago shifted towards mediating cases, this became a mandatory part of the onset of the process in 2015. Although there is nothing to indicate that cases with CHRO have become more meritorious, the number of employers paying to settle cases has risen dramatically. While certainly there are many instances where this outcome is warranted, there are also a significant number of cases where businesses are settling claims simply to avoid the costly and time consuming expense of fact-finding conferences. This is not good public policy.



CBIA and its member companies suggest the following reforms to the CHRO process:

1. Resume using the legal standards currently in the statute that allow for a robust and meaningful review of cases at the Case Assessment Review stage in order to dismiss meritless cases at the onset of the claim process. Alternatively, adopt the standards used by the Equal Opportunity Commission that have made the federal process significantly more efficient than the process used by CHRO.
2. Make the initial mediation conference voluntary. These mediation conferences are an unnecessary expense of time and money when the respondent has no intention of settling a claim they believe to have no merit.

3. Allow the respondent to be present while the complainant and his or her witnesses are questioned during the fact-finding conference. When the complainant is testifying, all of the respondent's witnesses should have the right to be present to hear the accusations against them in order to refute aspects of the complainant's testimony with their counsel.
4. Prohibit CHRO student-interns from conducting fact-finding conferences.
5. There should be a more structured investigation process. CHRO should be required to verify that both the claimant and the respondent intend to show up at the fact -finding conference. CBIA often hears from our members that plaintiffs fail to show up because he or she claimed to have not heard about the conference.
6. There should additional legislative and executive accountability for the commission using metrics other than the amount of dollars generated through settlements. If an agency measures itself by the number of settlements, then it will naturally follow a process that strongly encourages and incentivizes employers to pay to settle cases, including frivolous cases. This is bad public policy. In many instances, settlement is not a just and fair outcome, it's just the cheaper one.
7. Allow the complainant or respondent to request a release of jurisdiction if there is a pending civil action or arbitration between the parties.

I thank the committee for taking on this important subject and am happy to provide any additional information you may need regarding my testimony.

Sec. 5. Section 46a-83 of the 2016 supplement to the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2017*):

(a) Not later than fifteen days after the date of filing of any discriminatory practice complaint pursuant to subsection (a) or (b) of section 46a-82, or an amendment to such complaint adding an additional respondent, the commission shall serve the respondent as provided in section 46a-86a with the complaint and a notice advising of the procedural rights and obligations of a respondent under this chapter. The respondent shall either (1) file a written answer to the complaint as provided in subsection (b) of this section, or (2) not later than ten days after the date of receipt of the complaint, provide written notice to the complainant and the commission that the respondent has elected to participate in pre-answer conciliation, except that a discriminatory practice complaint alleging a violation of section 46a-64c or 46a-81e shall not be subject to pre-answer conciliation. A complaint sent by first class mail shall be considered to be received not later than two days after the date of mailing, unless the respondent proves otherwise. The commission shall conduct a pre-answer conciliation conference not later than thirty days after the date of receiving the respondent's request for pre-answer conciliation.

(b) Except as provided in this subsection, not later than [thirty] forty-five days after the date (1) of receipt of the complaint, or (2) on which the commission determines that the pre-answer conciliation conference was unsuccessful, the respondent shall file a written answer to the complaint, under oath, with the commission. The respondent may request, and the commission may grant, one extension of time of not more than fifteen days within which to file a written answer to the complaint. An answer to any amendment to a complaint shall be filed within twenty days of the date of receipt to such amendment. The answer to any complaint alleging a violation of section 46a-64c or 46a-81e shall be filed not later than ten days after the date of receipt of the complaint.

(c) Not later than sixty days after the date of the filing of the respondent's answer, the executive director or the executive director's designee shall conduct a case assessment review to determine whether the complaint should be retained for further processing or dismissed because (1) it fails to state a claim for relief or is frivolous on its face, (2) the respondent is exempt from the provisions of this chapter, or (3) [there is no reasonable possibility that investigating the complaint will result in a finding of reasonable cause] the executive director or the executive director's designee is unable to conclude the information provided by the complainant and the respondent establishes that a discriminatory practice has occurred, except that any dismissal pursuant to this subdivision shall not be deemed to have conclusively established that the respondent has not engaged in a discriminatory practice. The case assessment review shall include 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. The executive director or the executive director's designee shall send notice of any action taken pursuant to the case assessment review in accordance with section 46a-86a. For any complaint dismissed pursuant to this subsection, the executive director or the executive director's designee shall issue a release of jurisdiction allowing the complainant to bring a civil action under section 46a-100. This subsection and subsection (e) of this section shall not apply to any complaint alleging a violation of section 46a-64c or 46a-81e. The executive director shall report the

results of the case assessment reviews made pursuant to this subsection to the commission quarterly during each year.

(d) Not later than sixty days after the date of sending notice that a complaint has been retained after a case assessment review, the executive director or the executive director's designee shall assign an investigator or commission legal counsel to hold a [mandatory] [voluntary](#) mediation conference. A mediation conference may but need not be held if the commission has held a pre-answer conciliation conference. The investigator or commission legal counsel assigned to conduct the mediation shall not be assigned to investigate the complaint. The [mandatory] [voluntary](#) mediation conference may not be scheduled for the same time as a fact-finding conference held pursuant to subsection (f) of this section. The mediator may hold additional mediation conferences to accommodate settlement discussions.

(e) If the complaint is not resolved after the [mandatory] [voluntary](#) mediation conference, the complainant, the respondent or the commission may at any time after such conference request early legal intervention. If a request for early legal intervention is made, a commission legal counsel shall determine not later than ninety days after the date of the request whether the complaint should be (1) heard pursuant to section 46a-84, [as amended by this act](#), (2) processed pursuant to subsection (f) of this section, or (3) released from the jurisdiction of the commission. In making such determination, commission legal counsel may hold additional proceedings and may utilize and direct commission staff. If a commission legal counsel determines that the complaint should be processed pursuant to subsection (f) of this section, the commission legal counsel may recommend that the investigator make a finding of no reasonable cause. The investigator shall make such a finding unless the investigator believes the commission legal counsel made a mistake of fact. If the investigator intends to make a finding of reasonable cause after the commission legal counsel recommends otherwise, the investigator shall consult with the commission legal counsel.

(f) Not later than fifteen days after the date of (1) a [mandatory] [voluntary](#) mediation conference that fails to resolve a complaint, or (2) an early legal intervention decision to investigate a complaint, the executive director or the executive director's designee shall assign an investigator to process the complaint. The investigator may process the complaint by any lawful means of finding facts, including, but not limited to, a fact-finding conference, individual witness interviews, requests for voluntary disclosure of information, subpoenas of witnesses or documents, requests for admission of facts, interrogatories, site visits or any combination of these means for the purpose of determining whether there is reasonable cause for believing that a discriminatory practice has been or is being committed as alleged in the complaint. As used in this section and section 46a-84, "reasonable cause" means a bona fide belief that the material issues of fact are such that a person of ordinary caution, prudence and judgment could believe the facts alleged in the complaint.

(g) (1) Before issuing a finding of reasonable cause or no reasonable cause, the investigator shall afford each party and each party's representative an opportunity to provide written or oral comments on all evidence in the commission's file, except as otherwise provided by federal law or the general statutes. The investigator shall consider such comments before making a finding. The investigator shall make a finding of reasonable cause or no reasonable cause in writing and shall list the factual findings on

which it is based not later than one hundred ninety days from the date of the case assessment review, except that for good cause shown, the executive director or the executive director's designee may grant no more than two extensions of the investigation of three months each.

(2) If the investigator makes a finding that there is reasonable cause to believe that a violation of section 46a-64c has occurred, the complainant and the respondent shall have twenty days from sending of the reasonable cause finding to elect a civil action in lieu of an administrative hearing pursuant to section 46a-84, [as amended by this act](#). If either the complainant or the respondent requests a civil action, the commission, through the Attorney General or a commission legal counsel, shall commence an action pursuant to subsection (b) of section 46a-89, not later than ninety days after the date of receipt of the notice of election. If the Attorney General or a commission legal counsel believes that injunctive relief, punitive damages or a civil penalty would be appropriate, such relief, damages or penalty may also be sought. The jurisdiction of the Superior Court in an action brought under this subdivision shall be limited to such claims, counterclaims, defenses or the like that could be presented at an administrative hearing before the commission, had the complaint remained with the commission for disposition. A complainant may intervene as a matter of right in a civil action without permission of the court or the parties. If the Attorney General or commission legal counsel, as the case may be, determines that the interests of the state will not be adversely affected, the complainant or attorney for the complainant shall present all or part of the case in support of the complaint. If the Attorney General or a commission legal counsel determines that a material mistake of law or fact has been made in the finding of reasonable cause, the Attorney General or a commission legal counsel may decline to bring a civil action and shall remand the file to the investigator for further action. The investigator shall complete any such action not later than ninety days after receipt of such file.

(h) If the investigator issues a finding of no reasonable cause or if the complaint is dismissed pursuant to subsection (m) of this section, the complainant may file a written request for reconsideration with the executive director or the executive director's designee, not later than fifteen days from the sending of such finding or dismissal. A request for reconsideration shall state specifically the reasons why reconsideration should be granted. A commission legal counsel shall grant or reject reconsideration not later than ninety days after the date of the sending of such finding or dismissal. A commission legal counsel shall conduct such additional proceedings as may be necessary to render a decision on the request.

(i) After finding that there is reasonable cause to believe that a discriminatory practice has been or is being committed as alleged in the complaint, an investigator shall attempt to eliminate the practice complained of by conference, conciliation and persuasion not later than fifty days after the date of the finding. The refusal to accept a settlement shall not be grounds for dismissal of any complaint.

(j) No commissioner or employee of the commission may disclose, except to the parties or their representatives, what has occurred in the course of the commission's processing of a complaint, provided the commission may publish the facts in the case and any complaint that has been dismissed and the terms of conciliation when a complaint has been adjusted. Each party and his or her representative shall have the right to inspect and copy documents, statements of witnesses and other

evidence pertaining to the complaint, except as otherwise provided by federal law or the general statutes.

(k) In the investigation of any complaint filed pursuant to this chapter, commission legal counsel may issue subpoenas requiring the production of records and other documents or compelling the attendance of witnesses.

(l) The executive director or the executive director's designee may enter an order of default against a respondent who (1) after notice, fails to answer a complaint in accordance with subsection (a) of this section or within such extension of time as may have been granted; (2) fails to answer interrogatories issued pursuant to subdivision (11) of section 46a-54 or fails to respond to a subpoena issued pursuant to subsection (k) of this section or subdivision (9) of section 46a-54, provided the executive director or the executive director's designee shall consider any timely filed objection; (3) after notice and without good cause, fails to attend a fact-finding conference; or (4) after notice and without good cause, fails to attend a [mandatory] [voluntary](#) mediation conference. The respondent may make application to the executive director to vacate the default. Upon entry of an order of default or upon the decision of the executive director not to vacate the default, the executive director or the executive director's designee shall appoint a presiding officer to enter, after notice and hearing, an order eliminating the discriminatory practice complained of and making the complainant whole. The commission or the complainant may petition the Superior Court for enforcement of any order for relief pursuant to section 46a-95.

(m) The executive director or the executive director's designee may enter an order of dismissal against a complainant who (1) after notice and without good cause, fails to attend a fact-finding conference; (2) after notice and without good cause, fails to attend a [mandatory] [voluntary](#) mediation conference; or (3) refuses to accept an offer of settlement where the respondent has eliminated the discriminatory practice complained of, taken steps to prevent a like occurrence in the future and offered full relief to the complainant. [Unless otherwise agreed to by the complainant and the respondent, no witnesses shall be sequestered when the complainant is questioned at the fact-finding conference.](#)

Sec. 6. Subsection (a) of section 46a-94a of the 2016 supplement to the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2017*):

(a) The commission, any respondent or any complainant, aggrieved by a final order of a presiding officer, may appeal to the Superior Court in accordance with section 4-183. Any complainant may appeal to the Superior Court in accordance with section 4-183 if the complainant is aggrieved by (1) the dismissal of his or her complaint by the commission for failure to attend a [mandatory] [voluntary](#) mediation session as provided in subsection (m) of section 46a-83, [as amended by this act](#), (2) a finding of no reasonable cause as provided in subsection (g) of section 46a-83, [as amended by this act](#), or (3) rejection of reconsideration as provided in subsection (h) of section 46a-83, [as amended by this act](#).

Sec. 7. Subsection (b) of section 46a-101 of the 2016 supplement to the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2017*):

(b) The complainant and the respondent, by themselves or their attorneys, may jointly request that the complainant receive a release from the commission at any time from the date of filing the complaint. The complainant or the complainant's attorney may request a release from the commission if the complaint is still pending after the expiration of one hundred eighty days from the date of its filing or after a case assessment review in accordance with subsection (c) of section 46a-83, [as amended by this act](#), whichever is earlier. The executive director or the executive director's designee shall conduct an expedited case assessment review in accordance with subsection (c) of section 46a-83, [as amended by this act](#), if the commission receives a request for a release of jurisdiction from the complainant prior to one hundred eighty days from the date a complaint is filed. [Upon request from the complainant or the respondent, the commission may grant a release of jurisdiction if the commission determines there is a pending civil action or arbitration between the parties.](#)