

**Connecticut Employer Lawyers Association
Connecticut Advocates for Employee Rights**

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2016-2017 Executive Board:

September 27, 2016

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Good morning Senator Fonfara, Senator Kissel, Representative Carpino, Representative Mushinsky and members of the committee. This testimony supplements that which I offered during the public hearing on September 21, 2016.

My name is Deborah McKenna. I am an attorney at The Hayber Law Firm. We have offices in Hartford and New Haven, CT and I practice in the area of plaintiff's side employment law. I have practiced in this area of the law for the past 20 years. I testified at the September 21, 2016 hearing on behalf of the Connecticut Employment Lawyer's Association (known as CELA). CELA now submits this supplemental testimony.

CELA is a voluntary membership organization whose members are attorneys from throughout Connecticut who devote at least 51% or more of their employment related practice to representing employees. As such, CELA attorneys represent individual employees in all types of employment related matters including, but not limited to, discrimination, wrongful termination, and claims involving state and federal FMLA and related leave of absence issues as well as whistleblower claims. CELA attorneys have a great deal of experience before the Connecticut Commission on Human Rights and Opportunities.

CELA appreciates this opportunity to share its views on the effectiveness of the Connecticut Commission on Human Rights and Opportunities (known as the "CHRO"),

particularly as it pertains to complaint processing. By the very nature of our work, CELA's members spend a substantial part of their practice appearing at the CHRO. CELA has a great deal of respect for the professionalism displayed by the CHRO staff, particularly those in the legal department, as well as the agency's long history fighting to advance the rights of the citizens of the state of Connecticut.

There are five main areas that we would like to focus our testimony on: standard of review; consistency of processes; mandatory mediation; time to resolution; and resource allocation.

We will first focus on the standard of review that applies to employment discrimination complaints. "Case Assessment Review" is the process by which the Commission decides whether to accept a case for a full investigation. This process was previously known as "Merit Assessment Review" but the name was changed by Public Act 15-249, S. 2. Despite the name change, the process and the applicable legal standard has not changed. A complaint can only be rejected by the Commission without an investigation if: (1) it fails to state a claim for relief; (2) it is frivolous on its face; or (3) there is no reasonable possibility that investigating the complaint will result in a finding of reasonable cause. Conn. Gen. Stat. § 46a-83(c); Conn. Reg. § 46a-54-49a. Reasonable cause is defined as "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." Conn. Gen. Stat. § 46a-83(f). This standard does not require the heightened showing that a court would apply to a motion for summary judgment but rather is more closely analogous to a motion to dismiss or state court motion to strike, which is designed to test the sufficiency of the allegations in the Complaint. At this juncture, the burden on the Complainant is fairly low, particularly since most of the evidence upon which the Complainant is likely to rely

to support his or her claim is in the custody and control of the employer. Additionally, the Commission's own Case Assessment Review criteria makes clear that cases requiring credibility determinations should not be dismissed at this stage.

Prior to the 2011 changes, these Reviews were being conducted in the regional offices and when a case was rejected, the Complainant had a right and often did request that the Commission reconsider its rejection of a complaint. As one CHRO representative testified during the hearing, nearly 60% of the initial dismissals that he had reviewed were reconsidered and sent back for a full investigation. Since the legal department now conducts this initial review and is consistently applying the proper standard, it only makes sense that more cases are accepted for a full investigation. Despite CBIA's attempts to portray the Commission as an activist agency, the fact is that Case Assessment Reviews are being done correctly. Consistent application of the correct legal standard does not just benefit Complainants – who count on the Commission for a fair review – but it also increases the credibility of the Commission.

One area that could benefit from additional consistency is the Commission's investigative stage of the case processing. Once a case has been accepted for an investigation, it is up to the individual investigator to determine how best to proceed with an investigation. Under Conn. Gen. Stat. § 46a-83, a great deal of discretion is left to the investigator to determine how best to investigate a case that has been accepted for a full investigation. Specifically, the statute provides for “any lawful means of finding facts.” The statute allows the investigator to conduct a “fact finding conference, individual witness interviews, requests for voluntary disclosure of information, subpoenas of witnesses or documents, request for admission of facts, interrogatories, site visits or any combination” of these methods. Unfortunately, this discretion has led to inconsistent practices in the various offices and among the various investigators. One

frequent criticism expressed, at least by Complainants' counsel, is that there is a lack of confidence in the depth and thoroughness of the CHRO's investigation. While it is understandable that investigators should be able to have a certain amount of flexibility with regard to case management, certain types of case processing are more effective than others. For example, a more formal fact finding conference, in which the witnesses are required to provide sworn testimony and opposing parties are given an opportunity to challenge that testimony add a seriousness to the process that is lacking during the more informal and private witness interviews which are sometimes used as a substitute for a full fact finding. Indeed, even within the confines of a fact finding conference, the practices can vary significantly depending upon investigators. For example, some investigators require that witnesses be sequestered while others do not. Some investigators have even allowed for a back and forth discussion among the witnesses – which negatively effects the weight and credibility of the fact finding process. The lack of consistency adds uncertainty to the fact finding process – which has a negative effect on both parties. One way to address this problem would be to require more consistency during the fact finding process. If both Complainants and Respondents had a clear understanding of what to expect in terms of an investigation, it would add credibility to make this part of the CHRO's process.

Another area that could benefit from some revision is the required mandatory mediation process. Although there has always been a mediation component to a fact finding, the 2011 revisions to Conn. Gen. Stat. §46a-83 moved the mediation up in the process -requiring it to be held before the case is assigned for an investigation. CELA understands that the intent was to reduce the CHRO case load by resolving cases quicker and that some cases do benefit from early mediation. However, for parties who are represented, this mandatory part of the process is rarely fruitful. Instead, it typically delays the processing of the case and increases the attorney time

spent on the file. Although we are not aware of the statistics, through discussion with our members, it seems like few are actually resolved at this stage, particularly when the mediation is not conducted by members of the legal staff. Also, when mediations are conducted by individuals who are not CHRO counsel, there seems to be a lack of understanding as to what elements of relief can be part of a settlement. Unfortunately, Respondents, particularly when represented, do not appear to take this part of the process seriously and often come prepared to resolve a case for little more than nuisance value. This is frustrating for Complainants and can create actual impediments to settlement at a later stage. A Complainant will remember how insulting it was to be offered \$2500 during the CHRO mediation, a memory that stays with them throughout the case. There are some situations in which mediation at an earlier point in the process can be beneficial – such as when the parties are not represented and the CHRO’s practice should be modified to better address these situations. One potential solution to this issue would be to create a process that permits parties who are both represented by counsel to opt-in to the mediation process rather than making it mandatory. This would allow the Commission to focus its resources on cases that have a more realistic chance of being resolved at this early stage.

Modifications to the mandatory mediation process would also have an effect on the amount of time that it takes for a case to reach a conclusion. Despite the repeated attempts by the CHRO to increase the speed with which it processes cases, the fact is that it still takes too long from case initiation to issuance of a reasonable cause finding. Although Conn. Gen. Stat. § 46a-83(a) requires that “not later than fifteen days after the filing of a discriminatory practice complaint.... the Commission shall serve the Respondent” this does not always happen. Additionally, the law also requires that “the investigator shall make a finding of reasonable cause or no reasonable cause in writing not later than one hundred ninety days from the case

assessment review, except for good cause shown...” but allows for two three-month extensions. However, cases frequently do take longer than the allotted time period – and not because they are complicated or require the investigation of many witnesses. Indeed, the most common complaint from investigators is that they have an overwhelmingly large number of files and when their caseloads are combined with intakes - meaning that investigators are required to meet with and assist Complainants to file complaints - the end result is that cases move very slowly. In fact, it is not unusual for a case to not be resolved before the current two-year deadline to file it in court.

One additional way to remedy this problem would be to actually staff the CHRO at appropriate levels and with individuals who share the stated mission of the agency –*to eliminate discrimination and to establish equal opportunity and justice for all persons within the state.* While budget constraints are inevitable, it is unrealistic to expect that an agency that is functioning with 77% of its staff but seeing caseloads that increase each year to move efficiently. Indeed, for the fiscal year July 1, 2014 to June 30, 2015, the total complaints filed was 2482, of which 2017 were charges related to employment. This is an increase of 310 from the year before and an increase of 404 from 2013. A more fully staffed agency should certainly be better able to meet the statutory timelines.

CELA recognizes that the CHRO provides an invaluable and necessary service for *pro se* complainants to enforce their right to be free from workplace discrimination. It is certainly in the interest of some Complainants to bring their claims to the CHRO and stay there – rather than taking them through the court system. Indeed, for some individuals – the CHRO may be their only option to protect their rights. The CHRO and those *pro se* litigants would be well-served if the issues outlined above were addressed.