A Modest Proposal for Overhauling the Commission on Human Rights and Opportunities

By Joshua A. Hawks-Ladds

My proposed expedited procedure would eliminate unnecessary personnel, frivolous claims, and exorbitant costs.

No one can dispute that the Commission on Human Rights and Opportunities (CHRO) is in trouble. Money, staffing, and management woes have plagued the agency for years. Having practiced before the commission for nearly two decades—both on behalf of complainants (during the first decade) and respondents (during the second decade)—I can confirm that the CHRO is in need of drastic change.

One of the first civil rights agencies in the country, the commission's primary responsibility (among other things) is to eliminate discrimination in Connecticut's housing and employment sectors. However, the commission is also a gatekeeper of discrimination claims: before taking advantage of the courts, a complainant must slog through the commission's procedures in order to exhaust the commission's administrative remedies. The commission is the deferral agency for federal civil rights agencies and receives federal dollars to handle employment and housing discrimination complaints. The dollars flow as long as the commission's statutory scheme is "substantially equivalent" to the relevant federal scheme.

Recently, I argued a housing discrimination case before the Connecticut Appellate Court involving the commission's representation of an individual litigant in court. The commission argued (in part) that its "limited resources" do not permit it to adequately represent individuals in court and it therefore relies heavily upon pro bono civil rights agencies for such representation. If the agency is not permitted to intervene, the commission argued, then the victim's rights cannot be adequately represented by the commission. This case highlights a growing concern with the ability of the commission to effectuate its purpose in these dire economic times, when budget cuts are decimating numerous state agencies.

Unfortunately, the commission has become an underfunded, understaffed, and perpetually backlogged bureaucracy. Along with many valid discrimination complaints, the commission's offices are clogged with specious claims that the commission is required to investigate. This means that the bona fide discrimination claims against landlords and employers get lost in the morass. Some of the valid claims are removed from the CHRO and litigated in the state and federal courts. However, many of the claims (over 2,000 are filed each year) languish for years in the agency's offices. The system is unfair to claimants with bona fide claims, as well as employers and landlords with bona fide defenses.

The system is also undermined by regulations that favor exhaustive discovery, the retention of claims that do not have even the slimmest hope of succeeding at a public hearing or trial and a system that favors retaining investigators that do not understand the laws and lack the requisite investigation skills. The end result is an agency that simply cannot adequately handle the backlog of cases and cannot afford to bring lawsuits on behalf of complainants when the law requires it to do so.

The current commission procedure consists of an aggrieved individual filing a complaint or charge of discrimination that may include many pages of accusations, some of which have no relevance to a discrimination claim. The complaint is filed with the commission and then served on the employer or landlord. Attached to the complaint is a multitude of documents, including what is commonly referred to as a "Schedule A"—a multi-page discovery request that requires responses to numerous questions that could be used in the CHRO action or any subsequent litigation. Usually, the respondent must retain a lawyer to assist in responding to the complaint and Schedule A in order to protect its interests. After the respondent submits the paperwork, the complainant has an opportunity to rebut that submission. The CHRO then reviews the paperwork and a commission representative must decide whether the complainant states a claim that would permit an investigation of the complaint to take place. Those initial steps take months—just to have the "pleadings" perfected.

In those cases that pass an initial merit review, many months pass before the parties receive notice that an investigator is assigned to the matter. In employment cases, the parties receive notice of that assignment as well as a date for a mediation/fact-finding conference. At that conference, the parties are supposed to discuss a settlement of the claim and be ready to present witnesses and documents to support their positions. I have had matters where well over a year passes between the initial filing and the mediation/fact-finding conference is scheduled.

In both housing and employment discrimination cases, after an investigation, an investigator writes a draft report, opining on whether he or she believes that it is more likely than not that discrimination occurred. The parties may comment on that draft report and then, eventually, a final report is issued. If the investigator determines that reasonable cause of discrimination exists,

then the matter is placed on the CHRO's docket for a public hearing—which is an administrative trial. The public hearing referee cannot award noneconomic damages or attorneys' fees—a complainant must seek those remedies in court after first receiving the commission's release of its jurisdiction over the matter.

Obviously, the commission's current process is unacceptable. Neither side receives a timely adjudication of the claim. For years the complainant's rights remain unvindicated and the respondent's exposure remains in limbo. And the cost to employers, landlords, and the state is exorbitant. It could not have been the legislature's intent to permit such extensive delays in resolving discrimination matters, nor could it have intended such a financial burden on the state and on respondents. The original intention must have been for a speedy resolution of discrimination complaints—much like the speedy resolution of other administrative claims.

There is an extraordinarily simple solution to the problem: a complete overhaul of the commission's procedures to mirror the state Department of Labor's Unemployment Compensation system, with one exception: if either party does not agree with an appeal referee's decision relating to a charge of discrimination, then that party may appeal that decision, *de novo*, to the superior court. Of course the process needs to comply with certain federal requirements in order for the commission to continue to receive federal dollars.

A discrimination complaint process that mirrors the unemployment compensation system would virtually eliminate the initial pleading and discovery stage, the investigation, and the public hearing and replace it with an expedited process. The unemployment system (and my proposed commission process) works as follows: a claimant files a claim. The claim is a simple form that clearly states why the claimant is aggrieved and what remedy the claimant seeks. The DOL sends the employer a notice of the claim along with a notice of a hearing before an administrator. The employer can respond in writing or simply attend the hearing—by telephone or in person, or the employer can waive its appearance altogether. If either party is dissatisfied with the administrator's decision, the aggrieved party may, within 21 days, appeal the administrator's decision and receive a *de novo* hearing before an appeals referee. At that (formal) hearing, a record is created and a final decision is made. For unemployment claims, an appeal of that decision is not *de novo*, but rather based on the record created before the appeals referee. The appeal goes to a panel known as the Employment Security Review Board. From there, an aggrieved party has an administrative appeal to the superior court. I propose that the appeal be *de novo* in discrimination cases.

Such a streamlined process would expedite discrimination claims. Claims would be filed and heard within a few months. The following would be eliminated: extensive, one-sided discovery (the so-called "Schedule A") and extensive pleadings, drawn-out investigations, mediation and fact-finding conferences, report-writing, comment period, final report, and the public hearing process. Both sides would receive an administrative hearing and then, if they choose, a timely, fair hearing before an appeals referee who would render a swift decision ordering the appropriate remedy. Either side could appeal that decision to superior court for a full *de novo* adjudication of their claims. And, unlike in the commission, the court can provide a complete remedy to the prevailing party.

This process would eliminate the backlog, and reduce the size and expense of the current commission. It would greatly reduce the number of commission personnel.

Detractors of the proposal will argue that employers will always appeal negative referee decisions because they have deeper pockets than complainants, and complainants will not have the resources to hire lawyers to defend those claims. There is some merit to that argument. However, protections can be built into the law—including permitting the commission to intervene in cases that it believes to be meritorious and worth pursuing on behalf of the individual's and/or the public's interest.

While this proposal may have opposition—especially from those who believe that complainants receive justice by having their claims handled for free by a state agency, even if the claim sits for many years without a decision—my proposed expedited procedure would eliminate unnecessary personnel, frivolous claims, and exorbitant costs, and permit a speedy, fair resolution of discrimination complaints both in the employment and housing sector. **CL**

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