

**At the Crossroads:  
Is There Hope for Civil Rights Law Enforcement in New York?**

**A Report from the  
Anti-Discrimination Center  
of Metro New York, Inc.**

## About this Report

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## About the Center

The Anti-Discrimination Center of Metro New York is a not-for-profit 501(c)(3) organization, formed to assist in combating, curbing, preventing, and remedying discrimination in housing, in employment, and in education and other forms of public accommodations.

The Center sees discrimination as invidious whether it is based on race, color, national origin, gender, sexual orientation, marital status, familial status, age, disability, alienage, citizenship status, or such other bases as may be proscribed by anti-discrimination laws, regardless of whether such discrimination occurs by design or effect.

The Center litigates, provides *amicus* and consulting assistance, and offers training in these areas. Among the Center's projects will be analyzing, conducting research on, and investigating the factors that have historically perpetuated discrimination, and those that currently perpetuate discrimination, including segregation and unequal opportunity, especially with regard to the systemic operation of those factors within the New York metropolitan area.

Included in the Center's work will be ongoing assessments of the work of the public entities charged with carrying out federal, state, and municipal anti-discrimination laws.

At the beginning of 2004, the Center will be inaugurating a program of testing for housing discrimination (which will later be expanded to include employment discrimination as well).

## About the Author

Craig Gurian is Executive Director of the Center. He began working in the anti-discrimination field 15 years ago. Gurian was the principal author for the Commission on Human Rights of the comprehensive 1991 revisions to the City's Human Rights Law. Among other research, he was the principal author of *It Is Time To Enforce The Law: Fulfilling the Promise of the New York City Human Rights Law*, issued by the Civil Rights Committee of the Association of the Bar at the end of 2001. Gurian is Adjunct Associate Professor of Law at Fordham University School of Law, where he teaches anti-discrimination courses. He received his B.A. from Columbia College; his J.D. from Columbia Law School; and his M.A. in United States history from Columbia's Graduate School of Arts and Sciences.

**“We must not turn away from one another. We must not retreat into separate tribes of like-minded, like-looking people who worship the same god, wear the same clothes, read the same books and eat the same food as one another. This is the way of exclusion, not inclusion. We cannot afford to keep going this way. If we are to survive as a society, as a nation, we must turn toward one another and reach out in every way we can.”**

**- Representative John Lewis,  
*Walking with the Wind***

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## I. Introduction

Confronted with evidence of an apparently inadequate police response to a bias incident on Staten Island, Mayor Bloomberg has said he has “zero tolerance” for bias crimes, and, referring to those who commit such crimes, has asked the City’s District Attorneys to “punish such criminals to the fullest extent permitted by law.”<sup>1</sup> Contrary to some intemperate rhetoric that has vilified the Administration in connection with this issue, we believe that the Mayor’s remarks represent earnest opposition to -- and a sincere commitment to fight -- bias crimes. We wish our evaluation of the City’s overall record of anti-discrimination law enforcement could have been equally optimistic.

Twenty-one months ago, the Administration inherited an anti-discrimination law enforcement system that was in complete disrepair. As a Bar Association report found, the City’s Human Rights Commission was deeply underfunded, unfocused, and backlogged. Most importantly, it lacked an understanding of either the need to create, or the means by which to create, a credible deterrent against acts of discrimination in the same way deterrence is created in other areas of law enforcement.<sup>2</sup> It was not asking itself the fundamental question for any anti-discrimination agency: to what extent are we making headway in deterring, preventing, uprooting, and remedying discrimination?

If possible, the record of the City’s Law Department was worse. Though it had possessed

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<sup>1</sup> *New York Times*, September 23, 2003, p. B4, col. 5.

<sup>2</sup> For a description of the wholesale failure by either the Human Rights Commission or the City’s Law Department to enforce the City’s Human Rights Law as of the end of 2001, see the report of the Civil Rights Committee of the Association of the Bar of the City of New York, entitled *It Is Time to Enforce the Law: Fulfilling the Promise of the NYC Human Rights Law*, 57 *The Record* 229 (Summer 2002). The report is available on the web at [www.antibiaslaw.com/committeereport.pdf](http://www.antibiaslaw.com/committeereport.pdf).

since 1991 the authority and responsibility to investigate instances of systemic discrimination (also known as “pattern-and-practice” cases), the Law Department had altogether failed to do so. It was in a peculiar position as well in terms of its responsibility to be an advocate for robust interpretations of the City’s Human Rights Law: as the City’s discrimination defense attorney, it had an institutional interest in seeing the Human Rights Law narrowly construed, a not-very-subtle conflict-of-interest.

The new Administration has sought to signal the coming of a new day. It has expressed a commitment to the “vigorous enforcement” of the City’s Human Rights Law, “one of the most rigorous civil rights laws in the country.”<sup>3</sup> It has given an assurance that the agency’s attorneys and investigators have been retrained, and that the agency can now refocus its resources on “systemic human rights violations and meritorious claims.”<sup>4</sup> Rhetoric is one thing, of course, performance another. We remain convinced that the efforts of the current administration have the potential to yield more substantive results than that of its listless and ineffective predecessor. Particularly encouraging is the beginning of a testing program. Likewise, the decision to enlist in the enforcement effort personnel whose role had previously been limited to “community relations” work was sound.

But there are a series of deeply troubling warning signs that suggest that the City’s anti-discrimination programs have been and will continue to be less effective than we need those programs to be. Among other things, the Law Department is still grossly failing to meet its obligations; and the Commission on Human Rights is unable or unwilling to conduct effective investigations, fails to penalize those who discriminate, has not created a credible deterrent, and unlawfully refuses to accept complaints.

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<sup>3</sup> *CCHR Newsletter*, Jan/Feb 2003, p. 2.

<sup>4</sup> *Id.*, pp. 1, 2.

## II. The City's Law Department

Contrary to popular belief, the Commission is not the only agency with authority and responsibility to enforce the City's Human Rights Law. The City's Law Department is obliged to investigate and prosecute cases where there is a pattern and practice of discriminatory conduct.<sup>5</sup> This authority and responsibility is in addition to and independent of the authority of the Commission. Unfortunately, the Law Department's record has not improved.<sup>6</sup>

### A. Total lack of enforcement

Once again, the Law Department failed to bring a single prosecution under the City's Human Rights Law in all of Fiscal Year ("FY") 2003. Of the hundreds and hundreds of attorneys in the Law Department, there is not one devoted specifically to City Human Rights Law enforcement. As illustrated by the chart below, the Law Department's inaction is part of a sorry and unbroken pattern.

Law Department Prosecutions Under the City Human Rights Law								
FY95	FY96	FY97	FY98	FY99	FY00	FY01	FY02	FY03
0	0	0	0	0	0	0	0	0

The Law Department has had the same excuse over the years: we're waiting for cases from the Human Rights Commission. Aside from the fact that the wait has been long and fruitless, the response reveals a failure to appreciate how civil rights cases are developed. If there is not a group

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<sup>5</sup> Title 8, Chapter 4 of the Administrative Code.

<sup>6</sup> Notwithstanding our substantive critique, the Center would like to thank the Law Department for its prompt and professional response to our Freedom of Information Law request.

of highly-trained attorneys assigned specifically to the task of developing investigations and prosecutions, those investigations and prosecutions won't get developed. There are certainly talented attorneys in the Department's Affirmative Litigation Division who could do the job if permitted, but developing these cases has clearly not become a priority.

### **B. A failure to advocate**

Part of the institutional role of the Law Department (which, in 1991, it insisted be given to it and not the Commission on Human Rights) is to act as the in-court advocate for defending and promoting the City's Human Rights Law. It is a role that invites a conflict-of-interest because it has at the same time the responsibility of being the City's discrimination defense attorney – a role it has played with vigor. Nevertheless, the Law Department insisted on this authority. It has largely failed to use it. In FY03, there was only one case in which the Department submitted an *amicus* brief to defend the application of the City Human Rights Law.

## **III. The City's Human Rights Commission**

### **A. The Commission is More Underfunded than Ever**

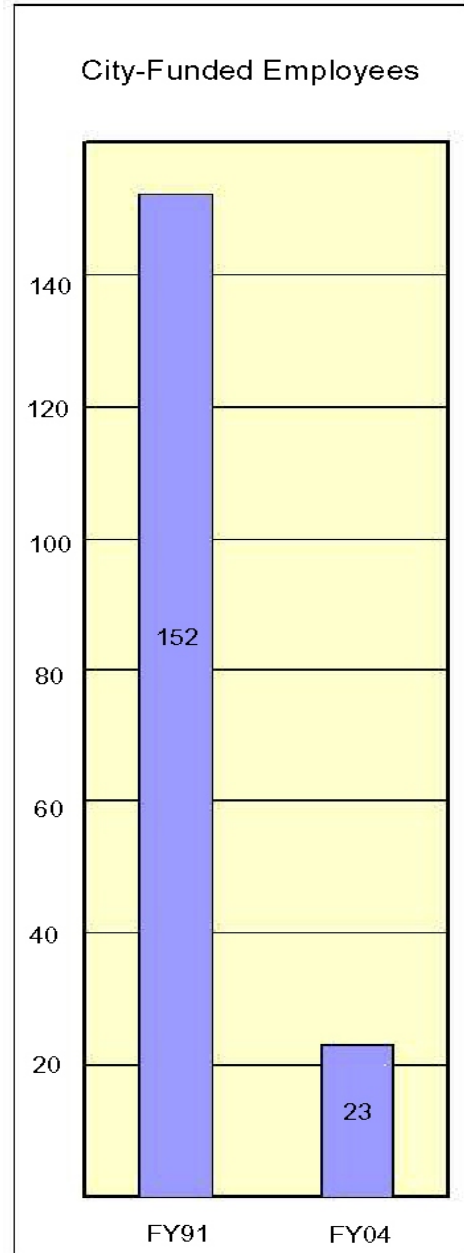
The Giuliani Administration started by wanting to eliminate the Commission on Human Rights altogether, and settled for the quieter and more effective strategy of starving the agency of resources. The Bloomberg Administration, notwithstanding its rhetorical commitment to the Commission, has now cut City funding to the agency even below the dismal levels of its predecessor. Annual City funding to the Commission has now been brought under \$3 million; that is, less than



a penny a New Yorker per week. Even more striking is what has happened over the long term. In FY91, the Commission had 152 City-funded employees. In FY04, the Commission is only budgeted for 23 such employees, a reduction of approximately 85%. Perhaps this is a realistic level of commitment for a small- or medium-sized City that is relatively homogeneous. But to suggest that it is anything close to adequate for New York, a City of eight million people that is part of what the Census Bureau has found to be the most segregated “primary metropolitan statistical area” for Hispanics and Latinos in the entire United States,<sup>7</sup> takes the idea of “doing more with less” beyond all reasonable bounds.

Perhaps the most insidious aspect of ratifying the previous Administration’s chokehold on Commission funding is the way that the scope of the problem of discrimination is redefined to rationalize the low level of spending. It would

be a rare Administration indeed that would say, “Yes, we know that discrimination is entrenched and ongoing; and we know that fighting it is a major and complex task requiring highly experienced



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<sup>7</sup> The New York primary metropolitan statistical area encompasses the five boroughs of New York City, plus Westchester, Rockland, and Putnam Counties. See Iceland, John, et al., *Racial and Ethnic Residential in the United States: 1980-2000* (U.S. Census Bureau, Series CENSR-3, 2002).

litigators; but, in the scheme of things, funding a full-fledged effort is just not a high priority for us.” It is much easier to try to reduce apparent demand for the agency’s services so as to pretend that the scope of the problem is smaller; to imagine that discrimination cases are “simple” so as to justify high caseloads and quick turnaround; and to disdain pushing for results that fully compensate victims of discrimination -- let alone results that seriously punish those who discriminate – so that expensive and time-consuming litigation against recalcitrant offenders will not be necessary. The evidence to date suggests that the current Administration has opted for the easier road.

## **B. The Commission Remains Unable or Unwilling to Conduct Effective Investigations**

Taking a sample month in FY03, the Anti-Discrimination Center examined all Commission orders “disposing of” cases. In addition, we have looked at other cases that have been brought to the Center’s attention, and have examined various full-year statistics as well.<sup>8</sup> The results are disturbing: in far too many cases, there is no real investigation.

### **1. The failure to probe**

The first rule of Discrimination 101 is that discrimination generally does not announce itself. It is essential to probe an employer’s or housing provider’s articulated justification for its action to be able to assess whether that justification may be a pretext for discrimination. Relying on the position statement of a discrimination defense lawyer doesn’t do the trick: one needs access to data, and access to those with knowledge of the facts and circumstances of the challenged action. This

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<sup>8</sup> The Commission ignored repeated requests to provide a representative to discuss questions we had about the Commission’s operations, and has not fully responded to or complied with the Center’s Freedom of Information Law requests.

is not to say that an investigative agency should not look critically at the statements and other evidence put forth by a complainant – it should. But the fact remains that it is the employer or housing provider that naturally has, in most cases, a disproportionate amount of the information relating to why an action was actually taken.

“No Probable Cause” or “NPC” determinations are final agency determinations, extinguishing, subject to appeal, the rights of the complaining party. Most of the NPC determinations in the sample were so lacking in detail that they did not even list what basic investigative steps were taken. But in the group that did provide details, it turns out that 32 percent of the investigations did not involve interviewing anyone at all. Another 43 percent of the investigations involved only an interview of the complainant. Another 14 percent involved only an interview of a witness, not of the principals. Thus, in at least 89 percent of these cases, no respondent was interviewed. An agency cannot uncover discrimination if it doesn’t look and probe for discrimination.

## **2. Misunderstanding the agency’s role at the investigative stage**

In part, this problem is a function of the agency’s misapprehension of what it means to be “neutral” in an investigation. One version of neutrality is that which is supposed to be performed by a judge or other ultimate finder-of-fact. In this version, the finder-of-fact receives what is submitted, and then assesses the material in an impartial fashion. There comes a point in the administrative process where the Commission is supposed to do exactly this. In those cases where Probable Cause is found and a trial is held, the parties to the case are the Commission’s Law Enforcement Bureau, acting as prosecutor, and the person or entity charged with having

discriminated. The parties present evidence, and an Administrative Law Judge weighs the evidence and issues a recommended decision and order. The Commission, acting as ultimate fact-finder, adopts or modifies the recommended decision based on the trial record and the comments of the parties.

In the investigative stage, however, the Commission is supposed to wear a different hat, and neutrality in the conduct and assessment of an investigation is supposed to have a distinctly different character. There cannot, of course, be favoritism, and a perception that the agency is either reflexively pro-complainant or pro-respondent would undermine the agency's credibility. However, an investigative agency -- the role played by the Commission's Law Enforcement Bureau -- is not a neutral *observer*, it must be an *active and questioning participant*. In other words, its role is not to accept submissions, but to go out and establish the facts on its own.

The current Commission does not believe that this is true. It believes that "the burden of proof rests with the complainant." It thinks that the aggrieved party "must submit evidence sufficient" to justify a Probable Cause determination. It ignores a fundamental problem: the complainant is not in the position to gather evidence. Unlike the period of pre-trial discovery in court proceedings, where the parties have the ability to gather facts to support their respective cases, a complainant is not even a party to the case. It is only the Law Enforcement Bureau that has the investigative authority to demand the production of documents and witnesses (it has, but rarely if ever uses, broad subpoena power).<sup>9</sup>

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<sup>9</sup> Thus, it is the Law Enforcement Bureau that has the obligation to track down individual witnesses that have been identified; even when no specific witnesses have been identified, the Bureau has an obligation to call in potential witnesses, as where a complainant alleges that a statement expressing discriminatory preferences was expressed in an open office with many people

Complainants should, of course, cooperate with an investigation to the extent to which they are able. But once a complaint has been filed, *it is the Commission's obligation* to be as probing with respondents as it would be as if it were already prosecuting the case, and as probing with complainant as it would be as if it were already defending the case. In so doing, it would dig deeply to identify what parts of each side's version do and do not add up. Yet the Commission engages in a process of what might be called "asymmetrical skepticism." NPC after NPC relies on the idea that a complainant has not "rebutted" the contentions of the respondent – contentions generally contained in an answer or position statement prepared by respondent's counsel. In essence, the Commission will say to an (almost always unrepresented) individual: "Go ahead and disprove what respondent's counsel has written."

The respondent's attorney's position winds up being treated as true unless conclusively proven false by complainant, without that position ever being challenged directly by Commission inquiry.<sup>10</sup> A more even-handed alternative, and one that recognizes that attorneys for discrimination defendants don't tend to volunteer inculcating reasons for their clients' conduct, is to treat a position statement as one of the bases on which to build an investigation (along with asking who participated, who knew or should have known, what are the appropriate comparisons, etc.).

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around.

<sup>10</sup> A similar problem exists when the Commission treats conflicting versions of an event as a "tie" that goes to the respondent. Since unimpeachable third-party witnesses are not frequently available in the context of discriminatory acts, it is important for a credible complainant to be able to tell her story at a trial, and leave it to the ultimate fact-finder to decide her testimony alone is enough to prove discrimination (there is, of course, no legal requirement for corroboration).

### 3. Ignoring the appropriate standard for Probable Cause Determinations

Making the problem worse is the Commission's failure to apply the appropriate standard to its determinations of whether Probable Cause exists. The proper standard for probable cause is clear: "The Law Enforcement Bureau *shall* find probable cause exists to credit the allegations of the complaint...where a reasonable person, looking at the evidence as a whole, *could* reach the conclusion that it is more likely than not that the unlawful discriminatory practice was committed."<sup>11</sup> Tellingly, this regulation was not quoted in a single NPC determinations we were able to examine. The reason is that the Commission wants to -- and we found they did -- hold complainants to a trial-level standard of proof.<sup>12</sup> In fact, the Probable Cause standard requires less than a trial-level standard of proof. It is framed in terms of whether a reasonable person *could* reach the conclusion that discrimination was more likely than not, not whether a reasonable person *must* reach that determination. In other words, the Commission, at this stage, is not supposed to be asking the question "is discrimination more likely than not," but rather, "is there enough evidence that it is possible for a reasonable person to believe that discrimination is more likely than not." The "could reach the conclusion" standard means that all inferences that can reasonably be drawn in complainant's favor should be drawn in complainant's favor, and this the Commission refuses to do.

Sometimes, the Commission is just determined to close a case. In a construction industry case alleging gender-based discrimination, there was evidence that complainant had been

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<sup>11</sup> 47 RCNY 1-03 (emphasis supplied).

<sup>12</sup> Sometimes NPCs are explicitly framed in a way that only makes sense in the context of a motion for a directed verdict: a case dismissed because a complainant hasn't "proved" pretext; more frequently, that they haven't proved or "substantiated" their allegations (a difficult feat without the benefit of either pre-trial discovery or the Commission investigating the respondent).

contemporaneously complaining of disparate treatment, and there were sworn statements from several witnesses that complainant was a good worker (*i.e.*, evidence tending to show that the employer's claim that complainant's work was "substantially below minimum standard" was merely a pretext). One of the few other women ever to work on the respondent's sites also must have experienced gender bias: she was quoted as saying that if a woman couldn't tolerate sexism she should choose another line of work. Nevertheless, the Commission chose to credit the employer's explanation, and did so without exploring any criticisms that may have been made about complainant were themselves motivated by gender bias. Moreover, the way the Commission ultimately characterized the gender breakdown of its workforce suggests a willingness to shape the facts to meet the needs of coming to an NPC determination. The Commission had gotten what, for it, were unusually robust statistics on respondent's seven work sites. Over five years, there were an average of 79 men employed per year. In two of those years, no women were employed, and, in three of those years, one woman was employed per year. How did the Commission manage to treat this data as undercutting (rather than supporting) the idea that respondent had "systematically excluded women"? By characterizing respondent thus: "more than one-half of its sites employed at least one female construction worker."

#### **4. Failing to understand and apply basic principles of discrimination law**

Compounding the problem still further is the Commission's unawareness of – or unwillingness to apply – either basic principles of discrimination law or the specific provisions of the City's Human Rights Law. It should be said that the failure to have done so in a particular case that was NPC'd does not necessarily mean that the case should have been PC'd; in the particular circumstance, the error may have been ultimately harmless. But these errors do cast a light on how

the agency evaluates cases in general. The Center looked mostly as cases from the sample month, a month in which there were 99 NPCs and only two PCs.

In one case, the agency dismissed a public accommodations complaint because the complainant ultimately “received the services she requested.” The agency did not explore the obvious question of whether the initial denial of service, and the derogatory remarks alleged to be leveled at complainant when the service was provided, constituted either a withholding of service or the provision of inferior service because of discrimination.

In another case, complainant alleged discrimination on the basis of national origin. He claimed that there was evidence of race discrimination against other employees as well. The Commission was not interested in this evidence, asserting that evidence of animus against the others “would by no means establish” animus against complainant. The Commission seemed unaware either of the fact that discrimination against others – even on different bases – can be relevant to a discrimination complaint, or of the fact that the employer could have been harboring a prejudice in favor of workers from Western European backgrounds *to the exclusion of all others*. In the latter circumstance, evidence of discrimination against other workers who were not Western Europeans would have been especially relevant.

In another case, the Commission erroneously applied the “same employer” doctrine. It would certainly be fair in the context of a discharge claim to ask why the same employer who would hire an employee of a particular protected class would, soon thereafter, fire that employee for discriminatory reasons. On the other hand, the fact that an employer has hired an employee of a particular protected class does not mean that the employee would not be harassed on the job on the



basis of his protected class. Yet the Commission treated the fact that respondents knew of complainant's race and color prior to hire as evidence countering the harassment claim.

In a pair of cases, there was ample evidence of sexual harassment, but the Commission dismissed the cases because the wrongdoer supposedly worked for an entity that had too few employees to qualify as an employer under the Human Rights Law, and because the agency wouldn't hold other respondent entities vicariously liable for the actions of the wrongdoer. There is no indication that the agency ever explored the question of joint-employer doctrine; recognized that an employer is responsible not only for the actions of its employees, but for the actions of its agents as well; or recognized that liability was possible under the theory that the offices in question were a public accommodation for which the lessor of the space was responsible.

The Commission failed to apply the "continuing violation" doctrine. That doctrine -- which even a very conservative Supreme Court has accepted in the harassment context<sup>13</sup> -- provides that all acts that make up a violation are actionable so long as at least the most recent occurred within the limitations period.

The agency only looked at the question of whether respondents "knew" of complainants' disability status instead of also looking at whether the respondents "should have known." This

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<sup>13</sup> This is not to suggest that interpretations of federal law are automatically the correct interpretations of City law. If there was one thing that was clear about the legislative history of the comprehensive 1991 amendments to the City Human Rights Law, it was that interpretations of state and federal law were to be seen as the floor below which the City law could not fall, not a ceiling above which the City law could not rise. Interpretations of the City law are supposed to be made by construing the law liberally to accomplish its purposes. The fact that analysis of the City law is intended to be distinct from analysis of state or federal law is a fact with which many federal and state judges have had great difficulty over the years. It is a consequence, in part, of the Law Department's failure to act as an advocate for the law and of the Commission's failure to develop a body of independent case law.

despite the fact that the City Human Rights Law is very clear that the obligation to make reasonable accommodation arises when the covered entity should have known of a person's disability.<sup>14</sup> The agency apparently does not like this feature of the law: when it was pointed out to the agency that its website failed to set forth the law correctly, it chose to keep its more restrictive definition posted.<sup>15</sup>

In another disability case, the Commission only looked at whether a physical standard for employment was reasonable, and, because the complainant could not meet that standard without accommodation, issued an NPC. The Commission did not, as it was obliged to do, analyze whether the complainant could have achieved the required level of function with accommodation.

The City Human Rights Law is clear that discrimination can play no role in the actions of covered entities.<sup>16</sup> Yet, the Commission resolutely applied the single-motive, *McDonnell Douglass* model, rather than applying mixed motive analysis to situations where there was some direct evidence of discriminatory animus. For the agency, it was as though evidence tending to show that a respondent had a legitimate motivation automatically made allegations of another, improper motivation incredible.

In another case, the complainant had charged that the respondents had retaliated against her for having filed a complaint with the agency. Ignoring the basic principle that retaliation can occur

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<sup>14</sup> Admin. Code §8-107(15)(a). The law was framed in this way to make sure that covered entities would not try to evade responsibility by averting their eyes to facts that should be obvious.

<sup>15</sup> It did this as well in connection with failing to make clear just how broadly the City Human Rights Law covers apartment rentals in two-family owner-occupied dwellings, coverage not available under the State Human Rights Law or the Fair Housing Act.

<sup>16</sup> Admin. Code §8-101.

independent of the validity of the underlying charge, the agency dismissed the retaliation complaint based on its belief that the underlying charge was without merit. It apparently failed altogether to investigate complainant's charges that one of the respondents had threatened to treat her adversely in various ways if she did not withdraw the complaint.

Frequently, the agency speculates about what could have been a legitimate reason for a respondent to have taken action against a complainant,<sup>17</sup> forgetting that the question is not what could have been permissible, but rather *what was the actual reason* for a respondent's actions.

The agency failed to consider that a statement of discriminatory preferences is itself illegal, regardless of whether any other violation can be proved. A complainant may not know that this prohibition is set forth in Administrative Code §8-107(d), but the agency should.

The foregoing list – which is but a sample of the problems of analysis found – is deeply troubling. The problems found, remember, come largely from a pool of approximately 100 determinations examined, and thus comprise a very significant percentage of the sample. These problems reflect a need both for better training and for a more civil rights-friendly attitude.

##### **5. How the Commission's Investigative Posture Translates into Outcomes**

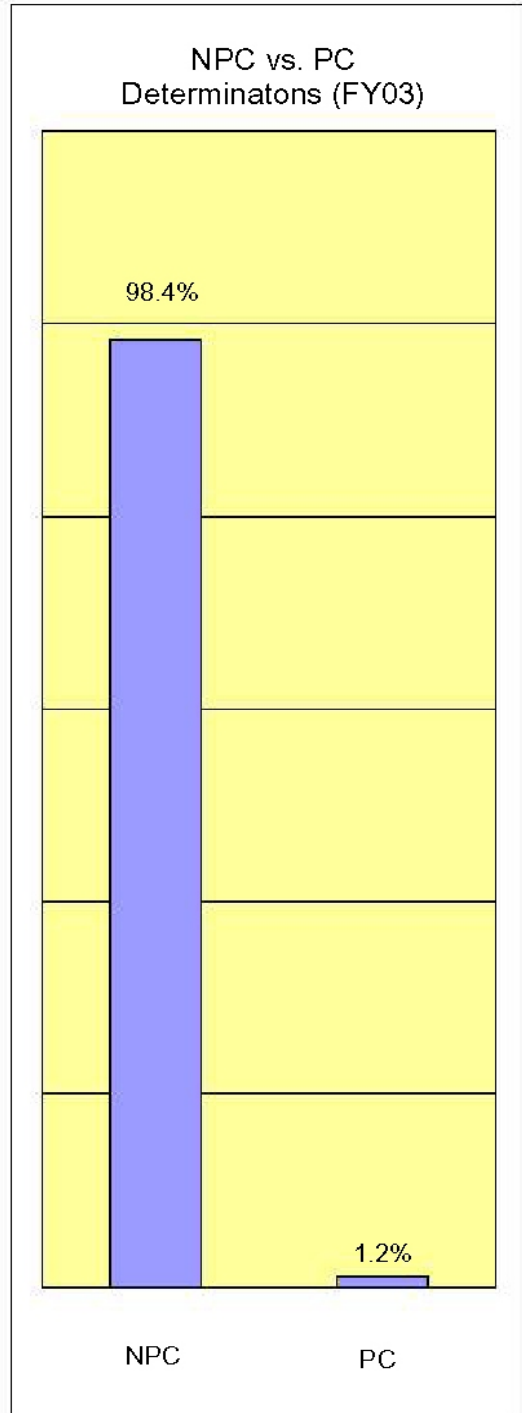
The agency reached a determination of whether probable cause exists in 1,547 cases in FY03. Of these, 1,523 were No Probable Cause determination – fully 98.4 percent. This is an even higher percentage than was the case when the Bar Association examined this question in connection with the Commission's Fiscal Year 2000 work. It is an extraordinarily high percentage by any standard.

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<sup>17</sup> The agency even issued an NPC in a case where the respondent had failed to answer, even though answers are required by the City Human Rights Law, and defaults are permitted to be taken.

Two points need to be made to put these statistics in better perspective. First, it is indisputably true that a significant percentage of cases brought to anti-discrimination administrative agencies are in fact without merit. The agencies do not like to think about how they contribute to dissuading people with meritorious claims from bringing such claims to the agencies,<sup>18</sup> but the fact remains that many if not most individual claims that are brought to agencies like the Commission are not meritorious. It is also quite likely that a high percentage of cases that were left to languish by the current Commission's predecessors were non-meritorious cases as to which no one previously had the will or inclination to render a decision.

Nevertheless, when determinations as to whether there is probable cause wind up as NPCs 98.4 percent of the time, there is ample reason to be concerned. This is especially the case where, as here, an examination of how the agency works reveals a failure either to conduct



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<sup>18</sup> For example, a potential complainant with a good claim who saw an attitude towards investigations that was slipshod and an attitude towards discrimination injuries that was undervaluing might be inclined to believe that it was the better part of valor to abandon the claim and press on with her life, leaving the injury unremedied and the wrongdoer unpunished.

proper investigations, to understand and consider cases pursuant to the substantive requirements of the City Human Rights Law, or to apply the appropriate standards for whether probable cause exists. Lurking always in the background is the fact of the Administration's budget decisions: if the agency were more probing and found probable cause more frequently, it would be put in the position of having to acknowledge the need for significantly greater staffing, an acknowledgment that is politically *verboten*.

### **C. The Commission fails to penalize discriminators**

The Commission's record and attitude in connection with civil penalties can only be described as unsatisfactory in every respect. In 1991, the City's Human Rights Law was amended to permit the imposition of civil penalties up to \$100,000 per violation. The cap was substantially too low (a large employer or landlord would not even be caused to flinch at that level of penalty), but an important principle was established: discrimination harmed not only a particular individual against which it was directed, but it harmed the very fabric of the City itself.

It is important to understand that these penalties were not intended to be reserved for only the most egregious violations of the law: even in those circumstances where there was no showing of either willfulness, wantonness, or malicious, penalties were still available up to \$50,000 per violation. The idea was that the penalties could be imposed "to vindicate the public interest."<sup>19</sup> In signing the law, then-Mayor Dinkins pointed to the traditional law enforcement function served by civil penalties: "As cases begin to be prosecuted under the new law...the existence of these penalties

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<sup>19</sup> Admin. Code §8-126(a).

will exert a strong deterrent effect against acts of bias.”<sup>20</sup>

Those hopes have never been realized, and remain unfulfilled today. In FY03, there was but a single penalty recommended (in the amount of \$10,000).<sup>21</sup> The Commission did not insist on including civil penalties in any of the 153 cases it settled. The failure is doubly ironic: first, because the Commission’s posture hardly represents enforcement “to the fullest extent of the law” (to use Mayor Bloomberg’s phrase); second, because those civil penalties that are collected go to our City. If, for example, the Commission achieved through its settlements and trials a total of 50 civil penalties, averaging \$20,000 each, the \$1 million collected would be sufficient to fund a robust testing program.<sup>22</sup>

At a hearing before the Council’s Committee on General Welfare in March, 2003, Commission representatives were asked about the absence of civil penalties. One of the Deputy Commissioners responded: “We haven’t had a case that we thought was appropriate.” He added that there was a “delicate balance” that needed to be struck because the respondent paying the civil

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<sup>20</sup> Remarks of the Mayor at Public Hearing on Local Laws, June 18, 1991, p. 3 (available at [www.antibiaslaw.com/LL39LegHist-Mayor.pdf](http://www.antibiaslaw.com/LL39LegHist-Mayor.pdf)).

<sup>21</sup> The Commission was uncertain as to whether the penalty was finalized by the end of FY03, but we include it to give the agency the benefit of the doubt.

<sup>22</sup> To its credit, the agency has reactivated a long-dormant testing program. Testing is a procedure whereby pairs of trained employees or agents of an agency enact the role of seeking an apartment (or a job). Each member of a pair is given equivalent profiles, leaving them to differ only in respect to the factor for which a test is being run (*e.g.*, where the test seeks to determine whether African-Americans are receiving treatment adverse to whites, one member of the tester pair would be African-American, the other white). Testing is a well-established and effective means by which to ferret out discrimination. Unfortunately, the Commission says that only 51 paired tests were conducted in all of FY03. The need for more testing and other work to counter systemic or embedded discrimination is discussed below at pages 32-33 and 35-36.

penalties would be the same respondent who was compensating the complainant.

Well, it certainly isn't a "delicate balance" when an agency *never* includes a civil penalty provision in a settlement agreement, or when the answer to "where in the zero to one-hundred-thousand dollar range the agency should insist on" is always "zero." The problem is three-fold.

First, to the extent that the Commission believes that compensating the complainant is "punishment enough," it trivializes the harm that we all suffer at the hands of discriminators and fails to carry out the intention of the Human Rights Law.

To the extent that the Commission believes that there is a fixed amount that a respondent will pay, and civil penalties will, in essence, come out of the pocket of a complainant, it reflects an unwillingness to recognize that a discrimination defendant's position is dynamic, not static: it depends on what it perceives as the scope of its potential exposure (and the likelihood of that exposure being realized). Discrimination defendants are certainly not going to volunteer to add a civil penalty to the amount being paid to a complainant, and they currently believe – correctly – that they will not be forced to. If the agency demonstrated its willingness to proceed in the face of recalcitrance, it would find more flexibility than it imagines exists.

To the extent that the Commission fails (as it does) even to insist on civil penalties in cases where Probable Cause has already been found (one of the recommendations of the Bar Association report), it has lost sight of basic principles of plea bargaining. One wants to encourage resolutions as early in the process as possible, consistent with meeting the purposes of the law. Making clear that civil penalties were being evaluated on a case-by-case basis prior to a Probable Cause determination, but would always be insisted upon once Probable Cause had been found, would help

that cause the same way a criminal prosecutor makes sure not to leave a favorable plea agreement on the table indefinitely.

#### **D. The Commission Undervalues Discrimination Injuries**

Several years ago, United States District Court Judge Robert Carter cautioned that, “In the face of persistent housing discrimination which continues unabated some 30 years after Congress passed the Fair Housing Act...the genuine emotional pain associated with such discrimination should not be devalued by unreasonably low compensatory damage awards.”<sup>23</sup> He pointed out that there was some research that had connected “the experience of discrimination to lower levels of life satisfaction and higher levels of stress and psychological suffering, including depression.”<sup>24</sup> One plaintiff in the case had described feeling embarrassed and humiliated; the other, angry and demoralized. The Court upheld a jury verdict of \$114,000 per person in emotional distress damages.

In a departure from recent past practice, the Commission has reported (albeit in summary form) its settlement results. This can be an important step forward to identifying one of the concrete ways in which the agency assists victims of discrimination. It could help potential discriminators understand that there is a price to be paid for discriminating. We applaud the move to report more than how many cases were “processed,” and discuss the need for more robust reporting measures at pages 33-34 and 35-36, below. Unfortunately, the Commission has reported its results in dramatically misleading ways. The Commission reported in the Mayor’s Management Report that

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<sup>23</sup> *Broome v. Biondi*, 17 F.Supp.2d 211, 226 (S.D.N.Y. 1997) (footnote omitted).

<sup>24</sup> *Id.* at 225, n. 9.



there were 153 settlements (a number which turns out to be only five percent of all case closures).<sup>25</sup> On the very next line of the MMR, the “Average value of cash settlement” is listed as \$13,332. Taken at face value, this amount would represent an improvement over recent Commission practice, but nevertheless does not represent a serious and appropriate level of compensation for this type of injury (as anyone familiar with awards and settlements in discrimination cases brought in court knows well).

But one cannot take the reported amount at face value. As a preliminary matter, reporting an average without reporting the median is frequently misleading, since a few larger settlements can skew the average so that it appears artificially high. Unfortunately, the Commission went further in dressing up its numbers. The actual average sum gotten for complainants per settlement was only \$7,190, a figure derived from dividing the total amount gotten for complainants (reported as approximately \$1.1 million) by the total number of settlements (reported as 153).

The way the Commission arrived at its inflated number was to *exclude from its calculations the significant number of settlements where the complainant received no money*. It turns out that the Commission did not get monetary compensation for complainants in 71 of the 153 cases (46.4 percent). The Commission did not provide to the Center the median settlement data we had requested, but it is clear from what can be derived from the MMR, and from the fact that there were a couple of small dollar (\$100 and \$500) settlements in the sample month data we did examine, that

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<sup>25</sup> In calculating all case closures, we have omitted the 24 Probable Cause determinations. PCs, despite the Commission’s odd characterization, are not “closed cases”; they are the very cases that need to be litigated until tried or appropriately settled.

the median settlement could only have been in the few-thousand dollar range or less.<sup>26</sup>

Why so low? One important factor is that the Commission does not recognize the significance of what it means to be denied reasonable accommodation. It is, of course, important that the accommodation be forced to be made, and, according to information provided by the Commission, it did so in 33 of the 153 cases settled. But the Commission normally does not consider what a respondent's past failure to accommodate has meant to a complainant, and treats the matter as resolved without requiring the payment of any monetary compensation to the person who had been excluded or rendered unable to access an apartment or store properly. This policy is not only unfair to the individual who has been denied what is lawfully her right to full access, it sends entirely the wrong message to those who are responsible for making housing units, workplaces, and public accommodations open to all. As pointed out in the Bar Association report: "[T]here is little incentive created among housing providers at large to agree to changes informally asked for by tenants because the consequences of refusal are so limited." The lack of incentive to cooperate voluntarily is exacerbated by the Commission's failure to seek civil penalties as it should, as discussed above at pages 17-20.

The second key factor is philosophical. Many discrimination defendants and their counsel genuinely believe that "too much" is made of discrimination injuries; that discrimination plaintiffs are just seeking "a windfall"; and that, somehow, an appropriate amount of compensation for emotional distress is tied to the size of one's paycheck (as if those who are low-paid suffer less).

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<sup>26</sup> The midpoint of 153 settlements is 77. Since 71 resulted in zero dollars, and there was a \$100 and \$500 settlement in the sample month results, the median would be the fourth lowest settlement of the balance of the cases that did achieve monetary compensation.

Whatever one may think of this attitude among discriminators and their defenders, surely this attitude shouldn't infect the thinking of those whose job it is to be civil rights prosecutors. Victims of discrimination should not have their injuries trivialized by the very people whose job it is to protect them. Thus, it is especially disappointing to hear that, in one of the rare cases in which a complainant received a Probable Cause determination, there was an attempt to pressure a complainant into accepting a mere \$5,000 settlement.

Complainant was told that \$5,000 was a lot of money. He was told that he should not be objecting to a \$500 per month payment plan: if complainant were to get the money at once, "You never know, you might blow it in one shot." Complainant was told that the various owners of the building had low income – without distinguishing between civil penalties (which are pegged to how much it takes to punish a particular offender) and compensatory damages (which are designed to restore a person fully, regardless of the offender's financial status). The idea that an enterprising student was denied housing and forced to undergo the humiliation of rejection, as well as the cost of commuting in time and money, did not, apparently, strike the agency as a serious violation. The agency tried to suggest weaknesses in the case relating to which owner or owners would be responsible for the discrimination, either not knowing or not caring that all owners are strictly liable under the City Human Rights Law for the actions of each and all of their agents. The Commission did not consider the fact that taking the case to trial would both allow an Administrative Law Judge to value the injuries and, at the same time, perform the salutary function of demonstrating to violators that the agency was in fact prepared to try meritorious cases. Instead, it Commission dangled the possibility of dismissing the case because complainant was supposedly refusing a reasonable settlement.

The third factor circles back once more to resources and stamina. Discrimination defendants are not going to pony up more money because they have suddenly become more enlightened: they'll do so when they are forced to. So long as the agency fears the need to add staff so as to have the wherewithal to reject low-dollar settlements, discriminators will know that a relatively rejectionist stance will win the day. The Commission must make it clear that it will try any case where the relief offered in settlement is inadequate. Trying two cases in a year, as was the case in FY03, does not send that message.

#### **E. The Commission lacks a credible threat of litigation**

We think the Commission would agree that an important part of effective law enforcement involves the creation of a real deterrent, and that the creation of a real deterrent means demonstrating to that potential violators that: (a) there is a real risk of detection; (b) a real risk of prosecution; and (c) a real risk of bearing significant costs as the results of their illegal conduct. Certainly that is the operative theory in every other aspect of law enforcement. Yet the Commission doesn't even have a budget either for the taking of depositions or for the taking of sworn testimony pursuant to subpoena. Combined with a the lack of staff, a lack of prosecutions (only two trials conducted in all of FY03), a paucity of complaints initiated by the agency itself (only three in all of FY03), limited testing, a lack of civil penalties, and a lack of adequate compensation for victims, the unfortunate message to potential violators is: "You don't have very much to worry about at all."

## **F. The Commission unlawfully refuses to accept complaints**

It is important to be able to focus on systemic violations and meritorious individual claims, as the Commission asserts it wants to be able to do. But it is also important to fulfill the agency's statutory obligations to individual complainants, and, to the extent that triage is performed, to do so in a way that lends itself to accountability.

The Human Rights Law permits anyone to file a complaint, and mandates that the agency acknowledge such filing.<sup>27</sup> Likewise, Commission regulation provides that there is a right to file by any person "claiming to be aggrieved," or by that person's attorney.<sup>28</sup> The regulations, too, mandate acceptance of complaints by the Commission's Law Enforcement Bureau.<sup>29</sup>

The statutory requirement of Commission acknowledgment of a complaint was new in the comprehensive 1991 revisions to the law. It was a means by which to deter the practice of ad hoc rejection of (or sitting on) a complaint, as well as a means by which to achieve clarity as to when complaints were actually filed. At the same time, a section on mediation and conciliation was added to the law. It authorized the Commission to engage in such dispute resolution proceedings "at any time *after* the filing of the complaint."<sup>30</sup> Why after the complaint only? So that each instance of attempted mediation or conciliation could be properly tracked, without potential complainants getting lost in the bureaucracy or otherwise shortchanged, and without potential respondents being

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<sup>27</sup> Admin. Code §8-109(a).

<sup>28</sup> 47 RCNY §1-11(a)(1).

<sup>29</sup> 47 RCNY §1-11(e).

<sup>30</sup> Admin. Code §8-115(a).

pressured or bullied in the context of an unsupervised, ad hoc procedure.

Now the Commission, despite law, regulation, agency history, and legislative history to the contrary, claims that it can decide whether or not an individual (or her attorney) will be permitted to file a complaint, and claims to be able to dictate how the complaint is written up – even if a well-pleaded complaint is presented to the agency.

Discouragement of complaint filing is improper in itself, and has a chilling effect on the willingness of New Yorkers to use the agency as a forum to which to turn. The agency asserts that it does not turn away those with “lawful complaints,” but this is just another way of saying that it has arrogated unto itself the power to determine the merits of a complaint, something the law contemplates be done only after filing (and, generally, after investigation). These numbers don’t lie: after averaging about 1,000 complaint filings per fiscal year for many years, the number was reduced to 714 in FY02 (when the current Administration had been in place for only half a year), and now has been reduced to a mere 291 for all of FY03. People are being improperly turned away in large numbers.

The Commission attributes part of the decline to the miracle of successful pre-complaint “interventions,” of which it says there were 159 in FY03.<sup>31</sup> Successful pre-complaint interventions, like other forms of informal resolution on which the Commission has come to rely increasingly,<sup>32</sup> have very real drawbacks. For example, unlike the case of formal conciliation agreements, a

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<sup>31</sup> The phenomenon had existed to some extent in prior years (*i.e.*, there were such resolutions in addition to the approximately 1,000 cases filed per year), but had not previously been reported in the Mayor’s Management Report.

<sup>32</sup> Such as “withdrawal with benefits.”

violation of the terms of an intervention or other informal resolution is not itself treated as a violation of the Human Rights Law.<sup>33</sup> In addition, these interventions tend to provide little if any compensation for complainants. But the most immediate problem is in the area of accountability, and it is in this area that the Commission's practice demonstrates exactly the risks that the 1991 changes to the law were designed to prevent.

Successful interventions may be nice, but what about the other people who have come to the agency and do not wind up with a filed complaint? In response to inquiry, *the Commission says it does not have data to determine what happened to those people for whom intervention was not successful, let alone for those people for whom intervention was not attempted and for whom a complaint was never filed.* The agency is simply not keeping track, and thus there is a growing number of people who have simply "disappeared," sent away by means of undocumented communications.

It is not as though any serious observer wants the Commission to waste time on complaints that are not meritorious. Indeed, the Bar Association report included a proposal to amend the Human Rights Law so as to permit the agency to decline to investigate up to 25% of complaints filed each year. The key difference between the Bar Association proposal and Commission practice is whether a complainant is permitted to file. Pursuant to the former, all complainants would be permitted to file. Because of that, all complainants would avoid statute-of-limitations problems, and, crucially, there would be a ready-made audit trail. The agency's needs would be met as well. The proposal allowed a significant level of prosecutorial discretion. If there were clearly non-meritorious or non-

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<sup>33</sup> Admin. Code §8-107(8) makes violation of conciliation agreements an unlawful discriminatory practice.

jurisdictional complaints remaining, or if a complainant failed to cooperate with an investigation, the agency would be able quickly to dismiss the case. Under the Bar Association proposal, of course, there was a cap to the number of cases that could be rejected out-of-hand,<sup>34</sup> and complainants who had their cases dismissed in the traditional way would retain the right to appeal.

Under current Commission practice, there is no audit trail, no limit to the number of cases that can be rejected out-of-hand, no appeal rights, and statute-of-limitations problems ready to happen (as was the case when the agency, having failed to file a complaint in the first instance, had to desperately track down a complainant -- who had gone overseas -- in order to beat a statute-of-limitations deadline).

Even cases that the Commission considers “good results” illustrate the problem. In mid-July of 2003, a New Yorker aware of her rights wanted to file a complaint that a major New York cultural institution had been failing to make reasonable accommodation for her disabilities, had failed to do so for a long time, and had even failed to respond to her letters of complaint. This person submitted a verified complaint to the Commission which complied with all requirements for filing, and which clearly set forth allegations that, if true, would make out violations of the Human Rights Law. The complaint was nevertheless not filed. The would-be complainant repeatedly made clear her desire for the complaint to be filed, but the Commission attorney said that it was Commission policy to mediate first, and that, in any event, a complaint would have to be drafted by the agency.

After two months, the complaint was still not filed. Despite the fact that the would-be complainant had expressed her desire for a variety of injunctive and compensatory relief (both

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<sup>34</sup> And these complainants would have retained and been advised of their right to file in court.



verbally and in the text of her complaint), and despite the fact that all the things she had asked for were available remedies under the City's Human Rights Law, the agency ultimately informed her that the case had been concluded. The good news was that some (very real) modifications were promised to be made by the cultural institution. And these should not be minimized.

The bad news is all that it reflects about the Commission's attitude and practices. Even if the resolution the Commission imposed on the would-be complainant had been acceptable to her, the reality is that the resolution has no teeth: while the promises made may be fulfilled, there is no enforceable mechanism to insure that they are. Just as bad, the Commission did not even bother to discuss any potential objections the would-be complainant might have. Rejecting the principle that a victim of discrimination is entitled to decide whether to file a complaint, the would-be complainant was informed: "[T]he Commission has decided that there is no need for filing a formal complaint..." So much for the assertion that people with lawful complaints are not turned away.

What about the training that complainant wanted to be included in any agreement? Disregarded by the agency. What about compensatory damages for having been excluded? As previously discussed, the agency, contrary to the law, apparently doesn't view this type of exclusion as an injury that should be compensated. What about the fact that the would-be complainant is now subject to the argument that the first example of lack of proper access about which she wanted to complain is now more than a year old, and thus she is subject to the argument that such a claim is time-barred at the agency? The most gentle answer would be, "Too bad."

Assume for a moment that the agency had accepted the complaint for filing as it was legally obligated to do (and that the statute-of-limitations problem had been avoided). Assume that the

agency found that the complainant was unwilling to accept what the Commission came to believe was a reasonable settlement agreement. Would the agency have had any recourse? Actually, yes. The City Human Rights Law permits the agency to dismiss a complaint for administrative convenience on those grounds.<sup>35</sup> Proceeding in this fashion would have been distinctly different. First, the proposed agreement would have to have been in the form of an enforceable conciliation agreement. Second, proceeding in the legal, post-filing fashion subjects agency action to scrutiny and correction. Dismissals can be appealed from, and, even if the promises had made it into the form of a conciliation agreement, it might not be so easy to explain the “reasonableness” of an arrangement that provided for zero compensatory damage, and which did not provide for training.

Last, imagine the position of a person less persistent and less informed about the law than the would-be complainant discussed above. If our would-be complainant was not permitted to file, how many others with absolutely proper complaints have been turned away as well?

### **G. Potential advantages to the Big Case Dump**

For years – indeed, for much of its history – the Commission was choked with an enormous case backlog. For most of the time, there was a last-in, last-out system, so that New Yorkers alleging they had been discriminated against would perpetually be moving to the end of a very long line. A swift response is essential, and way the backlog had been handled precluded swift responses. Throughout the prior administration, the response was merely to throw up one’s hands.

This Administration was determined to break the back of the backlog. In one year, it closed more than 3,000 cases (the 1,523 No Probable Cause determinations were joined by 1,376 dismissals

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<sup>35</sup> Admin. Code §8-113(a)(4).

for Administrative Convenience or other administrative cause, 153 settlements, and two trials). There is no point in pretending that this was a pretty process. Dubious means – both the improper application of legal standards, sometimes by people not trained in anti-discrimination work, and the improper restriction of incoming cases – helped the process along.<sup>36</sup>

But the process has changed the reality of the Commission’s current-day potential. The Big Case Dump has brought the Commission’s inventory of cases to be investigated down to an extremely manageable 500-600. This does not, of course, help the individuals whose cases were closed before adequate investigation or analysis was done.<sup>37</sup> It does mean that the time is at hand where a reasonably-funded agency could investigate new cases promptly and spend significant energy on systemic and Commission-initiated matters. The question is how the Administration is going to interpret its ability to execute the Big Case Dump.

If it persists in its view that discrimination cases are “easy,” maintains its current investigatory practices, and continues its reluctance to force respondents to do the right thing (there were zero attempts to secure preliminary injunctive relief in FY03), prospects are poor. If it recognizes the complexity of many discrimination cases, changes its investigatory ways, and adopts a more traditional law enforcement attitude (*i.e.*, more concerned with victims; less concerned about the offenders), prospects are significantly better.

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<sup>36</sup> Part of the process was dismissing cases when the complainant could not be found. In the sample month we examined, approximately half of the dismissals for Administrative Convenience were because of a failure to locate. Were that pattern extrapolated to the entire year, it would represent more than 650 such closures. The Commission has not provided that information, and, because of the Commission’s insistence on withholding the names of complainants from these final determinations of their rights, we could not assess how hard the Commission bothered to look for the lost complainants.

<sup>37</sup> We have not been provided with sufficient information for us to come to a reliable estimate as to how many people with actually meritorious cases were prejudiced by the Big Case Dump.

## **H. Systemic and other more Commission-initiated cases**

The Commission has embraced in principle the idea that its highest yield in anti-discrimination work will come from the cases it initiates on its own, without waiting for a complainant to come through the door. Commission-initiated complaints – which have long been authorized under the law – can probe patterns of discrimination that may not be evident to an individual (as when a real estate broker steers some clients to or away from a neighborhood based on race). It can also function as the anti-discrimination equivalent of the way “sweeps” are used in the policing context. It wouldn’t take a lot, for example, to determine what stores are failing to provide access to persons with disability: violation after violation is visible on the street; it only requires someone to be looking.

As mentioned earlier in this report, testing is a valuable means by which to determine whether and where discrimination is occurring.<sup>38</sup> The Commission has said publicly that it was doing testing every day, but in response to the Center’s inquiry it reports that only 51 paired tests were conducted in all of FY03. Even 51 paired tests are a start, and for that the Commission should be congratulated. But this is a city of more than three million households. The volume of testing that was done in FY03 no more creates a sense in the mind of a potential discriminator that there is a real risk of detection than would be created in the mind of a potential criminal offender who was

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<sup>38</sup> People sometimes like to brush off the harsh reality of deeply segregated neighborhoods with the argument that patterns are merely a reflection of economic differences. In fact, Census data from 2000 show a different picture. For example, there are close to 600,000 households in New York City where the household income is between \$30,000 and \$50,000. Of these households, approximately 40 percent are white, non-Hispanic; approximately 27 percent are black, non-Hispanic; and approximately 24% are Hispanic of any race. Those numbers don’t match up with the reality of very many neighborhoods.

told: “Watch out – we’re going to patrol this whole City with a handful of cops.”

Unfortunately, there were only three Commission-initiated complaints that were generated in FY03. The task ahead is one of “seek and ye shall find,” and we should hope the agency would make it a priority to bolster substantially the extent to which they look.

### **I. The Commission does not have systems in place to assure accountability**

One internal mechanism to assure accountability that does exist under the City’s Human Rights Law is the right of anyone who has had a case dismissed by the agency’s Law Enforcement Bureau to appeal the determination to the Chairperson of the agency. In FY03, however, dismissals were vacated in the rarest of circumstances. One explanation is that the agency almost always got the determination right in the first instance, a hypothesis not supported by the types of errors and omissions of analysis discussed above at pages 11-15. More plausibly, the refusal to vacate was a function of the overriding desire to reduce caseload, a process discussed above at pages 30-31. A structural problem, though, is that the “initial determination” function and the “review” function have not been kept separate as they were intended to be. There is supposed to be a line or wall between the Law Enforcement Bureau on the one hand, and the Chairperson (aided by the General Counsel’s office) on the other. The agency has blurred or ignored this line.

Another basic mechanism that should exist is the ability to record and analyze data on what the agency is doing. The Commission does not have adequate case tracking and analysis systems in place. As mentioned previously, the agency does not track what happens to people who contact the agency and wind up not filing a complaint. The agency is not even able to disaggregate the

various types of dismissals for administrative convenience. One impediment is apparently that, when a dismissal is appealed, the case is no longer treated as a dismissal in the system, meaning that an accurate automated count cannot be done. The agency is not readily able to provide the median dollar settlement per case, nor the number of cases closed because the agency lost the complainant (it has been almost three months since these data were requested, and they have still not been provided). These are all basic problems that could be easily solved if the agency received and was trained on relatively simple database software.

It bears mentioning that the agency has taken some steps to provide additional results-based indicators (such as the number of accommodations achieved), and has committed itself to doing some level of breaking down the percentages of broad categories of case closures in future reporting. More is needed.

#### **IV. Recommendations**

The first question to be addressed is whether the City should have an active and aggressive anti-discrimination law enforcement effort. Some would say that we can't afford to have such an effort; we would say that *we can't afford not to have such an effort*. If the answer to the question is "yes," then there are a series of basic steps that need to be taken.

**Commission personnel at all levels have to be trained to understand both the procedural and substantive requirements of the City Human Rights Law, and to learn what is involved in proper investigations and prosecutions of anti-discrimination claims.** One way to do this is to **bring on board an experienced civil rights prosecutor** – perhaps from the Civil

Rights Division of the Justice Department – who would be able to share his or her expertise in constructing these types of investigations and prosecutions.

**The Commission has to create a serious deterrent against those who would discriminate.** Discriminators and potential discriminators need to understand that there is a real risk of detection, and a real price to pay for discriminating. Part of the solution is **hiring enough staff** to be able to go after discriminators aggressively. Currently, the agency dare not engage in high profile public education about the availability of its services for fear that it would be swamped by people seeking to use them. That should never be the case. Part of the solution is **insisting on civil penalties.** At the very least, respondents should be made to know that if their recalcitrance extends to the point of a Probable Cause determination, the Commission will not settle a case without a civil penalty being included.

Part of the solution is **being prepared to try cases.** The agency should **establish targets** both for cases to be PC'd and for cases to be tried.<sup>39</sup> Part of the solution is to **treat discrimination injuries with respect.** The agency needs to make itself more aware of the scope of settlements and verdicts that are achieved in the context of cases brought to court, and **seek to bring Commission results into line.**

**The Commission must expand significantly the work its initiates, including creating a more extensive testing program.** These programs must be of sufficient scope to make anyone considering an act of discrimination stop and realize that detection efforts are ongoing every single

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<sup>39</sup> A case that is *properly* a No Probable Cause should never receive a Probable Cause determination. Targets remind the agency that its job is to find and fight more of the discrimination that continues to plague us.

day in multiple areas of the City.

**The Commission needs to end its over-reliance on informal, unenforceable agreements.**

The law provides for entry of conciliation agreements. These agreements are enforceable, and are supposed to perform a public education function.<sup>40</sup> Another way that the Commission can get a greater public education bang for its law enforcement buck is to **publicize its results more widely and more frequently**. The bi-weekly report the agency sends to the Mayor contains sets forth what the Commission considers to be its accomplishments, and there is no reason that such information should not, at least, be posted on its web-site. For example, the “\$180,000 settlement in a gender discrimination case against a city agency” reported in August seems on its face to be a substantial victory. The obtaining of “\$10,000 for a couple who alleged that a co-op board rejected them because they had a child,” reported in a memo to the Mayor in April is, in contrast, disturbingly low on its face, **but the publication of more information about Commission activities also serves to increase transparency**.

The need for transparency – to **have data reported and accessible so that agency performance can be evaluated both internally and externally** – is crucial. It would be desirable that the data be place either in the Mayor’s Management Report or on the Commission’s website for ease of access, but the agency must first commit the importance of gathering the data in the first instance (see the Appendix for more details). **Not only must the illegal refusal to accept complaints for filing stop**, the agency must create an audit trail to insure that no one who seeks to

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<sup>40</sup> The Commission, unfortunately, ignores that portion of the Human Rights Law which states that in the ordinary course “every conciliation agreement shall be made public.” Admin. Code §8-115(d).



use its services is lost. In any event, **the appropriate City Council committees need to exercise oversight** to make certain that the City's anti-discrimination function is being carried out thoroughly and aggressively.

**The Commission needs to ask itself why it is not getting better cases.** Introspection tends not to be the forte of governmental agencies, but any business that was dissatisfied with its yield would ask itself "why." The product the agency needs to be marketing is that of defender and protector of human rights. Applying the most basic of market research questions: What are the factors that are inhibiting victims of discrimination and their counsel from coming to the agency?

On the question of appropriations, **it is clear that the process of defunding the agency must be reversed.** Unless one believes that there only a handful of discrimination cases to be found in the City each year, the resources allocated do not begin to fill the need. An easy way to leverage the agency's resources is to enlist the assistance of other City agencies. The Department of Buildings and the Department of Housing Preservation and Development regularly communicate with building owners; the Department of Consumer Affairs regularly communicates with many owners of restaurants and other public accommodations. Putting those housing providers and owners of public accommodations on actual notice both of the obligations – and of the consequences, including the imposition of civil penalties, for failing to meet those obligations – should not be a difficult step.

As for the Law Department, **it is time to turn the Law Department's anti-discrimination functions over to the Commission on Human Rights.** The Bar Association report recommended that a first step for the Law Department would have been to assign a mere one percent of its attorneys

to these functions, a recommendation that was ignored. The City has waited far too long for the Law Department to fulfill its functions in this area, and a consolidation of function with the Commission would both serve the interests of structural efficiency and of eliminating the Law Department's ongoing conflict-of-interest.

## **V. Conclusion**

New York City -- like many cities -- has a number of deeply entrenched problems, of which continuing discrimination is one. Many of these problems require a massive infusion of government funding for there to be any hope of resolution. The fight against discrimination does require some reasonable funding. But at the end of the day, it requires most of all an understanding that the problem remains a serious one, and a deep and sustained commitment to prosecuting those who would discriminate to "the fullest extent permitted by law." How long will it take? Because there has never been a sustained commitment over many years to active civil rights law enforcement on any level of government, longer than Dr. King hoped when he answered "not long" 40 years ago. But if that commitment begins, the day will come: "The arm of the moral universe is long but it bends toward justice."

## Appendix: Missing Indicators and Missing Targets

The following is not intended to be comprehensive, but to illustrate the types of performance-based and quality-control indicators and targets at which the City ought to be looking. In respect to the targets, these are set out as first steps, not an ultimately acceptable level of performance.

<u>Indicator</u>	<u>FY04 target</u>
● Number of paired tests conducted	360
● Number of Commission-initiated complaints filed	50
● Number of individual complaints filed	1,200
● Number of preliminary injunctions sought	12
● Number of individual case Probable Cause determinations	120
● Number of trials	36
● Number of cases in which civil penalties are provided (via settlement or trial)	75
● Average civil penalty	\$20,000
● Pattern-and-practice cases brought in court (by the Law Department or its successor)	4

- Means and medians (as well as aggregates) are needed in terms of monetary relief secured for complainants through conciliation agreements and, separately, for that achieved after trial. Non-monetary relief should also be reported (one category of non-monetary relief is already reported).

- The numbers of each sub-category of dismissals needs to be able to be identified and tallied (*e.g.*, No Probable Cause Determinations, dismissals for lack of jurisdiction, dismissals for failure to locate complainant, dismissals because complainant refused to accept a conciliation agreement, etc.).

Note: it may seem as though there should be more cases in which civil penalties are awarded given the targeted number of Commission-initiated complaints and individual case Probable Cause determinations, but, when comprehensive investigations are done, and a prosecutor insists on reasonable relief and penalties, the time from filing to resolution cannot be artificially foreshortened. This is especially true where discriminators and their defenders have gotten used to the idea that settlements can be cheap and easy.