S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N A S S E M B L Y

February 11, 2009

Introduced by M. of A. MORELLE, ESPAILLAT, PERRY, P. RIVERA, GREENE, PAULIN, CLARK, HOYT, AUBRY, CANESTRARI, BENJAMIN, WEINSTEIN, ORTIZ, CAHILL, TOWNS -- Multi-Sponsored by -- M. of A. ALFANO, BOYLAND, BRADLEY, BRENNAN, CHRISTENSEN, COOK, DelMONTE, DESTITO, DIAZ, GALEF, GIANARIS, GOTTFRIED, HEASTIE, KOON, McENENY, MILLMAN, O'DONNELL, SCARBOROUGH, WEPRIN, WRIGHT -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, in relation to the hearing of complaints by the division of human rights and the awarding of certain fees and costs in such complaints

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 297 of the executive law is amended by adding a new subdivision 1-a to read as follows:

1-A. THE COMMISSIONER SHALL ESTABLISH A COMPREHENSIVE MANAGEMENT AND TRAINING PLAN TO ASSURE COMPLAINT PROCESSING WITHIN THE TIME CONSTRAINTS SET FORTH IN THIS SECTION. SUCH PLAN SHALL ASSURE THAT THE QUALITY OF THE COMPLAINT PROCESSING IS NOT SACRIFICED TO ACHIEVE TIMELY RESOLUTION.

THE COMMISSIONER SHALL PUBLISH A PROPOSED MANAGEMENT PLAN WITHIN ONE YEAR OF THE EFFECTIVE DATE OF THIS SUBDIVISION. SUCH PLAN SHALL BE PUBLISHED IN A MANNER CONSISTENT WITH THE PUBLICATION REQUIREMENTS SET FORTH IN THE STATE ADMINISTRATIVE PROCEDURE ACT. THE COMMISSIONER SHALL CONDUCT A PUBLIC HEARING ON THE PROPOSED FINAL MANAGEMENT PLAN AT LEAST FORTY-FIVE DAYS PRIOR TO THE PLAN'S ENACTMENT. THE PLAN SHALL INCLUDE, BUT NOT BE LIMITED TO, THE FOLLOWING:

A. A COMPREHENSIVE STAFFING PLAN SETTING FORTH THE NUMBER OF STAFF NECESSARY IN EACH SECTION OF THE DIVISION TO PROPERLY INVESTIGATE, HEAR, AND EITHER ADJUDICATE OR RESOLVE ON THE MERITS ALL PENDING CASES WITHIN TWO YEARS OF THE EFFECTIVE DATE OF THIS SUBDIVISION;

B. A COMPREHENSIVE STAFFING PLAN SETTING FORTH THE NUMBER OF STAFF NECESSARY IN EACH SECTION OF THE DIVISION TO PROPERLY INVESTIGATE, HEAR,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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AND EITHER ADJUDICATE OR RESOLVE ON THE MERITS ALL NEW COMPLAINTS FILED WITHIN THREE YEARS OF THE EFFECTIVE DATE OF THIS SUBDIVISION;

C. A PRESERVATION OF EVIDENCE PLAN WHICH PROTECTS THE INTEGRITY OF COMPLAINANT'S DOCUMENTARY AND WITNESS EVIDENCE IN ALL CASES WHERE A COMPLAINT HAS BEEN PENDING FOR TWO YEARS. SUCH PLAN SHALL INCLUDE TAKING DEPOSITIONS OF WITNESSES, OBTAINING AND MAINTAINING ALL POTENTIALLY RELEVANT DOCUMENTS, AND TAKING A COMPREHENSIVE STATEMENT FROM COMPLAINANT;

D. ESTABLISHMENT OF AN OMBUDSPERSON TO WHOM ANY PERSON MAY FILE A GRIEVANCE THAT A CASE IS NOT BEING INVESTIGATED PROPERLY OR THAT THE PERSON IS NOT BEING TREATED APPROPRIATELY. THE OMBUDSPERSON SHALL:

(I) BE AN ATTORNEY;

(II) BE APPOINTED AT THE LEVEL OF, AT LEAST, AN ASSISTANT COMMISSIONER;

(III) BE MANDATED TO UNDERTAKE IMMEDIATE INVESTIGATION OF GRIEVANCES;

(IV) HAVE THE AUTHORITY TO REQUIRE REMEDIAL ACTION TO PROMPTLY RESOLVE THE PROBLEM IF THE COMPLAINT IS WELL FOUNDED; AND

(V) PROVIDE A REASONED WRITTEN EXPLANATION TO THE GRIEVANT IF IT IS DETERMINED THAT THE GRIEVANCE IS NOT WELL FOUNDED;

E. ESTABLISHMENT OF A PERMANENT TRAINING ADVISORY COMMITTEE. THE FUNCTION OF THE TRAINING ADVISORY COMMITTEE SHALL BE TO REVIEW ALL TRAINING MATERIAL AND PROCEDURES FOR INVESTIGATORS, ATTORNEYS, ADMINISTRATIVE LAW JUDGES, AND OTHER PROFESSIONAL OR EXECUTIVE LEVEL STAFF AND TO MAKE RECOMMENDATIONS TO IMPROVE THOSE PROCEDURES. THE COMMISSIONER SHALL COMPLY WITH THE TRAINING RECOMMENDATIONS. THE COMMITTEE'S MEMBERSHIP SHALL BE COMPRISED OF FOUR DESIGNEES APPOINTED BY THE COMMISSIONER, FOUR DESIGNEES APPOINTED BY THE TEMPORARY PRESIDENT OF THE SENATE, AND FOUR DESIGNEES APPOINTED BY THE SPEAKER OF THE ASSEMBLY.

ALL NON-COMMISSIONER DESIGNEES SHALL BE ATTORNEYS WHO HAVE PRACTICED OR TAUGHT IN THE FIELD OF DISCRIMINATION LAW FOR AT LEAST TEN YEARS. COMMITTEE MEMBERS SHALL BE CHOSEN TO REFLECT A BALANCE OF COMPLAINANT AND RESPONDENT INTERESTS. THE COMMITTEE SHALL DESIGNATE THE CHAIRPERSON AND VICE CHAIRPERSON FROM AMONG ITS MEMBERS BY A MAJORITY VOTE. THE COMMITTEE SHALL MEET AT LEAST QUARTERLY AND AT SUCH OTHER TIMES AS CONVENED BY THE CHAIRPERSON. THE MEMBERS OF THE COMMITTEE SHALL RECEIVE NO COMPENSATION FOR THEIR SERVICES, BUT SHALL BE ALLOWED THEIR ACTUAL AND NECESSARY EXPENSES INCURRED IN THE PERFORMANCE OF THE DUTIES HEREUNDER; THE DIVISION SHALL FULLY COOPERATE WITH THE COMMITTEE AND PROVIDE RESOURCES THAT ARE REQUESTED BY THE COMMITTEE TO CARRY OUT ITS MANDATE;

F. ESTABLISHMENT OF A PROFESSIONAL MEDIATION UNIT WHICH SHALL BE COMPRISED OF MEDIATORS WHO HAVE AT LEAST FIVE YEARS OF NON-DIVISION EXPERIENCE IN DISCRIMINATION MEDIATION, WHO HAVE DEMONSTRATED SUCCESS IN SUCH EFFORTS, AND WHO HAVE SUCCESSFULLY COMPLETED DISCRIMINATION MEDIATION TRAINING PROGRAMS;

G. ESTABLISHMENT OF A NO PROBABLE CAUSE REVIEW UNIT WHICH SHALL: (I) CONDUCT A SAMPLE REVIEW OF NO LESS THAN FIFTEEN RANDOMLY SELECTED NO PROBABLE CAUSE CASE FILES PER YEAR FOR EACH INVESTIGATOR; (II) REVIEW ALL CASE FILES OF AN INVESTIGATOR, FOR THE PREVIOUS TWELVE MONTHS, WHERE A REVIEWER DETERMINES THAT, IN THE SAMPLE REVIEW, THE INVESTIGATOR HAD ONE OR MORE FILES SHOWING SIGNIFICANT INVESTIGATIVE OR ANALYTICAL DEFICIENCIES; (III) TAKE REMEDIAL ACTION TO CURE ANY DEFICIENCIES FOUND IN REVIEWED FILES INCLUDING, BUT NOT LIMITED TO, A REMAND FOR FURTHER INVESTIGATION OR DIRECTED FINDING OF PROBABLE CAUSE; (IV) DIRECT COUNSELING AND REMEDIAL TRAINING FOR INVESTIGATORS AND THEIR SUPERVISORS WHERE MORE THAN ONE DEFICIENCY CASE IS IDENTIFIED WITHIN ANY TWELVE MONTH REVIEW PERIOD; (V) DETERMINE ALL APPEALS FROM NO PROBABLE CAUSE

FINDINGS, ISSUE A REASONED WRITTEN FINDING, AND TAKE REMEDIAL ACTION WHERE NECESSARY; (VI) MAINTAIN COMPUTERIZED RECORDS SHOWING, BY INVESTIGATOR AND REGIONAL OFFICE, SUCH THINGS AS HOW MANY CASES WERE REMANDED FOR FURTHER INVESTIGATION OR ISSUANCE OF A PROBABLE CAUSE AS A RESULT OF BOTH THE REVIEW AND APPEAL PROCEDURES, THE NATURE OF THE DEFICIENCIES FOUND, AND WHETHER REMEDIAL TRAINING WAS REQUIRED; AND (VII) PREPARE MONTHLY, YEAR-TO-DATE, AND CUMULATIVE REPORTS OF THE NO PROBABLE CAUSE UNIT'S ACTIVITIES TO BE INCLUDED IN THE MONTHLY REPORT ESTABLISHED IN PARAGRAPH H OF THIS SUBDIVISION;

H. ESTABLISHMENT OF A MONTHLY STATISTICAL AND MANAGEMENT REPORT WHICH IS POSTED ON THE DIVISION'S WEBSITE. SUCH REPORT SHALL SET FORTH: (I) ALL CASE PROCESSING STATISTICAL DATA FOR THE MONTH AND YEAR-TO-DATE, INCLUDING BUT NOT LIMITED TO, NUMBER AND PERCENT OF PROBABLE AND NO PROBABLE CAUSE FINDINGS AND NUMBER AND PERCENT OF COMPLAINANTS LOSING AND PREVAILING AFTER HEARING; (II) NEW DIVISION INITIATIVES; AND (III) IDENTIFICATION OF PROBLEM AREAS AND PROPOSED ACTIONS TO ADDRESS SUCH PROBLEMS;

I. ESTABLISHMENT OF AN ORDER REPORTING LINK ON THE DIVISION WEBSITE WHERE ALL COMMISSIONER'S ORDERS ARE PUBLISHED ON A MONTHLY BASIS.

S 2. Paragraph c of subdivision 4 of section 297 of the executive law, as amended by chapter 166 of the laws of 2000, is amended and a new paragraph c-1 is added to read as follows:

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint, evaluating applicants for membership in a place of accommodation without discrimination based on race, creed, color, national origin, sex, disability or marital status, and without retaliation or discrimination based on opposition to practices forbidden by this article or filing a complaint, testifying or assisting in any proceeding under this article; (iii) awarding of compensatory damages AND REASONABLE ATTORNEYS' FEES AND COSTS, INCLUDING EXPERT WITNESS FEES to the person aggrieved by such practice; (iv) awarding of punitive damages, in cases of housing discrimination only, in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (vi) assessing civil fines and penalties, in cases of housing discrimination only, in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discrimi-

natory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious; (vii) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he or she shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he or she has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he or she has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

C-1. INTEREST SHALL BE RECOVERED UPON A SUM AWARDED BECAUSE OF UNLAWFUL DISCRIMINATORY PRACTICES UNDER THIS ARTICLE.

S 3. Subdivision 9 of section 297 of the executive law, as amended by section 16 of part D of chapter 405 of the laws of 1999, is amended to read as follows:

9. A. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, INCLUDING COMPENSATORY AND PUNITIVE DAMAGES AND UPON PREVAILING, SHALL RECOVER REASONABLE ATTORNEYS' FEES AND COSTS, INCLUDING EXPERT WITNESS FEES, IN THE ACTION including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this [chapter, provided that,] ARTICLE, HOWEVER, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of section two hundred four of the civil practice law and rules, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division. Any party to a housing discrimination complaint

shall have the right within twenty days following a determination of probable cause pursuant to subdivision two of this section to elect to have an action commenced in a civil court, and an attorney representing the division of human rights will be appointed to present the complaint in court, or, with the consent of the division, the case may be presented by complainant's attorney. A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c) and 42 USC 12117(a) and 29 USC 633(b) shall not constitute the filing of a complaint within the meaning of this subdivision. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any STATE administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a of this article.

B. ANY PARTY MAY DEMAND A TRIAL BY JURY.

C. INTEREST SHALL BE RECOVERED UPON A SUM AWARDED BECAUSE OF UNLAWFUL DISCRIMINATORY PRACTICES UNDER THIS ARTICLE.

S 4. This act shall take effect on June 1, 2011; provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.