Vanderbilt Law Review

Volume 18
Issue 3 *Issue 3 - June 1965*

Article 6

6-1965

# The Experience of State Fair Employment Commissions: A Comparative Study

Arnold H. Sutin

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Civil Rights and Discrimination Commons, and the Labor and Employment Law Commons

## Recommended Citation

Arnold H. Sutin, The Experience of State Fair Employment Commissions: A Comparative Study, 18 *Vanderbilt Law Review* 965 (1965)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol18/iss3/6

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

# The Experience of State Fair Employment Commissions: A Comparative Study

*Arnold H. Sutin**

*In this article, Dr. Sutin discusses the work of state agencies charged with enforcing fair employment laws. He surveys the substantive principles which have been developed by these agencies in enforcing these statutes, discusses the techniques and procedures of the commissions, and examines their shortcomings. He concludes by suggesting ways in which these agencies may be given a fuller opportunity to achieve their purposes.*

## I. Introduction

Passage of the new federal civil rights law in 1964 might have been expected to decrease the importance of the state fair employment practices (FEP) laws. Congress, however, chose not merely to permit these laws to continue in force to deal with purely local problems, but went further to entrust the primary administration of title VII, the federal fair employment statute, to state agencies where they exist. Thus the experience of these state agencies is of even greater importance now than formerly, for they will perform the day to day work of carrying out our nation's policy to prohibit discrimination in the labor market.

Are the state commissions ready and able to take on this responsibility? Have they demonstrated the imaginative determination that is going to be required? Are they equipped with adequate powers to achieve meaningful results? Or are these commissions too encumbered by inadequate statutory authorization, inertia, political debts, and timidity to be effective? These questions suggest the importance of examining the experience of the state commissions since they first began to appear at the end of World War II.

All twenty-two state fair employment practice acts operating through the vehicle of administrative commissions are designed to encompass both public and private spheres of employment.[1] Excep-

* Member of the Faculty, East Carolina College, School of Business.

1. Alaska, ALASKA STAT. § 23.25.040 (1962); California, CAL. LABOR CODE §§ 1410-32; Colorado, COLO. REV. STAT. ANN. § 81-19-1 (1953); Connecticut, CONN. GEN. STAT. ANN. § 31-122 (1961); Delaware, 1 CCH LAB. L. REP. ¶ 47,400 (1960) (Delaware's rudimentary structure is not included in our study); HAWAII REV. LAWS § 90A-1(c) (Supp. 1963); Illinois, ILL. ANN. STAT. ch. 48, § 851 (Smith-Hurd 1961); IND. ANN. STAT. § 40-2308 (Supp. 1964); Kansas, KAN. GEN. STAT. ANN. § 44-1001 (Supp. 1961); Massachusetts, MASS. ANN. LAWS ch. 151(B), §§ 1-6 (1957); Michigan, MICH. STAT. ANN. § 17.458(1) (1955); Minnesota, MINN. STAT. § 363.01 (1957);

tions from the jurisdiction of these acts are present in certain employer and employee categories and in their minimum employee requirements. These areas have been notable in giving rise to commission executive decisions and court litigations. Further, these acts, while concerned with discrimination on the grounds of race, creed, color or national origin, are, by reason of redundancy and variations in terminology, susceptible of some confusion in interpretation. In addition, decisions in the area of age discrimination, prohibited in a minority of fair employment practice laws, have further contributed to this large body of administrative law. However, it is in the administrative rulings evolving from the application of these laws to the varied facets of unlawful employment practices that the entire legal philosophy of fair employment practices commissions is best revealed.

A sufficient body of commission decisions and rulings have arisen since the first commission was established in New York[2] to permit a systematic exposition, which I shall attempt to provide by employing a comparative approach.

## II. The Legislative Basis and Establishment of State Fair Employment Practices Commissions

### A. *New York: Representative of Traditional State Statutory Legislation*

The passage of the Ives-Quinn Bill[3] by the New York legislature marked the establishment of the first Commission Against Discrimina-

---

Missouri, Mo. Ann. Stat. § 296.010(3) (Supp. 1964); New Jersey, N.J. Stat. Ann. § 18:25-12 (1963); New Mexico, N.M. Stat. Ann. § 49-4-1 (1953); New York, N.Y. Executive Law §§ 290-301; Ohio, Ohio Rev. Code § 4112 (1959); Oregon, Ore. Rev. Stat. § 659.019 (1957); Pennsylvania, Pa. Stat. Ann. tit. 43, § 951 (1964); Rhode Island, R.I. Gen. Laws Ann. § 28-5-1 (1957); Washington, Wash. Rev. Code § 49.50.010 (1962); Wisconsin, Wis. Stat. Ann. § 111.32 (1958).

2. See, *e.g.*, N.Y. Executive Law §§ 290-301.

3. Name changed to "State Commission on Human Rights" on February 12, 1962, effective Fall, 1962, N.Y. Hum. Rts. Comm'n, Newsletter vol. 3, no. 2. Governor Rockefeller, commenting on the change, said: "It is far more than a mere change in name. It reflects a conceptual evaluation to the point of view that a citizen of the state does not merely have a right to ask state assistance because he has been discriminated against, but rather that he is *endowed* with affirmative rights inherent to all Americans. (The meaning of the phrase "endowed with affirmative rights" is apparently political in nature, not legal). The affirmative connotation in the name 'Commission on Human Rights' more accurately represents the conscientious acceptance by the people of this state of the fundamental precept in our Declaration of Independence. . . ." *Ibid.*

We may note that other commissions have changed their names to convey more accurately their increase in jurisdiction. Thus, Rhode Island amended its Fair Employment Practices Act, changing the name of this agency to "Commission Against Discrimination" and empowered the commission to eliminate racial, religious and ancestral discrimination in the field of public accommodations including public housing projects. R.I. State Commission Against Discrimination, 1952 Ann. Rep. 4

tion (SCAD).[4] While New York was not the first state to prohibit employment discrimination, it exceeded all other jurisdictions in comprehensiveness of legislative coverage in six major employment areas: civil service, defense and war contracts, labor unions, public employees, public works and public school teaching.[5]

Three characteristics of these early statutes are particularly noteworthy: their restricted application to specific fields of employment; their narrow interpretation of "discrimination"; and their reliance for enforcement on local criminal or civil proceedings. However, there are two related major developments in anti-discrimination legislation among the states since New York established the first commission. The first is a significant increase in the number and diversity of similar statutes, which subsequently have been strengthened, thereby permitting findings of unlawful discrimination to be based on incidents involving not only race, but religion, color, ancestry and national origin.[6] The second is a shift from relying on traditional means of enforcement to the use of specific administrative agencies authorized to enforce their determinations by court order, and charged to combat discrimination in employment practices in broad areas of both the private and public sectors of the economy.[7]

It would be instructive to examine these traditional statutes in order to understand the inherent weaknesses which necessitated this second development. This may best be accomplished by considering the statutory scheme of one jurisdiction, New York, which may be considered as a representative model of states having traditional statutes prior to the enactment of the first commission in 1945.[8]

["State Commission Against Discrimination" is hereinafter referred to as SCAD.]

4. N.Y. EXECUTIVE LAW §§ 290-301.

5. N.Y. FEPC, 1944 ANN. REP. APP. J., at 148-50. A more comprehensive source is: DUFFY, STATE ORGANIZATION FOR FAIR EMPLOYMENT, Bureau of Public Administration, University of California (1944). Illinois, however, was reported to have had the largest number of fair employment statutes—twenty—according to a federal study. GRAVES, LEGISLATIVE REFERENCE 19 (Library of Congress, Bulletin 93, April, 1951). The discrepancy between the Duffy and federal reports would appear to be partly attributable to the elusiveness and inaccessibility of many statutes.

6. *Compare* DUFFY, *op. cit. supra* note 5, *with* GRAVES, *op. cit. supra* note 5, at 19-22 (the marked growth of such statutes among the states was reported four years later in this federal study).

7. In New York, we may observe that there was never a particular statute on discrimination in pre-employment generally, apart from discrimination in labor unions, in any field of employment prior to the enactment of the Law Against Discrimination N.Y. CIV. RIGHTS LAW § 43. While an amendment to the constitution, N.Y. CONST. art. 1, § 11, and N.Y. PEN. LAW § 700, forbade discrimination of any person "in his civil rights," the phrase "in his civil rights" actually was added by limitation to confine the applicability to rights found in the then existent civil rights laws, Constitution and statutes. See 4 REVISED RECORD OF CONSTITUTIONAL CONVENTION, NEW YORK 2626 (1938).

8. Enactments prior to § 11 of the New York Constitution were as follows: N.Y. CIV. RIGHTS LAW § 40(a) (originally enacted in 1932); N.Y. CIV. RIGHTS LAW §

The earliest statute prohibiting discrimination in employment in New York was enacted in 1918 and was incorporated into section 514 of the Penal Law. The statute makes it a misdemeanor to deny, or to aid or incite another to deny to any citizen public employment because of race, creed, color or national origin. Section 514 contained a prior existing provision forbidding discrimination in public accommodations.

The New York State Temporary Commission on the Condition of the Urban Colored Population found, in analyzing Section 514 two decades later, that it was originally conceived as a traditional civil rights measure prior to the 1918 incorporation, and thus failed to reflect the distinctions between public *employment* and "public *accommodations* . . . furnished by innkeepers or common carriers . . . or theatres or other places of amusements. . . ." As a remedy for employment discrimination, therefore, it was inherently inadequate. In explanation, the Commission pointed out that a refusal of public accommodations, something which may be claimed as of right, does not raise questions concerning the relative fitness of those discriminated against. This very difficult issue, however, lies at the heart of fair employment litigation. Indeed, it is often the main obstacle when one seeks to prove that refusal or denial of employment was based on racial or religious considerations. The Commission observed that the statute was designed as a punitive measure to expose, rather than correct, discrimination in promotion, salary increase and dismissals.[9]

Apart from these shortcomings, the weaknesses in the use of penal sanctions as the sole deterrent to wrongs committed in the socio-economic sphere were coming to be recognized. Trial was by a jury usually prejudiced in favor of the defendant, proof had to be beyond a reasonable doubt, and local prosecutors or grand juries were not easily persuaded to institute criminal proceedings at a time when they were preoccupied with more traditional crimes. These all militated against effective use of these sanctions. The Commission

---

42 (originally enacted in 1933); N.Y. LAB. LAW § 220(e) (originally enacted in 1935). N.Y. CONST. art. 1, § 11 provides as follows: "[N]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any firm, corporation or institution, or by the State or any agency or subdivision of the State." Apart from N.Y. PEN. LAW § 700-01 (originally enacted in 1941), additional statutory implementations were as follows: N.Y. CIV. SERV. LAW § 14(b) (originally enacted in 1939); N.Y. CIV. RIGHTS LAW § 43 (originally enacted in 1940); N.Y. PEN. LAW § 772(a) (originally enacted in 1940); N.Y. CIV. RIGHTS LAW § 44 (originally enacted in 1941); N.Y. PEN. LAWS § 514 (originally enacted in 1941); N.Y. CIV. RIGHTS LAW §§ 42-44 (originally enacted in 1942).

9. 1938 NEW YORK STATE TEMPORARY COMMISSION AGAINST DISCRIMINATION, REPORT ON THE CONDITION OF THE URBAN COLORED POPULATION 38 [hereinafter cited as N.Y. TEMP. SCAD].

was undoubtedly aware of two other limiting factors which are inherent in penal statutes: (1) the lack of comprehensive coverage resulting from the requirement that such statutes be specific enough to meet constitutional challenge, and (2) the requirement that such statutes be subject to strict judicial interpretation in accordance with accepted canons of construction.

That these weaknesses were significant is indicated by the fact that during the two decades following the passage of the 1918 New York law not a single criminal conviction was obtained though there was ample evidence of widespread discrimination in the state Civil Service.[10]

The Commission therefore recommended remedial action which included administrative enforcement by the Civil Service Commission. This action ultimately resulted in the enactment of section 14b of the Civil Service Law. It also recommended that this new section prohibit the denial of selection, appointment, promotion, increase of salaries, or dismissal or suspension of any employee in the Civil Service of the state, or its political subdivisions solely on account of race, creed or color.[11] This was one of the broadest exercises of jurisdiction then prevailing in the administrative setup of any of the existing state civil service commissions.[12]

Other statutes imposing penal and civil penalties were also in force in New York prior to the Ives-Quinn Bill. Section 40a of the Civil Rights Law prohibited any person or agency employed or maintained to aid in obtaining positions in the public schools, any school official, teacher, or employee of a board of education from asking, indicating or transmitting, directly or indirectly, the religious affiliation of any applicant for such employment.

Shortcomings were evident. Even though in civil suits for damages, the burden of proof required was only a preponderance of the evidence, the attendant difficulties characteristic of jury trials were at once apparent. By the very nature of the offense involved, discrimination, the complainant was likely to be a member of one of the lower

---

10. *Ibid.*

11. *Ibid.*

12. It is interesting to note that, while New York was acknowledged as holding a position of leadership in liberal civil service legislation, such states as California, CAL. GEN. LAWS ANN. § 201.5 (Deering 1941), and Pennsylvania, PA. STAT. ANN. tit. 71, § 741-502 (1942) had provided broader protection than New York N.Y. CIV. SERV. LAW § 14(b). These statutes, unlike the New York provision, had prohibited any question or notations regarding race or religion, in addition to actual discrimination. This had not been prohibited in New York until the passage of the Law Against Discrimination. N.Y. CIV. RIGHTS LAW § 43. This provision, which established a remedy by way of petition to the Civil Service Commission by aggrieved employees or prospective employees of the classified service of the state or any of its civil divisions or cities, was repealed in 1958. N.Y. UNCONSOL. LAWS § 790 (McKinney 1958).

socio-economic groups of the community against whom public prejudices are strong. When an employer or agency was charged with violation of the statute, juries were reluctant to find in favor of the complainant in the absence of documentary evidence clearly establishing guilt. In addition, the expense of engaging counsel whose fee was likely to be paid from the amount of damages awarded would be a deterrent, since such damages would often be only nominal.

The restrictive grounds of the statutes providing for penal or civil relief constituted glaring weaknesses. This is characteristic of other jurisdictions with similar statutes. Thus, although section 514 of the Penal Law prohibited discrimination in public employment on account of race, creed, color or national origin as a basis for a misdemeanor conviction, this section was atypical with respect to the grounds provided generally in other New York non-discriminatory statutes, as well as in the statutes of other major states such as New Jersey and Ohio. These New Jersey and Ohio statutes referred only to political or religious opinion or affiliation.[13]

The New York Temporary Commission Against Discrimination, recognizing the lack of comprehensiveness and conformity of coverage within the statutory scheme, sought a bill to amend the anti-discrimination statutes in order to have them refer uniformly to "race, creed, color or national origin," a jurisdictional phrase which is found in the New York Law Against Discrimination and generally is included in fair employment practice acts.[14]

Section 44 of the Civil Rights Law reveals another characteristic weakness of traditional statutes, textual ambiguity. Section 44 makes it unlawful for any person, firm or corporation engaged in the production, manufacture or distribution of munitions or war material, equipment or supplies, to deny employment to any person on account of his race, creed, color or national origin. The penalty for such discrimination is provided by sub-clause 1 of section 514 of the Penal Law. At one time this sub-clause declared such discrimination against a *citizen* a misdemeanor, while another sub-clause prohibited discrimination in public employment and public accommodations, but substituted the term "any other person" in lieu of "citizen." Because of this ambiguity the contention could be advanced that sub-clause 1 sought to protect citizens only.[15] This ambiguity, however, was

13. N.J. REV. STAT. ANN. §§ 11:17-1, 22-11 (1963); OHIO REV. CODE §§ 486.11, .17, .28 (1959).

14. N.Y. TEMP. SCAD, 1945 ANN. REP. 39.

15. This inconsistency may be partially explained by the fact that the provisions with differing wording were added by amendment, the first in 1941 and the latter in 1942, and by the fact that the insertions were in a penal section which was primarily intended to protect civil rights in public accommodations. The statute was later amended to resolve the ambiguity.

absent in section 220(e) of the New York State Labor Law, which gave express and unambiguous recognition to this exclusionary principle by declaring in part that every contract for or on behalf of the state or municipality for the construction, alteration and repair of any public building or public work shall contain provisions obligating every contractor and sub-contractor and persons acting on their behalf not to discriminate against any *citizen* of the State of New York.[16] The enactment of fair employment practices acts has removed all distinction between citizens and aliens by the inclusion of the term "individual" or "person."[17]

Even when a traditional statute contained broad language in terms of the avenues of employment and grounds of discrimination, it would also contain limiting provisions which devitalized its effect. Such a statute, section 43 of the New York Civil Rights Law, prohibits labor organizations from practicing discrimination on the basis of race, color or creed in the admission of members or in the designation of members to employers for employment, promotion or dismissal. This section bans discrimination; whether it be effected by ritualistic practices, constitutional or by-law prescripton or by the tacit agreement of its members. However, under section 41 only officers and representatives of a labor organization personally guilty of discrimination and not the organization itself were subject to punishment. This permitted individual business agents of unions to be replaced, leaving union policies unchanged.[18] Under the fair employment practices acts, unions or any entity, corporate or otherwise, may be enjoined, and upon failure to comply, are subject to liability for damages and fines.[19]

16. N.Y. LAB. LAW § 220(e), originally applicable only to state or municipal contracts "for the construction, alteration or repair of any public building or public work," has been amended to cover "contracts for the manufacture, sale or distribution of material, equipment or supplies." N.Y. UNCONSOL. LAWS § 424 (McKinney 1958).

17. Fair employment practices statutes represented a major change. Among the states prohibiting discrimination in war defense contracts and public works prior to 1945, it was not unusual to restrict protection to *citizens only*. See, *e.g.*, ILL. REV. STAT. ch. 24, §§ 24(1)-(8) (1960); IND. ANN. STAT. ch. 270 (1933); NEB. REV. STAT. § 144 (1943).

18. Contrast this with the strict statutes in force in Pennsylvania and Kansas prior to 1945. PA. STAT. ANN. tit. 43, § 211.3(f) (1941), provided that any labor organization "by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, denies a person or persons membership in its organization on account of race, creed or color. . . ." is not deemed a labor organization for the purpose of the Pennsylvania Labor Relations Act. KAN. GEN. STAT. ANN. §§ 21-2461-63 (1949) (originally enacted in 1941), forbade any labor organization which discriminates against any person or excludes from membership on account of race, color or creed any person from membership to act as a collective bargaining representative in the state, except those subject to the Railway Labor Act. 44 Stat. 577, 45 U.S.C. §§ 151-63, 81-88 (1958).

19. N.Y. EXECUTIVE LAW § 297.

### B. *Structure, Composition and Budget*

The newly formed commissions were confronted, *inter alia,* with the need for formulating their organizational structure and determining their function, composition and budgetary requirements as well as a locus of operation. These were necessary for the immediate implementation of their direct statutory responsibilities of preventing discrimination by means of supportive programs and services.

Statutes of some independently established commissions expressly require that the principal office of the commission be located at the state capital; other statutes provide for this by necessary implication.[20] Enforcement agencies in Oregon, Wisconsin and New Jersey operate within existing state agencies, and therefore their principal offices coincide with those of their respective parent agencies located in the capital cities of the states.[21] Further, many statutes authorize in general terms the establishment of additional commission offices as the circumstances of agency expansion from time to time require. In any case, the right to do so may be interpreted as being implicit in the statutes.[22]

It is apparent that the scope and dimension of transition from the statutory creature, to an operating administrative organization would be more extensive with respect to the newly created and totally independent commissions, of which New York's is a prime example, than those commissions which function within presently established and experienced bureaus, departments or divisions.[23] The independent com-

20. The statutes of New York and Pennsylvania which are representative of the many establishing independent commissions, contain the typical phraseology: "To establish and maintain its principal office in the city of Albany. . . ." N.Y. EXECUTIVE LAW § 295(1); "To establish and maintain a central office in the city of Harrisburg. . . ." PA. STAT. ANN. tit. 43, § 957(a) (1964). Statutes of other jurisdictions creating independently established commissions, such as that of Colorado, make no reference to the establishment of a main office of the commission. This may have been deemed unnecessary owing to two conjunctive factors: the prior history of civil rights operations and enforcement centered at the state capital, and the need of only one agency office for the state. California merely authorizes its commission to establish a principal office to afford flexibility of choice through experience. CAL. LABOR CODE § 1419(a). The commissions of New Mexico and Rhode Island, although independently established, would maintain their principal office in the state capital apart from statute. There the offices of the Labor and Industrial Commissioners who are charged with enforcing the respective acts are situated.

21. New Jersey—N.J. REV. STAT. § 18:25-71-10 (1963); Oregon—administered by the Bureau of Labor. ORE. REV. STAT. § 659,090(1) (1957); Wisconsin—"shall be administered by the Industrial Commissioner." WIS. STAT. ANN. §§ 111.33-.38 (1957).

22. Thus, while there is no express authorization in the Pennsylvania statute to set up additional offices, the provision "to meet and function at any place within the Commonwealth" implicitly grants that power. PA. STAT. ANN. tit. 43, § 957(b) (1964). Only Illinois has statutorily provided for an additional office outside the principal one in Chicago. ILL. REV. STAT. ch. 48, § 856(b) (Smith-Hurd 1961).

23. In Oregon, the FEPA is administered by an elected public official, the Commissioner of Labor in the Civil Rights Division, Bureau of Labor; in Wisconsin, the

missions were singularly confronted with the choice of adopting either a centralized or decentralized form of administrative control. Under the former approach, commission administrative operations and activities would be centered in a single agency office, while the latter approach envisaged the establishment of commission offices throughout the state, each to serve a particular geographical area, thus relegating to the principal office, primarily, the responsibilities of statewide planning and administration. Apart from budgetary limitations, the decisions as to centralized or decentralized control among the states rested upon what was deemed to achieve maximum commission effectiveness. Factors such as population makeup, density, numbers, size of metropolitan urban communities, immigration trends, rate of industrial expansion, and variations of attitude toward equality of opportunity were considered.[24]

The functions of the principal offices of all commissions appear to fall within three divisible and correlative classes of activities—administrative (including public relations, research and statistics), educational and legal.[25] The larger independent commissions, such as those of New York and Pennsylvania, have given the greatest recognition to the specialized functions of these activities; New York's commission has been foremost in this regard. The New York Commission operates through three major divisions headed respectively by an executive director for administration, a director of education, and a general counsel; it also has given separate recognition to the research function, which has divisional status. In addition, the regulatory activities (processing of complaints), originally a function of the legal division, have also been divisionalized.[26] Other commissions, such as Ohio's, have no separate legal division; the legal function is incorporated into the administrative division, and some of the responsibility falls upon the legal staff of the state Attorney General's Department.[27] Rhode Island's commission exemplifies another arrangement: the supervisor of education, an executive, operates under the agency's administrative head, and legal assistance is obtained from the Attor-

---

State Industrial Commission as a body administers the act within the Division of Fair Employment Practices. New Jersey is somewhat at variance, as the New Jersey Law is under the direction of an Assistant Commissioner of Education, Division of Civil Rights, Department of Education.

24. For a brief statement on this subject by a commission, see OHIO CIV. RTS. COMM'N, 1960 ANN. REP. 16.

25. N.Y. SCAD, 1957 REP. PROG. 34-36. New York has also provided a separate division of housing, a trend all commissions will likely be required to take with the addition and growth of more judicial responsibilities.

26. *Ibid.*

27. OHIO CIV. RTS. COMM'N, 1960 ANN. REP. 19. A lack of a commission research staff has been in evidence. The commission has thus, on occasion, requested legal research assistance from the State University School of Law. *Id.* at 33.

ney General's office. Thus, none of the specialized personnel are departmentalized.[28]

Administrative control varies from state to state. In New York, the General Counsel, head of the legal division, enjoys equal status with the Executive Secretary, the administrative head of the commission, and the several division heads. Only the General Counsel bears a staff relationship with the commissioners, to whom all are subordinate.[29] The Pennsylvania Commission places the head of its legal division under the control of the executive director, the administrative head. The chief of the legal division, however, is made coequal with the director of research (education) who is similarly under executive control.[30] Ohio places its executive director, the chief administrative officer, directly over the entire commission, giving no department or division status to the legal function; the executive director is responsible only to the commissioners. This represents the prevailing pattern.[31] We may note that some of the larger commissions provide for an assistant to the administrative head, giving him extensive authority. Ohio and Pennsylvania, for example, place all field representatives directly under his supervision; he has the additional responsibility of directing his own regional office.[32] In New York, the regional offices are now under the supervision of local regional directors answerable directly to the executive secretary of the commission.[33]

All principal offices of the state commissions function both as central offices providing statewide directional control and as regional offices. Administratively, this statewide control includes responsibilities for training and supervision of all field representatives; procuring, maintaining, and supplying of all equipment; preparing and operating the annual budget; and laying down of operational regulations and policies.[34]

28. R.I. FEPC, 1961 Ann. Rep. 3.

29. On March 6, 1963, at an interview with an associate counsel of the commission at the New York offices, it was his opinion that the general counsel informally had greater status than the division heads. The intra-agency influence of the legal division in New York is apparently unequaled among state commissions.

30. Pa. FEPC, 1957 Ann. Rep. App. I, 24.

31. Ohio Civ. Rts. Comm'n, 1960 Ann. Rep. 19; Pa. FEPC, 1960 Ann. Rep. App. I, 24.

32. *Ibid.*

33. N.Y. SCAD, 1957 Rep. Prog. 34-37.

34. The principal office of the commission is not necessarily the most active. Thus, Albany is statutorily the principal site of the New York State agency; functionally, however, the center of statewide policy and executive control is New York City. In addition, the New York City office serves the metropolitan area as a regional office and sustains the greatest caseload. N.Y. SCAD, 1957 Rep. Prog. 34-36. Similarly, the principal office of the Pennsylvania FEPC is at Harrisburg and sustains a relatively light caseload as compared with the regional offices in Philadelphia

The functions of many commissions are not necessarily confined to commission offices. Investigation, conferences and conciliation meetings between complainants and respondents, educational consultations with trade, labor and public utility associations, exploratory visits to the public; in fact, the entire gamut of commission activities are undertaken in various sections of the state.[35]

Regional offices typically operate under broadly formulated policies set forth by the commission and carry out their programs in geographical areas admittedly large in terms of their available facilities. Regional directors are equipped to receive, process, and conciliate charges of employment discrimination as is the principal office of the commission. They develop and organize—in cooperation with community councils and advisory agencies within their territorial jurisdiction—all facets of the educational programs in conjunction with employment agencies, labor organizations and the general public.[36]

The activities engaged in by the commission itself are largely based upon programs of education, both formal and informal, coordinated with existing public and private agencies on a statewide level. However, the educational activities conducted by the conciliation councils and advisory agencies are deemed of prime importance in the educational effort of the commission. The former groups are composed of interested and respected citizens recruited on a local level, serving without compensation other than expenses, and empowered by the commission to do one or more of the following: to study and make recommendations concerning discrimination; to foster cooperation among specialized groups and the general public; and to reduce group prejudice by means of the employment of all mass media, including the local distribution of commission literature.[37] It is to be noted that New York rejects the principle (which is a requirement of many commissions) of choosing members who are identified with a particular group or organization, but rather endeavors to ap-

and Pittsburgh. Unlike the New York City office, however, the Harrisburg office remains the center of statewide FEP control. We may note that the Philadelphia and Pittsburgh municipal Commissions on Human Rights have borne the greater caseload burden within these municipal areas than the state agency. The Philadelphia commission until two years ago had a larger staff than the Philadelphia office of the state agency.

35. FEP statutes creating independent commissions such as those of New York and Pennsylvania typically provide for the commissions "to meet and function at any place within the state." N.Y. EXECUTIVE LAW § 295(2); PA. STAT. ANN. tit. 43, § 957 (1964); N.Y. SCAD, 1946 ANN. REP. 4.

36. For a brief commission description of the functions of principal and regional offices, see N.Y. SCAD, 1946 ANN. REP. 4. See also OHIO COMM'N, *supra* note 24, at 17, for a description of the responsibilities of a regional office.

37. For an excellent description of the educational objectives of conciliation or community councils, see N.Y. SCAD, 1946 ANN. REP. 19-22.

point as members of the conciliation councils persons who are representative of their communities.[38]

The functions of the legal division or staffs liaisoned to the commissions by the Attorney General's office include the following: advising the commission and staff in all legal and investigative phases of their work; preparing memoranda of law and advisory opinions on legal questions; collecting selected legal material relating to discrimination; cooperating with government agencies in furthering the purposes of the law against discrimination.[39]

The laws of Hawaii and Oregon are administered under one-man supervision, the heads of their state labor departments serving the same functions as commissioners in other states.[40] Elsewhere, commission membership varies widely from three each in Massachusetts and Wisconsin[41] to eleven in Missouri.[42] Almost uniformly, the commissioners are selected by the Governor of the respective state. Oregon is the exception; the Labor Commissioner sits as an elected official.[43] In Wisconsin, the Industrial Commissioner, who is appointed by the Governor, sits with two other salaried commissioners.[44] New Jersey's arrangement also varies somewhat from the norm; the state has a seven-member commission, with only the Commissioner of Education or his designee possessing investigative and hearing functions.[45] None of these intra-departmental commissions is authorized to appoint counciliation councils, with the exception of that of Oregon.[46]

---

38. For an excellent account of the typical growth of the educational phase of commission activity, particularly with respect to the permanent local or regional conciliation councils, see N.Y. SCAD, 1961 Rep. Prog. 87-88; N.Y. SCAD, 1951 Rep. Prog. 71-78; N.Y. SCAD, 1948 Rep. Prog. 74-77; N.Y. SCAD, 1947 Ann. Rep. 19-20; N.Y. SCAD, 1960 Rep. Prog. 85-87; N.Y. SCAD, 1956 Rep. Prog. 67-70; N.Y. SCAD, 1955 Rep. Prog. 67-75; N.Y. SCAD, 1954 Rep. Prog. 67-73. Note that the statute and the Temporary Commission designated local or regional councils as "conciliation councils." The Commission, in its reports, refers to them as "Community councils" and, occasionally, "advisory councils," thus placing emphasis on the comprehensive and general aspect of their functions.

39. N.Y. SCAD, 1946 Ann. Rep. 5-6.

40. Hawaii Rev. Stat. § 90A-2 (Supp. 1963); Ore. Rev. Stat. § 659.060(1) (1957).

41. Mass. Ann. Laws ch. 151(B), § 3 (1957). The Industrial Commissioner administers the law, and acts as chairman. The commission has three other members.

42. Mo. Stat. Ann. § 296.010(3) (Supp. 1964).

43. Ore. Rev. Stat. § 659.060 (1957).

44. Wis. Stat. Ann. § 111.3(4) (1957). Three member commission with the Industrial Commissioner as chairman.

45. N.J. Stat. §§ 18:25-8(i) & (e). The Commissioner of Education, a Director of the Civil Rights Division or an Assistant Commissioner holds hearings and, with the consent of the Commission, appoints hearing examiners. N.J. Stat. § 18:25-70(a)-(e). The powers of the seven member Commission lie in consultation, research, appointment of staff, and liaison with the Governor.

46. Wisconsin's statute does not provide for conciliation councils; New Jersey places authority in the hands of heads of local governments.

States with independent commissions, except Connecticut, Indiana, Kansas, Missouri, and Washington, specifically require that commission selections be approved by the state Senate.[47]

Commissioners serve terms varying from three to six years, with the statutes of all independent commissions requiring the terms to be staggered.

With respect to compensation, the states of New Mexico, Colorado, and Minnesota provide no salary for their appointed commissioners, but the latter two states expressly provide for reimbursement of reasonable expenses incurred in the performance of their duties. New Mexico makes no such express allowance, but it is implicit. In other states, commissioners are compensated on a per diem basis. In Connecticut, compensation is twenty-five dollars per diem during public hearings only; while in California compensation is fifty dollars, in Michigan and Indiana twenty-five dollars, and in Pennsylvania fifteen dollars per diem for commission services, exclusive of reasonable expenses incurred.[48] Commissioners serving in Hawaii and Oregon are compensated by virtue of their other offices, while in Wisconsin and New Jersey, members of the commission are compensated by reason of services rendered as Industrial Commissioner and Commissioner of Education, respectively.

Five states have well salaried commissioners who participate substantially in the three key functions of the agency: finding of probable cause, formulating terms of conciliation, and participating as a quasi-administrative court at public hearings. These states are New York, Wisconsin, Massachusetts, Ohio and Rhode Island. New York's commissioners receive the largest compensation of all, 20,475 dollars per annum, exclusive of reasonable expenses incurred, and devote full time to their positions. In addition to the three primary functions of the commission already mentioned, they are engaged in the supervision and conduct of a substantial portion of the investigatory and counciliatory proceedings as well.[49] The observations concerning New York are applicable to a lesser degree to Wisconsin's two commissioners, exclusive of the Industrial Commissioner, as well as to the commissioners of Massachusetts, Ohio and Rhode Island. The commissioners heading these three commissions may be considered by

---

47. The many statutory provisions requiring Senate approval do not specify the votes necessary to constitute approval. The usual rules of legislative procedure apply, and a majority of a Senate quorum is sufficient. However, Pennsylvania's statute reads specifically as follows: "commissioner . . . with the advice and consent of two-thirds of all the members of the Senate. . . ." PA. STAT. ANN. tit. 43, § 956 (1964).

48. CAL. GEN. LAWS ANN. § 1416 (Deering 1964); CONN. GEN. STAT. ANN. § 31-124 (1960); MICH. STAT. ANN § 17.458(s) (1955); PA. STAT. ANN. tit. 43, § 956 (1964).

49. Chairman of the Commission received $25,200; Vice-Chairman, $23,100. An Act Making Appropriations for the Support of Government, No. 3004, at 17 (1963).

some as part time, but quantitatively they handle a significant portion of the agency work load.[50]

Because many commission appointments offer little or no compensation, appointments are voluntary. Lay commissioners, occupied with private matters are unable or unwilling to meet more often than monthly or bi-monthly, so that the actual investigatory and conciliatory work load must be placed in the hands of professional staffs. In these jurisdictions, the commissioners represent the general public and principally function by laying down broad statewide policies. Determinations such as a finding of probable cause or the terms of conciliation are made by the professional staff and are almost uniformly upheld when submitted to the full commission for review.[51]

The composition of commissions may be considered of some importance. Several of the state statutes have some specific requirement relating to the allocation of membership along political, geographical or occupational lines.[52] The statutes of Minnesota and Missouri specify that the commission must include one member from each geographical district; Colorado's statute, in addition to a political requirement, contains a rather vague geographical reference.[53] The state of Kansas has approached commission composition along occupational lines. It provides for proportional representation for management, labor and the general public.[54] The Minnesota commissioners, numbering nine, not only are limited geographically, but must also have one attorney-at-law among their number. New Mexico must include the Attorney General and Labor Commissioner in its five member commission.[55]

The theory underlying mandatory political, geographical or occupa-

50. Bamberger & Levin, *The Right to Equal Treatment; Administrative Enforcement of Anti-Discrimination Legislation*, 74 HARV. L. REV. 51 (1961).

51. *Ibid.*

52. IND. ANN. STAT. § 40-2310 (Supp. 1964): Not more than 3 members from the same political party. MICH. STAT. ANN. § 17.458(5) (1955): Also not more than 3 members from the same political party—remainder opposite party. PA. STAT. ANN. tit. 43, § 956 (1964): Not more than 5 members of the same political party. ILL. ANN. STAT. ch. 48, § 855 (Smith-Hurd 1961): Not more than 3 from same political party, and must be a resident for 5 years past. MINN. STAT. § 363.04 (1957); 9 Members, one from each Congressional district aud one Attorney at Law. See also notes 53, 54 & 55 *infra*.

53. COLO. REV. STAT. ANN. § 81-19-4 (1954). "Appointments shall be made to provide geographical area representation insofar as may be practicable." "No more than four members belonging to the same political party." Mo. H. Bill 226, 70th Gen. Assembly, § 2. "It shall consist of eleven members, one from each Congressional District of this state." MINN. STAT. § 363.04 (1957). ". . . one for each Congressional district . . ."

54. KAN. GEN. STAT. ANN. § 44-1003 (Supp. 1961). "Said commission shall consist of five (5) members, two (2) of whom shall be representative of industry, two (2) of whom shall be representative of labor, and one (1) of whom shall be from the public at large."

55. N.M. STAT. ANN. § 59-4-6 (1953), "[O]ne of whom shall be the duly elected and qualified Attorney General of the state . . . and one of whom shall be the duly appointed, qualified and acting Labor Commissioner of the state."

tional qualifications is that these requirements will encourage diversity of opinion and allay charges of partiality or bias. Many of the states, however, have rejected this rationale as unsound in principle and practice. The New York Temporary Commission, viewing the subject of discrimination as one of general public concern, rejected the many suggestions advanced for the allocation of the membership of the Commission along special interest lines, and chose to place unfettered discretion in the Governor.[56]

The size of the commission staff and the extent of its operations are dependent upon the availability of funds. There is a great variation among the states in this respect, ranging from one and one-half million dollars per annum for New York to 2,000 dollars per annum for New Mexico.[57] The wide budgetary differences are attributable to the variable factors of size, density of population, employment activity, number, kind and distribution of minority population, and degree of discrimination present within the respective states. It is important to keep in mind that, of the several approaches which may be used in analyzing budgetary figures, that which views commission allocations as they relate to total state and per capita expenditures is more meaningful than a comparison of the absolute amounts among the states. In any event, on the basis of the annual reports of the states, one may conclude that the commissions are hard put to do the "most effective work," particularly in the face of intensified commission efforts and activities due to over-increasing jurisdictional responsibilities.

## III. Coverage Problems

The New York statutes define "employer" in negative terms. The term covers all employers except a "club exclusively social, or a fraternal, charitable, educational or religious association or corporation . . . not organized for private profit."[58] According to the New York Temporary Commission, it embraces, in its positive sense, the commonly accepted dictionary meaning.[59] Some fair employment practices acts adopt the New York exemption in toto, while others, such as those of Rhode Island and Missouri, do so with slight modification. Thus, while Rhode Island's act largely follows the New York exemption, it further excludes, by express language, labor and non-sectarian organizations and associations engaged in social work.[60] Other acts,

56. N.Y. Temp. SCAD, 1945 Ann. Rep. 28.
57. An Act Making Appropriations for the Support of Government, No. 3004, at 17 (1963).
58. N.Y. Executive Law § 292(5).
59. N.Y. Temp. SCAD, 1945 Ann. Rep.
60. R.I. Gen. Laws Ann. § 28-5-3(b) (1957); Mo. Rev. Stat. 296.010(2) (Supp. 1964). Missouri simply excludes corporations and associations owned and operated by religious or sectarian groups.

such as those of Minnesota and Colorado, markedly deviate from the New York prototype and substantially minimize the scope of exemption. Thus, Minnesota exempts religious and fraternal corporations and associations "when religion shall be a bona fide occupational qualification for employment."[61] The acts of Colorado and Pennsylvania exempt these organizations only when they are totally non-government supported.[62] The acts of Michigan, Ohio and Connecticut provide total exemption from the above mentioned exceptions.[63]

Commissions have sought to interpret express exempt categories in terms of substance rather than form in order to limit their application. They have tended, for example, to closely scrutinize certificates of incorporation and articles of association to determine whether the practices of these entities are in substantial conformity with their stated purposes.[64] Thus, questions as to whether they are "non-profit" or supported "in whole or in part" by governmental appropriations will be determined from a primarily factual as opposed to a technical standpoint.

The scope of limitation in the area of explicit exemptions remains, however, a determination for the court. In the only court challenge to this end, the New York Commission sought to bring educational institutions within the purview of the Law Against Discrimination. The case of *Matter of the Board of Higher Education v. Carter*[65] arose out of an informal investigation by the New York Commission of religious discrimination in promotion and employment at Queens College, one of several municipal colleges under the jurisdiction of that Board. The Board brought a proceeding to restrain the Commission's continuance of its investigation on the ground that the Board, under the Education Law, was an educational "body corporate," a corporation not organized for profit, and thus expressly excluded from the term "employer." Inclusion is essential both to the enforceable jurisdiction of the commission under a verified complaint, and to the initiation of its investigation under an informal complaint.

61. MINN. STAT. § 363.02 (1957).

62. COLO. REV. STAT. ANN. § 81-19-2(5) (Supp. 1957); PA. STAT. ANN. tit. 43, § 954(b) (1964).

63. CONN. REV. STAT. § 31-122 (1958); MICH. STAT. ANN. § 17.458(2)(b) (1960); OHIO REV. CODE § 4112.01(B) (Baldwin 1964).

64. Matter of Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955). The court held that the commission has the power to lift the corporate veil to ascertain the facts with respect to the true status of a petitioner. It said: "If the petitioner is correct, then the Civil Rights Law aud the Executive Law creating the commission could be rendered completely ineffective by any individual or group using the guise of a membership corporation. It would result in the emasculation of the statute involved and substitute for substance the fetish of form."

65. 26 Misc. 2d 989, 213 N.Y.S.2d 132 (1961), *modified*, 16 App. Div. 2d 443, 228 N.Y.S.2d 704, *modified*, 14 N.Y.2d 138, 250 N.Y.S.2d 33 (1964).

The lower court held that the Commission lacked both enforceable and investigative jurisdiction. The Commission, asserting that public non-profit educational institutions were "employers" within the meaning of the statute, and hence subject to the enforceable jurisdiction of the Commission, appealed. The appellate division held that the plain language of the statute precluded enforceable jurisdiction and that the legislative history required this result. The court reasoned that while the legislature was aware of the wide powers held by the Regents and State Commissioners of Education with respect to religious and ethnic discrimination in the public schools of the state, it failed to indicate an intent to transfer this power to the Commission. The court held, however, that the Commission had jurisdiction to investigate informally for purposes of research and study.

The two vigorous dissenting opinions by Justices Stevens and Steuer are enlightening. Justice Stevens reasoned syllogistically that, inasmuch as the preamble to the law declared the statute to be in fulfillment of the provisions of the New York State Constitution (Article 1, section II), and inasmuch as this provision prohibits discrimination because of race, color, creed or religion "by the state or any agency or subdivision of the state," and, further, inasmuch as the Board of Higher Education is statutorily declared to be a state agency the Board is an "employer" falling without the statutory exemption. The learned justice buttressed his argument with legislative history and broad public policy objectives. Justice Steuer, while embracing Justice Stevens' rationale, concluded that the Board of Higher Education was not a corporation under the statute. The term "corporation" under the statute refers to private business corporations, not governmental entities. The court of appeals, in an opinion by Judge Bergan, held for the commission, stating:

> If the constitutional interdiction of discrimination in civil rights by the State or any State agency or subdivision be kept in mind and read with the provisions of section 291 of the statute which declares the opportunity for employment "without discrimination because of race, creed, color or national origin" is "a civil right," it becomes clear that the "general jurisdiction and power" of the commission to "eliminate and prevent discrimination in employment" attaches to all public agencies; and it would be reasonable to expect that all public agencies would yield readily to a legislative policy thus distinctly laid down.[66]

In holding the exemption did not apply, the court relied heavily on legislative history indicating that educational agencies of the state were intended to assist, not impede, the commission.

As to this question in other fair employment practices jurisdictions,

66. 14 N.Y.2d at 145-46, 250 N.Y.S.2d at 35.

New Jersey, Massachusetts, California and Oregon, with exemption provisions similar to those of New York—that is exempting from the term "employer" educational associations or corporations not organized for private profit—have entertained verified complaints against public educational institutions without judicial challenge. In California and Oregon, legal opinions have been rendered. An opinion by the Counsel of the California Fair Employment Practices Commission has concluded that when its statute used the words "private profit" it intended to make only a distinction between private institutions operated for profit and private institutions not operated for profit. The exemption is given to the latter. In Oregon, the Attorney General has rendered an opinion that school districts do not fall within the "association or corporation . . . not organized for private profit" exemption.[67]

A number of important case rulings have given some clarification to the subject of commission jurisdiction over employers.

The question of the amenability of agencies of foreign governments to the jurisdiction of the courts and thereby of the commission has been raised in New York by the filing of a verified complaint against the British Information Service—an agency of the British government—charging an unlawful employment practice in the use of employment application forms.[68] The Commission, while obtaining voluntary compliance on the part of the foreign employer, adopted the following principles concerning a foreign employer's assertion of immunity. The Commission will not take jurisdiction if, upon a claim of immunity, the foreign employer applies to the United States Department of State for issuance of a "suggestion of immunity" upon which the court will not entertain jurisdiction. Under the principle of restricted immunity,[69] the State Department must state that the employer is a sovereign nation, as distinguished from an agent or instrumentality, and is engaged in public and governmental functions as distinguished from private or commercial transactions.

Further, regarding sovereign immunity, well established principles of law hold that the federal government, its agencies and instrumental-

67. Brief for Appellant, pp. 92-96, Matter of Bd. of Higher Educ. v. Carter, *supra* note 65; Op. Calif. FEPC Counsel, Dept. of Indus. Relations, File No. 183 (May 31, 1960); Record, pp. 29-30, Matter of Bd. of Higher Educ. v. Carter, *supra* note 65; Op. Ore. Att'y Gen. No. 118 (Aug. 3, 1949); Record, p. 231, Matter of Bd. of Higher Educ. v. Carter, *supra* note 65.

68. N.Y. SCAD, 1956 Rep. Prog. 92-94.

69. This represents a restrictive theory of immunity. The immunity of the sovereign is recognized with regard to sovereign or public acts of a state, but not with respect to private acts. This is in contrast with the classical or absolute theory, in which a sovereign cannot without its consent be made a respondent in the court of another sovereign. The restrictive theory represents the present policy of the U.S. State Department. Dept. of State Bull., No. 984-5 [June 23, 1952].

ities are not amenable to the jurisdiction of a state agency.[70] However, mere technical federal control, with operations and policies left largely in private hands, may be insufficient to confer immunity. Thus the New York Commission has ruled that a steamship company whose vessels have been taken over by the United States War Shipping Administration under a general agency agreement stands, with respect to the New York Law Against Discrimination, in the nature of the private employer in regard to employees working aboard such vessels. Further, the mere fact that a steamship company operates in interstate and foreign commerce does not give such employer a cloak of immunity. The Commission reasoned that the application of the Law Against Discrimination to employment practices in the maritime field is a permissible exercise of state power. It does not violate either the admiralty and maritime clause or the commerce clause of the United States Constitution, nor interfere with the enforcement of existing federal law regulating employment in the maritime field.[71]

The railroads have also been the subject of important commission rulings in the field of interstate commerce. The New York Commission, reasoning along the lines of the maritime rulings, concluded that railroads, although engaged in interstate commerce, are subject to its jurisdiction; that since the Law Against Discrimination is a constitutional act in the exercise of the state police power, it does not place a burden upon interstate commerce or conflict with existing federal legislation.[72]

Several jurisdictions fail specifically to include the state and its respective political subdivisions within the meaning of the term "employer." This omission could well result in a lack of jurisdiction of state commissions over the entire range of state public employment agencies, as well as state employment service, and the power to command by subpoena state files, records and books for investigative purposes. New York and other fair employment practices states, though cognizant of the well recognized canon of construction that in the absence of express statutory inclusion or necessary statutory implication, the sovereign is not deemed to be affected by a statute, have

70. N.Y. SCAD, 1950 REP. PROG. 33. Despite the lack of jurisdiction, the Commission's policy is to eliminate the discriminatory practices by conferring with and bringing the grievance to the attention of the appropriate agency of the Federal government.

71. N.Y. SCAD, 1948 REP. PROG. 43. This view is largely vindicated by Colorado Anti-Discrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963), upholding application of the Colorado statute to hiring practices of an interstate carrier. The Commission ruling was reportedly based on six cases: Brown v. Weyerhauser Steamship Co.; Jackson v. Weyerhauser Steamship Co.; Austin v. Weyerhauser Steamship Co.; Clarke v. American President Lines, Ltd.; Hoyt v. Lykes Bros. Steamship Co.; Waters v. Lykes Bros. Steamship Co.

72. N.Y. SCAD, 1948 REP. PROG. 44. See Railway Mail Ass'n v. Corsi, 293 N.Y. 315, 56 N.E.2d 721 (1944), *aff'd*, 326 U.S. 88 (1945).

interpreted the public policy statement of their preambles as clearly supportive of state inclusion.[73]

The full implication of state inclusion as an "employer" has yet to be clarified. The statement by the Court of Appeals in the *Carter* decision, quoted above, that state agencies are within the jurisdiction of the State Commission Against Discrimination, raises the broader question as to the extent of commission jurisdiction over the entire state system. That this matter is far from academic may be shown by a recent lower court decision.[74] Petitioner filed a complaint with the New York Commission, alleging a conspiracy between the Mayor of the City of New York and four Councilmen from the Borough of Manhattan to elect only a member of the negro race to the office of Borough President of Manhattan. The Commission, in dismissing the complaint for lack of jurisdiction, ruled that elective office does not constitute employment within the meaning of the law. Justice Epstein, holding that the determination of the commission was proper, dismissed the petition. The determination of Justice Epstein was unanimously affirmed by the appellate division. A further appeal to the court of appeals was denied.[75]

The New York statute defines "employee" negatively, and no fair employment practices statute has defined, nor has any commission formally described, what is positively and inclusively meant by the term "employee." The interpretation of the New York Temporary Commission of the term "employer"—*i.e.*, the normally acceptable and dictionary meaning of the term—is similarly applicable to "employee."[76] Does this refer to the common law definition? Commission rulings have specifically recognized the common law definition in distinguishing employees from independent contractors. Thus, in *Chastang v. Houghton*, the Commission ruled that six real estate salesmen associated with brokers are not employees but independent contractors under the common law. As authority, the Commission cited *Matter of Wilson-Sullivan Company*,[77] where the court held that the designation in the Real Property Law of real estate salesmen as "employees" did not change their status under common law as "independent contractors."

An exempt category in New York is an employer with "fewer than six persons in his employ."[78] All fair employment practices states except Wisconsin and Hawaii exempt employers with less than a

73. N.Y. SCAD, 1945 REP. PROG. 28.
74. Association for the Preservation of Freedom of Choice, Inc. v. Dudley, 29 Misc. 2d 710, 222 N.Y.S.2d 631 (Sup. Ct. 1961).
75. 14 App. Div. 2d 596, 214 N.Y.S.2d 355 (1961).
76. N.Y. SCAD, 1945 ANN. REP. 28.
77. 263 App. Div. 162, 33 N.Y.S.2d 203 (1942).
78. N.Y. EXECUTIVE LAW § 290(5).

minimum number of employees, ranging from four in such states as Rhode Island, Ohio and New Mexico, to fifty in Illinois.[79] Both broad and limited interpretations have been given. Illustrative of the former is the ruling by the New York Commission that employees in all units of a multi-establishment employer are to be counted in determining the requisite number, provided such units are under the control of one parent organization or corporation.[80]

Indicative of the difficulty in interpreting the language are rulings of the New York State Commission that a spouse can not be included in the minimum number[81] and that active officers of the corporation are to be counted as employees.[82] Other interesting questions have been informally posed to commissions. One—whether a commission would take jurisdiction if it found the total number of different persons employed during the year exceeded the statutory minimum—was answered in the affirmative by Michigan and New York.[83] Another—whether in the absence of statutory direction all the employees making up the necessary minimum are required to work within the state—was answered in the negative by the New York Commission.[84] The statutes of Michigan, Illinois, Ohio and New Mexico have by express provision provided otherwise.[85]

Another express exclusion is provided for employees in the "domestic service of another" under all of the fair employment practices statutes except those of Wisconsin and Missouri.[86] A large number of

79. ALA. CODE tit. 18, § 3(5) (1953) (ten or more); CAL. GEN. LAWS ANN. § 1413(d) (Deering 1964) (five or more); COLO. REV. STAT. ANN. § 81-19-4 (1953) (six or more); CONN. GEN. STAT. ANN. § 31-122(f) (1961) (five or more); ILL. ANN. STAT. ch. 48, § 852 (Smith-Hurd 1961) (one hundred or more, after Dec. 31, 1962, seventy-five or more, after Dec. 31, 1964, fifty or more); KAN. GEN. STAT. ANN. § 44-1002 (Supp. 1961) (eight or more); MASS. ANN. LAWS, ch. 151(B), § 1(5) (1957) (five or more); MICH. STAT. ANN. § 17.458(2)(b) (1955) (eight or more); MINN. STAT. ANN. § 363.02(2) (1957) (eight or more); MO. REV. STAT. 296.010(3) (Supp. 1964) (fifty or more); N.M. STAT. ANN. § 49-4-3(d) (1933) (four or more); N.J. STAT. ANN. § 18-25-5(3) (1963) (six or more); OHIO REV. CODE § 4112.01(b) (1959) (four or more); ORE. REV. STAT. § 659.010(6) (1957) (six or more); PA. STAT. ANN. tit. 43, § 954(b) (1964) (twelve or more); R.I. GEN. LAWS ANN. § 28-5-6(b) (1957) (four or more); WASH. REV. CODE ANN. tit. 49, § 60.040 (1962) (eight or more).

80. N.Y. SCAD, 1945 ANN. REP. 55.

81. N.Y. SCAD, 1951 REP. PROG. 30.

82. *Id.* at 26.

83. Michigan would take jurisdiction if the total number of different persons employed during the year exceeded the statutory minimum, while New York deems it sufficient that six persons were employed at any one time near date. N.Y. SCAD, 1955 REP. PROG. 28.

84. N.Y. SCAD, 1955 REP. PROG. 27-28 (Smith v. Illinois Shade Cloth, Iuc.).

85. ILL. ANN. STAT. ch. 48, § 852(d) (Smith-Hurd 1961); MICH. STAT. ANN. § 17.458(2) (1955); OHIO REV. CODE § 4112.01(B) (1959); N.M. STAT. ANN. § 49-4-3(d) (1953).

86. N.Y. EXECUTIVE LAW § 292(5). New York phraseology is typical: ". . . or in the domestic service of auother . . ." CAL. GEN. LAWS ANN. § 1413(c) (Deering

states exclude employees who are parents, spouses or children of their employers.[87] The statutes of California, Illinois and Pennsylvania also provide for the exclusion of agricultural employees.[88]

The term "domestic" has been the subject of interpretation by the commissions, including those in New York and Pennsylvania, where the common law definition is applied. There, a domestic is one who performs the usual menial duties pertaining to a house or household. This definition clearly does not include, by its terms, an employee working in a commercial hotel, factory or office building; his employer is, therefore, subject to the statute.[89] A Pennsylvania ruling has held that a housemother employed by a men's college fraternity, although employed within a household, was a non-domestic since she engaged in duties of a supervisory or managerial nature.[90]

With regard to the meaning of agricultural employees exempt from commission jurisdiction, California's statutory exemption is restricted to those agricultural workers who "live in" only. Pennsylvania's exemption, and that of Illinois (whose term "agricultural labor" is defined by the State Unemployment Compensation Act) should follow California's restriction on live-ins to be consistent with the intent to make the very sensitive relationship associated with this employment free from public control.[91]

"Employment agency" has been construed broadly. The New York definition, "any person undertaking to procure employees or opportunities to work,"[92] has been incorporated into the statutes of some states. Missouri's statute restricts the term to commercial agencies. Other jurisdictions, seeking to avoid ambiguity, included the phrase "with or without compensation," and thus explicitly removed any distinction between commercial and non-commercial agencies.[93] In

1964), ". . . or in the domestic service of any person in the home. . . ." ILL. ANN. STAT. ch. 48, § 852(c) (Smith-Hurd 1961), ". . . does not include domestic servants in private homes. . . ."

87. The typical phraseology of these statutes is ". . . do not include any individual employed by his parents, spouse or child . . ." N.Y. EXECUTIVE LAW § 292(c).

88. CAL. GEN. LAWS ANN. § 1413(f) (Deering 1964); ILL. ANN. STAT. ch. 48, § 852(2)(c) (Smith-Hurd 1961); PA. STAT. ANN. tit. 43, § 954(b) (1964).

89. PA. FEDA, 1958 INTERP. RUL. 2.

90. *Ibid.*

91. CAL. FEPC, 1960 ANN. REP. 11 ("agricultural workers residing on the land where they are employed as farm workers"). CAL. GEN. STAT. ANN. § 1413(3) (Deering 1964). See also ILL. ANN. STAT. ch. 48, § 852(c) (Smith-Hurd 1961).

92. N.Y. EXECUTIVE LAW § 292(a). The New York definition standing alone would appear to include every type of employment agency regardless of the nature of its business. Its commission has ruled, however, that employment agencies which confine their business exclusively to the placement of persons in domestic service are not subject to the law.

93. MO. ANN. STAT. § 296.010(5) (1965), "includes any person undertaking for compensation to procure opportunities to work or to procure, recruit, refer, or place employees." "'Employment agency' includes any person regularly undertaking with

New York, it was understood by the Temporary Commission that the term would not be restricted to employment agencies engaged in business for compensation or profit.[94] Subsequent rulings by the permanent Commission have formalized this early pronouncement.

Commissions have given content to this area. It has been held that a private business school attempting to place its graduates in employment without charge constitutes an employment agency.[95] Charitable, community and professional organizations, although non-profit, come within the statutes insofar as they operate as an employment agency.[96] Appointment officers or placement bureaus of universities which undertake to find employment, full or part time, without charge for their students and graduates similarly fall within the ambit of this definition.[97]

Traditionally established and widely acknowledged discrimination in trade unions, in which non-membership frequently bars job seekers from opportunities for employment or apprenticeship training, requires that all commissions be provided under their statutes with explicit jurisdiction over labor unions. The New York statute provides that the term "labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.[98] Some jurisdictions incorporate the New York definition,[99] while others modify it by omitting the phrase "and is constituted for the purpose."[100] This omission raises the question of whether a labor union under this modified phraseology must not only function for one of the stated purposes, but must have been formed for these intended purposes.

The reasons expressed in the report of the New York State Tem-

---

or without compensation. . . ." OHIO REV. CODE § 4112.01(e) (1959). See also ILL. ANN. STAT. ch. 483, § 852(e) (Smith-Hurd 1961); MICH. STAT. ANN. § 17.458(1)(e) (1955); MINN. STAT. § 363.01(4) (1957); PA. STAT. ANN. tit. 43, § 954(e) (1964).

94. N.Y. TEMP. SCAD, REP. PROG. § 127(2).

95. N.Y. SCAD, 1952 REP. PROG. 29 (Harris v. Utt d/b/a Florence Utt Switchboard Schools).

96. N.Y. SCAD, REP. PROG. 26.

97. PA. FEPA, 1958 INTERP. RUL. 2.

98. N.Y. EXECUTIVE LAW § 292(3). The definition of "labor organization" is substantially the same as that in the New York State Labor Relations Act. N.Y. LAB. LAW § 701(5).

99. ALASKA STAT. § 23.25.040 (1962); CAL. GEN. LAWS ANN. § 1410 (Deering 1964); MASS. ANN. LAWS, ch. 151(B), § 1 (1957); N.M. STAT. ANN. § 49-4-1 (1953).

100. "The term 'labor organization' includes any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in relation to employment." PA. STAT. ANN. tit. 43, § 954(d) (1964).

porary Commission Against Discrimination for its failure to recommend to the legislature the broadest statutory coverage of employers and employees are suggestive and explanatory of similar omissions among other fair employment practices jurisdictions.

In support of exemptions generally, legislative stratagem played an important role: namely, the fear that without limitation of the scope of coverage, the Law Against Discrimination would not pass. Beyond this negative historical factor, the framers conceived the philosophy and approach to fair employment practices legislation as one of education rather than punishment, and sought to leave employers within exempt categories to adhere voluntarily to statutory standards.[101]

In particular, exemptions in support of non-profit fraternal, charitable, religious and educational organizations and associations[102]—the general categories of exemption—were viewed by the commission as desirable in light of the complicated and delicate questions concerning constitutionality and religious preference which would have arisen in failing to provide for these exemptions.[103]

In principle, however, any distinction between commercial and non-profit institutions only strengthens the desirability of placing the latter under legal protection. They are predicated upon respect for the dignity of man and are looked upon by the community as the leaders in fostering the high ideals of equality of treatment. Educational institutions, in particular, profess and instruct such respect. Violence to principle results when licenses and tax exemptions—governmental privileges—are bestowed upon institutions which are permitted by statute to violate at will the fundamental right of every person to earn a livelihood on the basis of job equality—a right declared by fair employment practices statutes or constitutional declaration to be the public policy of the state.[104] It is unjustifiedly discriminatory to deny the protection afforded by this legislation to the large number of persons employed within these exempt categories, many of whom are Jews, Negroes and Catholics, members of the very minority groups the statutes seek to protect.

The fears associated with the need for requiring minimum numbers of employees[105] were also commented upon by the New York Temporary Commission. In exempting employers with fewer than six employees from statutory restrictions, the commission justified its action on the basis of "practical administration." The Commission

101. N.Y. TEMP. SCAD, 1945 ANN. REP. § 130(4).
102. *Ibid.*
103. *Id.* § 127(7), at 28.
104. *Ibid.*
105. *Ibid.*

reasoned that too many problems of an administrative nature would be created under limited agency resources, should an excessive volume of commission complaints be permitted from applicants and employees of small businesses.[106] The experiences of the commissions have failed to disclose any basis for the practical administration argument. Concern over the filing of complaints up to or in excess of agency capacity has not even been suggested by the commissions. Limited budgetary allocations for expansion in agency services and a considerable amount of public reticence to resort to commission services have contributed to the expeditious handling of most complaints.[107] It

106. *Id.* § 127(6), at 28, "practical administration and in order to exempt the more or less personal relationship of domestic service, small business and family farms from the scope of the bill. . . ."

107. N.J. DEPT. OF ED., CIV. RTS. DIV., 1960-61 ANN. REP. 8. We may note, however, that some commissions such as that of New Jersey have from the beginning continued to handle heavy case loads, owing to the volume and complexity of complaints. Interesting statistics appear in the *Congressional Record* for April 8, 1964, at 6987:

"SENATOR CLARK [PA.] Actual experience under State FEPC laws shows that very few cases result in court actions.

A survey of 12 States, from date of enactment of an FEPC law in each State through December 31, 1961, shows that in almost 20,000 cases—actually 19,439— there were ouly 18 court actions.

Mr. President, I ask unanimous consent that a table on that point which appears in the hearings at page 134 may be printed in full in the RECORD at this point in my remarks.

There being no objection, the table was ordered to be printed in the RECORD as follows:

COMPARATIVE COMPLAINT EXPERIENCE UNDER STATE FAIR EMPLOYMENT PRACTICE LAWS

[From date of law until Dec. 31, 1961]

| State | Cases | Hearings | Cases and desist orders | Court actions |
|---|---|---|---|---|
| California | 1,014 | 2 | 2 | 2 |
| Colorado | 251 | 4 | 3 | 1 |
| Connecticut | 900 | 4 | 3 | 3 |
| Massachusetts | 3,559 | 2 | 2 | 0 |
| Michigan | 1,459 | 8 | 6 | 4 |
| Minnesota[1] | 184 | 1 | 1 | 1 |
| Missouri[2] | 45 | 0 | 0 | 0 |
| New Jersey | 1,735 | 2 | 2 | 2 |
| New York | 7,497 | 18 | 36 | 5 |
| Ohio | 985 | 2 | 1 | 0 |
| Oregon | 286 | 0 | 0 | 0 |
| Pennsylvania | 1,238 | 19 | 0 | 0 |
| Rhode Island | 286 | 0 | 0 | 0 |
| Total | 19,439 | 62 | 26 | 18 |

[1]The Minnesota figures do not cover cases arising in Duluth, Minneapolis, or St. Paul, where local antidiscrimination laws apply.

[2]The Missouri law became effective on Oct. 13, 1961. Of the 45 complaints received by July 23, 1963, 26 have been settled informally and 19 are still under investigation.

may also be noted that the existence of this type of exemption at a time when employment opportunities in small businesses are contracting may strengthen the need to eliminate this exemption.

The Temporary Commission specifically excluded domestic workers in order to exempt the more or less personal relationships of domestic service.[108] Conceding the intimate and sensitive nature of domestic service and the racial and religious preferences associated with employment of those who share the confines of one's home, nevertheless, the wholesome public purpose of enhancing the general living standard of these workers necessitates their protection under the statutes.

The exclusion of family employment[109] cannot be laid to considerations of enforcement or religious preferences, and inasmuch as such employment involves small numbers of persons and would not be based upon race, religion or national origin, its exclusion is entirely untenable. It is suggested that the rationale behind such a restriction lies in unreal considerations as to the disruptive effect of investigation and litigation among members of a family.

Exclusion of agricultural workers[110] irrespective of numbers employed, which fails to reflect the intimacy associated with domestic employment, seems to have gained its impetus from primarily political considerations. The objections registered with regard to domestic employees are similarly applicable.

The writer suggests, consistent with the narrowing gap between professed public policy and special privilege, that the definition of "employer" include any person employing one or more persons; further, that all employee exemptions be removed.

In order to commit an unlawful employment practice, there must be an act which is discriminatory on the basis of at least one of the several grounds expressly provided in the various fair employment practices statutes. These grounds vary in extent of inclusion and duplication of terminology, but all jurisdictions include all or a combination of the following grounds: race, color, creed, religious creed, national origin, county or ancestral origin, and age.[111] Several juris-

[3]The figure given is that of the House committee survey. Testimony of the general counsel of the New York State Commission for Human Rights suggests that only 4 complaints have resulted in the issuance of cease and desist orders. See statement of Henry Spitz before Subcommittee on Employment and Manpower, Senate Committee on Labor and Public Welfare, July 29, 1963.

108. See note 86 *supra* and the authorities cited therein.

109. See note 87 *supra* and the authorities cited therein.

110. See note 91 *supra*.

111. New York's statute reads: "because of race, creed, color or national origin. . . ." N.Y. EXECUTIVE LAW § 290. Pennsylvania's statute reads: "because of race, color, religious creed, ancestry, age or national origin. . . ." PA. STAT. ANN. tit. 43, § 953 (1964). Rhode Island's statute reads: "regardless of their race or color, religion, or country of ancestral origin. . . ." R.I. GEN. LAWS ANN. § 28-53 (1957).

dictions have formerly placed a particular interpretation on the meaning of these terms. With respect to "race" and "color," for example, the New York Commission has construed the term to be synonymous[112] and statistical compilations of the commissions have reflected this interpretation by failing to provide for separate racial and color categories.[113] Thus, discrimination against a Negro is classified as discrimination because of color, and the term "race" is redundant.[114]

National origin and ancestry have also been construed by the same commission as synonymous.[115] Fair employment practices statutes providing for both these grounds would appear to be similarly involved in the use of redundant terminology.

The more significant term, "creed," has been the subject of more diligent examination in the major fair employment practices states of New York and New Jersey, as the word tends to be susceptible to more varied and expansive meanings. These meanings are said to be derived from authoritative definitions found in dictionaries and general literature, in which political as well as religious principles are comprehended by the term.[116] An examination of traditional civil rights legislation and constitutional provisions has concluded this issue in favor of limiting "creed" to religious views or beliefs.[117] Therefore, while agnostics and atheists are protected from discrimination under fair employment practices statutes as non-believers whose convictions are predicated on religious principles,[118] persons of political, economic and social persuasions are held to have convictions, views or beliefs which do not constitute a creed within the meaning of the statute.[119] Whether convictions or beliefs are religiously, socially or politically grounded lacks clearly defined standards. Thus, in one New York Commission ruling, a conscientious objector who had been so classified by the Selective Service Board was held to fall under the protection

112. N.Y. SCAD, 1948 REP. PROG. 54.

113. N.Y. SCAD, 1959 REP. PROG. 129 (Table 6).

114. N.Y. SCAD, 1948 REP. PROG. 54.

115. N.Y. SCAD, 1951 REP. PROG. 31 (Dukson v. Topics Publishing Co.).

116. *Assembly Debates*, p. 88 (Feb. 23, 1945). See remarks of Irving H. Ives in the assembly debate preceding the enactment: "unquestionably creed, as it has been interpreted in all matters dealing with discrimination, means religious beliefs and nothing else."

117. OP. N.J. ATT'Y GEN., No. 17, DAD-AG No. 3 (March 28, 1949). Note this pertinent comment by the Attorney General: "It would be futile to resort to dictionaries . . . rather we approach the issue, first, from the viewpoint of the meaning intended by the legislators and secondly from pertinent provisions of the 1947 Constitution.

118. N.Y. SCAD, 1946 ANN. REP. 67 (Hartman v. Teachers' College of Columbia Univ.).

119. R.I. FEPC, 1950 ANN. REP. 3. In statutes such as that of Rhode Island which specify "religion" rather than "creed," the question is not arguable. In Rhode Island, clearly it is not unlawful for an employer to make specific inquiries of applicants for employment regarding membership or affiliation with any Communist, Fascist or other totalitarian organizations or groups.

of the statute, as his belief, according to the commission, was based on religious training.[120] On the other hand, this same commission ruled that moral precepts of the Masonic Order did not constitute a creed.[121] It would appear, however, that there is no necessary requirement that beliefs be based upon orthodox religious precepts.

Many fair employment practices statutes which prohibit racial, religious and ancestral discrimination include age discrimination, and their protective coverage varies between age 25 through 62 or 65, or 40 through 65.[122] Commissions have invoked their jurisdiction with respect to age in accordance with the literal terms of the statutory age groups, and, as a result, there has been little difficulty in determining age qualification. Thus, where age limitations barring workers over a maximum age or between an age group have appeared in advertisements—such as where an employer specifies that he wants a bookkeeper "under 35 years of age" or "between 35 and 45"—commissions have ruled that, inasmuch as these limitations bar all applicants over 35 or 45 respectively, including those between 40 and 65 who are within the prohibited age group, they are unlawful.[123] As for age specifications using descriptive words, a wide area of interpretation has been explored by commissions. Thus, "wanted young man" or "young woman" has been ruled unlawful, even though such phraseology in reference to age is indefinite and vague.[124] A request directed to experience, but without any age characterization, such as "15 years experience," is lawful.[125]

The term "person" is the most comprehensive of any jurisdictional term found in the statutes. It is defined under the New York statute as including "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."[126] This comprehensiveness is also found either literally or with slight modification in all the other statutes. Thus a "person" aggrieved by a violation of these statutes, of a commission's order,

120. N.Y. SCAD, 1946 ANN. REP. 67. (White v. Board of Trans.).

121. Julio Ray v. Webb & Knapp, Inc., C-5866-59. See also N.Y. SCAD, 1960 REP. PROG. 105.

122. CONN. GEN. STAT. ANN. § 31-122(K) (1961). HAWAII REV. LAWS § 90A-1(a) (Supp. 1963) (no age mentioned); MASS. ANN. LAWS ch. 151(B), § 1(8) (1951) (ages 45-65); N.Y. EXECUTIVE LAW § 296(3)(a) (ages 40-65); ORE. REV. STAT. § 659.024 (1957) (ages 25-65); PA. STAT. ANN. tit. 43, § 954(h) (1964) (ages 40-62); WASH. REV. CODE § 49.44.090 (1962) (ages 40-65); WIS. STAT. ANN. § 111.32(5) (b)(1) (1952) (ages 40-65).

123. N.Y. SCAD, 1959 REP. PROG. 71. The New York Commission has ruled that it has no jurisdiction over complaints filed by persons who claim discrimination because they are under age nor by persons over age 65 (CA-6429-59).

124. N.Y. SCAD, 1959 INTERP. RUL. 6.

125. *Id.* at 4.

126. N.Y. EXECUTIVE LAW § 292(1). This definition is identical to the definition in the New York State Labor Relations Act. N.Y. LAB. LAW § 701(1).

or of a court order, shall include every conceivable legal entity, natural and juridicil.

## IV. THE NATURE OF UNLAWFUL DISCRIMINATORY PRACTICES

All fair employment practices commissions are authorized to deal with three major avenues of employment discrimination—employers, employment agencies, and labor unions. New York's statute and several others prohibit discrimination by employees.[127] New York and Wisconsin prohibit discrimination in regard to age by employers, employment agencies and licensing agencies.[128] The first, employers, involves three broad facets—hiring, discharge and discrimination in compensation, terms, conditions and privileges of employment. Some statutes contain the phrase "or any matter directly or indirectly related to employment," seeking thereby to assure the maximization of commission coverage by express terms,[129] which, in the absence of this phrase, would be included by statutory implication.

Commissions have laid down—either by case interpretation or by formal policy statements—rulings which may be considered basic to the law. No more basic is the interpretation given to the phrase "because of age, race, creed, color or national origin" in the context of the provision dealing with unlawful employment practices.[130] Statutory language, legislative history and constitutional requirements unquestionably show that only prejudicial beliefs and attitudes regarding the prohibited grounds, causally related to overt acts, fall within the enforceable jurisdiction of the statute.[131] This was shown in a recent public accommodation case before the New York Commission.[132] A cab driver accepted a negro complainant as a passenger but refused to take him to his destination, justifiably claiming that such a trip would delay his scheduled return to the cab terminal. The passenger indicated to the driver that he would report him to the police for his refusal, whereupon the driver responded with derogatory racial remarks. The complainant abruptly left the cab. The Commission, while admonishing the driver for his exceedingly strong

127. N.Y. EXECUTIVE LAW § 297. "Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate . . . may file with the commission a verified complaint."

128. N.Y. EXECUTIVE LAW § 295(3); WIS. STAT. ANN. § 111.32(5)(b)(1) (Supp. 1965).

129. MICH. STAT. ANN. § 17.458(3)(a) (1960); OHIO REV. CODE ANN. § 4112.02(A); R.I. GEN. LAWS ANN. § 28-5-7(F) (1957).

130. N.Y. TEMP. SCAD REP., Leg. Doc. No. 6, pp. 16, 31, 48-49. "[I]n its proposal of its principal measure on discrimination, the commission limits *direct legal action*, enforceable by penalties, to *discrimination in employment*."

131. *Id.* at 16-20, 26.

132. N.Y. SCAD, 1961 REP. PROG. 105. (Simmons v. Londall Operating Corp.).

prejudice, found that his refusal to provide service to the complainant was not *motivationally* connected with the fact that complainant was a Negro, but rather to the desire not to be off schedule.

The interpretation of the terms "conditions and privileges of employment" reflects the essential theme of equality typical of fair employment practices statutes. Commissions, while refraining from projecting their own job standards on employers,[133] have insisted that these standards (job specifications set up as a pre-requisite for employment) be fixed and applied without discrimination and that a standard of evaluation in which merit is the sole criterion, be similarly applied.[134] Other concepts of equality of job opportunity include non-segregated[135] and non-token employment, equality of employment opportunities for all persons including members of a majority racial or religious group who are the objects of discrimination by members of minority groups and[136] geographical equality—that is, the rejection of the principle of quota employment, whereby a restriction is sought limiting the percentage of persons of a given religious or racial group to that which those groups bear to the entire population within a given geographical location.[137]

Commissions have categorically rejected the various stereotype argu-

133. N.Y. SCAD, 1950 Rep. Proc. 37. (Frazier v. Reader's Digest Ass'n).

134. N.Y. SCAD, Rep. Proc. 49. "Under normal circumstances, it is not within the province of the Commission to substitute its judgment for that of an employer, nor will this ever be done if the exercise of that judgment is made in good faith and not influenced by considerations declared to be illegal. The test uniformally applied is 'was the complaint judged solely on the merits and without regard to race, creed, color or national origin?'" (Porter v. Gen. Acc., Fire & Life Assur. Corp.).

135. Kan. Gen. Stat. Ann. § 44-1002 (Supp. 1961). Kansas' statute defines "unlawful employment practices" as including "segregate or separate."

136. N.Y. Temp. SCAD, 1959 Rep. Proc. 19. This is an example of discrimination against one member of a minority by another member of a minority. Here a Puerto Rican was refused employment because he was not a Negro and only Negroes were employed.

137. N.Y. SCAD, 1950 Rep. Proc. 38. (Moe v. H.R.H. Constr. Corp.); (Saunders v. Knickerbocker Constr. Corp.). Some respondents have sought unsuccessfully to counter the severity of this ruling by advancing the reasonable quota argument. The literal terms of the fair employment practices statute are, however, clear. N.Y. SCAD, 1955 Rep. Proc. 57-58. We may note that complainants have sought quota commitments. Thus, in an investigation of a complaint filed before the New York Commission, a Negro complainant holding Group III status in Local 134, Bottlers and Drivers Union, urged as part of his request for relief that a minimum figure should be established as to the number of Negroes to be given Group III status. The investigating commissioner stated, "Finally, I think it worthwhile to note for the record that I explicitly reject complainant's argument . . . that a minimum figure should be established as to the number of Negroes to be given status in the industry. This Commission has been consistently opposed to a quota, both as a matter of law and as a matter of policy. Quota may establish an apparent immediate objective; they almost invariably result in a long term loss so far as the purposes of the Law Against Discrimination are concerned. The history of so-called minimums becoming maximums is far too persuasive to be overlooked."

ments frequently advanced by employers. Two types—one for the benefit of employers, the other allegedly for the benefit of the discriminated party—have been before the New York Commission. With regard to the former, employers who have had unsatisfactory past experience with a member of the applicant's racial or religious group, have concluded that other members of this group will similarly prove unsatisfactory. Employers also commonly believe that the hiring of a member of a religious or racial minority would unnecessarily expose him to the usually encountered discriminatory expressions from other employees.

The New York Commission has pointed out, first, that every applicant is entitled to, and guaranteed under the law, consideration for employment based upon his particular experience and qualifications only;[138] and, secondly, that every employee is guaranteed the right to perform his duties in accordance with his ability under conditions which permit him to maintain a sense of self-respect without being subject to any acts, words or expressions by either employer or fellow employees which are derogatory of the racial, religious or national origin group to which he belongs.[139] Further, an employer, when informed of a personality or other conflict between an employee and supervisor or another employee which is based upon discriminatory attitudes prejudicing him in his conditions or privileges of employment, has a *positive responsibility* to take action to deal effectively with such a situation. This includes, if necessary, restoration to the offended employee of the proper conditions and privileges of employment.[140]

---

138. N.Y. SCAD, 1952 REP. PROG. 33. (Matter of Julie Jacobs, Inc.).

139. *Ibid.* In *Salston v. Previews, Inc.*, the Commission, in rejecting this argument, said, "Members of groups historically discriminated against are aware when they go into situations where they will meet people of groups other than their own that they will suffer embarrassment from those who practice un-American and discriminatory habits of speech. Nevertheless, they must earn their living and, therefore, have tried to build a support to their sensitivities which would ease such hurt. . . . An employer must not let his consideration of an applicant be altered because of the possibility that the position might put applicant in a situation where discriminatory remarks might be heard."

140. N.Y. SCAD, 1953 REP. PROG. 29. In *Sawyer v. Zita, Inc.*, the Commission said: "Under the Law Against Discrimination, it is the duty of an employer to prevent employees from creating a situation which militates against the proper conditions, privileges and terms of any other employee's employment. This means simply that, if a group of employees should by their actions and words offend another employee because of his race, creed, color or national origin, then it becomes the obligation of the employer, upon being advised thereof, to take immediate action to restore to the offended employee the proper conditions and privileges of his employment." N.Y. SCAD, 1954 REP. PROG. 23. In *Phillips v. National Broadcasting Co.*, the investigating commissioner said: "Name calling which might seem innocent under certain circumstances —in one's family group, where people are aware of close ties—is not permissible in work situations where it might evidence discrimination. . . . It is an employer's responsibility to make certain that those who work for him treat fairly their fellow workers and

Perhaps no more fundamental an area of protection under the Laws Against Discrimination exists than that of freedom from religious discrimination in employment. While conceding that employers may not, under the clear terms of the statute, discharge employees because of religious beliefs, affiliations or observances, New York places a reciprocal responsibility upon employees as well—that is to refrain from abusing this right under working conditions. Thus, a New York Commission ruling held that a continuous carrying on of religious propaganda to the annoyance of an employer's customers, especially on the situs of employment and during prescribed working hours, constituted a lawful basis for discharge.[141] Further, the same Commission has ruled that, while all persons are free to observe their religion in accordance with their conscience,[142] employers cannot be expected to accept the imposition of unusual hardships occasioned by individualistic practices which deviate widely from those customarily observed by persons of the same faith.[143]

Another basic area of protection has been in regard to private agreements, including collective bargaining and arbitration agreements, which have the effect directly or indirectly of preventing individuals from appealing to the law.[144] Commissions have had occasion to reject the validity of an arbitration agreement which had such an effect. Illustrative is the New York Commission's recent concern over the so-called Jensen Arbitration award, negotiated between the Interna-

that evaluations be made on fair records, kept without discriminatory factors influencing the judgment they reflect."

141. N.Y. SCAD, 1951 Rep. Prog. 41. (Sciuto v. Bankers Trust Co.). In this case it was said by the Commission, "Under the Law, an employee may not be discharged because of his religious belief or affiliation, but an employer retains the right to discontinue the services of an employee if he carries on any propaganda, religious or otherwise, to the annoyance of his fellow employees, or tenants in a building owned by the employer, in which employee is working, especially if such acts are committed during working time."

142. N.Y. SCAD, 1953 Rep. Prog. 27. (Bornstein v. Buying & Research Syndicate, Inc.). It is never material that the employee does not in fact, religiously observe.

143. N.Y. SCAD, 1955 Rep. Prog. 33. (Feuer v. United Press Ass'n Newspictures Bureau). N.Y. SCAD, 1960 Rep. Prog. 113. (Turpin v. New York City Transit Authority). In cases where time off for religious observances is challenged in New York, the controlling consideration has been whether or not the absence of the employee would interfere with the orderly and normal operation of the employer's business. Where to permit time off would not impose a great hardship on both employer and co-employees, it is unlawful to refuse time off. For a fuller statement, see N.Y. SCAD, 1955 Rep. Prog. 33.

144. Similar protection has arisen under federal legislation. See Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944), where the Court held that the Railway Labor Act imposes on a labor organization the duty to represent all the employees in the craft without discrimination because of their race; and Hughes Tool Co., 1964 CCH NLRB 13,250, where the NLRB unanimously held that refusal by a local union to investigate or consider a grievance filed by a Negro employee for reasons of race amounted to illegal restraint and coercion of the employee in the exercise of his statutory rights under the NLRA.

tional Longshoremen's Association and New York Shippers' Association, which fixed seniority and priorities for employment on the New York waterfront. The Commission recognized the beneficial effect that the award had for those Negroes who were presently secured in status on the waterfront by putting them in a position where they would likely receive a reasonable degree of employment. But it also declared that general patterns of negro discrimination, present or future, were not frozen by the award, and that such an award or any subsequent agreement could not "limit, affect, or alter in any manner the right of an individual to seek redress before this commission for the infringement or denial of any right granted to such individual by the Law Against Discrimination."[145]

Rulings and statutory exemptions affecting job performance in addition to pension or retirement plans or systems have widened the area of permissive employer conduct in age discrimination.[146]

While no employer need hire an applicant who is physically unable to perform his duties, pre-employment examinations concerning minimum physical standards are required to be reasonably related to job performance and uniformly applied to all applicants for the particular job category.[147] Further, an employer may also terminate employment

145. N.Y. SCAD, 1959 REP. PROG. 30 ("Jenson Agreement"). See also N.Y. SCAD, 1950 REP. PROG. 42. (Brandt v. Manny Wolf's Forty-Ninth St. Chop House). A reprisal against an employee who seeks redress under the Law Against Discrimination rather than the machinery of arbitration is unlawful in New York. N.Y. SCAD, 1952 REP. PROG. 46. (Eisenstein v. W. R. Grace & Co.). The commission has, by analogy to "arbitration of grievances" clauses in collective bargaining agreements, concluded that a money settlement accompanied by a general release constitutes a private agreement between private parties, which is ineffective to oust the commission of jurisdiction. The rationale is that any private agreement cannot oust a state agency constituted by the legislature as an expert body and empowered by it to carry out a particular function for the public welfare.

146. Statutory exemptions for inability to physically perform only are found in a number of jurisdictions. See N.Y. EXECUTIVE LAW § 296 3-a(c) (Supp. 1964); ORE. REV. STAT. § 659.026(1) (1963); WIS. STAT. ANN. § 111.32(3)(c) (Supp. 1965). The intra-agency commissions of Wisconsin and Oregon are singular in their statutory age exemptions. Wisconsin's statute, apart from the usual provisions granting an exemption for retirement plans or systems and the inability to perform physically or the need for education or experience, contains an explicit age exemption where age distinctions must reasonably be expected to assist in the development of persons for future supervisory, managerial, professional or executive positions. WIS. STAT. ANN. § 111.32(3)(c) (Supp. 1965). Also, under the same statute, age exemptions apply to hazardous occupations, including law enforcement and fire fighting. Oregon's statute, while providing for exemptions for physical inability to perform, and the need for experience or education, contains no provision for exemptions on the basis of retirement plans or systems. However, it does contain the unique exemption for public employees. In addition, certain exempt categories are provided, including state police officers, employees of the Oregon Liquor Authority, employees of the State Department of Agriculture, sheriffs, police chiefs and policemen, fire chiefs and firemen, and weight masters employed by the State Higbway Department.

147. N.Y. SCAD, REGULATIONS FOR APPLYING AGE DISCRIMINATION LAW § F.

should the person be physically unable to perform his duties, but such inability is required to be substantial and of a non-temporary nature.[148] Clearly, the above basis for hire or discharge is not predicated on age as such.

Some commissions have viewed the inability to perform adequately because of the physical changes associated with the age of employees as necessitating a qualified application of the above rule regarding termination of employment. Thus, in New York, should an employer establish a policy of terminating the employment of every employee in a routine job upon his reaching a specified age, predicated on the belief that employees reaching that age are usually unable to perform the duties of the job in question, such a policy would be unlawful unless he can show that his belief has a *substantial basis in fact* and that it is not *practicable* to examine each individual employee's physical qualifications.[149] New York has enlarged upon this exception. Where employment is in a highly specialized occupational category, and demands a high level of physical ability and coordination, it is not necessary for the employer to show that it is impractical for him to pass upon the physical merits of each employee. He need only establish the *specialized character* of the job category and the "reasonableness" of the compulsory termination. Typical are airline employers who require the automatic termination of employment of pilots at age sixty without reference to individual physical conditions.[150]

Several fair employment practices statutes prohibiting age discrimination contain explicit provisions exempting the termination of employment because of age from constituting an unlawful employment practice when such termination is compulsory under the terms or conditions of a bona fide retirement or pension plan, or system.[151] Connecticut's statute, in addition, has provided an age exemption when contained in a collective bargaining agreement between an employer and a bona fide labor organization.[152]

New York has provided some rulings which illuminate the law in this area. The New York Commission has ruled that a retirement age specification which is within the statutory age group shall be lawful when it is part of a bona fide retirement policy, plan or system established prior to July 1, 1958, and contains retirement benefits.[153] The Commission, in interpreting the bona fides of these systems, plans

148. *Id.* § G, ex. 2.
149. *Id.* § G, ex. 3.
150. *Id.* § G, ex. 4.
151. CONN. GEN. STAT. REV. § 31-126(1) (Supp. 1963); PA. STAT. ANN. tit. 43, § 955(a)(1)(1964); WIS. STAT. ANN. § 111.32(5(e) (Supp. 1965).
152. CONN. GEN. STAT. REV. § 31-126(1) (Supp. 1963).
153. N.Y. SCAD, REGULATIONS FOR APPLYING AGE DISCRIMINATION LAW § H(a).

or policies, has looked to such elements as effectiveness of communication to employees, uniformity of application, and substantiality of time prior to the effective date of the age provision in which compulsory retirement and payment of benefits have become operative. In cases where the system, plan or policy was established after June 30, 1958, the employer will be called upon to demonstrate the reasonableness of the specified compulsory retirement age in relation to his over-all employment policy as well as to the particular occupational category to which it is made applicable.[154] Where a system, plan or policy fails to contain employee benefits, then it will be subject to the most extensive scrutiny of such relevant criteria as the date of the establishment of the system, plan or policy, the history of its administration, and the effectiveness of its communication to all employees, in addition to the requirements under systems, plans or policies containing benefits but established subsequent to June 30, 1958.[155]

Commissions have also been confronted with policy decisions which admit of no easy solution. While it is clearly discriminatory for the same employer to pay a lesser salary to one racial group of employees than to another for identical services, would it be unlawful for an employer to discriminatorily refuse to hire a Negro for one position while employing him for another with higher pay and prestige? A technical interpretation would support the view that inasmuch as discrimination did in fact take place, the statute would be violated although no economic loss ensued.

Fair employment practices statutes prohibit discrimination in labor organizations. Discriminatory exclusion or expulsion of individual applicants, loss of conditions and privileges and unequal treatment of members are prohibited. In New York, express protection from discrimination is given by the union to employers and individual employees.[156] Provisions in union constitutions, by-laws, ritualistic practices, informal rules and the like, which exclude any person from membership on the grounds prohibited in the statute are unlawful, and commissions have requested that such documents be revised to eliminate such provisions.[157] Neither may unions arbitrarily confine the consideration of any application to a local union of which the majority of members are of the applicant's race or national origin, the so-called segregated lodges or auxiliaries.[158]

Under the New York statute, it is unlawful: "For an employer or em-

---

154. *Id.* § H(b).
155. *Id.* § H(c).
156. It is unlawful "for a labor organization . . . to discriminate in any way against any of its members or against any employer or any individual employed by an employer." N.Y. EXECUTIVE LAW § 296(1)(b) (Supp. 1964).
157. N.Y. SCAD, 1945 ANN. REP. 56.
158. N.Y. SCAD, 1948 REP. PROG. 46.

ployment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication . . . which expresses, directly or indirectly, any limitation, specification or discrimination. . . ." based upon the prohibited grounds of the statute.[159] All fair employment practices statutes except those of Alaska and Illinois similarly provide that discriminatory publications constitute an unlawful employment practice. Wisconsin, as does New York, includes "licensing agencies" in addition to employers and employment agencies in age discrimination, but, apart from age discrimination, Wisconsin provides no protection against unlawful advertisement.[160] While Pennsylvania does not prohibit licensing agencies from discriminating as to age, Washington's statute does so provide. Rhode Island expressly prohibits age discrimination by labor unions, in addition to employers and employment agencies.[161] We may note that Pennsylvania and Rhode Island have both particularized and expanded the term "employment agency" by including the phrase "and other employee referring sources." They sought thereby to avoid any doubt as to statutory coverage in this area of unlawful practices. New York and states having similar statutes accomplish the same result by statutory interpretation.

Most discriminatory advertisements are obvious. Thus, those which specify "Christian," "Chinese help," "select Southern help," "Italian cook," are clearly unlawful. At the other extreme, the insertion of an ad which reaffirms the law is lawful. Thus such ads as "interested solely in qualification without regard to race or religion" are clearly acceptable.[162] Other phraseology such as "you are eligible whether white or colored,"[163] and "Christian-Jewish firm wanted . . ." present more difficult problems. The New York Commission has found such phraseology objectionable and has recommended instead the description "Help wanted—non-discriminatory."[164]

Discriminatory advertising directed in favor of out of town college and university applicants against those who are members of minority group schools in the large metropolitan cities and private educational institutions has been of particular concern to New York and other highly industralized Northern and Midwestern states. The New York Commission has fully examined such specifications as "OOT COLL," "OOT COLL GRAD" and the like, and has ruled such

159. N.Y. Executive Law § 296 1(c) (Supp. 1964).
160. Wis. Stat. Ann. § 111.32 (Supp. 1965).
161. R.I. Gen. Laws Ann. § 28-5-7(C) (1957).
162. Pa. FEPA, 1958 Interp. Rul. 13.
163. The phrase "white or colored" is particularly objectionable as it militates against the coucepts of group homogeniety.
164. N.Y. SCAD, 1950 Rep. Prog. 40.

specifications to be unlawful. It has concluded that employers and employment agencies inserting these ads seek to limit the job opportunities for young people of Jewish, Negro, Catholic and foreign extraction who happen to be more numerous in New York City than elsewhere. Such ads imply, in the view of the commission, that there is some peculiar defect common to people who attend city colleges and other schools in New York City. Employers have unsuccessfully contended that there is no intent to discriminate and have advanced the argument that such specifications constitute a bona fide occupational qualification predicated on the principle that, although academic training is essential, other background such as that acquired from scholastic association through student living outside the direct orbit of parental supervision and the broadening contacts made away from the subway are an asset in any national or international business.[165]

A version similar to the out of town college specifications is a New York help wanted advertisement reading "Trainee (3) 20-26, merchandising career; no Met. N.Y.C. born, relocate; open." Here too, employers have sought unsuccessfully to show that persons educated in the metropolitan colleges do not care for the small city or town life which employment as trainees often entails. They soon become dissatisfied and ultimately resign, with the resultant loss to the company of the expense involved in lengthy training programs. Further, experience has shown that individuals who have been brought up in New York City and have never lived in rural communities are less willing to accept outside employment than those who, even for a short time during their college careers, have lived out af town. In rejecting these claims, the New York Commission considered the intended purpose of such specifications and has drawn unfavorable inferences. It has pointed out that there are a great many individuals who go to college outside of the city who do not live near the places where colleges are located, and who might have homes in New York City.[166]

"Ivy League" advertisements, although not presenting the same basis for rejection as the out of town college cases, have been found objectionable in New York, although at present, the Commission has not ruled them to be unlawful on their face. Nevertheless, in view of the questionable character of such advertising, New York has sought voluntary elimination.[167]

A problem not at all solved relates to the use by advertising agencies of names which in themselves connote both to applicants for employ-

165. N.Y. SCAD, 1950 REP. PROG. 40. (Matter of Tobison Employment Agency).
166. *Ibid.* (Matter of Ross Employment Agency).
167. N.Y. SCAD, 1959 REP. PROG. 34.

ment and to prospective customers that the agency accepts registration and makes referrals on the basis of the discriminatory grounds of the statute. Commissions, in the absence of a licensing requirement, have not sought to require the changes of any existing names, since they recognize that a name itself may be a valuable asset if the agency has legitimately established good will under its use. The New York Commission may now require under an express licensing provision that, when the use of such an agency name is employed, a parenthetical clause in the advertising copy be added negating the discriminatory implication in the name itself.[168]

All fair employment practices statutes except that of Alaska specifically prohibit discriminatory pre-employment inquiries. In New York it is unlawful for any employer or employment agency,

> to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination . . . or any intent to make any such limitation, specification or discrimination, nnless based upon a bona fide occupational qualification.[169]

Other statutes include the same provision.[170] Pennsylvania, Ohio, Michigan, Minnesota, and Rhode Island prohibit discriminatory inquiries by labor organizations, as well as by employers and employment agencies. Connecticut and Illinois, in sharp contrast to the pattern, limit such provisions to employment agencies only.[171]

New York and Washington include licensing agencies in the area of age discrimination. Wisconsin, following the pattern in the area of unlawful advertisement, includes employers, employment agencies and licensing agencies, but the provision is applicable to age discrimination only. Oregon, however, provides no protection in the area of age discrimination.

The intent to discriminate is not an essential of this prohibition. Consistent with statutory language, commissions have ruled that the mere giving of a discriminatory application form or the making of a discriminatory inquiry is sufficient, and the element of good faith is immaterial.[172]

---

168. Newly licensed employment agencies must omit the use of a discriminatory name, by statute. N.Y. Gen. Bus. Law § 174.

169. N.Y. Executive Law § 296(3).

170. Cal. Labor Code § 1420; N.M. Stat. Ann. § 59-4-(C) (1953).

171. Conn. Gen. Stat. Rev. § 31-126(b) (1961); Ill. Ann. Stat. ch. 48, § 853(b) (Smith-Hurd 1964); Mich. Stat. Ann. § 17.458(3)(b) (1960)); Minn. Stat. Ann. § 363.03 (1957); Ohio Rev. Code Ann. § 4112.02 (Baldwin 1964); Pa. Stat. Ann. tit. 43, § 955(b)(2) (1964); R.I. Gen. Laws Ann. § 385-7 (1957).

172. N.Y. SCAD, 1948 Rep. Proc. 55. However, in informal proceedings, the New York Commission considers and gives due weight to the good faith of a respondent, particularly in determining the nature and extent of any affirmative action which may

The prohibition applies to oral and written inquiries prior to employment. After an applicant is hired, inquiries made concerning race, religion, ancestry or age will become, under the statute, the basis for a compliant under the provision prohibiting discrimination in the course of employment.[173] It is interesting to note in this regard that the New York Commission has ruled that it is unlawful to engage in a discriminatory inquiry in connection with upgrading in employment. The rationale is that the higher position sought by an employee constitutes in relation to the position presently held, prospective employment.[174]

This unlawful employment provision prohibits direct and indirect discriminatory inquiries. A direct inquiry is a question which on its face discloses the applicant's race, religion, ancestral background or age; an indirect one, on the other hand, is a question, the answer to which will probably disclose the applicant's race, religion, ancestry or age.[175] It is in respect to the latter that important problems are faced, since indirect questions could be both legitimate and discriminatory in purpose. Commissions must establish limits to which they will extend inquiries which indirectly express a limitation, specification or discrimination. The New York Commission's approach to this problem has been to consider each inquiry as it has presented itself and to reach a decision by comparing the inquiry with rulings previously made. The commission then proceeds to follow the general test as to whether or not the answer will probably disclose the applicant's race, religion, national origin or age. In applying the test of "probability" of disclosure, the commission considers the factors of *materiality* and *necessity* of inquiry to *identification, investigation* and *evaluation* of the applicant. This reflects the principal objective of the statute not to absolutely preclude disclosure.[176]

As an illustration of the problem, the New York Commission has had to pass on union application forms which include questions of national origin for administrative reasons, or require photographs to be attached for purposes of preventing fraud. The Commission has ruled that, although bona fide, such queries may be considered as evidence of intent to bar applicants from membership, and it is incumbent upon the unions to revise or otherwise change such material.

The Commission has sought, in accordance with its general policy,

---

be required to achieve compliance. N.Y. SCAD, RULINGS ON PRE-EMPLOYMENT INQUIRIES 1 (January 1, 1961).

173. *Id.* at 66.

174. N.Y. SCAD, 1950 REP. PROG. 44. (Backus v. Brooklyn Public Library).

175. RULINGS ON PRE-EMPLOYMENT INQUIRIES, *supra* note 172, at 6.

176. N.Y. SCAD, 1948 REP. PROG. 56.

to assist unions in adapting to the law. Thus, where a membership application form contained the query "English-Italian" in the upper right corner so as to enable the union to ascertain whether the prospective member wished to have notices sent to him in English or Italian, the Commission requested that this question be deleted and the following inquiry on the reverse side of the form substituted: "Do you prefer to receive notices of meetings, or other notices, written in the English or Italian language?"[177] In those cases where photographs were requested with membership application forms so as to check the growing evil whereby members lend cards to friends to enable them to obtain temporary work, the Commission has requested that photographs not be affixed to application forms themselves, but that photographs be submitted independently of the application, and that the membership committee not see them while they determine the question of membership.[178]

A general problem which has not been entirely solved is that which results from the awkward necessity facing some employers to choose between conflicting orders of different governmental agencies with respect to particular pre-employment inquiries. Some commissions, such as New York's, have ruled that whenever an employer can show that he is following a particular course of action in connection with a pre-employment inquiry pursuant to a governmental agency having jurisdiction, the commission will view this agency as the responsible party and, if action is appropriate, deal with such agency directly.[179]

Many commissions have used their regulatory power to publish lists of permitted and prohibited pre-employment inquiries. These commissions have taken considerable pain in doing so on the theory that the most desirable approach with regard to this prohibited area is merely to admonish. The rulings are designed to be recurrent reminders of the present state of the law. Some commissions, including New York's, in their interpretation of pre-employment inquiries, have not only declared particular inquiries to be unlawful, but in many instances have consulted with employers and employment agencies as to the purpose of the inquiry and the reason for the desired information. They have then undertaken to suggest substitute inquiries which are not unlawful, but which accomplish the same result.[180]

177. N.Y. SCAD, 1950 REP. PROG. 39. (Raglund v. O'Dowd & Kelvin Eng'r Co.).

178. *Id.* at 48-49.

179. N.Y. SCAD, 1949 REP. PROG. 39.

180. Bamberger & Lewin, *The Right to Equal Treatment: Administrative Enforcement of Anti-Discrimination Legislation*, 74 HARV. L. REV. 526, 559 (1961). Criticism has been directed toward the excessive compiling of these lists and in discussing individual injuries or advertisements in the light of the fact that recalcitrant employers and advertisers may be artful in inventing new phraseology.

In its published rulings, the Commission has taken the position that inquiries listed as lawful may be used without question, but if any inquiry is used which is listed as unlawful, the Commission will question such usage and request its discontinuance unless there is factual support that it is not discriminatory in nature, or, if discriminatory, that it is exempted on the basis of a bona fide occupational qualification. Factual support in the form of new facts relating to a particular inquiry previously ruled unlawful may result in a modification or withdrawal of it.[181]

Although commissions view the violation of published lists as prima facie illegal, that is, not necessitating a showing that information obtained by asking questions which are forbidden has actually been utilized in the course of hiring a job applicant, they are not deemed conclusive. The published rulings are made on the basis of findings which have been made by the commission. They are to be considered only as presumptions in the preliminary stage of the quasi-judicial procedure provided by the statute. The statute provides full opportunity, including a public hearing with all elements required to constitute due process, to challenge any ruling. Under the statutory procedure, therefore, the application of any pre-employment ruling will ultimately be decided with reference to the facts of the particular case.[182]

Statutory prohibitions against making discriminatory pre-employment inquiries are subject to one exemption—inquiries based upon a bona fide occupational qualification upon which a certificate of "qualification" may issue.[183] In deciding what constitutes a "qualification," commissions are faced with problems that are often as delicate as they are important.[184] In New York this was early recognized at the public hearings before the Temporary Commission, where witnesses alluded to this exemption as a possible "loophole"[185] which employers could use to escape from their statutory obligations. Charles Tuttle, counsel for the Commission and principal draftsman of the law, pointed out that the exemption would be granted only on clear proof of a good faith relationship between the "qualification" applied for and the nature of the employer's business.[186] Subsequently, the Commission ruled that the "qualification" must be material to

181. N.Y. SCAD, 1951 REP. PROG. 47-48.

182. N.Y. SCAD, 1953 REP. PROG. 7.

183. N.Y. EXECUTIVE LAW § 296(1)(c) (Supp. 1964).

184. *Supra* note 180, at 560.

185. I SCAD, PUBLIC HEARINGS 350 (1944); II SCAD, PUBLIC HEARINGS 669, 690, 946 (1944).

186. I SCAD, PUBLIC HEARINGS 350 (1944).

job performance.[187] This concept of materiality has been given a broad construction so as to include factors both intrinsic and extrinsic to work performance.

Whether intrinsic or extrinsic factors will be used to determine materiality in cases involving racial, religious or ancestral discrimination has been an issue of particular controversy. This controversy arises because decisions based on extrinsic factors involve a policy determination. Thus, in New York, neither traditional practices, the preferences of customers, employers and employees to deal or work with persons of a particular race, creed or national origin, would justify the issuance of a "qualification" based thereon.[188] These qualifications bear no relation to factors intrinsic to work performance—the standard of materiality applied in these cases.[189] For policy reasons, however, the Minnesota Commission has held otherwise. It has ruled that an employer has a right to create various types of atmosphere and determine the style of decor in their places of business so long as they do not use this as an intentional device for excluding persons of different racial or religious backgrounds.[190]

Where the issue is not whether intrinsic factors should be applied, but whether there is a sufficient correlation between the "intrinsic" qualification sought and the requirements of work performance, the issue becomes merely one of fact. Thus, the New York Commission has allowed a religious "qualification" for the employment of non-Jews in an Orthodox Jewish hotel because under the Jewish Orthodox faith Jews are not permitted to work as bell-hops on the Sabbath.[191] Also, under Jewish Orthodox law, the maker of Kosher wine is required both to offer prayer at its pouring and to be orthodox in its handling.[192]

Cases in which the correlation between the "qualification" and job performance has been remote, necessitating a denial of "qualification," similarly involve a factual determination. Thus, the New York Commission has denied "qualification" both on the remoteness of the

187. N.Y. SCAD, 1946 Rep. Prog. 18; N.Y. SCAD, 1948 Rep. Prog. 61; N.Y. SCAD, 1952 Rep. Prog. 36.

188. N.Y. SCAD, 1950 Rep. Prog. 47.

189. N.Y. SCAD, Rulings on Pre-Employment Inquiries 7 (January 1, 1961).

190. Minn. FEPC, 1958 Ann. Rep. 6; N.Y. SCAD, 1955 Rep. Prog. 36. *But see* Hinds v. Walter Lindecke. There the New York commission found that the complainant was refused admission to the respondent's establishment because of his color, but that the motivation thereof was a fear of resentment on the part of white patrons, with a consequent loss of business. In this connection, the respondent was advised that even in the remote contingency that the admission of Negroes constituted a business risk, it was a risk the respondent had to assume.

191. N.Y. SCAD, 1960 Rep. Prog. 118. (Leo Gartenberg and Jacob Schechter).

192. N.Y. SCAD, 1960 Rep. Prog. 119. (Ganeles-Lenger Wine Corp.).

correlation between racial background and public opinion on the subject of liquor preferences or the ability to function successfully as a social worker.[193]

New York for over a decade has been plagued with the question of whether employers or their agents should be allowed to elicit information concerning an applicant's religion and his preferences of a foreign country for work location, when the furnishing of such information is purported to serve the interests of American international relations. In *American Jewish Congress v. Carter*,[194] the New York Court of Appeals held that an employer or agent is not entitled to a "qualification" based upon religion invoked by a foreign government. A brief review of the background of the commission's activities leading up to this case will prove instructive.

In 1947, the New York Commission granted a "qualification" to the J. Walter Thompson Company. The company had requested the qualification in connection with an advertisement which it sought to place in a New York newspaper on behalf of a New Zealand company seeking to recruit engineers and technicians for employment in New Zealand. Its job offer was restricted to British subjects. The Commission's grant of "qualification" went unchallenged.[195] In 1950, a complainant, Daytree, filed a complaint against the International Placement Agency and the American Arabian Oil Company, its principal, charging that the placement agency had been directed by the American Arabian Oil Company to ascertain applicants for employment in Saudi Arabia who were of the Jewish faith. Saudi Arabian policy was to refuse entrance visas to Jews. The Commission granted the respondents a "qualification" based on information from State Department officials that the exigencies of American foreign policy required that Saudi Arabia's preference be honored. The Commission, however, limited its grant to employment within the Arabian states.[196] We may note that the New Jersey Commission had previously granted a "qualification" in a related case.[197] Some two years later, a complaint was filed against American Arabian Oil Company charging color discrimination. In the course of the ensuing investigation, the

193. N.Y. SCAD, 1960 REP. PROG. 116-17. (Ingram v. Benton & Bowles, Inc.).

194. 9 N.Y.2d 223, 213 N.Y.S.2d 60 (1961).

195. N.Y. SCAD, 1959 REP. PROG. 82. No specific determination has as yet been made in the area of national origin, citizenship and age. See the J. Walter Thompson Co. case and the Aruba case. Place of birth and age requested by the Aruba government of all expatriate personnel to be employed in Aruba, Netherlands Antilles—granted by Commission Nov. 6, 1958.

196. N.Y. SCAD, 1950 REP. PROG. 47-48. (Daytree v. American Arabian Oil Co.); (Daytree v. International Placement Agency).

197. Appellant's Memorandum, p. 41, American-Jewish Congress v. Carter, *supra* note 194.

Commission had occasion to admonish the company against a policy of religious discrimination.[198]

In 1956, the American-Jewish Congress filed a complaint charging the American Arabian Oil Company on two counts—first, with refusing to hire persons of the Jewish faith, and second, directly questioning and attempting to solicit information on application forms as to whether applicants were Jews. The Congress sought to annul the determination as to the grant of the "qualification" and to have its charges credited. The investigating commissioner, adhering to the rationale and similar findings of fact of the 1950 determination, found for the respondent company. Upon appeal to the supreme court, the commission determination was reversed. Judge Epstein held that, as a matter of law, a bona fide occupational qualification did not apply where it failed to be intrinsic to job performance. In the case at hand, religious affiliation bore no intrinsic relation to the ability to engage in technical labor. He further held that extrinsic factors were not present for the qualification. Under established principles of constitutional law, in the absence of a conflicting treaty or federal statute, the public policy of New York State, as evidenced by the Law Against Discrimination, prevails over what may be deemed the economic and political interests of the United States. In addition, he held that the commission findings of the respondent company's lack of discrimination in domestic employment lacked a factual basis and was, therefore, arbitrary and capriciously determined.[199]

An important area where extrinsic factors have been deemed material in granting a qualification involving discrimination in national origin has been in connection with contracts affecting the national security. The New York Commission has ruled that where a federal agency, under appropriate regulations, requires an employer under contract with it to obtain specified information such as place of birth and citizenship, the required inquiries will be deemed to be based upon a "qualification." The Commission ordinarily suggests to the employer that he make an application to the Commission for a ruling that the inquiries required by the federal agency are based on a qualification. The Commission communicates with the agency confirming the necessity for such inquiry. Needless to say, in this area,

198. Shede v. American Arabian Oil Co., C-8717-52. Brief of Appellant, p. 10, American-Jewish Congress v. Carter, *supra* note 194.

199. American Jewish Congress v. American Arabian Oil Co., 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959), *modified*, 10 App. Div. 2d 833, 199 N.Y.S.2d 157 (1960), *aff'd*, 9 N.Y.2d 233, 173 N.E.2d 778 (1961). The case was unanimously affirmed by Appellate Division with the modification that the provision remitting the matter to the commission to be disposed of "in accordance with the memorandum opinion filed simultaneously" be struck. This modification was upheld and the appellate division was affirmed by the court of appeals.

the Commission, recognizing the importance of expeditious action, makes every effort to give prompt attention to such requests.[200]

Where the qualification sought has involved age rather than race, religion, creed, color or national origin, extrinsic factors more easily lend themselves to the materiality necessary for the "qualification."[201] Yet, even here, the terminology employed has often been less than totally precise. The New York regulations, for instance, permit consideration of age as a qualification when it is a bona fide factor "in connection with job performance,"[202] or "in an apprentice training or on-the-job training program of long duration,"[203] or "in fulfilling the provisions of other statutes."[204]

In addition to the New York rulings approving these qualifications, Pennsylvania and Connecticut have included in their statutes the right to predicate a "qualification" on the extrinsic age factor by providing that the unlawful employment practices sections are inapplicable to the terms and conditions of bona fide retirement, pension or employee group insurance plans.[205] New York's and Wisconsin's statutes refer to retirement policies or systems.[206] Connecticut's statute expressly includes bona fide apprenticeship plans or systems.[207] Inasmuch as pre-employment inquiry as to age on an application form is unlawful when made for the purpose of barring any individual

200. N.Y. SCAD, 1950 ANN. REP. 64-66. Note that the California statute specifically provides for exemptions for security reasons: "It shall be an unlawful employment practice, unless based upon . . . applicable security regulations established by the United States or the State of California." CAL. LABOR CODE § 1420. The employer in California, in seeking a qualification, must await a commission ruling; any earlier act, if in violation of the statute, will be held illegal, even if an exemption is subsequently granted.

201. There are generally more requests for determining bona fide qualifications for age than in any other area.

202. N.Y. SCAD, REGULATIONS FOR APPLYING AGE DISCRIMINATION LAW § D(1)(a). Jobs in airlines as pilots and stewardesses have been one of the first occupational areas in which exemptions were available. PA. FEPC, 1960 ANN. REP. 6. Pennsylvania allowed bona fide occupational qualifications because the rigorous training given stewardesses obviously could not be undertaken by women of age 40 or more. Statutes have also provided expressly for exemptions on the basis of physical ability to perform.

203. N.Y. SCAD, REGULATIONS FOR APPLYING AGE DISCRIMINATION LAW § D(1)(b).

204. *Id.* § D(1)(c).

205. PA. STAT. ANN. tit. 43, § 955(a)(1)-(3) (1964). See also CONN. GEN. STAT. REV. § 31-126 (1961), which provides "(2) operation of the terms or conditions of any bona fide retirement or pension plan, (3) operation of the terms or conditions of any bona fide group or employee insurance plan . . . ."

206. "[O]r to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purpose of this subdivision." N.Y. EXECUTIVE LAW § 396-3-a(c). "[N]or to affect any retirement policy or system of any employer where such policy or system is not a subterfuge to evade the purpose of this subsection." WIS. STAT. ANN. § 111.32(5)(c) (Supp. 1965).

207. "(4) operation of any bona fide apprenticeship system or plan." CONN. GEN. STAT. REV. § 31-126 (1961).

or otherwise discriminating against him in employment, the presence of maximum entrance age requirements necessitated by the terms of retirement or apprenticeship plans or systems must stand or fall on the validity of those plans or systems within the intended meaning of these exempt provisions. New York regulations with respect to the lawfulness of these plans or systems are instructive. Under those regulations, the existence of a provision in a retirement plan stating a maximum eligibility age for entrance into the plan is not a lawful basis for refusing an applicant for employment who is over the stated age, if the compulsory retirement age provision set forth in the plan could be made applicable to the employee without resulting in its disqualification under the Internal Revenue Code.[208] An employer, however, may advise an applicant that if he is over the maximum entrance age of a bona fide retirement plan, he will be accepted for employment, but that under the terms of the plan he may either be excluded or receive reduced benefits.[209] Costs of the retirement plan or system after a maximum age may be the basis for refusal in employment. In New York, the employer must demonstrate that the increased costs will be substantial enough to materially affect the terms or conditions of the plan. Such cases are examined and reviewed to determine any changes in circumstances.[210] Employers may vary insurance coverages (apparently under group policies) according to age.[211]

Commissions grant bona fide occupational qualifications upon the facts presented in each specific case, and refrain from general definitions. Thus, a request by a detective agency to have the New York Commission grant a blanket bona fide occupational qualification to all detective agencies in the state, authorizing them to honor discriminatory specifications of race or color as to investigators and guards, was denied. However, commissions will afford an employer in this regard the opportunity, by previous submission or upon investigation itself, to present reasons why an exemption should be made in the case of a particular agency based upon its own factual background and experience.[212]

In New York, typical of fair employment practices jurisdictions, the burden of proof as to the validity of a qualification is upon the employer, inasmuch as a bona fide occupational qualification is an

208. N.Y. SCAD, Regulations for Applying Age Discrimination Law § I, ex. 1.

209. *Id.* § I, ex. 2.

210. *Id.* § J.

211. *Id.* § K.

212. N.Y. SCAD, 1953 Rep. Prog. 31 (Campbell v. Wm. J. Burns Int'l Detective Agency).

exception to the general statutory prohibition.[213] In jurisdictions such as Pennsylvania, the ruling is reversed. There the commission has the burden of showing that the qualification when challenged is non-essential.[214]

It may be noted that New York does have two significant procedural distinctions with regard to the "qualification." First, contrary to prevailing commission practice, under its rules of procedure, the question of determining a qualification rests upon the non-reviewable discretion of its assigned investigating commissioner. He may request, however, the advice of the full commission prior to his determination.[215] Second, employment agencies have been privileged. As a general rule, an employment agency filling a job order containing an age specification will share responsibility with the employer unless a determination of "qualification" is made. In New York, the agency will not be held to have violated the law if the agency acted in good faith in seeking to comply with the law and, in addition, maintained written records available to the commission in regard to each job order which it seeks to fill upon the basis of a "qualification." Such records are required to include the names of the employers, job descriptions, and the basis for the claim of "qualification."[216]

The New York statute provides that it is an unlawful employment practice for,

> any employer, labor organization or employment agency to discharge, expel, or otherwise discriminate against any person because he has opposed the practices forbidden by this article (Law Against Discrimination) or because he has filed a complaint, testified or assisted in any proceeding under this article.[217]

All fair employment practices statutes have a comparable provision. Ohio, however, maximizes coverage by using the term "person" in lieu of "employer, labor organization or employment agency."[218] The "opposed to any practices" provision is primarily designed to free aggrieved persons from fear of reprisal for seeking recourse to the remedies afforded by the statute as complainants, and to encourage candor on the part of those participating as witnesses at pre-public and public hearings.[219] Relatively few cases of this nature have

213. Bamberger & Lewin, *supra* note 180, at 561.
214. *Ibid.*
215. N.Y. SCAD, R. PRAC. & PROC. 227.
216. N.Y. SCAD, REGULATIONS FOR APPLYING AGE DISCRIMINATION LAW § E.
217. N.Y. EXECUTIVE LAW § 296(1)(d).
218. OHIO REV. CODE ANN. § 4112.02(G) (Baldwin 1964). "[F]or any person to discriminate in any manner . . . against any other person."
219. N.Y. SCAD, 1954 REP. PROG. 30. We may note there is no implied intent to grant a complainant preferential treatment by virtue of his having filed a complaint with the Commission.

been presented to the commissions, however, and rulings are sparse. One New York case is interesting. Complainant was allegedly discharged because he filed a previous complaint against a respondent employer. The filing had the effect of apprising the employer of the complainant's unsatisfactory work performance, the prime factor leading to the discharge. The commission ruled that, although the filing was only indirectly responsible for the employee's discharge, it was one of the contributing causal factors in his discharge, and hence unlawful.[220]

The New York statute provides that it is unlawful "for any person to aid, abet, incite, compel or coerce the doing of [any] act . . . [prohibited by the] Statute, or to attempt to do so."[221] Almost all fair employment practices statutes contain a comparable "aiding and abetting" provision.[222] Some are more restrictive than the New York provision. Few cases in this category have confronted commissions, and few of these have justified findings of discriminatory intent.[223] More frequently, cases arise where this intent is absent, such as where employment agencies fail to refer prospective applicants to employers they suspect of discriminatory practices, wishing to spare them embarrassment, or where referrals are limited by these agencies on the assumption that the applicant would not be interested in applying for such positions. These cases have been held to constitute unlawful employment practices under the "aiding and abetting" provision. The Commission has ruled that agencies are required to advise the applicant of the names and addresses of such employers, leaving to them the decision as to whether the applicants are acceptable.[224] The New York Commission has gone further and ruled that merely inquiring as to employer's preference in terms of race, creed, color or national origin constitutes an unlawful act.[225]

---

220. N.Y. SCAD, 1949 Rep. Proc. 30-31. (Saunders v. Harbor Marine Constr. Corp.).

221. N.Y. Executive Law § 296(6).

222. Ore. Rev. Stat. § 659.030(5) (1963). Oregon's statute appears most restrictive by stating "for any person, whether an employer or an employee. . . ." The statutes of Pennsylvania and other states, however, use the phrase "For any person, whether or not an employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of an act declared by this action to be an unlawful discriminatory practice." Pa. Stat. Ann. tit. 43, § 955(e) (1964). N.M. Stat. Ann. § 59-4-4(E), contains the phrase "whether an employer or an employee or not . . ."

223. Typical of hostile cases is a situation where a lessee is ordered by a landlord to discharge an employee under threat of invoking a cancellation provision of the lease, should the lessee resist his demands. See, *e.g.*, N.Y. SCAD, 1959 Rep. Proc. 92-93. (Morehead v. World-Wide Transp. Desk, Inc.).

224. N.Y. SCAD, 1950 Rep. Proc. 43. (Matter of Nostrand Employment Agency).

225. N.Y. SCAD, 1954 Rep. Proc. 32. (Bower v. Ross).

## V. Procedural Problems

### A. *Complaint*

An action against a party alleged to have committed a discriminatory act must normally begin with the filing of a complaint. All fair employment practices statutes, other than that of Minnesota, expressly provide that the complaint must be verified; Minnesota simply requires that it be signed by the complainant or his authorized agent.[226]

The general rules of evidence are applicable to the verification of complaints. Thus, the New York Commission on Human Rights has ruled that a minor may file a verified complaint providing he understands the meaning of an oath.[227] Unverified statements by telephone or hearsay are uniformly rejected as a basis for a verified complaint under commission rule-making policies.[228]

All statutes permit a complaint to be brought by an "aggrieved person." Many, in addition, permit an attorney-at-law of any person claiming to be aggrieved to file; some provide that a state official, either the Attorney General or Labor Commissioner, may file on behalf of the people of the state.[229] Some states have permitted employers as "aggrieved persons" to file against employees who refuse to comply with the law.[230]

"Aggrieved person" includes all those persons who have been allegedly denied equal treatment. Does it include persons who have been the object of discrimination without having suffered an economic loss? Some commissions have held that it does. Thus, an employment agency with whom a discriminatory order is placed by an employer or placement interviewer is an "aggrieved person."[231]

226. Minn. Stat. Ann. § 363.06 (Supp. 1963).

227. N.Y. SCAD, 1951 Rep. Prog. 58 (Matter of Storer).

228. *Id.* at 33. (Bowman v. White Plains Greeting Card Corp.). As to unverified complaints in commission-instituted investigations, the New York Commission has ruled that such an investigation must be based upon credible information from responsible sources, accompanied by a reasonable amount of factual data. The Commission will not initiate an investigation based solely on hearsay, rumors, or gossip. We may note, however, that anonymous communications such as letters protesting discriminatory hiring practices of employers against whom a verified complaint is pending are informatively held by the New York Commission. The commission bears in mind, however, their anonymous character.

229. Kan. Gen. Stat. Ann. § 44-1005 (Supp. 1961) (the Attorney General). N.M. Stat. Ann. § 59-4-10(b) (1953) (the Attorney General or Industrial Commissioner). N.Y. Executive Law § 297(1) (the Attorney General or the Industrial Commissioner). N.J. Stat. Ann. § 18:25-13 (1964) (the Attorney Gencral or Commissioner of Labor). Pa. Stat. Ann. tit. 43, § 959 (1964) (the Attorney General).

230. N.Y. SCAD, 1950 Rep. Prog. 52. (Jaydean Restaurant v. Engel).

231. N.Y. SCAD, 1951 Rep. Prog. 14; N.Y. SCAD, 1949 Rep. Prog. 31-32. The New York Commission has ruled in the cases of *Quality Pearl Co.* and *Jones v. Tailored Woman, Inc.*, that an employment agency "is a person claiming to be aggrieved." Note, however, a placement interviewer, if held to be an independent contractor, can not bind the agency. Muechneck v. Position Securing Bureau, Inc., N.Y. SCAD, 1951 Rep. Prog. 43-44.

The statutes of Ohio and Rhode Island specifically permit interested private agencies to file complaints.[232] In New York, lacking such express authority, group filing is restricted by statutory construction to pre-employment inquiries and unlawful employment advertising.[233] In any event, policy favors this restriction because it is primarily in these types of cases that groups rather than individuals are aggrieved.

The practical question of whether a business or a trade organization can file a complaint against a competitor whose discriminatory practices may unduly affect its business operations under the theory of protecting group interests has not been presented before any commission regulating employment. The New York Commission, however, has had the opportunity to pass upon this question in regard to individual proprietors catering to the public who have sought relief because of incidental or indirect harm caused by a discriminating competitor. A New York City complainant, a barber, charged a competing barber with referring all his negro customers to him. He alleged the loss of white trade as a result. The New York Commission ruled that the complainant was not a "person aggrieved," inasmuch as he was not denied, nor had he even sought, service.[234] A similar case was investigated by the Colorado Commission. There a proprietor of a dance hall alleged loss of patronage owing to its practice of admitting patrons regardless of group identity, whereas a competing dance hall refused admittance to persons of Spanish ancestry.[235]

Test cases have been presented before some commissions. Individuals, prompted by some group interest or motivated by a sense of justice, who apply for a job, knowing that they probably will be refused, and having no intention of accepting a position if offered, have been held to be "aggrieved persons."[236] Some commissions,

232. Ohio Rev. Code Ann. §§ 4112.05(B), 4112.01(A) (Baldwin 1964), provides, "Whenever it is charged in writing and under oath by a person, referred to as the complainant." "Person includes . . . and other organized groups of persons." R.I. Gen. Laws Ann. § 28-5-17 (1956), provides "or an organization chartered for the purpose of combating discrimination or racism, or of safeguarding civil liberties, or of promoting full, free, or equal employment opportunities. . . ." See also R.I. Comm. Against Discrimination, Policies of Fair Employment Practices 3 (1949). The express provisions permit private agencies to file in the many categories of employment discrimination.

233. N.Y. SCAD, 1956 Rep. Proc. 27-29 (American Jewish Congress v. Hill); *id.* at 37-38 (Anti-Defamation League of B'nai B'rith v. American Veterinary Publications, Inc.) (*semble*). See also Mass. Comm. Against Discrimination, Policies 3 (1958). In Massachusetts, pre-employment inquiries are subject to attack only when employment has been refused in answer to them.

234. N.Y. SCAD, 1959 Ann. Rep. 94 (Barcia v. Armenio).

235. Colo. Anti-Discrimination Comm'n, 4th Annual Report 10 (1957-58). The Commission failed to find probable cause. No ruling on the issue of whether the complainant was an "aggrieved person" was made.

236. Note, 74 Harv. L. Rev. 526, 531 (1961). In an interesting housing complaint before the New York Commission, a Negro alleged that his efforts to apply for a house

however, such as Oregon's, have discouraged what they call "entrapment cases" although they have accepted such complaints.[237] Of course, those who apply for employment expecting to be refused but willing and able to accept such employment, if offered, are clearly "aggrieved."

Some commission rules provide for prepared forms upon which complaints or charges are to be written.[238] Others have no fixed forms for privately-initiated complaints. Prepared forms may serve to increase uniformity and to encourage factual detail, and, thus, are thought to be desirable.

The categories of information of a complaint are outlined in many of the rules of procedure, all of which require at least three elements: the full name and address of respondents, a concise statement of facts constituting the alleged unlawful practices, and the date or dates of the alleged unlawful act or acts.[239] While all statutes grant to an "aggrieved person" the absolute right to file a complaint and have it processed, the purpose of an interview is to help screen out those complaints, which are frivolous or manifestly not within the jurisdiction of the commission, and to permit the redrafting of complaints which are often in non-legal and ambiguous language. This procedure is intended to anticipate counteraction by the respondent, who may claim that the complaint's charge of discrimination is insufficient owing to its sparsity, vagueness, indebtedness, or speculative nature—defects which he may raise subsequently at a public hearing or in court on a motion to dismiss.[240]

in a project were frustrated by various excuses given by an agent. The respondents contended that complainant was not seriously interested in the project but wanted to make a "test case." A determination of probable cause was found and the terms of conciliation provided for commission supervision "in the event that complainant for any reason declines to accept a house as offered by respondent. . . ." Tapley v. Biljean Realty Corp., CH-5620-58. See also N.Y. SCAD, 1959 REP. PROG. 91-92.

237. Note, *supra* note 236, at 529.

238. N.Y. SCAD, R. PRAC. & PROO. § 2(h) (1953). See also N.Y. SCAD, 1948 REP. PROG. 14. Forms are available in New York. In Rhode Island, the commission form is optional. See R. of Prac. & Proc. Art. I, "Complaint," (July 27, 1949). Similarly, Rules & Regulations of the Ohio Civil Rights Commission and the Massachusetts Commission Rules of Procedure provide for prepared forms for commission-initiated actions. OHIO CIVIL RIGHTS COMM'N, R. & REG. II(9) (Aug. 31, 1960); MASS. COMM'N, RULES OF PROC. 1(b) (Jan. 6, 1961).

239. *E.g.*, N.Y. SCAD, R. PRAC. & PROC. § 2C (1953). OHIO CIVIL RIGHTS COMM'N, R. & REG. 4-5 (1960).

240. Typical is Pennsylvania—"Whenever practical, complainants will be asked to write out their complaints in their own words, with whatever assistance is needed from the interviewer to insure full details." PA. FEPC, INVESTIGATION PROCEDURES § 1A. However, Oregon insures that a complaint will be more accurate and detailed by first requiring that an investigation based upon the story of the aggrieved be made. Upon a finding of probable cause, a new petition is filed by the Administrator. ORE. BUREAU OF LABOR, CIVIL RIGHTS DIV., RULES OF ADMIN. PROC. 5 (1) (1959).

The redrafting of a complaint by commission attorneys, however, does not eliminate the problems associated with stating a cause of action. As was said by the New York Court of Appeals in *Holland v. Edwards*,[241]

> One intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which subtleties of conduct . . . play no small part.[242]

Recognizing this, the court rejected the alleged violator's contention that the inherent vagueness or subjectiveness of allegations justified a dismissal as a matter of law.

No other judicial determination on this precise point has been found. On the commission level, the case of *Cohen v. River Rouge Savings Bank*[243] is typical. There, the Michigan Commission addressed itself to the question of the propriety of including the complainant's subjective or speculative convictions of discrimination in a complaint. The Commission, recognizing the evidentiary difficulties inherent in discrimination cases, made this observation in response to a motion for dismissal on the grounds that the complaint contained, among other defects, speculative allegations.

> As to complainant's subjective belief of discrimination, people do not generally broadcast discriminatory acts but attempt to hide them under vague generalities so that most often discrimination can be felt only as a subjective belief, and it is this specific type of conduct the Fair Employment Practices Act was promulgated to eliminate.[244]

It may be noted that frequently through investigatory or conciliation meetings, quite apart from the complaint itself, the respondent is completely apprised of the facts and could not in good faith plead ignorance.

Some commissions, including that of New York, require a statement as to other actions, civil or criminal, instituted in any other forum, based on the same unlawful discriminatory act alleged in the complaint.[245] To allow the "aggrieved person" first to seek a court remedy and thereafter commence proceedings before the commission if not satisfied with the court's determination would encourage a multiplicity of suits, the attending disadvantages of which are considered deroga-

241. 307 N.Y. 38, 119 N.E.2d 581 (1954).
242. *Id.* at 45, 119 N.E.2d at 584.
243. Claim No. 1050 (Mich. FEPC 1961).
244. *Ibid.*
245. N.Y. SCAD, R. PRAC. & PROC. 2(c)(5) (1953).

tive of successful administration.[246] Conversely, to permit a complainant to commence a court action while proceedings are pending before the commission is deemed equally derogative of sound administration; thus, the commissions of New York, Pennsylvania, and other states preclude any other action or remedy on the same cause while the action is pending before the commission.[247] The complainant, however, has the opportunity of initiating an action for damages under the traditional civil rights statutes in a case pending before the New York Commission, provided the Commission should in its discretion permit withdrawal.[248] Further, in New York and other states, once an "aggrieved person" has resorted to the remedy provided by the Law Against Discrimination, and a final determination by the commission has been made, it is deemed exclusive.[249]

All commission rules provide that a complaint may be amended by the commission or complainant. Statutes vary in permitting amendment prior to hearing or issuance of notice of a hearing. Complainant may amend in New York[250] and in Massachusetts,[251] as of right prior to issuance of the notice of hearing. Thereafter, in New York complainant may amend at the discretion of the hearing commissioners,

---

246. The New York Commission has ruled, however, that in this area it will accept complaints previously brought before the court if such complaints were dismissed for lack of jurisdiction, on the theoretical grounds that the cause was never actually before the forum.

247. N.Y. EXECUTIVE LAW § 300. "The procedure, herein, while pending . . . exclusive." Also in Castle Hill Beach Club, Inc. v. Arbury, 208 Misc. 35, 144 N.Y.S.2d 747 (Sup. Ct. 1955), the court said: "We are, therefore, constrained to hold that whether the instant proceedings [before the commission] are to be deemed concluded or still pending when the complainant commenced her action in the Municipal Court [action to recover $500 for violation of sections 40-41 of the Civil Rights Law] presents no vital issue. In either situation, the commission would have sole jurisdiction and could not be ousted therefrom by the subsequent institution of the plenary action." *Id.* at 40, 144 N.Y.S.2d at 750.

The New York law further provides that "if such individual institutes any action based on such grievance without resorting to the procedure provided in the law, he may not subsequently resort to the procedure therein." This provision has been interpreted in the case of Rivera v. Seafarers' Int'l Union of North America, N.Y. SCAD, 1957 REP. PROG. 68-70. If the following situations are not present, the provision is not applicable: (1) The prior action is not an action under the Civil Rights Law or any law of the State relating to discrimination because of race, creed, color or national origin. (2) The complainant in the prior action did not proceed on the theory that the respondent had committed a wrong because of race, creed, color or national origin. (3) The decision of the court did not demonstrate that it considered and decided any issue of discrimination because of race, creed, color, or national origin.

248. N.Y. SCAD, B. PRAC. & PROC. 2(j) (1953).

249. N.Y. EXECUTIVE LAW § 300: "And the final determination therein shall exclude any action, civil or criminal, based upon the same grievance of the individual concerned."

250. N.Y. SCAD, R. PRAC. & PROC. 2(i) (1953). The amendment power was exercised in a New York case where twenty-one separate complaints were consolidated and amended. One charge of discrimination was deleted. Carey v. Hall, N.Y. SCAD, 1951 REP. PROG. 56.

251. MASS. COMM'N AGAINST DISCRIMINATION, R. PRAC. & PROC. 7 (1961).

while in Massachusetts, only the commissioners may amend.

In New York, adding a cause of aetion not enumerated in the original complaint prior to issuance of notice of a public hearing requires the exercise of commission discretion under proper circumstances.[252] A complainant, however, may as a matter of right amend his complaint prior to hearing by adding a party complainant or respondent.[253]

Provisions granting the right to withdraw range widely from a right to do so at any stage of the proceedings to that of requiring the consent of the commission. Thus, in some jurisdictions, a complaint, or any part of it, may be withdrawn by the complainant at any time.[254] In other jurisdictions, withdrawal is permitted prior to the issuance of a commission complaint or final disposition by conciliation;[255] still others are more restrictive, requiring that a withdrawal must be by consent of one or more investigating commissioners prior to notice of a public hearing, and thereafter, only by consent of the commissioners at the public hearing.[256] A few statutes permit a complaint to be withdrawn only by the commission in its discretion and under specified conditions.[257] The importance of requiring the consent of the investigating commissioner is obvious. Otherwise, the complainant would be subject to pressures from employers or unions, seeking to persuade him to discontinue proceedings, particularly when the hearing stage has been reached. To prevent a complainant from stifling commission action and to permit just causes to come to a satisfactory conclusion, most states require commission consent.[258]

---

252. Also, the New York Commission, upon an investigation of facts, may amend the complaint to conform to the facts adduced thereto, namely the status of respondent. N.Y. SCAD, 1950 Rep. Prog. 44 (Richardson v. Rae). The New York Commission has ruled that the statutory provision authorizing amendment of complaints vests the investigating commissioners with the discretion, under proper circumstances, to add a new cause of action not enumerated in the original complaint. N.Y. SCAD, 1958 Ann. Rep. 60.

253. N.Y. SCAD, 1948 Rep. Prog. 48-49 (amended by adding party respondent). SCAD, 1959 Rep. Prog. 77 (amended by adding party complainant).

254. *E.g.*, Pa. Human Rights Comm'n, Regulations 101.09 (1961).

255. Ohio Civil Rights Comm'n, R. & Reg. II(b) (1962).

256. *E.g.*, Mass. Comm'n Against Discrimination, R. Prac. & Proc. (f) (1961). In New York, the consent of two commissioners is required. N.Y. SCAD, R. Prac. & Proc. (j) (1961).

257. *E.g.*, Calif. FEPC, R. & Reg. 19002(f) (1961), 1. If the request is made before the application has been filed, 2. If after, consent of commission.

258. In a complaint charging respondent with discrimination due to color in the terms of employment, the complainant requested that her complaint be withdrawn because the employer promised equal treatment "in the future." The New York Commission found the charges with regard to the refusal to upgrade Negroes too important to dismiss and denied the request to withdraw. See also *Mann v. Beck*, where the commission would not withdraw on the basis of public policy. It may be noted that for commissions with power to initiate enforceable complaints, the problem of withdrawal

Some statutes authorize the commissions to initiate their own complaints with the same enforcing power as is provided in the statute for privately-initiated complaints.[259] These commissions follow the same general procedure used in private complaints, and the subject matter is similar to the latter as well. A commission-initiated investigation may, however, take the form of a survey covering a large range of operations rather than one particular incident. Statutes providing for such power reflect a legislative intent that the function of the commission be more than the adjudication of disputes between private parties. Under such statutes the commission is conceived as an aggressive public agency seeking to ferret out discriminatory practices, first by persuasion and ultimately by coercion.

It is interesting to note that some commissions which are authorized to initiate complaints have assumed the power to conduct formal investigations without the formality of a complaint, on the theory that such investigations are a necessary step in determining the facts upon which to file a formal commission complaint. Other commissions, faced with non-statutory power to formulate policies to effectuate the purposes of their statutes, developed procedures, based upon the device of the so-called unverified informal complaint, permitting them to investigate on their own motion.[260] No issue has arisen when the subject of such investigation was within commission jurisdiction. In the case of *Board of Higher Education v. Carter*,[261] however, the New York Commission, which lacks express statutory power to initiate formal complaints, was challenged in its right to continue an informal investigation of alleged discrimination in Queens College. The lower court held that the Commission lacked such power, as the Board was exempt under the statute. On appeal to the appellate division, the majority of the court held that the respondent could not be subject to the enforceable jurisdiction of the Commission since it was an "exempt employer" under the statute.[262] A secondary question, as to whether the New York Commission may conduct so-called informal investigations for the purpose of study and recommendation, without the receipt of a verified (formal) complaint, also was presented. The majority of the court, upon examining the provisions of the statute conferring general jurisdiction upon the Commission "to take other action against discrimination" wherever it existed, with the

loses its importance. N.Y. SCAD, 1960 REP. PROG. 126 (Spann v. Lansky Die Cutting Corp.).

259. CONN. GEN. STAT. REV. § 31-127; N.J. REV. STAT. § 18:25-14; PA. STAT. ANN. tit. 43, § 955; R.I. GEN. LAWS ANN. § 28-5.

260. N.Y. SCAD, 1958 REP. PROG. 13.

261. 26 Misc. 2d 989, 213 N.Y.S.2d 132, *modified*, 16 App. Div. 2d 443, 228 N.Y.S.2d 704, *modified*, 14 N.Y.2d 138, 250 N.Y.S.2d 33 (1964).

262. 16 App. Div. 2d at 445-46, 228 N.Y.S.2d at 705-07.

related powers enumerated in the statute, concluded that the Commission had a right to conduct such investigations, surveys, studies, reports and related activities in public education.[263] Judge Stever, dissenting, disagreed.[264] The Court of Appeals tacitly accepted the existence of such power, while overruling the appellate division on the exemption issue.

Apart from whether they are statutorily authorized to initiate their own complaints, some commissions, such as Colorado's, have employed these informal complaints sparingly on the theory that a better case can be presented by a verified complaint.[265] Others, such as Pennsylvania's, employ the informal procedure only upon technical violations, such as illegal newspaper advertisements or illegal application forms.[266] Still other commissions commence informal investigations only when a reputable agency or interest group requests that they do so, and only when they are furnished credible information that acts of discrimination have been committed. These latter commissions believe that informal investigations are more properly designed to ferret out industry-wide job discrimination with better long range results than formal investigation on a case by case basis. Thus, industry-wide surveys are highly favored for informal investigation.[267]

A few commissions make wide use of this procedure both in investigating particular cases and in investigations in the nature of a survey. New York has invoked its non-enforceable jurisdiction by informal complaint in instances where the subject matter of the investigation or the parties involved may be such that the Commission could in no event obtain enforceable jurisdiction. For example, when the parties involved in the intended investigation are exempt by express statutory exclusion or when the Commission is seeking a voluntary compliance, jurisdiction has been granted. Another result is dictated when investigation is instituted on the basis of information set forth in a verified complaint, which must be discussed on jurisdictional grounds. In these instances, the Commission has continued its investigation when the facts of discrimination warrant informal continuance. Similar cases arise when a respondent, excluded from the enforcement provision of the law, has affirmatively requested that the charge be disposed of on the merits and the Commission has proceeded informally. Complainants have also, on occasion, due to personal convenience or fear of reprisal, sought to have the Commission employ the informal

263. 16 App. Div. 2d at 446-47, 228 N.Y.S.2d at 707-08. See text accompanying notes 65-67 *supra*.

264. 16 App. Div 2d at 458-59, 228 N.Y.S.2d at 718-19.

265. Note, 74 Harv. L. Rev. 526, 530 (1961).

266. *Ibid.*

267. Mass. Comm'n Against Discrimination, 14th Ann. Rep. 5 (1959).

investigative apparatus rather than filing a formal complaint as a "person aggrieved." In any event, the efficacy of this procedure has been established.[268]

Illustrative of the successful use of informal investigation in an individual case is a much publicized case reported by the Massachusetts Commission, in which the NAACP and other organizations submitted a written request to the commission to investigate the employment policies of a local baseball club. The call for an investigation was precipitated by the dropping of a Negro player, Elijah "Pumpsie" Green, from the club prior to the end of spring training. The Commission, after obtaining information from these organizations concerning the club policies, met with the officials of the club in open session and announced its decision to investigate. A little over two months after the investigation commenced, the club arrived at a final agreement which, in effect, guaranteed a non-discriminatory policy in hiring and conditions of employment.[269]

Where statutory power resides with state officers such as the Industrial or Labor Commissioner or the Attorney General,[270] the commission may request such officers, if the facts warrant, to file a formal complaint. This obviates the necessity of relying upon their non-enforceable jurisdiction by informal complaint. To date, the success of the conciliation process has not required this procedure, and, except in New York, no public official has acted on his own initiative.[271]

Statutes vary widely with respect to the time of filing of complaints and to the statute of limitations.[272] California requires a complaint to be filed within one year of the alleged wrong,[273] whereas the New York statute provides only a ninety day period.[274] Some commissions, such as California's, permit an extension beyond the statute of limitation for an "aggrieved person" to obtain knowledge of the facts;[275]

---

268. *E.g.*, N.Y. SCAD, 1948 REP. PROG. 36-37.

269. *Supra* note 267, at 6.

270. See note 4 *supra* and authorities cited therein.

271. The Attorney General of New York, in 1960, exercised the power to file a complaint. N.Y. SCAD, 1960 REP. PROG. 125 (Lefkowitz v. Wells' Fargo Armored Service Corp.). We may note that an amendment to § 297 of the Law Against Discrimination has empowered the Attorney General to use subpoenas in connection with his filing of complaints with SCAD. Laws of 1960, ch. 978, effeetive April 28, 1960.

272. Illustrative of the range of periods of limitations are the following: Oregon, 2 years (the 2-year statute of limitations in tort applies); Colorado, 6 months; Counecticut, 90 days; Illinois, 120 days; Kansas, 6 months; Massachusetts, 6 months; Michigan, 90 days; Minnesota, 6 months; Rhode Island, 1 year.

273. Cal. Labor Code § 1422.

274. N.Y. SCAD, R. PRAC. & PROC. 2(i) (1953).

275. CAL. LABOR CODE § 1422. The period may not exceed 90 days after obtaining knowledge of the facts. CAL. FEPC, RULES AND REGULATIONS 19002(d) (1960).

others, such as New York's, make allowance for a discriminatory practice of a continuing nature by permitting filing at any time between the date of the first unlawful acts and the date of their termination.[276] It must be noted, however, that few complaints are filed after the limitation period.[277]

B. *Investigation*

After a complaint is filed, it is recorded and numbered. The proceedings of the larger independent commissions, such as New York's, require that the complaint be examined by the executive director or the equivalent chief administrative officer of the commission, who, as part of his supervisory responsibilities, has the duty of transmitting the complaint to the chairman or commission staff for subsequent assignment.[278]

As a preliminary step to assignment to an investigating commissioner, the chairman of the New York Commission examines each complaint to determine whether the Commission is without enforcement jurisdiction by reason of statutory exemptions or otherwise. If it appears that the Commission has no jurisdiction, the chairman or commissioner will dismiss. If there is reasonable doubt, the case may be referred for investigation to develop the facts.[279]

Investigation procedures among the commissions show little consideration for the rights of respondents, although in New York the investigating field representatives, as a first investigatory step after filing of the complaint, seek to obtain a personal interview with the respondent.[280] In general, respondents are often not apprised that they are under investigation until a field trip is made to their office or place of business, a practice convenient to the commission. Indeed, even misrepresentation has been employed. Thus, investigators for the Washington State Board Against Discrimination have on occasion misrepresented themselves as "state investigators," in order to keep respondents in the initial phase of an investigation from resisting the furnishing of information and full disclosure.[281]

In any event, an investigation of an unlawful employment practice may touch upon every phase in the respondent's employment setup. Thus, the methods of recruiting and usual sources of personnel, the

276. *Supra* note 272, 2(d).

277. In New York, a verified complaint must be filed within 90 days after the alleged act of discrimination. If a complaint is filed beyond the 90 days, the commission may retain jurisdiction if the statute of limitations is not pleaded as an affirmative defense (deemed waived). N.Y. SCAD, 1948 Rep. Proc. 50.

278. *Id.* at 12.

279. *Ibid.*

280. *Id.* at 13.

281. Note, *supra* note 265, at 534.

contents of employment application blanks, job specifications, procedures for hiring, promotion, wage scales, dismissal, and grievance machinery are usually scrutinized during the course of an investigation. The extent and depth of the agency investigation of a respondent will depend largely upon the cooperation of the respondent and the source out of which the complaint has arisen. On the latter point, the commissions may more readily deal with it by telephone or letter. On the other hand, alleged discrimination in hiring or promotion, where there is conflict as to what was said or done, requires more extensive investigation and factual analysis. Such an investigation may quite often go beyond the question of the respective qualifications of the complainant.

The majority of commissions are given statutory power to subpoena witnesses, including employees, and to require the production for examination of books or papers relating to any matter under investigation.[282]

Illustrations of the contentions regarding commission subpoena power likely to be raised by respondents in other jurisdictions are found in two recent commission cases: *Sun and Splash Club v. Division Against Discrimination*,[283] and *Ragland v. City of Detroit*.[284] In the former case, the New Jersey Commission commenced an action on a complaint by eight Negroes who alleged that they had been refused admittance to the club on the ground that it was private. In the course of the ensuing investigation, the Commission sought to subpoena certain records to determine whether the club qualified as a place of public accommodation and would thus fall within the jurisdiction of the Commission. The respondent club asserted that the statute does not authorize the use of subpoena while the Commission is in the investigatory stage. The court, rejecting this contention, reasoned that the statute must have contemplated the use of subpoena as a necessary incident to determining commission jurisdiction.

In the latter case, the Michigan Commission demanded all employee records of the Detroit Board of Water Commissioners' Sewage Treatment Plant in order to pass on the allegations that the Board had discharged an employee in retaliation for filing a complaint with the Commission. In a motion to quash the subpoena, the respondent city contended that the opening of files would be destructive of employee morale, and that it would be unfair to permit commission

282. N.Y. EXECUTIVE LAW § 297(7). New York's phraseology is comprehensive: "To . . . subpoena witnesses, compel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith to require the production for examination of any books or papers relating to any matter under investigation."

283. Sun and Splash Club v. Division against Discrimination, 3 RACE REL. L. REP. 726 (N.J. Super. 1957).

284. MICH. FEPC, Claim No. 287 (1959).

investigators to examine personnel files and draw conclusions therefrom without the presence of a representative of the respondent city to observe what was being examined. However, a compromise satisfying the parties was reached.

The commissions of Oregon, Rhode Island, Alaska, Colorado, Michigan, and Kansas have no statutory power to subpoena records during the investigatory phase, and, as a result, effective administration is likely to be inpaired considerably.[285]

All commissions, by express statutory authority or incident to the subpoena power, may obtain testimony of witnesses outside the state by deposition on the motion of any commissioner. In one of the few cases where such power was invoked, little difficulty was encountered. The New York Commission found it necessary to obtain the testimony of a witness who had served on the membership committee of the respondent labor organization in a case in which the complainant applied for and was allegedly refused membership on the basis of his creed. The witness resided in Stockholm, Sweden. After the giving of notice and an opportunity to be heard was afforded the attorneys for both the complainant and respondent, the investigating commissioner issued an order requiring the witness to appear before a consular representative of the United States Department of State in Stockholm. The deposition was then forwarded to the Commission.[286]

### C. *Probable Cause*

The procedure of investigation normally comes to a close when the investigator makes a formal determination as to whether probable cause exists for crediting the allegations of the complaint. If the commission, on recommendation of an investigating commissioner or a staff investigator, does not find any unlawful employment practices, the case is closed.

The question as to whether the respondent may, by offering to adopt the investigator's recommendations and thus terminate the proceedings, obviate the necessity of going to conference and conciliation

285. Colorado provides for subpoena powers for public hearings. The Commission may issue a subpoena. Upon failure to obey, the Commission must petition the district court for a subpoena. Disobedience of this subpoena is subject to contempt. The Kansas Commission reports no handicap by the lack of subpoena power in the investigatory stage. However, while they report most respondents cooperate, difficulties are beginning to present themselves. KAN. CIVIL RIGHTS COMM'N, 1962 REP. PROG. 4. In Illinois, only the chairman of the board may issue subpoenas. ILL. REV. STAT. tit. 48, §§ 9, 859 (1961). Michigan's commission must apply to the circuit court. MICH. STAT. ANN. § 17.458(8) (1960). In Minnesota, the board may issue subpoenas signed by at least two members. MINN. FEP, RULES OF PRACTICE (1956). In Wisconsin, subpoena for the attendance of witnesses may be obtained by the parties upon request. INDUSTRIAL COMM'N FEP PROCEDURES, RULE 18.

286. N.Y. SCAD, 1949 REP. PROG. 29 (Schindler v. Council 29, Air Line Pilots).

prior to a finding of probable cause has frequently presented itself. While all FEP acts prescribe that once a formal determination of probable cause has been made, a commission must proceed to conference and conciliation, many commissions will procedurally permit the termination of proceedings at an appropriate time prior to a formal determination of probable cause.[287] The investigating procedures of Pennsylvania and Minnesota expressly provide for the negotiation of a settlement at any time prior to a finding of probable cause.

The question whether a denial of due process results upon a finding of probable cause in which there was an absence of the right to a preliminary hearing and an opportunity to be heard by witnesses has been raised before at least one commission. In this case, respondents have sought to liken a commission proceeding under the FEP statute to that of a criminal case where a right to a preliminary hearing before a magistrate and a formal finding of evidence sufficient to warrant further proceedings are required before being compelled to submit to public hearing before the commission. The Michigan Commission, in denying the above contention, held that in a civil administrative proceeding the rules and law pertaining to a criminal proceeding are inapplicable, and, after examining the language of the Michigan FEP statute, concluded that it did not contemplate a formal advisory proceeding for its finding of probable cause.[288]

The procedural rules of many commissions provide for the right to apply for reconsideration of dismissal for lack of probable cause, but this is within the discretion of the commission. In these states, the applications are required to be in writing and filed within a given number of days or within a reasonable time after the mailing of the notice of dismissal.[289] Pennsylvania's statute expressly authorizes

287. See N.Y. SCAD, 1955 REP. PROG. 46. There the New York Commission contrasted the New York Labor Relations Board with the Commission as to the issuance of a complaint. The Board may or may not issue a complaint as a matter of policy. Under the Law Against Discrimination, after a finding of probable cause, the Commission must proceed to conference, conciliation and persuasion. However, a formal finding of probable cause is not a condition precedent for a satisfactory settlement. Thus, an employer, owner of a restaurant, filed a verified complaint against one of his waitresses, a white person, charging her conduct and behavior toward a fellow employee, a Negro cook, as discriminatory. The investigating commissioner found that the waitress apologized to the cook before the union's anti-discrimination committee. The union undertook to have the respondent apologize at a shop meeting as well. Other facts, such as the employer's failure to reprimand or admonish the waitress, and the lack of evidence that the cook ever protested his treatment by the respondent waitress, led the investigating commissioner to hold that the remedial purposes of the Law were satisfactorily achieved. N.Y. SCAD, 1950 REP. PROG. 53. (Jaydean Restaurant, Inc. v. Engel).

288. Cohen v. River Rouge Savings Bank, Claim No. 1050, Mich. FEPC.

289. Fifteen days, New York, Michigan; right to appeal no specified period—"within reasonable time," Wisconsin; seven days, Conneeticut; ten days, Ohio, Colorado, Kansas, Pennsylvania; thirty days, Washington, Missouri, California.

the commission to hear an appeal from a dismissal,[290] and the statutes of Michigan and Ohio expressly provide for judicial review.[291] In the absence of a specific provision, the commission's affirmation or reversal, on appeal, of a dismissal for lack of probable cause would seem to be judicially reviewable under the general statutory provision providing for the judicial review of commission orders.[292] This question was first presented in New York. In *Jeanpierre v. Arbury*,[293] the complainant instituted an article 78[294] proceeding in the supreme court to review a dismissal for lack of probable cause. The application was denied on grounds that the New York statute provided no intermediate or preliminary determination of commission decisions, but only those made after formal hearing under oath. On appeal to the appellate division, the court, dealing primarily with this latter issue, went into the question of whether there was legislative intent to permit a submission.

In construing the language of the statute as denying the right to interim review, the court reasoned,

> There appears to be a careful and consistent legislative design to grant judicial review in certain specific situations and to preclude such review in others. [The statute in specifying judicial review after formal hearing, therefore, barred] . . . similar review where the right had not been explicitly granted.[295]

The court of appeals, although sustaining the appellate division on

---

290. PA. STAT. ANN. tit. 43, § 959 (1964).

291. MICH. STAT. ANN. § 17.458(8) (1960); OHIO REV. CODE ANN. § 4112.06 (Anderson 1964).

292. Note, *supra* note 265, at 572. Reviews of commission determination of probable cause have varied in procedure. California has held that a finding of no probable cause is reviewable by mandamus. Massachusetts permits a review to determine whether it is arbitrary or capricious by a writ of *certiorari*. Oregon expressly precludes review of a dismissal for lack of probable cause by restricting appeal from Commission orders only after a public hearing; however, appeals have been taken to the Attorney General and then to the Governor. The reviewability of Commission action short of a determination of probable cause presents an interesting question. In *Carter*, the Commission, apart from claiming jurisdiction, challenged the appropriateness of a proceeding under article 78 of the old Civil Practice Act to appeal to the Commission's right to investigate. The Commission contended that the appeal was premature, in the absence of a final determination or order. There was no determination, as the investigation went no further than the complaint stage. The Commission further contended that the writ of prohibition or mandamus was inappropriate for the appeal. The former restrains a body or officer from exercising a judicial or quasi-judicial function only; the latter was inappropriate to grant negative injunctive relief under the facts. The Commission observed that the remaining provisions of the article were similarly inappropriate. The argument was rejected by the lower court and the appellate division assumed jurisdiction without explicit comment.

293. 3 App. Div. 2d 514, 162 N.Y.S.2d 506 (1957).

294. Art. 78, § 1296 of the old Civil Practice Act is now superseded by §§ 7803-04 of the Civil Practice Law. No substantial change has been made.

295. *Supra* note 293, at 517, 162 N.Y.S.2d at 509.

the grounds that the commission's determination of a lack of probable cause was supported by substantial evidence, held to the contrary when addressing itself to the question of the right to interim review by saying,

> No intent to preclude judicial review of such determination [probable cause] may be found in the language of Article 15 of the Executive Law nor from its legislative history. The rule is well settled that, in the absence of a 'clear expression by the legislature to the contrary,' the court may review discretionary acts of an administrative officer or body to determine whether the discretion has been exercised in an arbitrary or capricious manner.[296]

At present there is no statutory provision for reconsideration of a determination of probable cause by a commission.

Apart from the definition of probable cause as "a reasonable cause to believe that the complainant may have been discriminated against, viewing the record as a whole," there is no reasonably well formulated standard as to its meaning and application in a given case. The elements which may constitute probable cause to credit the allegations in a complaint cannot always be precisely defined. Hundreds of variant factors may be present in every case. Circumstantial evidence sufficient to persuade one investigator of the presence of discrimination may be unconvincing to another. Subjective judgments of personality traits likely to be prejudicial are often difficult to determine. In a specific case, it may not be possible to satisfy all the purely legal requisites of proof of discrimination. Then too, there is always a tendency to rest a finding of probable cause only on such evidence as would sustain the allegations in a subsequent public hearing.

Nevertheless, in advertising and pre-employment inquiry complaints, the application of "probable cause" has become somewhat standardized. In cases alleging discrimination in advertisements and in written or oral pre-employment inquiries, the commission need only show that the language used falls within the published lists of illegal pre-employment inquiries or specific commission rulings to establish a prima facie case. The failure of the employer to successfully plead the defense of bona fide occupational qualification or other exemption, would result in a finding of probable cause.

In simple employment cases where there is an application and refusal, the following information would normally make out a prima facie case: (a) the complainant's qualifications meet the specifications of the job, (b) the complainant's qualifications are superior to the successful applicant's or to the other rejected applicants' (c) the num-

296. 4 N.Y.2d 238, 240, 149 N.E.2d 882, 883 (1958).

ber of employees who are members of complainant's group is relatively low, and (d) an examination of prevailing and past patterns of employment, including sources and methods of recruitment, shows that they are calculated to discriminate.[297]

The finding of probable cause, however, need not be predicated upon or confined to a set or combination of elements as outlined above. In a New York case advancing this proposition, the respondent allegedly rejected the physical appearance of complainant. This objection was subsequently found, in the opinion of the commission, to be factually erroneous. Complainant, a Negress, sought a position as flight hostess with respondent's airline company. After passing the required physical and mental examinations, she was rejected by the company because of her appearance; specifically, a "poor complexion," "unattractive teeth," and "legs that were not shapely." The investigating commissioner, upon observing complainant's physical appearance, stated that,

> I am of the opinion that when complainant applied for the position of flight hostess with the respondent, she met all of the qualifications specified; education, weight, height, appearance, health and being single. We are unanimous in our opinion that respondent's objections to complainant's physical appearance are not factually accurate.[298]

Had respondent been vague with regard to complainant's appearance, it would seem that it would have been more difficult to determine that prejudice was involved in the rejection.

It is arguable that a reasonably well formulated standard and a certain uniformity of application would result if the ultimate issue in discrimination cases, namely the credibility of respondents, were to constitute a minimum basis for a finding of probable cause. The issue of probable or no probable cause would revolve solely on the inability of the investigator to say with reasonable certainty that the rejection of the complainant was due to factors other than discrimination.

The efficacy of this approach could be seen in a situation where there is an application and refusal by a respondent for employment or membership in a labor union. The burden of proof would then shift to respondent, and if respondent failed to give a credible explanation, a finding of probable cause would result. This is in contrast to the need of the investigator to make out a prima facie case of requisite elements which would measurably increase the quantum of evidence necessary to sustain a finding.[299]

297. Carter, *Practical Considerations of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination,* 40 CORNELL L.Q. 40, 46 (1954).

298. N.Y. SCAD, 1947 REP. PROG. 49. (Franklin v. Transworld Airlines, Inc.).

299. Ore. FEP Law, First Public Hearing (August 1961). The quantum of evidence sufficient for a prima facie case has at times been light. Thus, the Oregon Commis-

### D. *Conference, Conciliation and Persuasion*

The statutes of all FEP jurisdictions provide for conference, conciliation and persuasion as a mandatory procedure after the finding of probable cause.[300] The intended purpose of this procedure is to afford respondent the opportunity—short of formal commission adjudication with its attendant stigma—first, to negotiate an adjustment of the unfair employment practice; second, to prevent its recurrence; and third, to bring, if necessary, his employment practices, policies and methods into compliance with the letter and spirit of the Law Against Discrimination.[301] In support of this purpose, the terms of conciliation are designed to give a respondent an opportunity to make the transition from a policy of discrimination to that of non-discrimination in an orderly fashion, and to inaugurate this new policy in such a manner that it becomes a part of the normal employment procedure.

Conciliation agreements are thought to be primarily induced by the presence of coercion, whether by having the respondent face the prospect of a public hearing followed by court enforcement or, if exonerated, being submitted to the unfavorable notoriety frequently attached to a charge of discrimination. Although coercion is often the prime catalyst in conciliation proceedings, its effectiveness varies considerably with the respondent's personality and the nature of his business activities. For example, employers who sell services and products directly to the general public under brand names or trade marks are more amenable to conciliation, at least at the outset, than industrial manufacturers selling small metal parts indirectly to the trade for further processing. Those employment agencies or unions whose services are offered directly to the general public and whose names are frequently seen in the press or trade magazines are also particularly sensitive to any smear upon their reputation.

Most commissioners and their staffs agree that educational persuasion plays a most valuable role in the conciliation procedure. In fact, educational methods to effectuate public acceptance of FEP legislation are considered of primary importance. New York Commissioner Elmer Carter some years ago emphasized this point:

> The Law Against Discrimination is not without sanctions. But the success

sion made a finding of probable cause on the complaint of a Negro rejected for union membership by secret ballot, where there was present in the history of the union a consistent pattern of exclusion of Negroes.

300. *E.g.*, N.Y. EXECUTIVE LAW § 297. "[I]f such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion."

301. This is the irreducible minimum. In New York, the respondent is also required to display the commission poster. Ross v. Arbury, 206 Misc. 74, 133 N.Y.S.2d 62, *aff'd*, 285 App. Div. 886, 139 N.Y.S.2d 245 (1955).

of its administration was deemed not to depend upon results obtained from the application of its punitive provisions, but rather upon the development of techniques of conferences, persuasion and conciliation.[302]

The opportunities to examine the rationale of the respondent's contentions, the dissection of myths and rumors, and the subtle or otherwise indirect appeals to the fundamental ideals of Judeo-Christian morality and the American creed, have proven to be contributing factors in coming to a just conciliation agreement.

The success of conciliation, attested to by the relatively few disputes reaching litigation, has been attributed by some to the fact that conference technique, the heart of the conciliation process, presents no real difficulty; that a sort of amiable chat between the respondent and the investigating commissioner ensues. On the contrary, conferences are often prolonged and present a test of skill and endurance. The investigating commissioner is not only engaged in settling a simple complaint; he is engaged in the effort to change an attitude, a habit of mind and action. Unless he can achieve this, the permanence of the settlement itself may be greatly in doubt.[303]

So important have some commissions viewed the patience and understanding required for, *inter alia,* successful conciliation, that executive directors of commissions have been replaced for their failure or inability to exhibit these traits. Even when the power of commission coercion is considerable with respect to a given respondent, experienced conciliators have generally approached negotiations in a spirit of compromise. Adamant refusal of employment by a respondent is not categorically rejected as such by commissions, provided the equity of the case justifies granting concessions. Illustrative of this principle is a case involving a request that back pay be withdrawn in return for concessions by the respondent;[304] or the case of a New York complainant's agreement to have her complaint conditionally withdrawn upon the respondent's employment of another girl whom he deemed qualified.[305]

Typical of the inflexible approach of some commissions is the ruling of the Attorney General, as chief legal counsel for the Oregon Civil Rights Commission, to the effect that the Commission may not com-

302. Carter, *supra* note 297, at 46. "No one can reasonably believe that deep rooted prejudice. . . ."

303. *Ibid.*

304. Note, *supra* note 265, at 541.

305. N.Y. SCAD, 1958 REP. PROG. 15. This involved employment by an airline, where a public hearing constituted notice in 1958. A new approach was used in this instance. The complainant agreed to the employment of another Negro girl whom the employer deemed qualified, and the Commission permitted the complaint to be conditionally withdrawn.

promise any rights of complainant in a conciliation conference. In an Oregon proceeding, the investigator largely plays the role of a prosecutor who presents the grounds for his findings of probable cause. The respondent presents his side of the case. Conciliation terms are then drafted which the respondent may accept or reject. If these terms of conciliation are rejected, the investigator's office reports this fact to the Labor Commissioner for a decision as to whether the case should be scheduled for a public hearing. This procedure rules out the element of persuasion and re-education, except where the respondent experiences, on his own initiative, a change of heart. The Commission thus relies excessively upon the investigator's finding of probable cause.[306]

All state commissions employ standard procedures for follow-up review of cases which have been conciliated. Frequently, authorized follow-up investigations are incorporated in the terms of conciliation. In New York, the commission has a policy of reviewing complaints approximately six months after closing the file to determine whether additional inquiry is necessary, and the investigating commissioner may direct that there be additional reviews. Commissions showing this continuing interest accomplish a double purpose: first, they insure that the conciliation agreement has been carried out, and, secondly, they observe whether changes have taken place in the employment patterns or practices.[307] Many commissions have sought to standardize conciliation agreements to the extent of incorporating certain minimum requirements in them in addition to the varying affirmative actions which they deem contingent upon the equities present in each case. The number of these minimum requisites varies, but all commissions provide that their respective conciliation agreements contain at least a cease and desist order against all unlawful employment practices charged and substantiated in the complaint.

One of the better representatives of this standardized approach is the New York Commission. Their conciliation agreement generally comprehends four requirements, the first of which is an immediate elimination of all existing violations of the law as disclosed by investigation. Thus, New York goes beyond the remedial action implicit in the particular complaint.[308] The elimination of unfair

306. Note, *supra* note 265, at 541.

307. N.Y. SCAD, 1956 Rep. Prog. 17-22.

308. The commission is confronted with an awkward situation when it finds, in the course of an investigation, other acts of discrimination corresponding to a general pattern. It may have no particular complainant who is qualified. To order respondent to hire a specific number of persons of minority groups would require the respondent to seek out members of a particular racial or religious group, and not consider them on a non-discriminatory basis. In New York, an employer once requested the Commission to assist him in recruiting. The Commission declared that applicants must

employment practices is based upon the power of the Commission to apply for a cease and desist order expressly provided by statute,[309] and all commission statutes similarly provide. Otherwise, with respect to the remaining requirements, the broad phraseology of all commission statutes grants wide discretion for the relief of the complainant. The second minimum requirement in New York is that respondent obey the law; this is generally preceded by a detailed explanation by the investigating commissioner. Thirdly, the respondent must commit himself to displaying a commission poster in a conspicuous and lighted place where employees, applicants for employment or, in the case of labor unions, applicants for union membership, may see it.[310] Finally, the New York Commission demands that it be allowed to make periodic re-inspections of the respondent's employment patterns, practices and policies, and to examine records incident to such review.[311]

In addition to the requisites outlined above, there are particular remedies which provide for direct vindication of the complainant himself for the wrong he has suffered at the hands of the respondent, and protect him against further wrongful acts of the respondent.[312] There is little doubt that the aforementioned remedies are within the power of the commission. Commission statutes either expressly or implicitly empower commissions to vindicate the complainant by ordering the hiring, reinstating or upgrading of complainant, with or without pay; or, in the case of the labor union, to admit or restore complainant to membership.[313]

In referral or dismissal cases, however, the attempt to make whole a particular complaint presents difficulties. When the position in question has been filled, the commission may order respondent to

---

be judged on merit, and recommended additional reemployment reference sources. N.Y. SCAD, 1954 REP. PROG. 52. In addition, the Commission believed that courts would be reluctant to enforce an order which has been violated, in the absence of a specifie complaint. Therefore, a broad affirmative order requiring periodic reporting, and requirements broadening the employment base has been upheld.

309. Markey v. Marketime Drugs, Inc., No. E-575, 1960 WASH. STATE BD. AGAINST DISCRIMINATION. If an individual complainant is found to have been discriminated against and is no longer interested in the employment, and a general pattern of diserimination is not present, a cease and desist order may be the only appropriate remedy.

310. N.Y. SCAD, 1956 REP. PROG. 60-61. The validity of such commission regulation has been upheld, on appeal, in Ross v. Arbury, *supra* note 301. Note that the penal provision, § 299, "willfully violate an order of the Commission," has been applied in cases where respondents failed to display posters. See Schwartz v. Technical Service Ageucy.

311. Spitz, *Patterns of Conciliation Under the New York Law Against Discrimination*, (pt. II), 74 N.Y.L.J. (April 6, 9, 10 & 12, 1951).

312. *Id.* at (pt. III), 7.

313. N.Y. EXECUTIVE LAW § 297.

hire complainant to fill the first vacancy, depending upon the rate of turnover, the condition of the respondent's business, and the nature of the industry.[314] Often, the only practicable solution is the payment of compensation for loss of earnings (back pay), although compensation certainly is not an ideal adjustment of the complaint.[315] Indeed, the question of whether the commission, on a finding of probable cause, should require the more drastic remedy of immediate employment of a complainant even if it compels the dismissal of a person who has been hired to fill the vacancy, illustrates the difficulty of providing complete relief for the complainant. The New York Commission has rejected the view that the immediate employment of a complainant is the only adequate restoration of his civil rights and that the necessary personnel adjustment is the concern of the respondent. The Commission, in defense of what it believes to be the greater good, has sought to place its emphasis on alternative relief such as back pay. This is preferable to an atmosphere fraught with bitterness and resentment, a condition which might well follow the abrupt dismissal of a person who in no way was responsible for discrimination.[316]

Conciliation agreements vary with respect to the degree of formality required. In some states they take the form of an official consent order drawn up by the commission staff and submitted to the respondent for his signature. In New York, conciliation agreements normally consist merely of an interchange of correspondence between the investigating commissioner and the respondent or his authorized agent. Occasionally, a conciliation agreement will consist of a written statement of the terms of adjustment concluded in oral conference prepared by the commission and transmitted to respondent. When

---

314. In *Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc.*, the Commission issued a cease and desist order, ordering respondent to enroll complainant in its next training class. The airline raised the question of the constitutionality of the Commission's jurisdiction in interstate commerce. The Colorado Supreme Court held the Commission could not issue the order because it would unconstitutionally burden interstate commerce. The United States Supreme Court, however, reversed. 149 Col. 1259, 368 P.2d 970 (1962), *reversed,* 372 U.S. 714 (1963).

315. Spitz, *supra* note 307, at 8. Back pay orders are statutorily authorized in many commission states. The New York Commission has awarded back pay to complainants for periods in excess of a year. Generally, it is required that the complainant make a reasonable effort to minimize loss, and often the awards have been compromised sums. In granting a back pay order which is analogous to an award of damages, a commission should, consistent with the usual rules of damages applied in breach of employment contract cases, weigh the complainant's attempt to mitigate damages and consider his earnings during the time he was barred from employment. We may note that the New York Temporary Commission, aware of the back pay provision of the statute, requires the complaint to be filed within 90 days.

316. No commission is reported to have required the discharge of an innocent successful applicant to accommodate complainant.

repeated complaints are sustained against a respondent, however, the commission will require his signature on the consent order.[317]

A wide range of approaches have been taken by the various states in regard to confidentiality in conciliation proceedings. Some statutes provide that conciliation agreements shall be unqualifiedly confidential.[318] New York provides for secrecy in all matters disclosed by investigation and subsequent conciliation.[319] Colorado has extended non-disclosure, even to the filing of a complaint, by regulation although investigating officials are permitted to testify concerning matters involved in conciliation which were previously revealed by investigation.[320] Still others are told that their proceedings in general are to be confidential.[321]

Secrecy, however, is apparently not deemed to be an indispensable commission policy, as may be seen from the statutes of Massachusetts, Pennsylvania, Connecticut and Minnesota. In Massachusetts and Connecticut, disclosure is permitted when the terms of conciliation have been adjusted.[322] Similarly, in Pennsylvania, terms of adjustment may be disclosed.[323] Minnesota permits disclosure of matters involved

317. It is to be noted that the trend is away from the informal incorporation of conciliation agreement provisions in letters to respondents, and toward the more formal consent order. The latter is held to be more desirable in that it spells out the remedy for the complainant as well as the general policies to be followed by the respondent, including his responsibilities in follow-up supervision. In addition, the stipulations in the order are reached by consent of all parties, including the commission, and thus provide a substantial legal basis for enforcement of its provisions.

318. CAL. LABOR CODE § 1421; KAN. GEN. STAT. ANN. § 44-1005 (Supp. 1959); MICH. STAT. ANN. § 17.458 (1960); N.J. REV. STAT. § 18:25-14 (Supp. 1964); N.M. STAT. ANN. § 59-4-10(b) (1953); N.Y. EXECUTIVE LAW § 297. Violation by a member of the commission subjects this person to disciplinary action under the State Civil Service Act. WASH. STATE BD. AGAINST DISCRIMINATION, R. PRAC. & PROC. 3 (non-disclosure by regulation; board may publish any complaint that has been conciliated).

319. N.Y. EXECUTIVE LAW § 297. See also N.Y. ADMINISTRATIVE CODE § X41 10 (9) (Supp. 1961). "After the filing of any complaint, the chairman of the commission shall designate . . . to make . . . prompt investigation in connection therewith . . . he shall immediately endeavor to eliminate . . . by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors." *Supra* note 272, 3(4). N.Y. SCAD, R. PRAC. & PROC. 3(c) (1953). Commission rules of procedure provide for no disclosure only with respect to conference, conciliation and persuasion. Also, the Report of the Temporary Commission interpreting the statute, alluded only to conciliation.

320. Colorado permits disclosure if made prior to the conduct of the commission's general investigation. See COLO. REV. STAT. ANN. § 80-24-7 (4) (Supp. 1960); COLO. ANTI-DISCRIMINATION COMM'N, R. PRAC. & PROC. 3(d) (1959).

321. N.Y. ADMINISTRATIVE CODE § X41 10(9) (Supp. 1961).

322. CONN. GEN. STAT. REV. § 31-127 (1960); MASS. ANN. LAWS ch. 151B, § 5 (1957); MASS. COMM'N AGAINST DISCRIMINATION, R. PRAC. & PROC. 2(5) (1961). "The members of the Commission and its staff shall not disclose what has occurred in the course of concilation conferences, provided, however, that the Commission may publish the facts of any complaint which has been dismissed, and the terms of conciliation when the complaint has been disposed of."

323. PA. STAT. ANN. tit. 43, § 959 (1964). See also PA. HUMAN RIGHTS COMM'N REG. § 110.01 (1961).

in conciliation. This, however, is restricted to non-specific material. Illinois, on the other hand, requires the consent of the respondent for disclosure.[324]

Thus, in the case of informal investigations involving no enforceable jurisdiction, commissions exercise discretion and dispense with requirements of non-disclosure of information under certain circumstances. In general, a policy of secrecy has not been practiced consistently with regard to information obtained in the investigations of the various commissions. In New York, for example, the Commission for several years included the names of respondents in its annual report of cases.[325] Washington's State Board Against Discrimination is an example of a commission which has only recently reversed its policy from one of secrecy to one of inviting the general public to all its meetings, distributing an agenda of cases to be discussed in advance, and providing mimeographed copies of the investigator's report and recommendations.[326]

The respondent, if ultimately dissatisfied with the terms of conciliation as laid down by the commission, may await the public hearing. Apart from the Washington statute,[327] however, none of the FEP acts contains a specific provision for reconsideration of a conciliation agreement or the terms offered by the commission to the respondent. Commissions such as those of New York, Pennsylvania, Colorado and Connecticut, however, provide a procedure for reconsideration of a complaint through their general powers to prescribe suitable regulations for the commission.[328]

New York, Colorado and Michigan, in order to insure the complainant of an opportunity to file for reconsideration, require the investigating commissioner, in the case of New York, and the staff member, in the cases of Colorado and Michigan, who negotiated the terms of conciliation, to serve on the complainant a copy of the agreement. The complainant must thereupon file a timely application for reconsideration. Applications are granted at the discretion of either the chairman of the commission or the individual commissioners. In these states the commission, upon granting the application, may amend the terms of conciliation or refer the case to an investigating

324. ILL. REV. STAT. ch. 48, § 853 (Smith-Hurd 1964). Illinois permits disclosure upon written consent of respondents. MINN. STAT. ANN. § 363.03(6) (1957). Minnesota permits disclosure, but not its efforts in a particular case.

325. *Compare* N.Y. SCAD, 1957 REP. PROG., *with* N.Y. SCAD, 1958 REP. PROG.

326. As to the "open hearings," see foreword in WASH. STATE BOARD AGAINST DISCRIMINATION, 1959 REP. PROG. 3.

327. WASH. REV. CODE ANN. § 49.60.260 (1962).

328. COLO. ANTI-DISCRIMINATION COMM'N, R. PRAC. & PROC. 4 (1959); CONN. CIVIL RIGHTS COMM'N, R. & REG. § 371-16 (1960); N.Y. SCAD, R. PRAC. & PROC. 4 (1953); PA. HUMAN RIGHTS COMM'N REG. § 102-08 (1961).

examiner with recommendation for further investigation or conciliation. In New York, the chairman of the commission performs this function.[329]

Questions arise as to whether a right to judicial appeal lies upon a refusal to reconsider, with respect to both those states which provide such a procedure by statute or regulation and those which lack such a procedure. It would appear, from the reasoning applicable to the right to judicial appeal from a dismissal for lack of probable cause, that conciliation agreements would be subject to appeal if they were found to be arbitrary or capricious.

### E. *Enforcement*

Whoever represents the commission at conciliation, whether an investigating commissioner or staff member, is required, upon his failure to resolve the alleged violation, to make a report to the entire commission. This procedure is required by all commissions.

Most commission procedures give the commission a wide latitude of action. The commission may request that the same or a different official reinvestigate or endeavor to reach a satisfactory settlement. On the other hand, the commission may proceed to set the case for public hearing. Most commissions require a quorum vote of the commission before proceeding to the public hearing stage. In California, however, a single commissioner may call a hearing.[330] In Oregon and Alaska, the consent of the State Commissioner of Labor, who sits as a one-man commission at public hearings, is required.[331] New York and Rhode Island permit this question to be determined by their own investigating commissioners who are required, upon failure at conciliation, to proceed directly to public hearing.[332] In any event, the procedure at this stage becomes more formal and the rules of civil procedure are followed.

Most commissions are required by statute to serve upon the respondent a written notice of hearing together with the complaint.[333] The notice states the time and place of hearing, and informs the respondent that he is required to file a written verified answer to the complaint in person or by attorney within a specified number of days. Answers may contain a general or specific denial of every

---

329. Colorado: *Ibid.*; New York: *Ibid.*

330. Cal. Labor Code § 1423.

331. Ore. Rev. Stat. § 659.060 (Supp. 1959). Alaska Stat. § 23.10.215 (1962).

332. N.Y. SCAD, R. Prac. & Proc. 5 (1953). R.I. R. Prac. & Proc. Art. IV (1949).

333. N.Y. Executive Law § 297, is typical. "In case of failure to eliminate such practices, or an advance thereof . . . he shall cause to be issued and served in the name of the Commission a written notice . . . ."

allegation of the complaint denied by the respondent and may be based on information and belief or a denial of any knowledge or information sufficient to form a belief. Any matter constituting a defense may be pleaded.

Most commissions allow respondents the opportunity, as a matter of right, to amend pleadings prior to hearing.[334] The failure to answer the complaint does not permit commissions under their procedure to immediately issue an order. Before a decision is made, a hearing is required, testimony taken, and findings of fact made.[335]

Most commissions are not parties to the action until an order has been issued and sought to be enforced. In California and Oregon, the commissions officially enter the case when the hearing stage is reached. In California, an accusation is served on the respondent by the investigating commissioner in the name of the entire commission.[336] In Oregon, the Administrator of the Civil Rights Division or Director of the Senior Workers Division may file a petition with the Commission of Labor requesting a cease and desist order from the Commission against the respondent. At this point the Commission becomes a party to the action. The Commissioner of Labor then designates a staff attorney from the Attorney General's office to conduct the hearing on behalf of the Commission.[337]

Once the determination is made to proceed to hearing, no specific statutory provision or regulation is available authorizing a reconsideration of the commission decision and it is doubtful that the statutes contemplate, or due process requires, a second review once a court has already considered the legality of the terms of conciliation. The question as to the availability of interlocutory relief after the commission's decision to proceed and prior to a final determination at public hearing is an open one. No statute or commission regulation specifically provides for interlocutory relief as such, yet it would appear that such relief would be incidental to effectuating the complainant's remedy.

The Massachusetts Commission, in *Marshall v. Equi*,[338] sought to obtain a temporary injunction to enjoin the respondent from selling realty to another buyer. The court, in refusing this relief in the

334. See notes 23-26 *supra*.

335. PA. HUMAN RIGHTS COMM'N REG. § 104.09 (1961).

336. CAL. FEPC, R. & REG. IV (a). This procedure enables the commission to redraft the complaint on the basis of new facts elicited during investigation. However, all statutes permit a commission to amend a complaint before public hearing.

337. ORE. BUREAU OF LABOR, CIVIL RIGHTS DIV., RULES OF ADMIN. PROC. 5 (I) (1959).

338. No. 76678, Mass. Supreme Ct., Suffolk County (March 1960).

absence of express statutory authorization, declared that the Commission must await the pending investigation and hearing. It would seem that in the case of discrimination in employment the result would be similar.

The court is not disposed to read such implied power into the applicable statute when it would be required to weigh the opposing equities in the balancing of relative injury between complainant and respondent in employment, and also be required to determine the question as to the likelihood of the complainant prevailing at the hearing and being entitled to a permanent injunction.

Other interlocutory relief, apart from injunctions, has been considered. In a Washington case, the State Board Against Discrimination filed a notice of *lis pendens* and moved to have a receivership appointed for a house which had been offered for sale, the respondent allegedly having refused to sell for a discriminatory reason. The motion was withdrawn before it was decided upon by the court, when the respondent committed himself not to dispose of the realty.[339]

Most commission hearing boards are made up of commissioners. Washington, California and Oregon, however, choose hearing examiners from a list of interested and qualified people. New Jersey's statute authorizes the commissioner to appoint a hearing examiner in his place.[340] In those states where commissioners are unsalaried, the commissioners usually are scattered throughout the state, and obtaining a necessary quorum for a hearing board may prove difficult. Once convened, however, all commission hearings are open to the public.

With regard to the rules of evidence, the majority of FEP acts contain the conventional provision "that the hearing tribunal shall not be bound by the strict rules of evidence prevailing in courts of Law or Equity." This provision is found in the statutes of such states as Colorado, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island. The Rhode Island statute also contains a provision authorizing the commission,

> to take into account all evidence, statistical or otherwise, which may tend to prove the existence of a predetermined pattern of employment or membership; provided that nothing herein contained shall be construed to authorize or require any employer or labor organization to employ or admit applicants for employment or membership in the proportion which their race or color, religion or country of ancestral origin bears to the total population or in accordance with any criterion other than the individual qualifications of the applicant.[341]

339. Note, 74 Harv. L. Rev. 526, 551 (1960).
340. N.J. Stat. Ann. § 18:25-8(1) (1945).
341. R.I. Gen. Laws Ann. § 28-5-22 (1949).

In Connecticut and Washington, the administrative agencies charged with responsibility to enforce the law against discrimination are authorized to make their own rules of practice to expedite hearing procedures.[342] In Alaska, Kansas, Michigan, Oregon and Wisconsin, the statutes are silent as to which rules of evidence prevail at the administrative hearings.[343]

The California FEP statute merely provides that the state Administrative Procedure Act shall govern the admissibility of evidence and other procedural questions at administrative hearings conducted by the commission. In effect, this provision incorporates by reference the conventional provision that the strict rules of evidence prevailing in courts of law or equity do not prevail at administrative hearings.[344]

Thus, wide discretion, as a matter of practice, is left to the chairmen of hearing boards, as to when the conventional rules of evidence in administrative hearings apply. Almost all commissions exclude hearsay evidence and leading questions, normally acceptable in administrative hearings. Oregon's commission, however, permits such questions if the right of cross-examination is given.[345] Apart from this area, the traditional procedural pattern prevails; witnesses are sworn,[346] both sides present evidence, objections and motions are made, and findings of fact, issues and orders are entered.

The commission's case is presented by its own attorney, or, under the terms of some statutes, the Attorney General or one of his assistants. In the majority of states, the complainant is permitted, by express statute or by regulation, to be represented by counsel; all respondents are entitled under the same statutes or regulations to legal representation.

Proof of discrimination has presented difficulties. First, refusal to hire, promote or classify may be attributed to a wide variety of reasons, many of which are lawful under the statute. Some FEP statutes, such as Rhode Island's and Ohio's, attempt to deal with this problem by expressly providing that the commission is to take into account all the existence of a predetermined pattern of employment or

342. These commissions follow the usual rules of evidence in administrative determinations. CONN. GEN. STAT. REV. § 31-125 (1962).

343. In these jurisdictions, rules of evidence not otherwise provided for by statute or commission procedure are governed by the applicable rules in suits in equity under the respective state's administrative procedure rules. Thus, in Kansas, the Commission shall be bound by the rules of evidence prevailing in courts of equity, and only relevant evidence of reasonable probative value is receivable.

344. CAL. LABOR CODE § 1424.

345. ORE. RULES OF ADMIN. PROC. 13(6) (1960). "Hearsay evidence shall not be admissible over an objection based on lack of opportunity to cross-examine."

346. *Id.*, (2). Testimony, by stipulation of both parties, may be taken without an oath, but such evidence is subject to exclusion for purposes of appeal.

membership.[347] Secondly, discrimination is largely a matter of intent; the proof of its existence must frequently be derived in large measure from circumstantial evidence, often vague and unsupported.

The answers to these difficulties lie in understanding that discrimination is rarely declared openly, and in most cases is a subjective belief on the part of the party discriminated against. Thus, it can rarely be shown except by circumstantial evidence. As was said by the court in *Castle Hill Beach Club, Inc. v. Arbury*,[348] a case involving discrimination under the New York law:

> It may be that the telephone listing, etc., as isolated facts, do not justify the conclusion that the membership corporation was a mere sham designed to conceal the truly public nature of the enterprise. But, in our judgment, the record, considered as a whole, leads to that conclusion. The various aspeets of a plan or scheme, when considered singly, may very well appear innocent. The true nature of the plan or scheme is revealed only when the various aspects are viewed as a totality.[349]

And in *F. W. Woolworth Co. v. NLRB*,[350] the Court of Appeals for the Second Circuit, in commenting on this phase of testimony, stated:

> Implicit in petitioner's argument is a basic objection to reliance upon so-called 'circumstantial evidence.' But courts and other triers of facts, in a multitude of cases, must rely upon such evidence, *i.e.*, inference from testimony as to attitudes, acts and deeds; where such matters as purpose, plans, designs, motives, intent or similar matters, are involved, the use of such inference is often indispensable. Persons engaged in unlawful conduct seldom write letters or make public announcements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled 'use me,' like the cake bearing the words 'eat me' which Alice found helpful in Wonderland.[351]

If the commission finds no discrimination, it is obliged by statute to serve on complainant an order dismissing his complaint. No statute authorizes the assessment of damages or penalties against an unsuccessful complainant. If the commission finds that discrimination has been practiced, it may issue remedial orders.

No statute gives a commission the power of self enforcement, nor do any of the commissions have direct power to impose contempt

347. Ohio Rev. Code § 4112.05 (Anderson 1959); R.I. Gen. Laws Ann. § 28-5 (1956).

348. 2 N.Y.2d 596, 162 N.Y.S.2d 1 (1957).

349. *Id.* at 608, 162 N.Y.S.2d at 9.

350. 2 F.2d 658 (2d Cir. 1941). Also note a similar statement by Justice Bergan in Holland v. Edwards: "Discrimination in selection for employment based on considerations of race, creed or color, is quite apt to be a matter of refined and elusive subtlety. Innocent components can add up to a sinister totality." 282 App. Div. 353, 359, 22 N.Y.S.2d 721, 726 (1953).

351. F. W. Woolworth Co. v. NLRB, *supra* note 50, at 660.

penalties for violation of these orders. All FEP statutes, however, provide penal sanctions for willful interference with commission orders.[352] No case has been found in which contempt charges have been filed, or in which the penalties provided have actually been imposed.

There are two cases which typify the extent of action presently taken in these areas. The first is the case of the *New York Commission Against Discrimination v. Ackley Maynes Company*.[353] After a complaint had been filed with the Commission charging the owners of a swimming pool with discrimination, a hearing was held and respondent consented to an order of the Commission requiring them to permit use of the pool on equal terms and to take other specific steps toward that end. Subsequently, non-compliance was charged by the Commission at a special term of the supreme court and an order of the court containing the same terms as the conciliation order was issued. Further, non-compliance with two provisions was charged by the Commission in a contempt proceeding before the same court. The court found the two respondents in contempt and imposed 400 dollar fines. One respondent was sentenced to a term of five days in the county jail, although he was given the opportunity to purge himself of contempt by compliance. Respondent subsequently purged himself of this contempt.

Second is the case of *William v. Murphy Motor Freight Lines, Inc.*,[354] which involved a threat to use penal sanctions. In that case, a Negro filed a complaint with the Minnesota Commission alleging discrimination in hiring. The Commission, in due course, found discrimination in refusal to hire complainant. The Commission stated that, if the complainant presented himself for employment within four months after issuance of the Commission order, and should the respondent still refuse to hire him, the case would be certified to the corporation counsel for prosecution without further action of the Commission.

All FEP statutes except California's authorize the commission to institute a judicial proceeding against the respondent directly after entering an order. Wisconsin extends this right to complainant as well as the commission.[355] California's statute permits the commission

352. N.Y. EXECUTIVE LAW § 299. Typical is New York's broad statute: "Any person, employers, labor organization or employment agency, who or which shall willfully resist, prevent, impede or interfere with the commission . . . or violate any order of the commission shall be guilty of a misdemeanor. . . ."

353. 4 RACE REL. L. REP. 358 (1959).

354. 3 RACE REL. L. REP. 244 (1958).

355. WIS. STAT. ANN. § 111.36(3) (1959). This means that any order issued by the commission may be enforced by mandamus or injunction by a suit in equity to compel specific performance.

to seek an injunction only in the case of further discriminatory acts on the part of the respondent.[356] Most FEP statutes give the commission power to apply for a temporary injunction pending judicial review.[357]

A trial de novo may be had in some jurisdictions. The statutes of Michigan, Minnesota, Oregon, and Wisconsin provide for such review. Of these, the statutory provisions in force in Michigan, Oregon and Wisconsin are mandatory,[358] while Minnesota's is discretionary,[359] Illinois, although not providing for a judicial trial de novo in its statute, does provide for a new public hearing by the commission.[360] Although the phraseology of the statutes suggests no qualifications for the application of de novo proceedings, commissions have attempted to limit its literal application. In *City of Highland Park v. Michigan FEPC*,[361] the Commission succeeded in limiting the scope of the de novo proceeding by restricting the trial court to conclusions of fact drawn from the hearing tribunal transcript. A full de novo proceeding with jury, however, is required for trials guaranteed under the state constitution.

Although Wisconsin has not gone this far under its de novo proceedings, the court asserts the right to retry all questions and hear all witnesses. However, it's courts have been disposed to concede commission findings of facts when a limited examination of witnesses is made. Thus, in *Carter v. McCarthy's Cafe*,[362] the court, while holding that the commission determination lacked "substantial evidence," acknowledged,

> The Court is very appreciative of the fact that the Board of Review had the opportunity to see the witnesses, while the Court did so only to a limited extent. The Court has given full weight to the testimony tending to support the Board's findings . . . whenever possible in preference to that contradicting it. . . .[363]

Finally, the courts of all FEP jurisdictions may enforce, modify or set aside any commission order.

356. CAL. LABOR CODE § 1429.

357. N.Y. EXECUTIVE LAW § 298 is typical—"Thereupon the court shall have jurisdiction of the proceedings and of the questions determined thereby, and shall have power to grant such temporary relief or restraining order as it deems just aud proper." Territory of Alaska, An Act, ch. 18, § 8 (1953). In Alaska, an appeal automatically results in a stay of the Commission order. In Illinois, stay of the Commission order is diseretionary. ILL. REV. STAT. ch. 48, § 861 (Smith-Hurd 1961).

358. MICH. STAT. ANN. § 17-458; (8),(2),(10),(C) (1960); ORE. REV. STAT. 659.026 (1963); WIS. STAT. ANN. § 111.31 (1957).

359. MINN. STAT. ANN. § 363.03(6) (1957).

360. ILL. REV. STAT. ch. 48, § 858(9),(4) (1961).

361. No. 594180, Mich. Cir. Ct., Wayne County, May 4, 1960.

362. 4 RACE REL. L. REP. 641 (1959).

363. *Id.* at 644.

## VI. Remarks

Fundamental to meaningful achievement by administrative agencies which possess quasi-judicial powers is the principle that they should be accorded a status similar to that of a specialized court of original jurisdiction. This principle has been imperfectly applied in the case of state commissions against discrimination in several respects. The statutes of some states, as we have seen, permit a reviewing court to hear commission cases de novo. This transfer of administrative fact finding responsibility to a court results in an unnecessary duplication of litigation. In addition, the prestige and fact finding potential of the commissions of these states tend to be undermined. Further, an administrative agency is created to deal with a limited field, and in that field it is an expert. Its members acquire an understanding of the problems involved deeper than one can expect of a trial court, which enters the particular area of law only occasionally. This is peculiarly the case in the field of discrimination, where judgment and credibility play an even greater role than in most other areas of law. The need for fact finding exclusiveness on the administrative level is thus particularly acute.

California authorizes its commission, contrary to the usual administrative practice, to apply to a court for injunctive or other relief only in the event of failure, or probable failure, to comply with a final order.[364] The Commission, under these provisions, must first proceed to establish a case of discrimination. Then an attempted or subsequent violation of the commission's final order must be shown before a forum may be obtained. The issue of discriminatory behavior may in effect be required to be litigated twice, while a determination of whether a violation of the commission's order has occurred must be made during the first and only hearing. It is recommended that commission orders be binding and that their violation be treated by the courts in conformity with normal administrative practice.

The desire for facility and ease in invoking the subpoena power as a means of acquiring needed records and witnesses in a judicial proceeding is apparent. Yet, as we have seen, in several states a subpoena may be obtained only upon the commission's making application to a district court, with attendant delays. Where commissions have statutory power to issue subpoenas, almost all of them, by internal procedure, require individual members of the commission to apply for authorization from either the chairman or a quorum of

364. Cal. Labor Code § 1429. "Whenever the commission believes, on the basis of evidence presented to it, that any person is violating or is about to violate any final order or decision . . . the commission may bring an action in the Superior Court . . . against such person to enjoin him from continuing the violation or engaging therein or in doing anything in furtherance thereof."

the assembled commission or board. This has the impractical effect of causing delay, particularly when commissioners meet or confer infrequently. The postponement of the obtaining of needed records and witnesses until such time as the members of the hearing panel have assembled at public hearing almost invariably results in an inadequate pre-public hearing record. Much preferred are statutes similar to that of Michigan which give the commission power to subpoena records and witnesses regarding any matter pending before it. All commissions presently possessing such power should provide that each commissioner or board member has the power to subpoena on his own motion. It may be noted with respect to the latter recommendation that, where subpoena power has been given to individual members, no legislation has been proffered to withdraw it.

Some statutes permit the court, "in its discretion" or "in the interest of justice," to remand the case pending before it for additional evidentiary findings.[365] These provisions, in effect, invite parties to renew a hearing without specific requirements in that they may show reasons why the evidence sought to be obtained was not adduced at the original commission hearing. It is undesirable, in the absence of a finding that additional evidence is both relevant and material, that the commission be required to take such additional evidence and thereby possibly impede or defeat the expeditious enforcement of a commission decision. Such an explanation should require that the applicant show *good faith*. This requirement is particularly important in light of the lack of injunctive and temporary relief available to an aggrieved party pending a final judicial determination.

I suggest, therefore, that if either party applies to the court for leave to obtain additional evidence, the court shall first be satisfied that the omitting party has acted in good faith; that there were reasonable grounds for the failure to obtain such evidence at the original administrative hearing; and that such evidence is both relevant and material to a proper determination by the court.

A major weakness in enforcement is the failure of many FEP statutes to grant the commissions power to petition a trial court for the right to impose interim sanctions subsequent to public hearing and prior to the determination of the trial court. The clear need for this power lies in the long delay attendant to final relief by court order. I, therefore, recommend that commissions be given the statu-

365. MINN. STAT. ANN. § 363.03(6) (1957). "The court may in its discretion remand the proceeding to the board for further hearing, or take additional evidence on any issue . . ." N.H. STAT. ANN. § 59-4-11 (1953). "The court on its own motion or on motion of any party may remand the case to the commission in the interest of justice for the purpose of adducing additional specified and material evidence. . . ."

tory power to petition trial courts for the right to obtain appropriate temporary relief by way of restraining order or fine pending the enforcement of the trial court's order.[366]

While conceding that a decision made by the commission on discrimination should be subject to review by an independent judicial authority in accordance with accepted administrative theory, as all FEP statutes provide, reason and experience suggest that appeals after a commission's public hearing should be directly reviewable by an appellate court. The appeals records of the New York Commission on Human Rights, as well as those of other commissions, show that the majority of appeals from the trial courts reach the appellate courts before the issue of law is finally determined. Apart from this consideration, appeals to trial courts afford respondents the opportunity to engage in dilatory tactics in an area where, for years to come, issues of law will be centered on statutory interpretations. A determination at the appellate level would obviously be more expedient particularly as FEP legislation is both novel and of compelling public interest. Further, appeals to trial courts throughout the state, as against appeals directly to appellate courts, lessen the chances for uniformity of interpretation in an area where the public policy position of the state should be particularly consistent. We may note that direct appeals, under the National Labor Relations Board[367] and other administrative agencies in the socio-economic field, not only establish precedent but also serve to emphasize the desirability of conforming to the practices of other successful agencies.

Many statutes, as we have seen, limit causes of action to "aggrieved persons" subjected to discrimination. Formal proceedings based upon commission-initiated investigation are not statutorily authorized. However, in order to achieve greater employment equality directly through enforcement, it has become increasingly clear that commissions will be forced to take more of an initiatory role than heretofore required. This is in harmony with the view that discrimination is a public wrong, not merely a private grievance. Some commissions, therefore, have sought to act affirmatively by initiating investigation as part of the

366. MASS. GEN. LAWS ch. 151B, § 5 (1957). The importance of temporary injunctive relief has been recognized in the housing field in the state of Massachusetts: "After a determination of probable cause hereunder, such commission may file a petition . . . seeking appropriate injunctive relief against respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations . . . pending the final determination of proceedings . . . ."

367. The board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia) . . . for the enforcement of such order and for appropriate temporary relief or restraining order . . . ." National Labor Relations Act § 10(a), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958).

educational phase of their activity.

The presence of industry-wide discriminatory hiring, as well as in certain promotional policies and extensive discrimination among employment agencies, make commission-initiated formal action particularly desirable. Such action would have the effect of reducing general discrimination which would not otherwise be touched on the basis of privately initiated complaints. Further, it is burdensome and undesirable to place upon employees the responsibility of filing complaints in the face of employer intimidation, reprisal and harrassment, which often continues for a considerable time before the commission is able to institute corrective action.

I, therefore, suggest that all FEP statutes expressly provide that the commission, upon a finding of discrimination, may on its own motion institute formal action in the same manner provided for private persons "aggrieved" under the statute.