



the work and family legal center

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Testimony before the New York City Council Civil Rights Committee Regarding  
Oversight of the Human Rights Commission

March 3, 2015

Submitted by Dina Bakst, Co-President and Phoebe Taubman, Senior Staff Attorney  
A Better Balance: The Work and Family Legal Center

Good afternoon. My name is Phoebe Taubman, and I am a Senior Staff Attorney at A Better Balance: The Work and Family Legal Center. A Better Balance is a New York City-based legal advocacy organization dedicated to promoting fairness in the workplace and helping workers across the economic spectrum care for their families without risking their economic security. A Better Balance also hosts a free hotline and legal clinic to assist low-income New Yorkers facing problems at work related to pregnancy and family caregiving. We receive calls from men and women across the tri-state area as well as individuals all over the nation in response to our advocacy efforts.

I want to start by thanking Council Speaker Mark-Viverito and Councilmember Mealy for convening this hearing to discuss how to improve the efficacy and impact of the Human Rights Commission (“the Commission”). We are excited about the potential for improving the Commission under the new leadership of Chair Carmelyn Malalis, whose experience as a litigator and passion for rooting out discrimination will serve her well in her new role. We are eager to support the Chair in her efforts.



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The New York City Human Rights Law (“NYCHRL”) is a powerful tool for fighting bias, and is one of the strongest such laws in the country. However, the law is only as strong as its enforcement. For low-income New Yorkers who cannot afford legal representation, the Commission is often the only avenue for vindicating their rights.

Although organizations like ours, and our partners in the New York City Human Rights Law Working Group advocating for reform of the Commission, take on some of these cases, we simply cannot meet more than a small part of the need. The City needs a revitalized Commission to fill the broad demand among low-income New Yorkers for accessible and affordable resolution of their claims, as well as to prosecute pattern and practice violations of the NYCHRL.

Failing to address discrimination has significant economic consequences not only for the victims but also for our city as a whole. Unfair treatment can trigger a cascade of misfortune for New Yorkers who have little to no financial safety net. We have heard from numerous callers who lost their job and paycheck because of discrimination, only to then find themselves sleeping on a relative’s couch, or in a homeless shelter, because they could not pay their rent. Others have found it hard to secure another job without a recommendation from their former employer, and must rely on public assistance to support themselves and their families for months. Most also draw on unemployment benefits for some period of time to help them stay afloat.



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We need a robust and committed Commission to enforce the NYCHRL on behalf of low-income New Yorkers, and discourage discrimination that injures them while also adding needless burden to our city’s public service infrastructure. We applaud the Council for committing to increase the Commission’s budget so the Commission may have the resources to implement many of the recommendations offered here today. In addition, we propose several strategies by which the Commission can improve enforcement of the NYCHRL for New Yorkers with the fewest resources.

**Improve Transparency and Information about Commission Process**

New Yorkers who turn to the Commission to resolve their discrimination claims have little knowledge about the process they are initiating when they file a charge. After an individual files a complaint of discrimination, the Commission must investigate the complaint to determine whether probable cause exists to suggest discrimination in fact occurred. If so, the case is assigned for prosecution; if not, the case is dismissed. In 2013, only 9% of cases filed with the Commission resulted in a finding of probable cause, while most cases—70%—were either terminated by administrative closure or dismissed in a finding of no probable cause.<sup>1</sup> These numbers are surprising, given the breadth of the anti-discrimination protections of the NYCHRL and the potential investigatory power of the Commission.

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<sup>1</sup> 2013 Annual Report, New York City Commission on Human Rights, at 6.



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Few New Yorkers understand the probabilities involved in the Commission process, or realize that by choosing to pursue their claims through the Commission, they may foreclose other legal options including the right to file a complaint in court. In addition to the complainant's chances of success, other aspects of the process, including which cases the Commission chooses to pursue and the timeframe in which a complainant can expect a resolution, are shrouded in mystery. The Commission does not disclose this information, or its implications, up front to complainants.

Complainants also may not understand that additional legal claims arising from their situation, which are outside the jurisdiction of the Commission, have statutes of limitation that run while the Commission process is ongoing. Given that the average time it took the Commission to resolve cases in 2013, including those resolved through pre-complaint intervention, was 320 days,<sup>2</sup> this can present a major barrier to justice for individuals who unknowingly let the clock tick on potential claims while waiting for a determination from the Commission.

The Commission should train staff to assist pro se complainants in understanding the basics of the NYCHRL, including how to distinguish actionable discrimination from other seemingly unfair treatment that does not make out a colorable claim. This can help claimants who feel wronged by their employer (or landlord) to avoid the feeling wronged again by a dismissive and taciturn Commission. The Commission should also train

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<sup>2</sup> Id. at 4.



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intake staff to explain the consequences of forum selection, so that complainants can make informed decisions about how best to resolve their disputes. The Commission should also ensure that intake staff are fluent in the central protections of (and the agencies tasked with enforcing) the laws that are often intertwined with employment discrimination, particularly pregnancy discrimination, including the Family and Medical Leave Act, New York State Temporary Disability Insurance and Unemployment Benefits laws, and the New York State Nursing Mothers in the Workplace Act, so that individuals do not lose their chance to apply for benefits or challenge other violations while waiting for the Commission's investigation to be completed. Finally, the Commission should train intake staff to ensure that all pro se callers are treated with the respect they deserve. By way of example, one client of ours reported feeling like the investigator in her case was uninterested, unduly argumentative, and did not communicate effectively about what relief he might seek from her employer.

### **Implement Fast-Track Resolution for Pregnancy Accommodations Claims**

Since January of 2014, the NYCHRL has guaranteed workplace accommodations to employees based on pregnancy, childbirth and related medical conditions. More than a year after going into effect, many employers are still unaware of their obligations under the law. This is an area where the Commission has the opportunity to avert costly litigation and the spiraling economic disadvantages of discrimination by intervening while pregnant workers are still employed. According to the Commission's own records, the average age of a pending pregnancy discrimination case in October 2014 was 271



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days—approximately the length of an average pregnancy.<sup>3</sup> By implementing a “fast-track” for these complaints, the Commission can keep them out of extended investigation, keep women on the job, and reduce staff workload. In California, where a similar accommodations requirement has been in effect since 2000, disputes have repeatedly been resolved quickly and informally through good faith negotiations.<sup>4</sup> The Commission should facilitate such negotiations between pregnant women and their employers in a timely matter, since pregnancy accommodations are, by definition, short-term in nature and the need for them may expire long before the Commission would otherwise finish investigation of a complaint.

### **Review and Clarify Existing Know-Your-Rights Materials**

In the absence of extensive case law interpreting and clarifying the scope of the NYCHRL, the Commission should review its public education materials and offer further guidance to employees and employers about their rights and responsibilities under the law. For example, the Commission’s Pregnancy and Employment Rights Info Card lists unpaid medical leave as a reasonable accommodation for needs related to pregnancy, childbirth and related medical conditions. While unpaid medical leave is a critical accommodation, and should certainly be specified as such for childbirth recovery and prenatal visits, in cases where other modifications can allow a woman to keep earning a

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<sup>3</sup> Mulqueen, Cliff. Correspondence from Cliff Mulqueen, Deputy Commissioner/General Counsel for New York City Commission for Human Rights.

<sup>4</sup> Noreen Farrell, Jamie Dolkas and Mia Munroe, *Expecting a Baby, Not a Layoff: Why Federal Law Should Require the Reasonable Accommodation of Pregnant Workers*, Equal Rights Advocates (2013).



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paycheck, it should be an accommodation of last resort. Also, the Commission should clarify that accommodations for breastfeeding in the workplace are included within the scope of the law.

### **Conclusion**

We are grateful that the Council is prioritizing enforcement of the NYCHRL and reinvesting in a robust and comprehensive human rights infrastructure for New York City. We are the eager to work with the Council and the new Chair of the Commission to promote fairness and prevent discrimination that threatens the economic security of New Yorkers with the fewest resources.