§ 297. Procedure

1.Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or herself or his [or]* her attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney general, or the chair of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2.

a.After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

b.Notwithstanding the provisions of paragraph a of this subdivision, with respect to housing discrimination only, after the filing of any complaint, the division shall, within thirty days after receipt, serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

3.

a.If in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the division, the complainant, and the respondent, including a provision for the entry in the supreme court in any county in the judicial district where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, of a consent decree

* The bracketed word has been inserted by the Publisher.

embodying the terms of the conciliation agreement. The division shall not disclose what has transpired in the course of such endeavors.

b.If a conciliation agreement is entered into, the division shall issue an order embodying such agreement and serve a copy of such order upon all parties to the proceeding, and if a party to any such proceeding is a regulated creditor, the division shall forward a copy of the order embodying such agreement to the superintendent.

c.If the division finds that noticing the complaint for hearing would be undesirable, the division may, in its unreviewable discretion, at any time prior to a hearing before a hearing examiner, dismiss the complaint on the grounds of administrative convenience. However, in cases of housing discrimination only, an administrative convenience dismissal will not be rendered without the consent of the complainant. The division may, subject to judicial review, dismiss the complaint on the grounds of untimeliness if the complaint is untimely or on the grounds that the election of remedies is annulled.

d.[Relettered]

4.

a.Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the court has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his or her attorney. With the consent of the division, the case in support of the complainant may be presented solely by his or her attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his or her discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his or her answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

b.If the respondent fails to answer the complaint, the hearing examiner designated to conduct the hearing may enter the default and the hearing shall proceed on the evidence in support of the complaint. Such default may be set aside only for good cause shown upon equitable terms and conditions.

c.Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training

program, on-the-job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint, evaluating applicants for membership in a place of accommodation without discrimination based on race, creed, color, national origin, sex, disability or marital status, and without retaliation or discrimination based on opposition to practices forbidden by this article or filing a complaint, testifying or assisting in any proceeding under this article; (iii) awarding of compensatory damages to the person aggrieved by such practice; (iv) awarding of punitive damages, in cases of housing discrimination only, in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three-b of section two hundred ninety-six of this article; and (vi) assessing civil fines and penalties, in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious; (vii) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he or she shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he or she has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he or she has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

d.The division shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.

e.Any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article. In cases of employment discrimination where the employer has fewer than fifty employees, such civil fine or penalty may be paid in reasonable installments, in accordance with regulations promulgated by the division. Such regulations shall require the payment of reasonable interest resulting from the delay, and in no case permit installments to be made over a period longer than three years.

5.Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

6.At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or if the complaint alleges an unlawful discriminatory practice under subdivision two-a or paragraph (a), (b) or (c) of subdivision five of section two hundred ninety-six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, or, if no supreme court justice is available in such county, in any other county within the judicial district, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper.

7.Not later than one year from the date of a conciliation agreement or an order issued under this section, and at any other times in its discretion, the division shall investigate whether the respondent is complying with the terms of such agreement or order. Upon a finding of non-compliance, the division shall take appropriate action to assure compliance.

8.No officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section.

9.Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of *section two hundred four of the civil practice law and rules*, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division. Any party to a housing discrimination complaint shall have the right within twenty days following a determination of probable cause pursuant to subdivision two of this section to elect to have an action commenced in a civil court, and an attorney representing the division of human rights will be appointed to present the complaint in court, or, with the consent of the division, the case may be presented by complainant's attorney. A complaint filed by the equal employment opportunity commission to comply with the requirements of *42 USC 2000e-5(c)* and *42 USC 12117(a)* and *29 USC 633(b)* shall not constitute the filing of a complaint within the meaning of this subdivision. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a of this article.

10. With respect to all cases of housing discrimination and housing related credit discrimination in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of employment or credit discrimination where sex is a basis of such discrimination, in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party to the action or the proceeding in the division's capacity as an employer. In cases of employment discrimination, a respondent shall only be liable for attorney's fees under this subdivision if the respondent has been found liable for having committed an unlawful discriminatory practice. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

> **(a)**the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or
>
> **(b)**the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action

or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

History

Add, L 1951, ch 800, § 1, with substance transferred from § 132; amd, L 1952, ch 285, § 7; L 1960, ch 978, § 1; L 1961, ch 414, § 5; L 1962, ch 164, § 2; L 1962, ch 310, § 134; L 1962, ch 369, § 3; L 1962, ch 529, § 1; L 1965, ch 4, § 2; L 1965, ch 851, § 4, eff Sept 1, 1965; L 1968, ch 10, § 2; L 1968, ch 958, § 6, eff July 1, 1968; L 1969, ch 218, § 1, eff April 25, 1969; L 1969, ch 359, § 9,10; L 1969, ch 1070, § 2; L 1970, ch 316, § 1; L 1974, ch 27, § 2; L 1974, ch 173, § 7, eff July 15, 1974,8,9; L 1977, ch 729, § 1, eff Aug 5, 1977,2, eff Aug 5, 1977; L 1982, ch 863, § 1, eff Sept 1, 1982; L 1984, ch 83, § 1; L 1984, ch 266, § 1, eff Aug 24, 1984; L 1989, ch 568, § 1, expired and repealed June 30, 1997 (see 1989 note below),1, eff Jan 13, 1990, expired and repealed June 30, 1997 (see 1989 note below); *L 1991, ch 342, § 1* (see 1991 note below); *L 1991, ch 368, § 1*, eff July 15, 1991,6; *L 1992, ch 182, § 1*, eff June 16, 1992 (see 1992 note below); *L 1994, ch 210, § 1*, eff June 28, 1994; *L 1994, ch 262, § 2*, eff Nov 3, 1994; *L 1997, ch 374, § 1*, eff Aug 5, 1997,2, eff Aug 5, 1997; *L 1999, ch 405, § 11* (Part D), eff Aug 6, 1999,12 (Part D), eff Aug 6, 1999,13 (Part D), eff Aug 6, 1999,14 (Part D), eff Aug 6, 1999,15 (Part D), eff Aug 6, 1999,16 (Part D), eff Aug 6, 1999,17 (Part D), eff Aug 6, 1999; *L 2000, ch 166, § 30*, eff July 18, 2000,32, eff July 18, 2000,33, eff July 18, 2000,34, eff July 18, 2000; *L 2009, ch 57, § 1* (Part AA), eff July 6, 2009,2 (Part AA), eff July 6, 2009; *L 2015, ch 364, § 1*, eff Jan 19, 2016.

Annotations

Notes

Editor's Notes:

See 1962 note under § 63-a.

See 1968 note under § 290.

Laws 1969, ch 1070, § 2-a, eff June 25, 1969, provides as follows:

§ 2-a. None of the amendments made by this act shall apply to the city of New York. (Amended by L 1970, ch 493, § 2, eff Sept 1, 1970, by adding § 2-a to Laws 1969, ch 1070.).

Laws 1989, ch 568, § 2, eff Jan 13, 1990, expires and repealed June 30, 1997, provides as follows:

§ 2. The commissioner of human rights shall establish a human rights arbitration advisory committee to assist and advise him or her in the promulgation of rules and regulations, and the implementation and functioning of the voluntary arbitration procedure. The committee shall consist of seven members, three of whom shall be appointed by the governor with at least one of these appointment being a member of the New York State bar association; two of whom shall be appointed by the speaker of the assembly; and two of whom shall be appointed by the majority leader of the senate. Committee members shall be chosen to represent a balance of complainant and respondent interests. The governor shall designate a chairperson of the committee. The chairperson and the commissioner of human rights each shall have the authority to convene the committee from time to time, as they deem appropriate. The committee shall report to the governor, the speaker of the assembly, and the majority leader of the senate on or before March 31, 1997, regarding the operation of the arbitration program; and the committee shall be entitled to receive from the commissioner of human rights such information as is necessary to monitor the arbitration program. The commission of human rights shall report to the governor, the speaker of the assembly and the majority leader of the senate semi-annually regarding the operation of the voluntary arbitration procedure. (Amd, *L 1994, ch 210, § 2*, eff June 28, 1994.).

Laws 1989, ch 568, § 3, eff Jan 13, 1990, provides as follows:

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become law, and shall expire on June 30, 1997, on which date the provisions of this act shall be deemed repealed. (Amd, *L 1994, ch 210, § 2*, eff June 28, 1994.).

***Laws 1991, ch 342, § 2*,** eff July 15, 1991, provides as follows:

§ 2. This act shall take effect immediately and shall apply to complaints filed with any federal commission on human rights on or after such date.

***Laws 1992, ch 182, § 2*,** eff June 16, 1992, provides as follows:

§ 2. This act shall take effect immediately and shall apply to complaints filed with any federal commission on human rights on or after such date.

Laws 2015, ch 364, § 4, eff January 19, 2016, provides:

§ 4. This act shall take effect on the ninetieth day after it shall have become a law, and shall apply to actions commenced on or after such date.

Amendment Notes:

2000. Chapter 166, § 30 amended:

Sub 1, by deleting “attorney-general” and “chairman”.

1999. Chapter 405, § 13 (part d) amended:

Sub 3, par b, by deleting “serve a copy of the”.

2009. Chapter 57, § 1 (part aa) amended:

Sub 4, par c, by deleting “in cases of housing discrimination only,”.

The 2015 amendment by ch 364, § 1, in the first sentence of the introductory language of 10, substituted “all cases of housing discrimination and housing related credit discrimination” for “cases of housing discrimination only” and added “and with respect to a claim of employment or credit discrimination where sex is a basis of such discrimination, in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney’s fees attributable to such claim to any prevailing party” and added the next to last of the introductory language of 10.

Notes to Decisions

I.Generally

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IV.Hearings

I. Generally

1. In general

In a proceeding alleging discrimination in employment on the basis of sex arising out of a then mandatory pregnancy-related resignation, notwithstanding that the regulation policy of 1959 did not then violate a statutory prescription and a complaint thereon is untimely the seniority system which became available in 1977 effectively revived that policy and constituted a separate discriminatory act, where the seniority system purportedly treated all personnel equally but disallowed credit for

service preceding any resignation, thereby failing to take into account the fact that only a pregnancy-related resignation was required and imposing a distinct burden on a woman; a seniority system can be found to currently discriminate against a woman when, in computing seniority, it disregards all service rendered prior to a resignation compelled due to pregnancy, notwithstanding that the law did not prohibit sex-based discrimination when the pregnancy-related resignation was originally demanded. *Board of Education v New York State Div. of Human Rights, 56 N.Y.2d 257, 451 N.Y.S.2d 700, 436 N.E.2d 1301, 1982 N.Y. LEXIS 3357 (N.Y. 1982)*.

Tavern owner who admitted that name selected for tavern and sign used for tavern were intended to attract male patrons and who was ordered to cease and desist from discriminating against women was not required to remove name and sign. *Rosenberg v State Human Rights Appeal Board, 45 A.D.2d 929, 357 N.Y.S.2d 325, 1974 N.Y. App. Div. LEXIS 4500 (N.Y. App. Div. 4th Dep't 1974)*.

Despite its contention that such action was necessary to inform public of available procedures and remedies for discriminatory actions, State Division of Human Rights (SDHR) engaged in arbitrary and capricious conduct in issuing press release detailing allegations of age discrimination made against college by former employee, disclosing that matter had been settled, and setting forth parts of settlement terms, where stipulation of settlement, which SDHR had participated in negotiating on former employee's behalf, provided for absolute confidentiality except for enforcement purposes. *Paul Smith's College of Arts & Sciences v Cuomo, 186 A.D.2d 888, 589 N.Y.S.2d 106, 1992 N.Y. App. Div. LEXIS 12126 (N.Y. App. Div. 3d Dep't 1992)*.

Sex, age, and disability discrimination claims filed against airline under CLS *Exec § 296(1)(a)* were not preempted by Federal Airlines Deregulation Act of 1978. *Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996)*, app. dismissed, *90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997)*, aff'd, *91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997)*.

Prospective sellers did not have standing to assert action under CLS *Exec §§ 296* and *297* against property owners association and its environmental control committee for their denial of application by prospective buyers to use property as vacation convent, since prospective sellers had not been victims of any discrimination. *Sisters of the Resurrection, New York Inc. v Country Horizons, 257 A.D.2d 729, 682 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 25 (N.Y. App. Div. 3d Dep't 1999)*.

N.Y. Exec. Law § 295(6)(a) and (b) were not collectively unconstitutional, based on the provisions for an administrative hearing under *N.Y. Exec. Law § 297(4)(a)* and (9); accordingly, the combined investigative and adjudicative functions of the New York State Division of Human Rights did not violate due process. *Town of Oyster Bay v Kirkland, 81 A.D.3d 812, 917 N.Y.S.2d 236, 2011 N.Y. App. Div. LEXIS 1259 (N.Y. App. Div. 2d Dep't)*, app. dismissed, *17 N.Y.3d 778, 929 N.Y.S.2d 79, 952 N.E.2d 1073, 2011 N.Y. LEXIS 1679 (N.Y. 2011)*, aff'd, *19 N.Y.3d 1035, 954 N.Y.S.2d 769, 978 N.E.2d 1237, 2012 N.Y. LEXIS 2725 (N.Y. 2012)*.

Provision of above statute to effect that members of commission and its staff shall not disclose what has transpired "in the course of such endeavors," refers to the provision of previous sentence of statute that commissioner shall endeavor to eliminate unlawful discriminatory practice and not to facts found by the investigator for the commission. *Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964)*, modified, *23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965)*.

Article 15 procedure does not violate due process, since subdivision 2 of the Article provides for a separation of the investigative and quasi judicial functions of the commission members. *Marrano Constr. Co. v State Com. for Human Rights, 45 Misc. 2d 1081, 259 N.Y.S.2d 4, 1965 N.Y. Misc. LEXIS 2061 (N.Y. Sup. Ct. 1965)*.

A cause of action based on plaintiff's claim of sexual harassment arising out of her employment relationship with defendant, who coerced her into sexual activity with his business associates in order to further his business, is cognizable under *Executive Law § 297 (9)*, which provides that any person aggrieved by an unlawful discriminatory practice shall have a cause of action for damages, and actions of an employer which discriminate against an individual in the "terms, conditions or privileges of employment" because of that person's sex are encompassed within the ambit of actionable wrongs (see, *Executive Law § 296 [1] [a]*; § 292 [4]). Under the Human Rights Law, an employer is prohibited from even attempting to exploit his dominant

position by imposing sexual demands upon an employee as an implicit condition of continued employment, and the employee need not prove that he or she resisted the abuse or refused to comply with the sexual demands, that tangible job benefits were lost, or that discriminatory conduct was intentional. *Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990)*, modified, *179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992)*.

In action under Human Rights Law to recover compensatory and punitive damages for sexual harassment arising out of employer's coercion of female employee to engage in sexual acts with his business associates to further his own business interests, offensiveness of employer's conduct was not mitigated by fact that plaintiff's job as actress and model involved commercial exploitation of her physical appearance, since sexual slavery was not part of her job description, and fact that she accepted employment which exploited her sexuality did not constitute waiver of protections against sexual harassment in workplace. *Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990)*, modified, *179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992)*.

Plaintiff failed to state cognizable claim under either New York City or New York State Human Rights Law by alleging that school district's denial of health insurance benefits to his domestic partner constituted discrimination on basis of marital status and sexual orientation. *Funderburke v Uniondale Union Free Sch. Dist. No. 15, 172 Misc. 2d 963, 660 N.Y.S.2d 659, 1997 N.Y. Misc. LEXIS 260 (N.Y. Sup. Ct. 1997)*, aff'd, *251 A.D.2d 622, 676 N.Y.S.2d 199, 1998 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 1998)*.

Former university employee's state law claims under *N.Y. Exec. Law § 291* were dismissed; because she chose to proceed with her discrimination complaint before the New York State Division of Human Rights (NYSDHR) and the NYSDHR did not dismiss her claim for administrative convenience, the claims were barred under *N.Y. Exec. Law § 297(9)*. *Forbes v State Univ. of N.Y., 259 F. Supp. 2d 227, 2003 U.S. Dist. LEXIS 7391 (E.D.N.Y. 2003)*.

Eleventh Amendment barred the *42 U.S.C.S. §§ 1981*, *1983*, and the New York State and City Human Rights Law complaints against a judge and a state judicial agency by the judge's former personal secretary; the Eleventh Amendment rendered the agency and the state immune from suit under § 1983 or under state law because the State of New York had not consented to suit in federal court, and because no express override of state statutory authority had been enacted by Congress in association with § 1983. *Bland v New York, 263 F. Supp. 2d 526, 2003 U.S. Dist. LEXIS 5521 (E.D.N.Y. 2003)*.

Simply because a judge's former secretary filed an administrative complaint against a judicial agency and the judge for discrimination based on gender, race, and color with a city human rights commission did not necessarily mean that the secretary's State and City Human Rights Law claims were barred; the complaint was forwarded to the state human rights division, which dismissed it for administrative convenience. Accordingly, the election of remedies doctrine did not argue for dismissal of the secretary's claims. *Bland v New York, 263 F. Supp. 2d 526, 2003 U.S. Dist. LEXIS 5521 (E.D.N.Y. 2003)*.

2. Procedure, generally

Complaint by Division of Human Rights charging employer with unlawful discriminatory practice relating to employment, alleging that employer's system of hiring had produced few Negro and Spanish-surnamed employees under circumstances where such minority groups were available for employment, was not insufficient to meet notice requirements of due process. *State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974)*, app. dismissed, *420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975)*.

Under *Executive Law § 297*, subd 4(a), failure of complainant to appear personally and testify at hearing did not require dismissal of complaint. *Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973)*, rev'd, *35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974)*.

Although it would have been better practice for Division of Human Rights to have conferred further with petitioner concerning the substantial information which it had gathered that her demotion was not the result of sex discrimination, there was no

reason to declare procedure and determination of Division arbitrary or capricious or an abuse of discretion. *Jackson v New York State Div. of Human Rights, 42 A.D.2d 684, 345 N.Y.S.2d 735, 1973 N.Y. App. Div. LEXIS 3988 (N.Y. App. Div. 4th Dep't 1973).*

Relevant provisions of Executive Law, when read together, establish legislative intent that, before determining whether there is probable cause for complaint of discrimination, commissioner of Division of Human Rights should give complainant full opportunity to present on record, though informally, his charges against employer or other respondent, including right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony. *State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977)*.

An order, which affirmed the State Division of Human Rights' order dismissing petitioner's complaint alleging age discrimination by his employer as being without probable cause, would be annulled, where petitioner had been discharged at age 57 after 28 years of satisfactory service, and where the division failed to investigate adequately, failed to hold a confrontation conference, and failed to resolve all the issues raised. *Steins v State Div. of Human Rights, 86 A.D.2d 795, 447 N.Y.S.2d 11, 1982 N.Y. App. Div. LEXIS 15408 (N.Y. App. Div. 1st Dep't)*, app. dismissed, *56 N.Y.2d 805, 1982 N.Y. LEXIS 5933 (N.Y. 1982)*.

It is within discretion of state Division of Human Rights to decide method or methods to be employed in investigating claim, so that determination by division of "no probable cause" should be overturned as capricious only where record demonstrates that its investigation was "abbreviated or one-sided." *Chirgotis v Mobil Oil Corp., 128 A.D.2d 400, 512 N.Y.S.2d 686, 1987 N.Y. App. Div. LEXIS 44111 (N.Y. App. Div. 1st Dep't 1987)*.

Plaintiff's action under CLS *Exec § 296(7)* should have been dismissed where federal court had previously dismissed such action, together with claim based on *42 USCS § 1981*, stating that "Plaintiff now concedes that the claims under (federal law) and the New York Executive Law are time barred." *Mchawi v State Univ. of New York, Empire State College, 248 A.D.2d 111, 669 N.Y.S.2d 545, 1998 N.Y. App. Div. LEXIS 1932 (N.Y. App. Div. 1st Dep't)*, app. denied, *92 N.Y.2d 804, 677 N.Y.S.2d 779, 700 N.E.2d 318, 1998 N.Y. LEXIS 1856 (N.Y. 1998)*.

In action for sexual harassment and retaliatory discharge, court properly denied plaintiff's motion to amend complaint to add action for wrongful termination based on disability discrimination under CLS *Exec § 296(1)(a)* since plaintiff had been aware of facts underlying alleged claim since inception of action, she failed to offer any reason or excuse for delay in seeking to amend complaint, and defendants had prepared case in response to original complaint, had no notice of new claim, and would suffer prejudice by its late edition. *Castagne v Barouh, 249 A.D.2d 257, 671 N.Y.S.2d 283, 1998 N.Y. App. Div. LEXIS 3656 (N.Y. App. Div. 2d Dep't 1998)*.

In action for retaliation under CLS *Exec § 296(7)* brought against Board of Trustees of divinity school (defendant), court should have granted defendant's motion to dismiss complaint where there were no allegations that defendant fell within ambit of CLS *Exec § 292(1)*, nor was it alleged that activity or activities in which defendant engaged were allegedly prohibited under Human Rights Law; although plaintiff alleged that defendant violated general duty to accommodate her disability under CLS *Exec § 296(3)(a)*, that section applied to employers, licensing agencies, employment agencies, and labor organizations and did not apply here. *Edwards v Board of Trustees of Colgate Rochester Divinity Sch., 254 A.D.2d 709, 677 N.Y.S.2d 868, 1998 N.Y. App. Div. LEXIS 10379 (N.Y. App. Div. 4th Dep't 1998)*.

Court should have granted defendants' motion to change venue from Bronx to New York County where New York County was site of allegedly discriminatory conduct and county in which all of anticipated nonparty witnesses resided, defendants furnished names and addresses of potential nonparty witnesses, setting forth essence of their anticipated testimony, and manner in which they would be inconvenienced, and plaintiffs failed to identify single nonparty witness who would be inconvenienced by attending trial in New York County. *Mohammad v Board of Managers, 262 A.D.2d 76, 691 N.Y.S.2d 486, 1999 N.Y. App. Div. LEXIS 6472 (N.Y. App. Div. 1st Dep't 1999)*.

Complaint properly stated action for violation of CLS *Exec § 296(16)* by alleging that defendant took adverse employment actions against plaintiff, based on fact that plaintiff, police officer, was arrested, although arrest had not resulted in conviction. *Annabi v Cassino, 269 A.D.2d 551, 703 N.Y.S.2d 745, 2000 N.Y. App. Div. LEXIS 2133 (N.Y. App. Div. 2d Dep't 2000)*.

Commissioner making investigation under above statute has right to question witnesses. *Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964)*, modified, *23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965)*.

The provision of this section requiring that a complaint charging discrimination in housing be filed in the Commission's Albany office prior to the designation of an investigating commissioner and the investigation is directory and not mandatory, and a failure to abide by such a directory rule does not affect a substantial right of a party and is no ground for upsetting the entire proceeding. *Barnes v Goldberg, 54 Misc. 2d 676, 283 N.Y.S.2d 347, 1966 N.Y. Misc. LEXIS 1403 (N.Y. Sup. Ct. 1966)*.

The human rights law authorizes intervention by court to insure that proceeding before division of human rights remains in status quo while proceeding is pending. *Kramarsky v New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977)*.

Subsidiary of public transportation authority was not entitled to writ of prohibition precluding Division of Human Rights (DHR) from holding hearing or taking any action in regard to discriminatory employment complaint by subsidiary's former employee, despite DHR's failure to comply with notice of claim provisions of CLS *Pub A § 1342* since (1) statute only applied to "action" and not to "proceeding" such as instituted by DHR, (2) statute excluded subsidiary corporation from notice of claim requirement, and (3) notice of claim provision had no application to action to vindicate public interest. *Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989)*.

Respondent State Division of Human Rights properly dismissed a race discrimination complaint under the Human Rights Law on grounds of "administrative convenience" at complainant's behest (*Executive Law § 297 [3] [c]*; see, *9 NYCRR 465.5 [d] [2] [vi]*) so that complainant could pursue all her claims against petitioner in Federal court, since complainant had expressly elected to pursue both her State law claims and Federal claims under title VII of the Civil Rights Act of 1964 (*42 USC § 2000e* et seq.) in Federal court rather than before the State agency and only filed her complaint with the Division in order to satisfy the requirements of Federal law before her claims could be asserted in Federal court. The dismissal of the complaint serves the Division's "administrative convenience" by conserving its scarce resources where complainant has the desire and resources to bring the complaint in Federal court. *New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990)*.

In a proceeding challenging the dismissal by respondent State Division of Human Rights of a race discrimination complaint on grounds of "administrative convenience" at complainant's behest (*Executive Law § 297 [3] [c]*; see, *9 NYCRR 465.5 [d] [2] [vi]*), petitioner's request for admissions of fact (*CPLR 3123*) that respondent had not dismissed any complaints for "administrative convenience" within the last two years "primarily because there was an action pending" in Federal court, except where first requested by the complainant, in order to establish some arbitrary and capricious activity by respondent is denied, since petitioner's request seeks conclusions about material issues and the notice to admit may not be utilized to request admissions of material issues or ultimate or conclusory facts. *New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990)*.

When the attorney general sought to subpoena records of a domestic worker placement agency, to determine if the agency was violating *N.Y. Exec. Law § 296* et seq., *N.Y. Civ. Rights Law § 40-c*, and *New York City, N.Y., Admin. Code § 8-107(a)*, by asking job applicants about their national origin, age, and marital status and accomodating employer preferences as to a worker's national origin and age, the attorney general's failure to serve a complaint on the agency, pursuant to *N.Y. Exec. Law § 297*, did not violate the agency's right to due process because the attorney general was free to initiate its own investigation into the agency's business practices, under its broad investigatory powers in *N.Y. Exec. Law § 63(12)*, without regard to the requirements of § 297. *Matter of Pavillion Agency Inc v Spitzer, 802 N.Y.S.2d 879, 9 Misc. 3d 626, 234 N.Y.L.J. 28, 2005 N.Y. Misc. LEXIS 1613 (N.Y. Sup. Ct. 2005)*.

Plaintiff's failure to serve copy of amended complaint on city commission on human rights and corporation counsel did not require dismissal of employment discrimination claims under New York City Human Rights Law, although NYC Admin § 8-502(c) required service of copy of complaint on such entities before suing, where plaintiff had served copy of original

complaint on both entities before suing. *Robins v Max Mara, U.S.A., 923 F. Supp. 460, 1996 U.S. Dist. LEXIS 1295 (S.D.N.Y. 1996)*.

3. Jurisdiction, generally

In view of the broad power granted by the legislature in its delegation to the commission, the jurisdiction of the commission must be taken as plenary. *Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953)*, aff'd, *307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954)*.

Where grievance before Division of Human Rights was a retaliation complaint and, although based on some of same alleged facts, issues were different from those of discrimination complaint previously filed with EEDC, Division of Human Rights was not divested of jurisdiction. *Russell Sage College v State Div. of Human Rights, 45 A.D.2d 153, 357 N.Y.S.2d 171, 1974 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 3d Dep't 1974)*, aff'd, *36 N.Y.2d 985, 374 N.Y.S.2d 603, 337 N.E.2d 119, 1975 N.Y. LEXIS 2069 (N.Y. 1975)*.

Section of Human Rights Law providing that within 60 days after complaint is filed the Division of Human Rights must give notice of hearing on alleged violations and that the hearing must be held within 15 days thereafter, was directory rather than mandatory, and fact that Division exceeded such time limits was not cause for invalidating its proceedings or terminating its jurisdiction. *Liverpool Cent. School Dist. v State Div. of Human Rights, 46 A.D.2d 1004, 361 N.Y.S.2d 787, 1974 N.Y. App. Div. LEXIS 3389 (N.Y. App. Div. 4th Dep't 1974)*.

Where complaint was filed with the State Division of Human Rights prior to initiation of Article 78 proceeding, the Division had jurisdiction and the remedy before the Division was exclusive, and thus the Human Rights Appeal Board was not divested of jurisdiction by petitioner's subsequent attempts to obtain court relief. *State Div. of Human Rights v Commissioner of New York State Dep't of Civil Service, 57 A.D.2d 699, 395 N.Y.S.2d 774, 1977 N.Y. App. Div. LEXIS 11737 (N.Y. App. Div. 4th Dep't 1977)*.

In a proceeding by a woman who alleged that a hospital denied her the accommodations, advantages, and privileges of a place of public accommodation, the trial court erred in divesting the Division of jurisdiction by an order in the nature of prohibition since, although the Division's delay of 636 days between the time the complaint was filed and the time it found probable cause was clearly in excess of the time limits specified in *Exec Law § 297*, the time schedules contained in that statute are directory only and, absent some showing of substantial prejudice, noncompliance with such schedules does not operate to oust the Division of the jurisdiction conferred on it; even if the woman had made a showing of substantial prejudice, prohibition was an inappropriate remedy in that she failed to first exhaust the remedies of administrative and judicial review. *St. Elizabeth Hospital v Kramarsky, 81 A.D.2d 1010, 440 N.Y.S.2d 97, 1981 N.Y. App. Div. LEXIS 11763 (N.Y. App. Div. 4th Dep't 1981)*.

CLS *Exec §§ 296* and *297* did not grant jurisdiction to State Division of Human Rights to consider issue of union local's refusal to waive requirements of union labor for low bidding non-union subcontractor who was offered, but refused, opportunity to sign full time agreement with union; clear intent of law was to prohibit discrimination by labor union in its membership practices, not to deal with issues concerning persons neither union members nor applying for memberships. *Gomez v New York State, Executive Dep't Div. of Human Rights, 122 A.D.2d 337, 504 N.Y.S.2d 307, 1986 N.Y. App. Div. LEXIS 59671 (N.Y. App. Div. 3d Dep't 1986)*.

New York State Division of Human Rights properly dismissed, for lack of jurisdiction, claim of racial discrimination brought by certified home health care aide, who was employed by 93-year-old quadriplegic to provide 24-hour care to attend to his health and personal hygiene needs, to cook for him, to transport him, and otherwise to care for him. *Thomas v Dosberg, 249 A.D.2d 999, 672 N.Y.S.2d 164, 1998 N.Y. App. Div. LEXIS 5177 (N.Y. App. Div. 4th Dep't 1998)*.

Because a college was not subject to the provisions of the New York City Human Rights Law, *N.Y. Exec. Law § 297*, an employee was not entitled to an award of an attorney's fee and expenses under *Administrative Code of the City of NY § 8-502(f)* or front pay; however, the employee was entitled to prejudgment interest on the employee's back pay under N.Y. *C.P.L.R.*

5001(b). *Jattan v Queens Coll. of City Univ. of N.Y., 64 A.D.3d 540, 883 N.Y.S.2d 110, 2009 N.Y. App. Div. LEXIS 5629 (N.Y. App. Div. 2d Dep't 2009)*.

By its enactment of *General Municipal Law § 239-s* giving New York City concurrent jurisdiction with the State Commission for Human Rights with respect to discrimination in housing, the legislature conclusively demonstrated its intention not to grant exclusive jurisdiction to the state in the matters of discrimination in housing. *Feigenblum v Commission on Human Rights, 53 Misc. 2d 360, 278 N.Y.S.2d 652, 1967 N.Y. Misc. LEXIS 1658 (N.Y. Sup. Ct. 1967)*.

The New York State Division of Human Rights in a special proceeding against a South African Airway was without jurisdiction to conduct a hearing on the visa policy of the Republic of South Africa as it affects the airline in carrying passengers. *South African Airways v New York State Div. of Human Rights, 64 Misc. 2d 707, 315 N.Y.S.2d 651, 1970 N.Y. Misc. LEXIS 1180 (N.Y. Sup. Ct. 1970)*.

Executive Law §§ 297(9) and *300*, taken together must be construed to mean that the State Division of Human Rights does not have any jurisdiction over a matter which was initiated before another administrative agency. *Board of Education v State Div. of Human Rights, 65 Misc. 2d 679, 318 N.Y.S.2d 633, 1971 N.Y. Misc. LEXIS 1807 (N.Y. Sup. Ct. 1971)*.

Where employer against whom employee filed age discrimination complaint with Division of Human Rights did not maintain office in New York County but in fact had its offices in Nassau County where alleged discrimination occurred, Supreme Court of New York County did not have jurisdiction to enjoin alleged discrimination pending decision of Division. *Sable v Sperry Gyroscope Div., 81 Misc. 2d 429, 365 N.Y.S.2d 595, 1975 N.Y. Misc. LEXIS 2400 (N.Y. Sup. Ct.)*, aff'd, *50 A.D.2d 517, 375 N.Y.S.2d 120, 1975 N.Y. App. Div. LEXIS 12207 (N.Y. App. Div. 1st Dep't 1975)*.

Education department and Division of Human Rights had concurrent jurisdiction to pass on complaint alleging that student applicant was denied admission to medical school on basis of discriminatory practices of school; thus school was not entitled to extraordinary remedy of writ to prohibit student applicant and Division from conducting discrimination complaint hearing on grounds they were proceeding in excess of jurisdiction. *New York University v New York State Div. of Human Rights, 84 Misc. 2d 702, 378 N.Y.S.2d 842, 1975 N.Y. Misc. LEXIS 3202 (N.Y. Sup. Ct.)*, aff'd, *49 A.D.2d 821, 373 N.Y.S.2d 719, 1975 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1st Dep't 1975)*.

Employer was not entitled to dismissal of employment discrimination suit on alleged jurisdictional defect that employee had not obtained notice of right-to-sue from Equal Employment Opportunity Commission (EEOC), since employee had requested right-to-sue letter from EEOC after waiting statutorily required 180 days from time charges were filed but received no response; thus, she was entitled to notice and EEOC's failure to issue letter would not preclude her action. *Scott v Carter-Wallace, Inc., 134 Misc. 2d 458, 511 N.Y.S.2d 767, 1986 N.Y. Misc. LEXIS 3119 (N.Y. Sup. Ct. 1986)*, dismissed, in part, *137 Misc. 2d 672, 521 N.Y.S.2d 614, 1987 N.Y. Misc. LEXIS 2698 (N.Y. Sup. Ct. 1987)*.

Because a claimant could maintain both an administrative proceeding and a federal court action for sexual harassment and employment discrimination, the New York State Division of Human Rights had jurisdiction under *N.Y. Exec. Law § 297(3)(c)* to dismiss the petitioner's complaint for administrative convenience; therefore, prohibition was not warranted under N.Y. C.P.L.R. art. 78. *Peek v New York State Div. of Human Rights, 835 N.Y.S.2d 877, 16 Misc. 3d 346, 2007 N.Y. Misc. LEXIS 3525 (N.Y. Sup. Ct. 2007)*.

A complaint addressed to a Supreme Court seeking an injunction against rental of apartments or sale or disposition of an apartment building because the owner and rental agent had violated this section by refusing to rent an apartment to plaintiff was dismissed for want of jurisdiction. *Redd v Zier, 229 N.Y.S.2d 582, 1962 N.Y. Misc. LEXIS 4175 (N.Y. Sup. Ct. 1962)*.

Commissions established by New York State Human Rights Law were authorized only to hear complaints about discriminatory employment practices by employers, employment agencies, labor organizations and apprenticeship committees and had no jurisdiction as to governmental action, or action by any entity not falling within the categories mentioned above. *Percy v Brennan, 384 F. Supp. 800, 1974 U.S. Dist. LEXIS 5879 (S.D.N.Y. 1974)*.

Federal court lacked jurisdiction over action against state university based on alleged violation of Human Rights Law, as state did not waive its exclusive jurisdiction over such claims merely by allowing federal Equal Employment Opportunity Commission to take responsibility for investigating plaintiff's complaints. *Jungels v State Univ. College, 922 F. Supp. 779, 1996 U.S. Dist. LEXIS 5483 (W.D.N.Y. 1996)*, aff'd sub. nom., *Jungels v Jones, 112 F.3d 504, 1997 U.S. App. LEXIS 14106 (2d Cir. N.Y. 1997)*.

Defendants, a town and a supervisor of the former employee, lacked the statutory authority to conduct a *N.Y. Gen. Mun. Law § 50-h* examination before the employment discrimination case could have been filed in the district court because no such examination was required under the New York State Human Rights Law, *N.Y. Exec. Law, § 290* et seq. *Gentile v Town of Huntington, 288 F. Supp. 2d 316, 2003 U.S. Dist. LEXIS 18870 (E.D.N.Y. 2003)*.

4. —Court of Claims jurisdiction

Plaintiff's action against the State, alleging that his employment at a State psychiatric center under the jurisdiction of the Department of Mental Hygiene was improperly terminated on the basis of his physical disability in violation of the Human Rights Law (*Exec Law § 296*) and seeking reinstatement, back pay, and damages for embarrassment, humiliation and mental and emotional distress, was properly commenced in the Supreme Court since, inasmuch as the Court of Claims has no power to order such equitable relief as reinstatement, a contrary conclusion would lead to the unfair result of requiring the person against whom the State has unlawfully discriminated to institute separate lawsuits to fully redress the wrong committed. *Koerner v State, 62 N.Y.2d 442, 478 N.Y.S.2d 584, 467 N.E.2d 232, 1984 N.Y. LEXIS 4406 (N.Y. 1984)*.

An action by an individual of Hispanic descent, alleging improper termination by reason of her supervisor's racial prejudice, properly set forth a cause of action under *Exec Law §§ 296*, *297(9)*, but was time-barred by *Ct Cl Act § 10(3)* where the claimant elected to assert the claim in the Court of Claims, notwithstanding that the same action brought against the State in its role as claimant's employer, if brought in Supreme Court, would be governed by a three-year statute of limitations. *Figueroa v State, 126 Misc. 2d 304, 481 N.Y.S.2d 946, 1984 N.Y. Misc. LEXIS 3606 (N.Y. Ct. Cl. 1984)*.

5. —Subject matter jurisdiction

In a proceeding brought pursuant to *Exec Law § 298*, to review a determination of the State Human Rights Appeal Board, which affirmed an order of the State Division of Human Rights dismissing plaintiff's complaint for lack of subject matter jurisdiction, the court properly found that the State Division of Human Rights did not have subject matter jurisdiction over plaintiff's complaint since plaintiff had pursued his action in the federal courts and *Exec Law § 297(9)* prohibits plaintiffs who initiate any action in a court of competent jurisdiction from pursuing the same grievance before the Division of Human Rights. *McGrath v State Human Rights Appeal Bd., 90 A.D.2d 916, 456 N.Y.S.2d 874, 1982 N.Y. App. Div. LEXIS 19195 (N.Y. App. Div. 3d Dep't 1982)*.

A complaint charging a public agency with an unfair discriminatory practice based upon a person's prior criminal convictions was properly dismissed by the State Division of Human Rights for lack of subject matter jurisdiction, since an Article 78 proceeding is the exclusive remedy available to remedy such a wrong. *New York City Transit Authority v State Human Rights Appeal Bd., 97 A.D.2d 825, 468 N.Y.S.2d 708, 1983 N.Y. App. Div. LEXIS 20604 (N.Y. App. Div. 2d Dep't 1983)*, app. dismissed, *62 N.Y.2d 646, 1984 N.Y. LEXIS 8025 (N.Y. 1984)*.

The Division of Human Rights and the Human Rights Appeal Board properly exercised subject matter jurisdiction, pursuant to *Exec Law §§ 296*, *297-a*, over a complaint by an applicant for a State Trooper position who had been disqualified by the State Police Division from its Hispanic-American/Spanish-surnamed minority hiring program, where the complaint effectively alleged that the State Police had discriminated against the applicant by refusing to treat him in the same manner that it treated others of Hispanic national origin or ancestry in considering him for employment, and where, though the Appeal Board specifically referred in its decision to an order by the United States District Court that had established guidelines for the State Police Division to follow in order to achieve a long-term goal of acquiring personnel comprised of women, blacks, and Spanish-surnamed Americans, there was uncontradicted documentary proof in the record, apart from the reference to the court

order, to support the appeal board's conclusion that the applicant was of Hispanic origin, so that the appeal board did not base its decision solely on an interpretation of the Federal court order, and, therefore, did not exceed its jurisdiction. *New York State Div. of State Police v McCall, 98 A.D.2d 921, 470 N.Y.S.2d 916, 1983 N.Y. App. Div. LEXIS 21243 (N.Y. App. Div. 3d Dep't 1983).*

The trial court properly dismissed an action in which plaintiff alleged that her former employer had retaliated against her due to her earlier complaint of sexual harassment where the retaliation claims before the court and plaintiff's earlier complaint before the State Division of Human Rights were undeniably similar, and, although additional facts appeared in the complaint, including he fact of plaintiff's termination from her employment, it was clear that those facts emanated from a continuing process of alleged retaliation giving rise to one claim, not several; accordingly, *Exec Law § 297(9)* deprived the trial court of subject matter jurisdiction, even though the administrative complaint before the division had been litigated and was on administrative appeal. *Spoon v American Agriculturalist, Inc., 103 A.D.2d 929, 478 N.Y.S.2d 174, 1984 N.Y. App. Div. LEXIS 19593 (N.Y. App. Div. 3d Dep't 1984)*.

Court lacked subject matter jurisdiction over plaintiff's claim for employment discrimination and wrongful discharge under CLS *Exec § 297* since plaintiff had initially filed statutory claim of employment discrimination and thus was precluded from commencing court action involving same claim. Employee's cause of action against his employer for intentional infliction of emotional distress, in connection with alleged employment discrimination and wrongful discharge, was properly dismissed for lack of subject matter jurisdiction since he had initially filed statutory claim for employment discrimination and wrongful discharge with Division of Human Rights in which he was able to seek damages for mental anguish and humiliation, and he was precluded from commencing action in court for same injuries under slightly different labels of intentional infliction of emotional distress and prima facie tort. *Horowitz v Aetna Life Ins., 148 A.D.2d 584, 539 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 3929 (N.Y. App. Div. 2d Dep't 1989)*.

Defendant corporation was entitled to dismissal of age discrimination action on basis of lack of subject matter jurisdiction where (1) plaintiff was Canadian citizen and resident of London, England who was employed by corporation for 28 years at various subsidiaries of corporation throughout United States and abroad, (2) plaintiff was employed in New York State for 2 ½ years ending in February, 1979, (3) at time his employment was terminated, plaintiff had been employed in London for 3 ½ years, and (4) plaintiff failed to allege that discriminatory act was committed within New York State. *Iwankow v Mobil Corp., 150 A.D.2d 272, 541 N.Y.S.2d 428, 1989 N.Y. App. Div. LEXIS 6931 (N.Y. App. Div. 1st Dep't 1989)*.

In action under Human Rights Law (CLS *Exec §§ 290* et seq.) for sex discrimination in employment in which plaintiff sought damages for, inter alia, emotional distress, court did not err in precluding testimony by defense expert that another lawsuit commenced against plaintiff caused her emotional distress, since (1) in diagnosis of plaintiff's condition, neither parties' experts had referred to other lawsuit, and (2) court allowed defendant to adduce testimony that several stress factors separate from plaintiff's discharge from employment were present in her life. *Rhoades v Niagara Mohawk Power Corp., 202 A.D.2d 762, 608 N.Y.S.2d 733, 1994 N.Y. App. Div. LEXIS 2307 (N.Y. App. Div. 3d Dep't 1994)*.

Court properly dismissed action for employment discrimination where plaintiff had brought administrative action against corporate defendant, which was voluntarily withdrawn with no indication that withdrawal was done for administrative convenience. *Brown v Wright, 226 A.D.2d 570, 641 N.Y.S.2d 125, 1996 N.Y. App. Div. LEXIS 4401 (N.Y. App. Div. 2d Dep't 1996).*

Court should have granted defendants' summary judgment motion on ground that plaintiff elected to pursue administrative remedy by filing complaint with New York State Division of Human Rights (NYSDHR) since plaintiff failed to produce admissible proof as to whether her complaint was referred to NYSDHR by Equal Employment Opportunity Commission or whether she filed it directly with NYSDHR; she submitted only attorney's affirmation that was not based on personal knowledge of facts stated therein. *Hirsch v Morgan Stanley & Co., 239 A.D.2d 466, 657 N.Y.S.2d 448, 1997 N.Y. App. Div. LEXIS 5365 (N.Y. App. Div. 2d Dep't 1997).*

In terminated employee's action for gender and age discrimination under both CLS *Exec §§ 290* et seq. and federal law, Supreme Court properly held that it lacked subject matter jurisdiction on ground that employee had elected to pursue her claims in federal court where (1) although language of CLS Exec former § 297(9), which was in effect when administrative

convenience dismissal was issued, did not contain explicit prohibition on commencement of action in state court, right to do so was limited, (2) administrative convenience dismissal was not for purpose of allowing employee to commence state court action but to pursue matter as part of litigation in federal court, (3) employee requested such dismissal so that her state and federal claims could "be brought in a single action," and (4) State Division of Human Rights understood that statement to mean that all claims would be pursued in federal court for purpose of conserving scarce state resources, which purpose served convenience of agency. *Kordich v Povill, 244 A.D.2d 112, 676 N.Y.S.2d 331, 1998 N.Y. App. Div. LEXIS 8680 (N.Y. App. Div. 3d Dep't 1998)*.

Department of Health was properly granted summary judgment dismissing action alleging that, by revoking plaintiff's medical license, it discriminated against him in violation of CLS *Exec § 296*, based on his adult Attention Deficit Disorder, as plaintiff essentially sought judicial review of determination which revoked his medical license, and such review had to be made via Article 78 proceeding, which was time barred. *Horne v New York State Dep't of Health, 287 A.D.2d 940, 731 N.Y.S.2d 781, 2001 N.Y. App. Div. LEXIS 9979 (N.Y. App. Div. 3d Dep't 2001)*.

An action instituted by New York City to restrain defendants from further discrimination with respect to housing rentals and from further violations of local laws was not subject to being stricken on the ground that the court had no jurisdiction over such an action, exclusive jurisdiction of the subject matter being vested in the State Commission against Discrimination. *New York v Claflington, Inc., 40 Misc. 2d 547, 243 N.Y.S.2d 437, 1963 N.Y. Misc. LEXIS 1934 (N.Y. Sup. Ct. 1963)*.

Plaintiffs' claims against the New York State Division of Human Rights, alleging that a settlement agreement entered into between the parties was void, properly survived a dismissal motion with respect to challenges to the validity of the agreement based upon events after the execution thereof, as the issues raised were not within the special competence of the Division pursuant to *N.Y. Exec. Law § 290* et seq. or *N.Y. Comp. Codes R. & Regs. tit. 9, § 465.1* et seq.; further, they were ripe for review and the Division had not commenced a proceeding under *N.Y. Exec. Law § 297(7)* and *N.Y. Comp. Codes R. & Regs. tit. 9, § 465.18*. *Ken-Vil Assoc. Ltd. Partnership v New York State Div. of Human Rights, 100 A.D.3d 1390, 954 N.Y.S.2d 294, 2012 N.Y. App. Div. LEXIS 7446 (N.Y. App. Div. 4th Dep't 2012)*.

Exec Law § 297 prohibiting plaintiff from commencing action alleging racial discrimination in New York courts after charges have been filed with New York State Division of Human Rights cannot limit subject matter jurisdiction of federal courts. *Clark v Times Square Stores Corp., 469 F. Supp. 654, 1979 U.S. Dist. LEXIS 12746 (S.D.N.Y. 1979)*.

Court lacks subject-matter jurisdiction over pendent state-law salary claim under CLS *Exec Law § 297(9)*, where claim arose out of employment discrimination lawsuit against CUNY, because CUNY is arm of New York State, and statute does not expressly or by implication waive State's Eleventh Amendment immunity against suit. *Moche v City Univ. of N.Y., 781 F. Supp. 160, 1991 U.S. Dist. LEXIS 18974 (E.D.N.Y. 1991)*, aff'd, *999 F.2d 538, 1993 U.S. App. LEXIS 18174 (2d Cir. N.Y. 1993)*.

Because the division of the state university had not consented to be sued in federal court on pendent state law claims and the statutory language of the New York State Human Rights Law (HRL), specifically *N.Y. Exec. Law § 297(9)*, did not provide the basis for finding that New York State had waived its Eleventh Amendment Immunity, the district court concluded that the employee's HRL claims against the state university were barred by the Eleventh Amendment. *Richman v Pediatric Serv. Group, LLP, 222 F. Supp. 2d 207, 2002 U.S. Dist. LEXIS 17491 (N.D.N.Y. 2002)*.

Federal court lacked subject matter jurisdiction over an employee's *N.Y. Exec. Law § 297* claim because the employee elected to have the state human rights claims adjudicated by the New York State Department of Human Rights, and none of the exceptions of N.Y. Exec. Law § 279(9) were applicable. *Johnson v County of Nassau, 411 F. Supp. 2d 171, 2006 U.S. Dist. LEXIS 5094 (E.D.N.Y. 2006)*.

Division of Human Rights is not barred from undertaking any of its procedures or enforcing any of its policies against respondent who is actively under jurisdiction of Bankruptcy Court, or one who filed for bankruptcy protection after cause of action arose. 1999 Order Comm HR No. 4-E-A-91-1400339A.

6. —Jurisdiction over employee of Human Rights Division

Writ of prohibition was improperly granted divesting New York State Division of Human Rights s/h/a State of New York Executive Department, Division of Human Rights (SDHR) of jurisdiction to prosecute complaint of employment discrimination, despite fact that there had been delay in processing complaint, since one reason for delay was transfer of matter from county human rights commission to SDHR, which was result of administrative restructuring, and determination as to whether petitioner suffered substantial prejudice by delay and death of petitioner's former owner should have been made by SDHR after hearing; once there is final determination, appropriate appellate review is available. *Pat's Carpet Outlet v State Exec. Dep't, Div. of Human Rights, 244 A.D.2d 338, 663 N.Y.S.2d 885, 1997 N.Y. App. Div. LEXIS 11011 (N.Y. App. Div. 2d Dep't 1997)*.

Executive Law § 297, subd 2 is on its face nondiscriminatory, and since the Human Rights Division's policy not to take jurisdiction in cases involving its own employees is reasonable and rationally based, former division employee was not denied equal protection by refusal of division to take jurisdiction of his complaint. *Colon v New York, Div. of Human Rights, 354 F. Supp. 343, 1973 U.S. Dist. LEXIS 15529 (S.D.N.Y. 1973)*, aff'd, *498 F.2d 1396 (2d Cir. N.Y. 1974)*.

7. Probable cause

It having been found that "probable cause" existed for believing the allegations of a complaint presented pursuant to this section, and such finding being supported by evidence, the Appellate Division properly remanded the matter to the commission for proceedings in accordance with art. 15, and the commission should accordingly proceed in accordance with the further mandates of this section. *American Jewish Congress v Carter, 9 N.Y.2d 223, 213 N.Y.S.2d 60, 173 N.E.2d 788, 1961 N.Y. LEXIS 1446 (N.Y. 1961)*.

Legislature did not contemplate a formal hearing by State Division of Human Rights in determining probable cause issue. *Jwayyed v New York Tel. Co., 42 A.D.2d 663, 345 N.Y.S.2d 233, 1973 N.Y. App. Div. LEXIS 4025 (N.Y. App. Div. 3d Dep't 1973)*.

In course of investigating complaint of discrimination, commissioner of Division of Human Rights should interview respondent's witnesses and receive its responses to complaint, and at such point, statute places upon commissioner responsibility to determine whether there is reasonable basis for sustaining complaint, based upon complainant's evidence, and for requiring employer or other respondent to answer and submit to hearing. *State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977)*.

Evidence, in proceedings on state employee's complaints of racial discrimination against him and of retaliation against him because he filed his original complaint, supported determination, in each case, of no probable cause for complaint. *State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977)*.

Provisions of Executive Law place responsibility on commissioner of Division of Human Rights to investigate complaint of discrimination and, if he finds that no probable cause exists for complaint, to dismiss complaint. *State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977)*.

Where the Human Rights Appeal Board reversed the Division of Human Rights' finding of lack of probable cause that petitioner had been discriminated against on the basis of race, reinstated the complaint, and remanded it for further proceedings, respondent, petitioner's former employer, is required to produce, pursuant to a subpoena duces tecum issued by the division, records concerning the color of the foremen and employees involved, since the petition follows precisely the directions of the Appeal Board to the division and without that information, which is prima facie material and necessary, the essence of the inquiry may be blocked and the investigation and hearing may be futile; in spite of the language of section 297 (subd 4, par a) of the Executive Law which provides that after the board has reversed and remanded an order of the division dismissing a complaint for lack of probable cause the division shall serve written notice requiring the respondent to answer the charges of

the complaint and appear at a public hearing, the division issued the subpoena duces tecum to respondent returnable before the regional director to give evidence in a further investigation, and in light of the statute the proceeding before the regional director is interpreted as a public hearing in which petitioner's attorney has the right to appear and issue a subpoena duces tecum. *Thompson v General Motors Corp., Chevrolet Motor Div., 67 A.D.2d 308, 415 N.Y.S.2d 548, 1979 N.Y. App. Div. LEXIS 10108 (N.Y. App. Div. 4th Dep't 1979)*.

An order by the New York State Division of Human Rights, which dismissed petitioner's complaint on the ground that there was no probable cause to believe that a racing corporation and certain of its officers had engaged in an unlawful discriminatory practice, would be confirmed where, given the nature of petitioner's complaint, the information uncovered through the division's written inquiry, and petitioner's failure to rebut said information after the opportunity to do so had been accorded him, the extent of the division's investigation was adequate. *Meachem v New York State Human Rights Appeal Bd., 87 A.D.2d 813, 448 N.Y.S.2d 774, 1982 N.Y. App. Div. LEXIS 16264 (N.Y. App. Div. 2d Dep't 1982)*.

In a proceeding pursuant to *Exec Law § 298* to review a determination of the Human Rights Appeal Board that probable cause existed to believe that the State Police discriminated on the grounds of race, color, and disability in the denial of a man's application to become a state trooper, no probable cause would exist where the man's only contention had been that the correctional services department, as his present employer, had charged him with irresponsibility, and with sleeping on the job, in an attempt to impede his effort to join the state police, and where the state police division had shown its compliance with a continuing federal court order that was designed to ensure proportionate minority representation on the police force. *New York State Div. of State Police v Kramarsky, 91 A.D.2d 805, 458 N.Y.S.2d 54, 1982 N.Y. App. Div. LEXIS 19701 (N.Y. App. Div. 3d Dep't 1982)*.

In a proceeding by a former employee who alleged that she had been terminated from her restaurant employment as a result of her race, the employee's complaint was properly dismissed for want of probable cause where she received the same benefits as other employees, and where she was terminated as a result of her inability to resolve her differences with her immediate supervisor. *State Div. of Human Rights ex rel. Jackson v Oswald Hof Brau-Haus, Inc., 91 A.D.2d 865, 458 N.Y.S.2d 368, 1982 N.Y. App. Div. LEXIS 19781 (N.Y. App. Div. 4th Dep't 1982)*.

An order of the State Division of Human Rights dismissing on a finding of no probable cause a complaint by a civil service employee that the oral test portion of an examination he took had been altered so that women received higher grade scores than men would be remanded, where in finding that there was no probable cause, the Division, for the most part, relied upon statistical percentages, which evaluated the final passing relationship between males and females, but made no attempt to isolate that portion of the test to which the complaint was directed, and thus it could not be ascertained on the record whether and to what extent the Division investigated the underlying basis of the claim. *Baldovin v State Div. of Human Rights, 94 A.D.2d 659, 462 N.Y.S.2d 221, 1983 N.Y. App. Div. LEXIS 18066 (N.Y. App. Div. 1st Dep't 1983)*.

The State Division of Human Rights did not conduct an inadequate, one-sided investigation of petitioner's claim of employment discrimination based on his age, disability and a previous criminal accusation, alleging failure to promote where petitioner had been given ample opportunity to state the bases of his claim and to respond to the city's statements in opposition, and the record had established that the city had pursued its policy of appointing the top candidate from the civil service list for the position sought, petitioner did not rank first on either list, and had been on light duty since 1983 due to numerous physical ailments, so that there was clearly a rational basis for the division's determination of no probable cause. *Shay v Elmira, 108 A.D.2d 968, 484 N.Y.S.2d 951, 1985 N.Y. App. Div. LEXIS 43299 (N.Y. App. Div. 3d Dep't 1985)*.

8. Evidence

Statistical evidence in conjunction with a hiring system that had the effect, even without evidence of intention, of excluding Black and Spanish-surnamed persons from employment was sufficient to support the entry of an order to cease and desist such constructive discriminatory practices. *State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974)*, app. dismissed, *420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975)*.

Where substantial evidence supported finding of State Division of Human Rights that brokerage employee had not been discriminatorily discharged because of her age, State Human Rights Appeal Board erred in setting aside such finding because of "differences of opinion." Merrill Lynch, Pierce, Fenner & Smith, Inc. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v State Div. of Human Rights, 48 A.D.2d 391, 370 N.Y.S.2d 96, 1975 N.Y. App. Div. LEXIS 9900 (N.Y. App. Div. 1st Dep't 1975)*.

Where record of proceedings before regional director of State Division of Human Rights showed rational basis for his determination of no probable cause with respect to complaints filed by employees, where hearing was extensive and complainants were present and represented by counsel, and where representatives of employer against whom complaints were made were present, represented by counsel, and testified and were cross-examined by counsel for complainant, mere fact that director's daughter was employed as mail clerk by employer against whom complaints were filed was no basis for disqualification of director or for setting aside determination. *State Div. of Human Rights v Merchants Mut. Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813, 1977 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1977)*.

In a proceeding pursuant to *Exec Law § 296* alleging that the refusal to rehire a transit system employee was in retaliation for his having filed an earlier complaint against the system, the dismissal of the complaint was based on substantial evidence, including the employee's unexcused absence from work, insubordination, falsification of records, tardiness, and resignation without notice. *Pisano v Capital Dist. Transit System, #1, 88 A.D.2d 1022, 451 N.Y.S.2d 912, 1982 N.Y. App. Div. LEXIS 17438 (N.Y. App. Div. 3d Dep't 1982)*.

In finding no probable cause to believe that a company had engaged in an unlawful discriminatory employment practice, the State Division of Human Right's investigation was not inadequate for failing to discover the existence of a tape recording made by the petitioner of his conversations with persons in the company's personnel office, where the petitioner failed to disclose the existence of the recording, notwithstanding that he had received a letter advising him to furnish the division with any additional information he might have. *Fessette v New York State Human Rights Appeal Bd., 94 A.D.2d 929, 463 N.Y.S.2d 331, 1983 N.Y. App. Div. LEXIS 18379 (N.Y. App. Div. 3d Dep't)*, app. dismissed, *60 N.Y.2d 553, 1983 N.Y. LEXIS 5566 (N.Y. 1983)*.

Employer was entitled to summary judgment dismissing age discrimination action where (1) employer submitted several sworn affidavits asserting that plaintiff was discharged solely for incompetency, (2) it was uncontradicted that plaintiff, 62 years old, was replaced by 60-year-old individual, and (3) plaintiff offered only conclusory assertion that "I believe that age was the determining factor in defendant's decision to terminate me"; mere fact that plaintiff was 62 years old when dismissed was not sufficient to raise fact question as to age discrimination. *Heffernan v Colonie Country Club, Inc., 160 A.D.2d 1062, 553 N.Y.S.2d 544, 1990 N.Y. App. Div. LEXIS 3769 (N.Y. App. Div. 3d Dep't 1990)*.

New York City Commission on Human Rights properly determined that New York City Transit Authority was guilty of sexual harassment and properly awarded discharged probationary employee back pay and damages for mental anguish where employee's supervisor unsuccessfully asked her for date on several occasions, then began writing reports charging her with various disciplinary infractions; harassment was exacerbated when she was told by Authority's manager of departmental relations that such conduct was to be expected because of her appearance and mode of dress. *Levy v City Comm'n on Human Rights, 196 A.D.2d 214, 609 N.Y.S.2d 576, 1994 N.Y. App. Div. LEXIS 2436 (N.Y. App. Div. 1st Dep't 1994)*, aff'd, *85 N.Y.2d 740, 628 N.Y.S.2d 245, 651 N.E.2d 1264, 1995 N.Y. LEXIS 1122 (N.Y. 1995)*.

Testimony of investigator was properly received in action to review and annul order made by commission. *Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964)*, modified, *23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965)*.

In enforcement proceedings under Article 15 of the Executive Law it is not necessary that findings be based on evidence establishing them beyond a reasonable doubt but it is sufficient if the findings are supported by evidence sufficiently substantial to prevent inferences of the existence of facts found to be reasonably drawn, and the Commission, at its hearing, is not bound by the strict rules of evidence prevailing in courts of law or equity. *State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967)*, modified, *34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970)*.

In fair hearing in progress before State Division on Human Rights on employee's claims that employer discriminated against her in employment by denying her equal terms, conditions and privileges of employment and by terminating her employment because of her age, court would enforce subpoena duces tecum requiring employer to produce certain enumerated documents sought by employee to show pattern and practice of terminating employees at given age to effect monetary savings of pension and profit-sharing benefits. *Russo v Reader's Digest, 91 Misc. 2d 1, 396 N.Y.S.2d 803, 1977 N.Y. Misc. LEXIS 2221 (N.Y. Sup. Ct. 1977)*.

Plaintiff's action against his former employer (Federal Reserve Bank) under Title VII, Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) was barred by election of remedies provision of CLS *Exec § 297* where plaintiff had filed complaint with New York State Division of Human Rights pursuant to CLS *Exec §§ 290* et seq., and complaint had been dismissed for lack of jurisdiction over employer, not for administrative convenience; New York's remedies available to former employee who alleges unlawful discrimination are mutually exclusive. *Moodie v Federal Reserve Bank, 861 F. Supp. 10, 1994 U.S. Dist. LEXIS 11480 (S.D.N.Y. 1994)*.

Complaint alleging that employer had discriminated against handicapped plaintiff would not be dismissed on basis that plaintiff had filed complaint with county human rights commission, constituting election of remedies under CLS *Exec § 297(9)*, where (1) plaintiff denied filing written complaint, (2) defendant was unable to produce one notwithstanding access to agency's records under freedom of information procedures, and (3) there was no evidence that case number was ever assigned to matter, which suggested that plaintiff's contact with agency was not treated as complaint. *Tumminello v Continental Baking Co., 861 F. Supp. 261, 1994 U.S. Dist. LEXIS 11971 (S.D.N.Y. 1994)*.

Plaintiff's claim against his former employer under New York State Human Rights Law was barred where he sought administrative remedy by first bringing his claim of discriminatory treatment to Division of Human Rights, and division dismissed his claim on merits. *Janneh v Regency Hotel, 870 F. Supp. 37, 1994 U.S. Dist. LEXIS 17688 (N.D.N.Y. 1994)*.

9. Authority of commissioner

In conferring broad authority upon State Human Rights Commissioner, legislature was addressing general business and industrial sphere rather than highly professional fields regarding special expertise, such as education. *New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976)*.

State's strong and important public policy against discrimination and need for programmatic enforcement of antidiscrimination laws has led legislature to vest broad authority in Human Rights Commissioner so that he may take appropriate action to eliminate and prevent discriminatory practices, and human rights law should be liberally construed to accomplish its purposes. *New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976)*.

Statutory design for commissioner of Division of Human Rights review of complaint of discrimination differs from court procedure in which question of fact is generally determined by jury or tribunal apart from court which has decided that question of fact exists for determination in that when commissioner finds that evidence before him establishes probable cause for complaint of discrimination, he has duty to serve notice on respondent to answer charges of such complaint and appear at public hearing before examiner for hearing of witnesses under oath on record on each side of dispute and ultimate determination of merits of complaint shall then be made by commissioner. *State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977)*.

Commissioner is required to make prompt investigation by field visit, written or oral inquiry, conference, or any method or combination thereof; matter is remitted to division for full and thorough investigation where probable cause issue was investigated in cursory and abbreviated manner and no independent inquiry was conducted to verify complainant's assertions prior to issue of no probable cause determination; investigation consisting of one interview with employer's personnel officer, obtaining copies of leave of absence policy and office memoranda together with letters from employer's attorney is

insufficient. *State Div. of Human Rights ex rel. Beckman v Gaylord Bros., Inc., 112 A.D.2d 726, 492 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 56237 (N.Y. App. Div. 4th Dep't 1985)*.

Determination of Commissioner of Human Rights would be annulled where commissioner had previously participated in matter as general counsel of Human Rights Division. *New York State Dep't of Correctional Servs. v State Div. of Human Rights, 216 A.D.2d 658, 627 N.Y.S.2d 800, 1995 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 3d Dep't 1995)*.

Fact-finding responsibility is lodged with Commissioner of Division of Human Rights, who is not bound by hearing examiner's recommendation. *Friedel v New York State Div. of Human Rights, 219 A.D.2d 547, 632 N.Y.S.2d 520, 1995 N.Y. App. Div. LEXIS 9604 (N.Y. App. Div. 1st Dep't 1995)*, app. denied, *91 N.Y.2d 802, 667 N.Y.S.2d 682, 690 N.E.2d 491, 1997 N.Y. LEXIS 4084 (N.Y. 1997)*.

10. Conference and conciliation

Inclusion in final order of conciliation, agreement to which no objections had been received within 15-day period following service on claimant's attorney of proposed conciliation agreement was neither arbitrary nor an abuse of discretion where *Executive Law § 297*, subd 3 did not require that service of proposed agreement on claimant's attorney be accompanied either by service of a statement of the statutory provisions relating to filing of objections or of a warning that objections be filed within 15 days. *Berry v Donner-Hanna Coke Corp., 42 A.D.2d 404, 348 N.Y.S.2d 414, 1973 N.Y. App. Div. LEXIS 3280 (N.Y. App. Div. 4th Dep't 1973)*, aff'd, *34 N.Y.2d 893, 359 N.Y.S.2d 283, 316 N.E.2d 717, 1974 N.Y. LEXIS 1445 (N.Y. 1974)*.

Service of proposed conciliation agreement on claimant's attorney rather than on claimant herself was proper where notice of appearance filed with regional director by claimant's attorney expressly demanded service on such attorney of "all subsequent written communications or notice to said party in this proceeding." Remand to State Division of Human Rights "for further investigation and action" on grounds that Division "should have looked into the question (of alleged discrimination) rather than discharging the complaint" did not require a hearing be conducted if the matter could be concluded by conciliation procedure. *Berry v Donner-Hanna Coke Corp., 42 A.D.2d 404, 348 N.Y.S.2d 414, 1973 N.Y. App. Div. LEXIS 3280 (N.Y. App. Div. 4th Dep't 1973)*, aff'd, *34 N.Y.2d 893, 359 N.Y.S.2d 283, 316 N.E.2d 717, 1974 N.Y. LEXIS 1445 (N.Y. 1974)*.

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Conciliation agreement between employee and contractor providing that employee would not be discharged from construction project by subcontractor without notice to president of contractor and to employee's attorney, but not specifying type of notice to be given or person bearing responsibility of furnishing such notice, was not breached where employee's dismissal was occasioned by general strike of elevator operators affecting entire building industry, and formal notice was not given to employee's attorney, in view of fact that employee's attorney received actual notice, and subcontractor did not receive copy of conciliation agreement. *Castagna & Son, Inc. v Chambers, 50 A.D.2d 833, 376 N.Y.S.2d 587, 1975 N.Y. App. Div. LEXIS 11689 (N.Y. App. Div. 2d Dep't 1975)*.

Where record raised no factual issue relating to claim that law firm unlawfully discriminated against individual by refusing to hire him, and it appeared as matter of law that complaint lacked merit and failed to raise genuine factual issues, confrontation conference was not required. *State Div. of Human Rights ex rel. Jafree v Bond, Schoeneck & King, 52 A.D.2d 1045, 384 N.Y.S.2d 568, 1976 N.Y. App. Div. LEXIS 12958 (N.Y. App. Div. 4th Dep't 1976)*.

Though provisions of Executive Law pertaining to procedures on a race discrimination complaint do not mandate a confrontation conference between the complainant and his employer, such a conference is authorized under the regulations as an aid to eliminate the discriminatory practice complained of during the investigatory stage. *State Div. of Human Rights ex rel.*

Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976).

Absent an explanation for the change in ordinary procedure, it was an abuse of discretion for the Division of Human Rights to exclude race discrimination complainant from participation in a conference between the Division's field representative and the complainant's employer. *State Div. of Human Rights ex rel. Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976)*.

Complainant, who was denied both opportunity to present his complaint of unlawful discriminatory practice related to employment and to rebut evidence submitted in opposition, was entitled to confrontation conference so that he might present his case in a proper and seemly manner. *Long Island Rail Road v New York State Human Rights Appeal Board, 59 A.D.2d 924, 399 N.Y.S.2d 259, 1977 N.Y. App. Div. LEXIS 14139 (N.Y. App. Div. 2d Dep't 1977)*.

In a proceeding brought pursuant to *Exec Law § 298* for enforcement of an order of the State Division of Human Rights after conciliation between the Division and the State Department of Mental Hygiene which awarded complainants compensatory damages, the reviewing court would grant the third-party petition against the third-party defendant, the State Department of Audit and Control, directing the third-party defendant to pay the sums agreed upon in the conciliation agreement, since the Division is empowered to direct the state agency to pay back salary upon a finding of discrimination, and would further hold that by enacting authority for the Division to pursue discrimination claims against employers, and not excluding the state as an employer, the legislature exercised its power to waive the state's usual immunity, that the jurisdiction of the Court of Claims against the state is not totally exclusive but is determined as the legislature may provide, and that the failure of the legislature to appropriate funds for payment of civil rights claims against the state is not indicative of its intent that the state was not subject to such award. *State Div. of Human Rights v Dep't of Mental Hygiene, Rome Dev. Ctr., 85 A.D.2d 915, 446 N.Y.S.2d 784, 1981 N.Y. App. Div. LEXIS 16759 (N.Y. App. Div. 4th Dep't 1981)*.

Investigation by State Division of Human Rights into employer's alleged age discrimination was not inadequate merely because division did not conduct confrontation conference or hearing, since petitioner was given full and fair opportunity to present evidence on his own behalf and to rebut evidence presented by employer. *Murphy v Russell Sage College, 134 A.D.2d 716, 521 N.Y.S.2d 199, 1987 N.Y. App. Div. LEXIS 50907 (N.Y. App. Div. 3d Dep't 1987)*.

Division of Human Rights did not act arbitrarily in dismissing employees' age discrimination complaints for administrative convenience at their own behest where they elected to pursue remedies in federal court; dismissal was in conformance with regulations, since retaining complaints by division would not advance state's human rights goals, especially since it would compel use of scarce state resources where employees had desire and resources to bring complaints in federal court. Division of Human Rights has authority to dismiss employment discrimination case for administrative convenience not only where complainant objects to proposed conciliation agreement but also where noticing complaint for hearing would be otherwise undesirable. *Eastman Chem. Prods., Inc. v New York State Div. of Human Rights, 162 A.D.2d 157, 556 N.Y.S.2d 571, 1990 N.Y. App. Div. LEXIS 6994 (N.Y. App. Div. 1st Dep't 1990)*.

Division of Human Rights properly dismissed complaint for race and disability discrimination on ground of administrative convenience prior to public hearing and formal fact-finding where complainant would be proceeding in federal court on identical claims. *Tribune Entertainment Corp. v New York State Div. of Human Rights, 210 A.D.2d 11, 619 N.Y.S.2d 559, 1994 N.Y. App. Div. LEXIS 11872 (N.Y. App. Div. 1st Dep't 1994)*.

Respondent's contention that he was denied due process where Investigating Commissioner did not hold conciliation conference with him individually was rejected, since § 297, subd 2 authorized Investigating Commissioner to set a matter down for a hearing before the Commission after first making efforts at conciliation, if circumstances so warranted. *Marrano Constr. Co. v State Com. for Human Rights, 45 Misc. 2d 1081, 259 N.Y.S.2d 4, 1965 N.Y. Misc. LEXIS 2061 (N.Y. Sup. Ct. 1965)*.

11. "Aggrieved person"

Where evidence that private club served non-member whites while refusing service to blacks present at fashion show open to public established a violation of *Executive Law § 296*, subd 2, blacks who had not requested service were nevertheless

aggrieved persons within the meaning of *Executive Law § 297*. *Batavia Lodge No. 196, L. O. M. v New York State Div. of Human Rights, 43 A.D.2d 807, 350 N.Y.S.2d 273, 1973 N.Y. App. Div. LEXIS 2914 (N.Y. App. Div. 4th Dep't 1973)*, rev'd, *35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974)*.

Respondent NAACP was entitled to lodge complaint as an aggrieved party under statutory provisions and the Division of Human Rights did not lack jurisdiction simply because the alleged violater is a municipal agency. *Glen Cove Municipal Civil Service Com. v Glen Cove NAACP, 34 A.D.2d 956, 312 N.Y.S.2d 400, 1970 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 2d Dep't)*, app. denied, (N.Y. App. Div. 1970).

An organization whose members are injured by an alleged discriminatory act is an "aggrieved person" having a right to maintain a proceeding seeking judicial review. *NOW v Gannett Co., 40 A.D.2d 107, 338 N.Y.S.2d 570, 1972 N.Y. App. Div. LEXIS 3217 (N.Y. App. Div. 4th Dep't 1972)*, app. dismissed, *32 N.Y.2d 940, 347 N.Y.S.2d 201, 300 N.E.2d 733, 1973 N.Y. LEXIS 1191 (N.Y. 1973)*, app. dismissed, *32 N.Y.2d 966, 1973 N.Y. LEXIS 2076 (N.Y. 1973)*, rev'd, *34 N.Y.2d 416, 358 N.Y.S.2d 124, 314 N.E.2d 867, 1974 N.Y. LEXIS 1480 (N.Y. 1974)*.

The trial court erred in failing to dismiss a loss of consortium action brought by the husband of a former medical center employee who alleged that the medical center and her former supervisor had discriminated against her by reason of her sex and marital status in violation of *Exec Law § 296(1)(a)* and had intentionally inflicted emotional distress upon her, since spouses of employees who allege actionable discrimination under the Executive Law are not "aggrieved persons" within the meaning of the statutes so as to support causes of action for loss of consortium, and since the wife's allegations were insufficient to state a cause of action for intentional infliction of emotional distress, so that any loss of consortium action derived therefrom would necessarily fail. *Belanoff v Grayson, 98 A.D.2d 353, 471 N.Y.S.2d 91, 1984 N.Y. App. Div. LEXIS 16486 (N.Y. App. Div. 1st Dep't 1984)*.

In action under Human Rights Law (CLS *Exec §§ 290* et seq.) for sex discrimination in employment, court would order new trial as to damages unless plaintiff agreed to reduction of award from $575,000 to $350,000 where plaintiff had shown lost income of only $226,000, and psychiatric condition that plaintiff suffered from as result of defendants' conduct resolved itself within 2 years. *Rhoades v Niagara Mohawk Power Corp., 202 A.D.2d 762, 608 N.Y.S.2d 733, 1994 N.Y. App. Div. LEXIS 2307 (N.Y. App. Div. 3d Dep't 1994)*.

Award of $54,000 for emotional distress as result or retaliatory discharge in violation of CLS *Exec § 296(1)(e)* was not excessive where (1) plaintiff testified that she suffered from irritable bowel syndrome, pains in her sides, insomnia, migraines and depression, and that as result thereof she sought medical treatment, (2) after her discharge, she was deeply concerned about her ability to support herself and her child because she was single mother with limited professional experience and training, and (3) she had been unable to secure comparable employment for approximately one year. *Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994)*.

Damages for lost wages in action under CLS Exec Art 15 should be calculated by difference between what plaintiff would have earned had he or she continued to remain employed with offending employer and what he or she actually earned; thus, in action for retaliatory discharge in violation of CLS *Exec § 296(1)(i)*, jury was entitled to presume that plaintiff was to receive wage increases in years following her discharge commensurate with wage increases that she had received in past. *Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994)*.

Division of Human Rights erroneously awarded back pay based on projections rather than actual salary and benefits earned during relevant period by complainant's former co-worker, whose salary was identical to complainant's when complainant left employment; further, award of back pay should have been reduced by amount of unemployment compensation that complainant received during period covered by award. *New York State Div. of Human Rights ex rel. Bice v Parkview Auto Sales, 206 A.D.2d 888, 616 N.Y.S.2d 113, 1994 N.Y. App. Div. LEXIS 7812 (N.Y. App. Div. 4th Dep't)*, transferred, *206 A.D.2d 889, 616 N.Y.S.2d 282, 1994 N.Y. App. Div. LEXIS 7813 (N.Y. App. Div. 4th Dep't 1994)*.

The State Commission for Human Rights was warranted in finding that a party who was not seeking housing for himself or anyone else, but who was merely acting as a tester for the purpose of obtaining information as to discriminatory practices of a

real estate broker, was not an aggrieved person. *Cumberbatch v Lytle, 55 Misc. 2d 1041, 287 N.Y.S.2d 132, 1967 N.Y. Misc. LEXIS 1008 (N.Y. Sup. Ct. 1967)*.

It is the prerogative of the commission to determine whether a petitioner is an aggrieved person. *Cumberbatch v Lytle, 55 Misc. 2d 1041, 287 N.Y.S.2d 132, 1967 N.Y. Misc. LEXIS 1008 (N.Y. Sup. Ct. 1967)*.

Within statute to effect that any person claiming to be aggrieved by an unlawful discriminatory employment practice shall have cause of action, "aggrieved person" means victim of the discriminatory practice. Wife of individual against whom an allegedly unlawful discriminatory practice was committed during his employment was not an "aggrieved" person within Executive Law providing that any person claiming to be aggrieved by unlawful discriminatory practice shall have cause of action. *Weinstein v Hospital for Joint Diseases & Medical Center, 81 Misc. 2d 366, 365 N.Y.S.2d 398, 1975 N.Y. Misc. LEXIS 2390 (N.Y. Sup. Ct. 1975)*, aff'd, *53 A.D.2d 627, 384 N.Y.S.2d 203, 1976 N.Y. App. Div. LEXIS 13330 (N.Y. App. Div. 2d Dep't 1976)*.

Prejudgment interest was not available on award of compensatory damages for pain and suffering under state Human Rights Law, although plaintiff was entitled to prejudgment interest on back pay award, since prejudgment interest is not recoverable in personal injury actions (CLS *CPLR § 5001*). *McIntosh v Irving Trust Co., 873 F. Supp. 872, 1995 U.S. Dist. LEXIS 954 (S.D.N.Y. 1995)*.

12. —Standing to sue

Under above provisions plaintiff has standing to complain only of grievances to which he has been one of the persons subjected. *Gaynor v Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627, 1965 N.Y. LEXIS 1651 (N.Y. 1965)*.

Roommates (one white man and one black man) had standing to bring action against owners of apartment building for damages for alleged unlawful discriminatory practices where roommates alleged that owners knew that white roommate was seeking accommodation for himself and his roommate and that discriminatory practice occurred after white roommate's disclosure that his roommate was black; if such allegations were established, jury could find that both roommates were injured by owner's racial bias, and it was not relevant that one roommate was white. *Dunn v Fishbein, 123 A.D.2d 659, 507 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 60809 (N.Y. App. Div. 2d Dep't 1986)*.

Women's organization had standing to file with Division of Human Rights a complaint alleging sex and race discrimination with respect to hiring, firing, promotion and compensation by operator of retail department store and the Division had power to investigate on basis of such complaint. *State Div. of Human Rights ex rel. Ducette v Adam, Meldrum & Anderson Co., 84 Misc. 2d 52, 375 N.Y.S.2d 502, 1975 N.Y. Misc. LEXIS 3091 (N.Y. Sup. Ct. 1975)*.

Naturalized citizen who graduated from foreign medical school, and was neither United States citizen nor permanent resident when he entered medical school, lacked standing to challenge his ineligibility for "Fifth Pathway" program under CLS *Educ § 6528(a)*, whereby United States residents who graduate from foreign medical schools may be licensed after only one year of residency, as board of regents had granted him 2 years' credit toward his residency requirement so that he was required to complete only one year of residency and thus was placed in same position he would have occupied if he had been admitted to Fifth Pathway program, and court would not assume that, because board exercised its discretion to grant 2 years' credit under CLS *Educ § 6506(5)*, it also would have exercised its discretion to waive requirement that he serve one year residency under Fifth Pathway program. *Jaghory v New York State Dep't of Educ., 131 F.3d 326, 1997 U.S. App. LEXIS 35140 (2d Cir. N.Y. 1997)*.

Wife had standing to sue car rental agency for violation of Human Rights Law, although she who did not personally fill out application to rent car after her husband's application was refused, based on evidence that she showed rental agent her license in effort to secure car after her husband's attempt to rent car was rejected, and that rental agent told her that agency would not rent to her family because they were Puerto Rican. *Rivera v Hertz Corp., 990 F. Supp. 234, 1997 U.S. Dist. LEXIS 21660 (S.D.N.Y. 1997)*.

13. "Employer"

A complaint charging the state Department of Labor with discriminatory practices in violation of *Exec Law § 296*, based upon the agency's dismissal of a claim for unemployment insurance benefits, was properly dismissed since § 296 was inapplicable in that the Department of Labor was not the claimant's employer, nor was it an employment agency or a labor organization. *State Div. of Human Rights v N.Y. State Dep't of Labor, Unemployment Ins. Div., 84 A.D.2d 961, 447 N.Y.S.2d 73, 1981 N.Y. App. Div. LEXIS 16238 (N.Y. App. Div. 4th Dep't 1981)*.

Factors considered in determining whether relationship of employer and employee exists are selection on engagement of servant, payment of wages or salary, power of dismissal, and power of control over servant's conduct; corporation is employer when corporation selects and hires petitioner and possesses and exercises power of control, reserves power of dismissal and indirectly pays wages; corporation may not avoid obligations by expediency of contracting with another for payment of workers under its control. *State Div. of Human Rights ex rel. Emrich v GTE Corp., 109 A.D.2d 1082, 487 N.Y.S.2d 234, 1985 N.Y. App. Div. LEXIS 47571 (N.Y. App. Div. 4th Dep't 1985)*.

Management agency which takes over payroll responsibilities is not employer for purpose of age discrimination claim where persons who retain management agency also retain responsibility for personnel decisions, including hiring and firing. *State Div. of Human Rights ex rel. Barnard v Broadway Warehouse Co., 109 A.D.2d 1090, 487 N.Y.S.2d 239, 1985 N.Y. App. Div. LEXIS 47582 (N.Y. App. Div. 4th Dep't 1985)*.

Plaintiff employee's conspiracy claim, based on theory that it linked individual defendant (another corporate employee) to employment discrimination claims asserted by plaintiff against corporate employer under Human Rights Law, was not actionable since discrimination claim under Human Rights Law is action created by statute, which did not exist at common law, and therefore cannot give rise to tort liability; also, corporate employee is not individually subject to discrimination suits under Human Rights Law absent showing of ownership interest or power to do more than carry out personnel decisions made by others. *Monsanto v Electronic Data Systems Corp., 141 A.D.2d 514, 529 N.Y.S.2d 512, 1988 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div. 2d Dep't 1988)*.

Portion of determination by state Division of Human Rights finding that New York City Transit Authority (NYCTA) had discriminated against petitioner and directing relief against NYCTA would be annulled where complaint was never amended to include allegations of discrimination against NYCTA, and NYCTA had no notice that it would be charged with discriminatory acts separate and apart from any alleged acts of discrimination on part of Manhattan and Bronx Surface Transit Operating Authority until hearing commenced. *Manhattan & Bronx Surface Transit Operating Auth. v New York State Div. of Human Rights, 225 A.D.2d 553, 638 N.Y.S.2d 761, 1996 N.Y. App. Div. LEXIS 1938 (N.Y. App. Div. 2d Dep't 1996)*.

Since New York State Teachers' Retirement System, in awarding pension benefits to male retiree with a female beneficiary in an amount less than would have been granted to a female retiree of the same age whose beneficiary was either male or female was merely following statutory direction and since the system was neither an "employer," an "employment agency" nor a "labor organization," the retirement system was not subject to investigation by the Human Rights Division with respect to its award of retirement benefits. *New York State Teachers' Retirement System v New York State Div. of Human Rights, 83 Misc. 2d 993, 373 N.Y.S.2d 964, 1975 N.Y. Misc. LEXIS 3027 (N.Y. Sup. Ct. 1975)*.

An applicant for a civil service position as a New York City police officer, who was deemed medically disqualified by the city's Department of Personnel due to a back condition, was entitled to sue the city under the anti-discrimination provisions of the Human Rights Law, *Exec Law § 296(1)(a)*, and was not relegated to an Article 78 proceeding under *Civ Serv Law § 50(4)(b)*; public employers are subject to the Human Rights Law, so that persons aggrieved by their alleged unlawful discriminatory practices are provided with alternative remedies. *Ramos v New York City Police Dep't, 127 Misc. 2d 872, 487 N.Y.S.2d 667, 1985 N.Y. Misc. LEXIS 2750 (N.Y. Sup. Ct. 1985)*.

Public transportation authority was entitled to writ of prohibition precluding Division of Human Rights from holding hearing or taking any action in regard to complaint by former employee of authority's wholly owned subsidiary since discrimination alleged in complaint related to unlawful employment practices, and authority was not employee's employer. *Central New York*

Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989).

Medical school that provided medical services at city hospital was not entitled to dismissal of discrimination claim asserted by hospital employee on ground that it was not plaintiff's "employer"; although medical school did not have ultimate authority to hire or fire plaintiff and it did not pay her wages, its employees exercised significant influence and control over conditions of plaintiff's employment and her "fate" at hospital. *Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995)*.

II. Remedies

14. Remedies available

Strong statutory policy of eliminating discrimination gives Commissioner of Human Rights Division more discretion in effecting an appropriate remedy than he would have under strict common-law principles. *Batavia Lodge No. 196, etc. v New York State Div. of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974)*.

Under evidence, Human Rights Division properly issued cease and desist order against employer in relation to practices resulting in barring or refusing to hire persons because of race, etc.; means chosen by Division were reasonably calculated to achieve desired objective without unduly infringing upon rights of employer. *State Div. of Human Rights v Kilian Mfg. Corp., 35 N.Y.2d 201, 360 N.Y.S.2d 603, 318 N.E.2d 770, 1974 N.Y. LEXIS 1309 (N.Y. 1974)*, app. dismissed, *420 U.S. 915, 95 S. Ct. 1108, 43 L. Ed. 2d 387, 1975 U.S. LEXIS 506 (U.S. 1975)*.

State Human Rights Commissioner has wide discretion in selecting appropriate remedy, but there are times when his determination of remedy may be set aside because it is erroneous as matter of law. Only under gravest of circumstances, where all other conceivable remedies have proved ineffective or futile, should Human Rights Commissioner enter campus to impose conferring of tenure, and even in extraordinary case where grant of tenure might serve as appropriate remedy the Commissioner should not impose such requirement without consulting with administration of institution and without considering effect of such order on institution and its faculty. That professor was not given fair opportunity to apply for tenure was insufficient to justify State Human Rights Commissioner's imposition of tenure requirement, and tenure requirement was deleted from his order. *New York Institute of Technology v State Div. of Human Rights, 40 N.Y.2d 316, 386 N.Y.S.2d 685, 353 N.E.2d 598, 1976 N.Y. LEXIS 2891 (N.Y. 1976)*.

The Commissioner of the State Human Rights Division reasonably concluded that an employer engaged in an unlawful discriminatory practice and compelled an employee to quit her job, where the evidence indicated that the employer had made blatantly obscene anti-Semitic remarks to her in the presence of other employees and had refused to apologize, notwithstanding the fact that the employer did not directly fire the employee and in fact had urged her to return to work. In exercising his broad powers to adopt measures reasonably deemed necessary to redress the injury to the employee, the commissioner properly directed that the employer apologize in writing, offer to reinstate the woman with back pay, together with $500 in damages for the shock, humiliation and outrage she experienced. *Imperial Diner, Inc. v State Human Rights Appeal Bd., 52 N.Y.2d 72, 436 N.Y.S.2d 231, 417 N.E.2d 525, 1980 N.Y. LEXIS 2830 (N.Y. 1980)*.

Human Rights Commissioner acted within his discretion when he ordered that deputy sheriff, who had been wrongfully terminated from her position due to racial and sex discrimination, be offered reinstatement to her position, even though remedy might deprive sheriff of his discretion in making appointments. *State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988)*.

As remedy for example of unlawful employment discrimination based on race and sex, Division of Human Rights properly ordered employer (1) to notify its supervisory employees that they were obliged to comply with nondiscrimination provisions of Human Rights Law, (2) to offer complainant promotion, with back pay, to position comparable to one unlawfully denied her, and (3) to pay complainant $10,000 in compensatory damages for hurt, humiliation and mental anguish she suffered as result of

unlawful discrimination. *Consolidated Edison Co. v New York State Div. of Human Rights, 77 N.Y.2d 411, 568 N.Y.S.2d 569, 570 N.E.2d 217, 1991 N.Y. LEXIS 363 (N.Y. 1991)*.

An award of $500 for mental anguish and humiliation was improperly granted since it was neither sought in the complaint nor supported by any evidence in the record. *Hillcrest General Hospital-GHI v New York State Human Rights Appeal Bd., 90 A.D.2d 481, 454 N.Y.S.2d 549, 1982 N.Y. App. Div. LEXIS 18487 (N.Y. App. Div. 2d Dep't 1982)*.

An award of compensatory damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish, and such an award may be based solely on the testimony of the complainant. *Board of Educ. v McCall, 108 A.D.2d 855, 485 N.Y.S.2d 357, 1985 N.Y. App. Div. LEXIS 43182 (N.Y. App. Div. 2d Dep't)*, app. denied, *65 N.Y.2d 601, 1985 N.Y. LEXIS 14750 (N.Y. 1985)*.

Commissioner was not arbitrary and capricious in age discrimination proceeding in awarding backpay and in directing that complainant be offered reinstatement in his position as methods specialist or position with equivalent title discharging in substantial part duties formerly performed by complainant; fact that employer had reorganized its factory operations since time it fired complainant or that almost 8 years had elapsed between firing and reinstatement order did not prevent commissioner from granting remedy. *State Div. of Human Rights ex rel. Cecconi v Chicago Pneumatic Tool Co., 110 A.D.2d 1080, 489 N.Y.S.2d 29, 1985 N.Y. App. Div. LEXIS 48967 (N.Y. App. Div. 4th Dep't 1985)*.

Although there was substantial evidence that department of corrections violated CLS *Exec § 296(16)* in making determination not to hire claimant as correction officer, claimant was not entitled to relief since civil service eligibility list in question expired almost one year before department made its determination and claimant made no challenge to list itself. *New York City Dep't of Correction v White, 163 A.D.2d 250, 558 N.Y.S.2d 71, 1990 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 1st Dep't 1990)*.

It was error for Commissioner of Human Rights to award respondent back pay from date he was disqualified from existing civil service eligibility list until list expired, as retroactive appointment with back pay would violate state policy of discretionary governmental appointive power underlying Civil Service Law and, while respondent was entitled to be considered for appointment, he was not guaranteed appointment had his name been on original list. *City of New York v New York State Div. of Human Rights, 250 A.D.2d 273, 682 N.Y.S.2d 387, 1998 N.Y. App. Div. LEXIS 13953 (N.Y. App. Div. 1st Dep't 1998)*, modified, *93 N.Y.2d 768, 698 N.Y.S.2d 594, 720 N.E.2d 870, 1999 N.Y. LEXIS 3434 (N.Y. 1999)*.

Order denying a former trooper's motion for attorneys' fees was error because her suit alleging sex discrimination, sexual harassment, and retaliation was not a tort action, the Equal Access to Justice Act (EAJA), N.Y. C.P.L.R. art. 86, applied, and attorneys' fees were available under the EAJA; an order quashing subpoenas duces tecum issued defense counsel for fee records was also error. *Kimmel v State of New York, 76 A.D.3d 188, 906 N.Y.S.2d 403, 2010 N.Y. App. Div. LEXIS 5351 (N.Y. App. Div. 4th Dep't)*, app. denied, *77 A.D.3d 1457, 908 N.Y.S.2d 381, 2010 N.Y. App. Div. LEXIS 7109 (N.Y. App. Div. 4th Dep't 2010)*, in part, *27 N.Y.3d 1121, 57 N.E.3d 68, 36 N.Y.S.3d 876, 2016 N.Y. LEXIS 1742 (N.Y. 2016)*, aff'd, in part, *29 N.Y.3d 386, 80 N.E.3d 370, 57 N.Y.S.3d 678, 2017 N.Y. LEXIS 1298 (N.Y. 2017)*.

Civil fine imposed upon the owners of a farm did not constitute an abuse of discretion because because a couple was discriminated against based on their sexual orientation, and the record reflected the hurt, humiliation, and mental anguish that they suffered as a result of the owners' conduct. *Matter of Gifford v Mccarthy, 137 A.D.3d 30, 23 N.Y.S.3d 422, 2016 N.Y. App. Div. LEXIS 238 (N.Y. App. Div. 3d Dep't 2016)*.

Under this section, the Commission has wide discretion in its choice of remedies deemed adequate to cope with unlawful practices, and the courts will not interfere except when the remedy selected has no reasonable relation to the unlawful practices found to exist. *Cooney v Katzen, 41 Misc. 2d 236, 245 N.Y.S.2d 548, 1963 N.Y. Misc. LEXIS 1318 (N.Y. Sup. Ct. 1963)*.

Since the Commission has great latitude in its choice of remedy, courts will not generally interfere unless the remedy has no reasonable relation to the discriminatory practices found to exist or unless the remedy exceeds the reasonable authority of the Commission. Where the Commission ordered a landlord to offer complainant the next vacant apartment to include a written lease of one, two, or three years at the option of the complainant, the remedy would be modified to the extent of deleting the provision for a one-year lease, which the court felt imposed an undue hardship on the landlord, since maximum rentals in rent controlled apartments could be increased only upon the execution of a lease for a minimum period of two years. *Lawrence*

Gardens, Inc. v State Com. for Human Rights, 53 Misc. 2d 20, 277 N.Y.S.2d 857, 1966 N.Y. Misc. LEXIS 1238 (N.Y. Sup. Ct. 1966).

Court was aware of no case in which a New York court has awarded New York State Human Rights Law, New York City Human Rights Law, or tort compensatory damages for noneconomic harms other than those falling within the recognized categories. Indeed, the New York Court of Appeals has noted that damages for nonpecuniary losses stand on less certain ground than does an award for pecuniary damages because they are based on a "legal fiction" that such losses can be compensated monetarily. *United States v City of New York, 897 F. Supp. 2d 30, 2012 U.S. Dist. LEXIS 133283 (E.D.N.Y. 2012)*.

Under both federal and New York law, claimants may not obtain compensatory damages for emotional distress based merely on the fact that they were unable to obtain work in their chosen occupation. *United States v City of New York, 897 F. Supp. 2d 30, 2012 U.S. Dist. LEXIS 133283 (E.D.N.Y. 2012)*.

15. —Injunctions

Although the Human Rights Appeals Board erred in dismissing an employee's appeal from the Division's order of no probable cause since *Exec Law § 297(2)* is directory and not mandatory in setting 180 days as the time period within which the Division must investigate and determine a complaint of unlawful discrimination, the Division's finding of no probable cause would be confirmed where, in view of the evidence in the record of the employee's unsatisfactory performance, the employer was not guilty of unlawful discrimination in discharging him two weeks after he was hired. *State Div. of Human Rights v American Can Co., 78 A.D.2d 1005, 433 N.Y.S.2d 906, 1980 N.Y. App. Div. LEXIS 13781 (N.Y. App. Div. 4th Dep't 1980)*.

An application by the State Commission for Human Rights for an injunction preventing respondents from selling, renting, leasing, or otherwise disposing of a certain apartment to anyone other than the complainant was denied, pending a determination of the issues by the Commission itself, and especially since in the first instance the matter should have been referred to the City Commission of Human Rights, even though such action was not a prerequisite to the bringing of the instant proceeding. *State Com. for Human Rights v Harvey Properties, Inc., 50 Misc. 2d 672, 271 N.Y.S.2d 365, 1966 N.Y. Misc. LEXIS 1916 (N.Y. Sup. Ct. 1966)*.

Where for the second time the owner of condominium apartments had offered to enter into a contract with the complainant for the sale of an apartment, provided a proceeding before the Commission for Human Rights was dismissed, and a prior application for an injunction preventing sale of the apartment had been denied because the court could find no evidence of alleged racial discrimination, defendant's motion for an injunction was denied. *State Com. for Human Rights v Westchestertowne Houses, Inc., 55 Misc. 2d 1015, 287 N.Y.S.2d 624, 1968 N.Y. Misc. LEXIS 1773 (N.Y. Sup. Ct. 1968)*.

In proceedings pursuant to Civil Rights Law § 297, subd 6, policewoman could not enjoin city from appointing any officer other than herself, either permanently, temporarily, or provisionally, to vacant position of sergeant pending conclusion of all litigation on order of State Division of Human Rights requiring city to offer policewoman next available sergeant position where police sergeant eligible list had expired pursuant to *Civil Service Law § 56* at time such order was made. *State Div. of Human Rights v Schenectady, 76 Misc. 2d 843, 351 N.Y.S.2d 290, 1973 N.Y. Misc. LEXIS 1540 (N.Y. Sup. Ct. 1973)*, app. dismissed, *45 A.D.2d 569, 360 N.Y.S.2d 111, 1974 N.Y. App. Div. LEXIS 3742 (N.Y. App. Div. 3d Dep't 1974)*.

Only Commissioner of Division of Human Rights may bring action for injunction to maintain status quo pending Division's decision on discrimination complaint. Where, if employees prevailed on complaint to Division of Human Rights that employer's proposed layoffs were unlawfully discriminatory on basis of age, employees would be reinstated with back pay, while if employer was forced to stay layoff pending Division's decision, salaries paid out during stay would never be returned, injunction of layoffs pending Division's decision would not be proper. *Sable v Sperry Gyroscope Div., 81 Misc. 2d 429, 365 N.Y.S.2d 595, 1975 N.Y. Misc. LEXIS 2400 (N.Y. Sup. Ct.)*, aff'd, *50 A.D.2d 517, 375 N.Y.S.2d 120, 1975 N.Y. App. Div. LEXIS 12207 (N.Y. App. Div. 1st Dep't 1975)*.

Where, if police department was allowed to make three appointments which it contended it was ready to make, any remedy which division of human rights might have endeavored to fashion might have proved fruitless, judgment would be entered restraining police department from making the appointments pending determination of complaint before the division of human rights. *Kramarsky v New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977)*.

Subdivision 6 of *section 297 of the Executive Law*, which provides that the Commissioner of the State Division of Human Rights may apply to the Supreme Court, after the filing of a complaint with the division alleging an unlawful discriminatory practice, for an order to show cause why a respondent should not be enjoined from doing or procuring an act which would tend to render ineffectual any order the commissioner might enter in such proceeding, affords a remedy designed to be invoked, in an appropriate case, during the period from the filing of the complaint with the division until the time that the commissioner issues an order in the proceeding; it was not designed to permit postdetermination intervention by the Supreme Court. Accordingly, a motion by the commissioner for a mandatory injunction compelling respondent to obey the commissioner's order to accept complainant, who alleged that she had been denied admission to respondent's graduate program because of a disability, was denied, since the court does not have the power to grant the relief sought. *Kramarsky v New York Psychoanalytic Institute, 102 Misc. 2d 806, 424 N.Y.S.2d 581, 1979 N.Y. Misc. LEXIS 2922 (N.Y. Sup. Ct. 1979)*.

Pursuant to *N.Y. Exec. Law § 297(9)*, plaintiff employee was not entitled to injunctive relief because he had not demonstrated any irreparable harm if the relief was not granted or shown how, despite the compensatory damages awarded, there was an absence of an adequate remedy at law. Furthermore, the employee acknowledged that his current position, which was created for him by his employer, did accommodate his disability *Welch v UPS, 871 F. Supp. 2d 164, 2012 U.S. Dist. LEXIS 91687 (E.D.N.Y. 2012)*.

16. Exhaustion of administrative remedies

Administrative convenience dismissals under CLS *Exec § 297(3)(c)* are subject to judicial review to extent that they are "purely arbitrary"—that is, to extent that they contravene or threaten to contravene statute, constitutional right, or administrative regulation. *Marine Midland Bank, N. A. v New York State Div. of Human Rights, 75 N.Y.2d 240, 552 N.Y.S.2d 65, 551 N.E.2d 558, 1989 N.Y. LEXIS 4454 (N.Y. 1989)*.

In an engineer's action against his former employer, alleging discriminatory discharge based on his national origin, the action would be dismissed where the engineer's administrative complaint, that was filed with the state human rights division, had not been dismissed for administrative convenience, inasmuch as an action for unlawful discriminatory practice is permitted after the filing of an administrative complaint only when the complaint is dismissed on the ground of administrative convenience. *Low v Gibbs & Hill, Inc., 92 A.D.2d 467, 459 N.Y.S.2d 47, 1983 N.Y. App. Div. LEXIS 16668 (N.Y. App. Div. 1st Dep't 1983)*.

An action brought by a labor union member alleging that her employer breached her contract of employment by refusing to enroll her as an individual member in the employer's dental plan would not be barred by *Exec Law § 297(9)*, which provides that an aggrieved person's filing of a discrimination complaint with the New York State Division of Human Rights constitutes a binding election of remedies, since plaintiff's breach of contract action was not the same as her discrimination charge previously commenced with the Division of Human Rights. *Goosley v Binghamton City School Dist. Bd. of Education, 101 A.D.2d 942, 475 N.Y.S.2d 924, 1984 N.Y. App. Div. LEXIS 18670 (N.Y. App. Div. 3d Dep't 1984)*.

In action to recover damages for unlawful discrimination based on marital status, plaintiff was not required to exhaust administrative remedies before commencing action in Supreme Court, even though Division of Human Rights is administrative agency charged with investigating and remedying discriminatory practices, since victims of discriminatory practices are given choice as to forum in which they may seek relief. *Ness v Pan American World Airways, 142 A.D.2d 233, 535 N.Y.S.2d 371, 1988 N.Y. App. Div. LEXIS 12457 (N.Y. App. Div. 2d Dep't 1988)*.

Approximate 7 ½ -year delay from filing of complaint with Division of Human Rights to conduct of hearing was not, by itself, prejudicial to employer as matter of law. *Pepsico, Inc. v Rosa, 204 A.D.2d 552, 612 N.Y.S.2d 74, 1994 N.Y. App. Div. LEXIS 5239 (N.Y. App. Div. 2d Dep't 1994)*.

Where no procedures were pending before the State Commission on Human Rights with respect to defendant's charge of discrimination on part of tavern owner, which charge had been dismissed by the Division of Human Rights, defendant, against whom tavern owner subsequently brought action for libel and malicious prosecution, the filing of which action was itself an unlawful discriminatory practice, was not required to exhaust administrative procedure by filing a complaint under the human rights law but was entitled to assert counterclaim to the libel and malicious prosecution complaint in order to recover for the discriminatory practice which the filing of that complaint represented. *Moran v Simpson, 80 Misc. 2d 437, 362 N.Y.S.2d 666, 1974 N.Y. Misc. LEXIS 1906 (N.Y. Sup. Ct. 1974)*.

Where division of human rights had not yet made final disposition of employment discrimination complaint, court could not concern itself with merits of controversy, and division was required to pursue matter to a conclusion before judicial intervention could be sought. *Kramarsky v New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977)*.

Federal employment discrimination suit was barred by plaintiff's failure to exhaust state administrative remedies where plaintiff had never sought redress through New York State Division of Human Rights, and where plaintiff did not pursue remedy with city civil rights commission until 4 years after initial complaint was filed with such agency by Equal Employment Opportunity Commission on plaintiff's behalf, and attorney error was insufficient excuse for failure to follow proper procedure. *Albano v General Adjustment Bureau, Inc. (GAB), 478 F. Supp. 1209, 1979 U.S. Dist. LEXIS 8799 (S.D.N.Y. 1979)*, aff'd, *622 F.2d 572, 1980 U.S. App. LEXIS 19246 (2d Cir. N.Y. 1980)*.

Claim under § 296 of New York Executive Law must be dismissed as premature where plaintiff alleges that he filed charges of discrimination and retaliation before New York State Division of Human Rights and that investigation of these charges is pending; having elected to proceed before Division, plaintiff is now precluded from pressing claims under § 296 before District Court. *Marin v New York State Dep't of Labor, 512 F. Supp. 353, 1981 U.S. Dist. LEXIS 11696 (S.D.N.Y. 1981)*, disapproved, *Morse v University of Vermont, 973 F.2d 122, 1992 U.S. App. LEXIS 19365 (2d Cir. Vt. 1992)*.

African-American woman, terminated from position of senior financial associate, has no viable claim under New York State Human Rights Law (CLS *Exec Law §§ 290* et seq.), even though claim is not administratively barred by exhaustion requirement, because her signature of release in conjunction with her termination was knowing and voluntary, and was thus valid under totality of circumstances. *Branker v Pfizer ,Inc., 981 F. Supp. 862, 1997 U.S. Dist. LEXIS 17896 (S.D.N.Y. 1997)*.

Former part time employee's employment discrimination claims were barred under *N.Y. Exec. § 297(7)* because the "administrative convenience" exception did not apply to these state law claims which she had previously raised before the New York State Department of Human Rights as the claims had been dismissed on their merits. *Ganthier v N. Shore-Long Island Jewish Health Sys., 345 F. Supp. 2d 271, 2004 U.S. Dist. LEXIS 23481 (E.D.N.Y. 2004)*.

Former employee's racially hostile work environment suit against his former employer was not subject to dismissal as time-barred under the New York Human Rights Law, *N.Y. Exec. Law § 297(5)*, because the alleged racial slurs, denial of computer access, and other alleged discriminatory acts were part of the same practice, and at least one alleged act occurred during the filing period. *Watson v Am. Red Cross Blood Servs., 468 F. Supp. 2d 484, 2007 U.S. Dist. LEXIS 1225 (W.D.N.Y. 2007)*.

17. Election of remedies

State Division of Human Rights was not authorized to dismiss, "for administrative convenience," age discrimination complaint which was time-barred by CLS *Exec § 297(5)*, and thus subsequent judicial proceeding could not be brought under more generous limitation period of CLS *CPLR § 214(2)*, since dismissal would contravene one-year time limitation of CLS *Exec § 297(5)* and election of remedies requirement of CLS *Exec § 297(9)*. *Marine Midland Bank, N. A. v New York State Div. of Human Rights, 75 N.Y.2d 240, 552 N.Y.S.2d 65, 551 N.E.2d 558, 1989 N.Y. LEXIS 4454 (N.Y. 1989)*.

Employer was not actually prejudiced by 8 ½ -year delay by state Division of Human Rights in processing employee's complaint of handicap discrimination, and thus complaint should not have been dismissed, even though delay was inordinate, where employer's increased exposure for back pay liability did not implicate its ability to defend, documents regarding

employee's Social Security disability applications remained available, and there was no indication either that employee contributed to delay or that division engaged in "repetitive, purposeless and oppressive" conduct. *Corning Glass Works v Ovsanik, 84 N.Y.2d 619, 620 N.Y.S.2d 771, 644 N.E.2d 1327, 1994 N.Y. LEXIS 4438 (N.Y. 1994)*.

By commencing a grievance procedure under a collective bargaining agreement, charging discriminatory practices in employment, teachers were not barred, either permanently or pending completion of the grievance procedures, from filing a complaint with the State Division of Human Rights. *Board of Education v State Div. of Human Rights, 38 A.D.2d 245, 328 N.Y.S.2d 732, 1972 N.Y. App. Div. LEXIS 5352 (N.Y. App. Div. 4th Dep't 1972)*, aff'd, *33 N.Y.2d 946, 353 N.Y.S.2d 730, 309 N.E.2d 130, 1974 N.Y. LEXIS 1743 (N.Y. 1974)*.

The Division of Human Rights properly asserted jurisdiction over a complaint of sexual discrimination filed by a female professor who had been denied tenure by her university, although the professor had previously instituted an Article 78 proceeding to review the university's denial of tenure, where the Article 78 proceeding and the sexual discrimination complaint were not based on the same "grievance," within the meaning of *Exec Law § 297(9)*, which provided that no person who had initiated a court action or an action before an administrative agency based on an unlawful discriminatory practice could file a complaint with the division with respect to the same grievance, in that in the Article 78 proceeding the professor had challenged alleged procedural irregularities in the tenure review process, whereas the sexual discrimination complaint was directed at alleged improper actions on the part of her department head. *State University of New York v State Human Rights Appeal Bd., 81 A.D.2d 688, 438 N.Y.S.2d 643, 1981 N.Y. App. Div. LEXIS 11240 (N.Y. App. Div. 3d Dep't 1981)*, aff'd, *55 N.Y.2d 896, 449 N.Y.S.2d 29, 433 N.E.2d 1277, 1982 N.Y. LEXIS 3098 (N.Y. 1982)*.

A city police officer, whose position was terminated after alcohol was detected in his blood in violation of a stipulation he had entered into in settlement of disciplinary charges against him, was barred by the provisions of *Exec Law § 297(9)* from pursuing his claim that he had been discriminated against due to his disability of alcoholism since his previous Article 78 proceeding, alleging that his dismissal had been improper, had been brought, on the same grounds as the present proceeding. *Whitney v State Human Rights Appeal Bd., 105 A.D.2d 991, 482 N.Y.S.2d 142, 1984 N.Y. App. Div. LEXIS 21082 (N.Y. App. Div. 3d Dep't 1984)*.

State Division of Human Rights improperly dismissed complaint of unlawful discriminatory practice based on sex, on ground that petitioner had another proceeding pending before Department of Transportation, since matter petitioner brought before department could not have led to any binding, enforceable adjudication or determination redressing petitioner's complaint of sex discrimination, and as such, it cannot be considered to have constituted action which petitioner had pending before administrative agency which barred her from filing instant complaint. *Fremgen v New York State Div. of Human Rights, 114 A.D.2d 679, 494 N.Y.S.2d 252, 1985 N.Y. App. Div. LEXIS 53353 (N.Y. App. Div. 3d Dep't 1985)*.

Employee who unsuccessfully files complaint before state division of human rights in which, in addition to alleging violations of human rights law, he alleges that union has tortiously interfered with contractual rights vis-a-vis employer by encouraging it to discriminate against him and that union has fraudulently mischaracterized nature of employee's position in prior proceeding before National Labor Relations Board is precluded from commencing action against union seeking to relitigate same claims. *Kuperman v Association of Bar, 118 A.D.2d 547, 499 N.Y.S.2d 8, 1986 N.Y. App. Div. LEXIS 54408 (N.Y. App. Div. 2d Dep't 1986)*.

In confirming determination that employer was guilty of sexual harassment of discharged probationary employee, court did not err in denying employee's request for future lost earnings or prejudgment interest as alternative to reinstatement, but employee should have been reinstated to her position as probationary employee and given additional probationary period in which to demonstrate her competence in atmosphere untainted by sexual harassment. *Levy v City Comm'n on Human Rights, 196 A.D.2d 214, 609 N.Y.S.2d 576, 1994 N.Y. App. Div. LEXIS 2436 (N.Y. App. Div. 1st Dep't 1994)*, aff'd, *85 N.Y.2d 740, 628 N.Y.S.2d 245, 651 N.E.2d 1264, 1995 N.Y. LEXIS 1122 (N.Y. 1995)*.

In civil action alleging employment discrimination based on sexual orientation, defendants were not entitled to dismissal of claims grounded in New York City Human Rights Law on basis that plaintiff elected his remedies under *NYC Admin Code § 8-502(d)* by filing complaint with New York City Human Rights Commission, as prior complaint was properly dismissed for "administrative convenience" under *NYC Admin Code § 8-113(a)(5)* to conserve city resources and allow joinder with state law

claims in state court in that city commission has limited jurisdiction extending only to claims arising under administrative code, whereas Supreme Court has exclusive jurisdiction over pendent civil claims arising under state law. *Acosta v Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 1st Dep't 2000)*.

Trial court erred by reversing its dismissal of plaintiff's state and city human rights law claims and common law claims based on retaliation and sexual harassment because plaintiff's state law and city causes of action were barred by her election of an administrative remedy under *N.Y. Exec. Law § 297(9)*, and the common-law negligence causes of action were barred by the exclusivity provisions of *N.Y. Workers' Comp. Law §§ 11* and 29(6). *Rodriguez v Dickard Widder Indus., 150 A.D.3d 1169, 56 N.Y.S.3d 328, 2017 N.Y. App. Div. LEXIS 4088 (N.Y. App. Div. 2d Dep't 2017)*.

Since plaintiff was precluded from commencing a court action for damages based upon an alleged discriminatory practice occurring on September 16, 1976 while his complaint before the State Division of Human Rights was still pending (*Executive Law, § 300*), the filing of a summons with the clerk of the court on September 15, 1977, the same date that he requested the dismissal of the complaint before the Division of Human Rights, but two weeks before the complaint was actually dismissed on the ground of administrative convenience, was a nullity rendering the subsequent service of the summons and complaint on defendant on October 31, 1977 time-barred as not being served within one year of the date of the alleged discriminatory act (*Executive Law, § 297*, subd 5). The statute which provides that a dismissal of a complaint before the Division of Human Rights on the ground of administrative convenience does not bar the bringing of a court action (*Executive Law, § 297*, subd 9) only serves to preserve plaintiff's right to sue but does not provide him with an extension of the mandatory one-year time limitation. *Cheselka v Eastern Air Lines, Inc., 93 Misc. 2d 219, 402 N.Y.S.2d 159, 1978 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1978)*.

An applicant for a civil service position as a New York City police officer, who was deemed medically disqualified by the city's Department of Personnel due to a back condition, was entitled to sue the city under the anti-discrimination provisions of the Human Rights Law, *Exec Law § 296(1)(a)*, and was not relegated to an Article 78 proceeding under *Civ Serv Law § 50(4)(b)*; public employers are subject to the Human Rights Law, so that persons aggrieved by their alleged unlawful discriminatory practices are provided with alternative remedies. *Ramos v New York City Police Dep't, 127 Misc. 2d 872, 487 N.Y.S.2d 667, 1985 N.Y. Misc. LEXIS 2750 (N.Y. Sup. Ct. 1985)*.

It was arbitrary and improper for State Division of Human Rights (SDHR), during pendency of court review of employment discrimination complaint, to dismiss complaint on ground of administrative convenience since (1) dismissal deprived employer of its right to continue to argue before SDHR that it had been prejudiced by 14-year delay between filing of complaint and probable cause determination, (2) dismissal was obvious attempt to deprive court of jurisdiction to review underlying matter, and (3) given that both federal and state statutory schemes for addressing illegal discrimination provide that discrimination claims be brought in only one forum, it appeared that dismissal was in fact means chosen to allow employee to select different forum (state court) to hear same matter that had previously been submitted to both federal court and state agency. *Avon Products, Inc. v State Div. of Human Rights, 138 Misc. 2d 466, 524 N.Y.S.2d 346, 1988 N.Y. Misc. LEXIS 36 (N.Y. Sup. Ct. 1988)*.

Plaintiff whose civil rights complaint before state agency is dismissed for administrative convenience may seek court remedy, even if it is plaintiff who seeks dismissal in order to pursue judicial remedy in federal court; once dismissal occurs, election of remedies barrier is removed. *Promisel v First Am. Artificial Flowers, 943 F.2d 251, 1991 U.S. App. LEXIS 20793 (2d Cir. N.Y. 1991)*, cert. denied, *502 U.S. 1060, 112 S. Ct. 939, 117 L. Ed. 2d 110, 1992 U.S. LEXIS 539 (U.S. 1992)*.

Plaintiff completed proper deferral of her charge in civil rights action to appropriate state or local agency before instituting suit under Civil Rights Act of 1964 where although plaintiff did not seek prior relief from any state or local agency, human rights commission had opportunity to act first after it was notified by Equal Employment Opportunity Commission of plaintiff's charge. *Winsey v Pace College, 394 F. Supp. 1324, 1975 U.S. Dist. LEXIS 12496 (S.D.N.Y. 1975)*.

CLS *Exec L § 297* does not bar employee from bringing sex discrimination action where Equal Employment Opportunity Commission referred her claim to state agency as is required under its own procedures, because required reference is not election by individual employee. *O'Brien v King World Productions, Inc., 669 F. Supp. 639, 1987 U.S. Dist. LEXIS 8476 (S.D.N.Y. 1987)*.

Employee's administrative complaint, asserted before City Commission of Human Rights that lacked subject matter jurisdiction, was not binding election not to sue. *Pierre v Chemical Bank, 960 F. Supp. 21, 1997 U.S. Dist. LEXIS 3032 (E.D.N.Y. 1997)*.

Former hospital employee's New York State Human Rights Law claims were barred by the election of remedies doctrine because the employee filed an administrative complaint on June 18, 2002, with the New York State Division of Human Rights, alleging unlawful employment action on the basis of age, disability, national origin, race, color, and sex, and the New York State Division of Human Rights issued a no probable cause determination after an investigation; *N.Y. Exec. Law § 297(9)* divested the court of such jurisdiction. *Lennon v New York City, 392 F. Supp. 2d 630, 2005 U.S. Dist. LEXIS 22550 (S.D.N.Y. 2005)*.

Plaintiff's claim in a federal district court was not barred because of an election of remedies because the complaint filed with the New York State Division of Human Rights was filed by the Equal Employment Opportunity Commission for duty sharing purposes. *Drew v Plaza Constr. Corp., 688 F. Supp. 2d 270, 2010 U.S. Dist. LEXIS 8699 (S.D.N.Y. 2010)*.

18. —Election between state and municipal remedies

Plaintiff, prior to commencing this action alleging violation of *Labor Law § 194*, filed complaint with City Commission on Human Rights alleging sexual discrimination arising out of same facts and circumstances; filing of administrative complaint constituted election of remedies barring maintenance of this action (*Executive Law § 297 [9]*; *Administrative Code of City of New York § 8-112*); plaintiff's argument that Administrative Code is inconsistent with Labor Law, in violation of "home rule" provisions of State Constitution, is without basis in view of explicit provisions of *Executive Law § 297 (9)* providing that filing of complaint "hereunder or with any local commission on human rights" shall preclude subsequent action in court. *Jones v Gilman Paper Co., 166 A.D.2d 294, 564 N.Y.S.2d 121, 1990 N.Y. App. Div. LEXIS 12059 (N.Y. App. Div. 1st Dep't 1990)*.

Employer was entitled to dismissal of complaint charging age discrimination where employee had already brought complaint pro se to city commission on human rights, which resulted in decision on merits in favor of employer, notwithstanding employee's claim that he was unschooled, was without benefit of counsel, and had only rudimentary knowledge of English, since he had benefit of full hearing and determination on merits of his claim, and CLS *Exec § 297(9)* does not import any "knowledgeable" prerequisite for election of remedies. *Magini v Otnorp, Ltd., 180 A.D.2d 476, 579 N.Y.S.2d 669, 1992 N.Y. App. Div. LEXIS 1308 (N.Y. App. Div. 1st Dep't)*, app. denied, *80 N.Y.2d 751, 587 N.Y.S.2d 287, 599 N.E.2d 691, 1992 N.Y. LEXIS 1568 (N.Y. 1992)*.

State Division of Human Rights properly dismissed Human Rights Law race discrimination complaint at complainant's request on ground of "administrative inconvenience" under CLS *Exec § 297*, in order to permit complainant to pursue all claims against petitioner in federal court, since complainant elected to pursue both state law claims and claims under 42 USCS § 2000-e et seq. in federal court and only filed complaint with division in order to satisfy requirements of federal law before her claims could be asserted in federal court. *New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990)*.

Employee was entitled to hearing on his motion for costs and attorney's fees, and to denial of employer's motion to set aside punitive damages award, under New York City Human Rights Law (*NYC Admin Code § 8-502(f)*) in disability discrimination case, even though jury's verdict did not specify whether employer was liable for discriminatory discharge under city Human Right Law (which permits recovery of punitive damages and attorney's fees) or state Human Rights Law (which does not permit such recovery), since state Human Rights Law has not preempted field, and that statute does not prohibit recovery of such fees for discrimination claims prosecuted under city law. *Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000)*.

Employee was not required to abandon or withdraw his cause of action for disability discrimination under state Human Rights Law, as condition to recovery of punitive damages or attorney's fees under New York City Human Rights Law. *Grullon v South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 712 N.Y.S.2d 911, 2000 N.Y. Misc. LEXIS 350 (N.Y. Civ. Ct. 2000)*.

Judicially unreviewed findings by Division of Human Rights in age discrimination claim under CLS Exec Art 15 did not have preclusive effect on claim, based on same factual allegations, brought in federal court under Age Discrimination in Employment Act, *29 USCS §§ 621* et seq. *Astoria Fed. Sav. & Loan Ass'n v Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96, 1991 U.S. LEXIS 3320 (U.S. 1991)*.

19. —Election between state and federal remedies

In a proceeding pursuant to *Exec Law § 298* to review an order of the State Human Rights Appeal Board, the trial court erred in dismissing petitioner's complaint on the ground that it was filed while a federal civil rights complaint was pending, where the record showed that petitioner's federal lawsuit and state discrimination complaint constituted attempts to remedy two separate grievances and no election of remedies was involved. *Grinan v Santaella, 81 A.D.2d 657, 438 N.Y.S.2d 371, 1981 N.Y. App. Div. LEXIS 11180 (N.Y. App. Div. 2d Dep't 1981)*.

Grievant who files charge of discrimination with federal Equal Employment Opportunity Commission is barred from pursuing remedy in state court since CLS *Exec § 297* bars grievant from pursuing remedy in state court if he files complaint with state Division of Human Rights; right to bring action in state court should not depend on which agency grievant files with. *Scott v Carter-Wallace, Inc., 147 A.D.2d 33, 541 N.Y.S.2d 780, 1989 N.Y. App. Div. LEXIS 6839 (N.Y. App. Div. 1st Dep't)*, app. dismissed, *75 N.Y.2d 764, 551 N.Y.S.2d 903, 551 N.E.2d 104, 1989 N.Y. LEXIS 4443 (N.Y. 1989)*.

Action for unlawful discriminatory discharge from employment was not barred by CLS *Exec § 297(9)*, even though plaintiff mailed complaint alleging unlawful discriminatory practices to federal Equal Employment Opportunity Commission (EEOC) 3 days before commencing action, since EEOC did not receive complaint until 7 days after commencement of action. *Rosa v Blake Business School, 182 A.D.2d 615, 582 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5664 (N.Y. App. Div. 2d Dep't 1992)*.

Court erred in invoking CLS *CPLR § 3211(a)(4)* to dismiss complaint alleging wrongful employment termination in violation of CLS *Exec § 296* because of pendency of plaintiff's federal court action against defendant alleging violation of Age Discrimination in Employment Act, since causes of action were not same although they involved common issue of age discrimination. *Walsh v Goldman Sachs & Co., 185 A.D.2d 748, 586 N.Y.S.2d 608, 1992 N.Y. App. Div. LEXIS 9865 (N.Y. App. Div. 1st Dep't 1992)*.

Administrative convenience dismissal of complaint with State Division of Human Rights alleging discriminatory discharge from employment on bases of race and physical disability was arbitrary where there was nothing in record to suggest that complainant intended to pursue his federal remedy before filing his administrative complaint or that he filed such complaint as prerequisite to commencing federal action, fact that over one year elapsed between filing of administrative complaint and commencement of federal action indicated that complainant initially intended to elect administrative remedy, and thus dismissal violated CLS *Exec § 297(9)* and CLS Div Hum Rts R § 465.5(e)(2) (*9 NYCRR § 465.5(e)(2)*). *Wegmans Food Mkts. v New York State Div. of Human Rights, 245 A.D.2d 685, 664 N.Y.S.2d 685, 1997 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 3d Dep't 1997)*.

Under current version of CLS *Exec § 297(9)*, State Division of Human Rights may dismiss administrative complaint for purpose of allowing complainant to annul his or her election of remedies and pursue action in state, instead of federal, court. *Kordich v Povill, 244 A.D.2d 112, 676 N.Y.S.2d 331, 1998 N.Y. App. Div. LEXIS 8680 (N.Y. App. Div. 3d Dep't 1998)*.

It was not "purely arbitrary" for State Division of Human Rights (SDHR) to dismiss complainant's sexual harassment complaint for administrative convenience after having initially found that there was probable cause to support her allegations, as her intervening commencement of federal court action asserting Title VII sexual harassment and retaliation claims, and pendant state claims mirroring her allegations in complaint filed with SDHR, effectuated election of remedies under CLS *Exec § 297(9)*. *Universal Packaging Corp. v New York State Div. of Human Rights, 270 A.D.2d 586, 704 N.Y.S.2d 332, 2000 N.Y. App. Div. LEXIS 2647 (N.Y. App. Div. 3d Dep't 2000)*.

In an action by an employee against her employer in which she alleged that she was discriminated against because she was a Caucasian and a native of the United States, the motion of the employer to dismiss her complaint, on the ground that the anti-

discrimination statute did not apply to white Americans, would be denied where the plain meaning of the words used and the perceived scope and intended application of the statute indicated that it applied equally to all persons; the employer's motion to dismiss the complaint on the second ground that the employee had previously filed a complaint with the Equal Employment Opportunity Commission that was still pending would likewise be denied, even though the employee failed to wait 180 days after filing the federal complaint to institute the action, where the employee's actions indicated her election to pursue her complaint in court. *Travis v Carlisle Corp., 109 Misc. 2d 173, 439 N.Y.S.2d 790, 1979 N.Y. Misc. LEXIS 2970 (N.Y. Sup. Ct. 1979)*.

Filing of federal complaint with Equal Opportunity Employment Commission that is then automatically referred to state Division of Human Rights is deemed to exercise plaintiff's option for administrative forum and thus precludes bringing court action. *Promisel v First Am. Artificial Flowers, 943 F.2d 251, 1991 U.S. App. LEXIS 20793 (2d Cir. N.Y. 1991)*, cert. denied, *502 U.S. 1060, 112 S. Ct. 939, 117 L. Ed. 2d 110, 1992 U.S. LEXIS 539 (U.S. 1992)*.

Construing Age Discrimination in Employment Act (*29 USCS § 621* et seq.) and CLS *Exec L § 297* liberally, their combined effect is that plaintiff cannot bring court action asserting both federal and state age discrimination in employment claims; one exception being that under § 297(9), plaintiff is not barred from bringing subsequent court action on his state law claim if his HRD complaint has been dismissed on grounds of administrative convenience. *Meschino v International Tel. & Tel. Corp., 563 F. Supp. 1066, 1983 U.S. Dist. LEXIS 17606 (S.D.N.Y. 1983)*.

State cause of action under Human Rights Law are not barred by filing of complaint with Division of Human Rights on grounds of election of remedies doctrine, as plaintiffs' Title VII (*42 USCS § 2000e* et seq.) and Age Discrimination in Employment Act (*29 USCS § 621* et seq.) discrimination charges were filed initially with EEOC as prerequisite to commencement of court action and subsequent decision by EEOC to refer such charges to Division of Human Rights cannot serve to bar plaintiffs' assertion of their rights under state law; further, even had plaintiffs initially invoked administrative proceedings before Division of Human Rights, such actions would only preclude filing of complaint in District Court while resolution of matters remained undecided by agency. *People by Abrams v Holiday Inns, 656 F. Supp. 675, 1984 U.S. Dist. LEXIS 24071 (W.D.N.Y. 1984)*.

Plaintiff seeking relief in federal court under Age Discrimination in Employment Act, after having filed timely complaint first with appropriate state agency and then with Equal Employment Opportunity Commission, as required by *29 USCS § 633*, is not barred by CLS NY *Executive Law § 297*, subd 9, because plaintiff's choice between state judicial and administrative relief does not affect right to bring federal claims in federal court, however, requirement of election of remedies under state statutes requires that pendent claim under New York Human Rights Law be dismissed for lack of subject matter jurisdiction under doctrine of election of remedies where plaintiff has administrative proceeding pending before New York State Division of Human Rights. *Hunnewell v Manufacturers Hanover Trust Co., 628 F. Supp. 759, 1986 U.S. Dist. LEXIS 29289 (S.D.N.Y. 1986)*.

In action by university professor alleging series of related acts and continuing policy of discrimination against women faculty members, plaintiff's claim that she was denied tenure by same individual for 6 successive years, despite having been recommended for tenure, was sufficient to trigger continuing violation doctrine; thus, Human Rights claim under CLS *Exec § 297* was not barred by statute of limitations. *Sunshine v Long Island Univ., 862 F. Supp. 26, 1994 U.S. Dist. LEXIS 12685 (E.D.N.Y. 1994)*.

Allocation of $11,400 emotional distress award and $17,713 "other expenses" award to fired female executive's claim under New York Human Rights Law (CLS *Exec Law §§ 290* et seq.) is approved, where federal $300,000 damage cap severely shrank jury's award of more than $5 million on Title VII (*42 USCS §§ 2000e* et seq.) claim, because Title VII clearly does not relieve employer from liability and award of damages under state law where jury has found such violation under both laws. *Luciano v Olsten Corp., 912 F. Supp. 663, 1996 U.S. Dist. LEXIS 613 (E.D.N.Y. 1996)*.

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relieve employer from liability and award of damages under state law where jury has found such violation under both laws. *Luciano v Olsten Corp., 912 F. Supp. 663, 1996 U.S. Dist. LEXIS 613 (E.D.N.Y. 1996)*.

Under *Exec § 297(9)*, employee's failure to annul her election of administrative remedy of age discrimination claim against employer before administrative hearing precluded her from bringing age discrimination suit in federal court against employer under *29 USCS § 623*, even if she and her attorney were unaware of intervening change in law that broadened grounds for annulment. *Harrison v New York City Off-Track Betting Corp., 107 F. Supp. 2d 455, 2000 U.S. Dist. LEXIS 11084 (S.D.N.Y. 2000)*.

Under *Exec § 297*, individuals seeking assuagement for employment discrimination under state law may either bring their claims in proper court or file complaint before New York State Division of Human Rights, but they may not do both. *Gallagher v IBEW, 127 F. Supp. 2d 139, 2000 U.S. Dist. LEXIS 19154 (N.D.N.Y. 2000)*.

Under *Exec § 297(9)*, charge of discrimination filed with EEOC cannot be considered to have been filed with state agency for election of remedy purposes until complaint is actually forwarded to state agency by EEOC and state agency opens file. *EEOC v Rotary Corp., 164 F. Supp. 2d 306, 2001 U.S. Dist. LEXIS 11550 (N.D.N.Y. 2001)*.

Where a former employee sued his former employer, alleging discrimination, including harassment, in violation of both state and federal laws, to the extent that the employee asserted discrimination claims under state law, they were barred by the doctrine of election of remedies under *N.Y. Exec. Law § 297(9)* (2005), because he filed a verified complaint with a state human rights division, which dismissed the complaint on the merits and not on the grounds of administrative convenience; however the employee was not thereby precluded from pursuing any claims under federal civil rights laws. *Lewis v N. Gen. Hosp., 502 F. Supp. 2d 390, 2007 U.S. Dist. LEXIS 62490 (S.D.N.Y. 2007)*.

Federal court lacked jurisdiction over plaintiff's claims under the New York State Human Rights Law, *N.Y. Exec. Law § 290* et seq., against every named defendant in his action, because those claims were based on the same facts and incidents raised in the charge; plaintiff's discrimination and retaliation claims were barred and subject to dismissal for lack of subject matter jurisdiction pursuant to the election of remedies doctrine set forth in *N.Y. Exec. Law § 297(9)*. *James v Countrywide Fin. Corp., 849 F. Supp. 2d 296, 2012 U.S. Dist. LEXIS 12838 (E.D.N.Y. 2012)*.

20. —Election between administrative and judicial remedies

Executive Law § 297 gives individuals a choice. They can either elect to sue in court and recover in damages which they can establish, including mental anguish, or they can elect to seek administrative relief under the Human Rights Law. Whether they elect to seek this latter relief, complainants may obtain directives and orders which will benefit both themselves and others in their position but they limit their recovery for damages to actual out-of-pocket expenses. *State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970)*, aff'd, *29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971)*.

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Person aggrieved by alleged unlawful discriminatory practice may seek relief in either an appropriate court or by complaint to the State Division of Human Rights, but not both. *State Div. of Human Rights v Commissioner of New York State Dep't of Civil Service, 57 A.D.2d 699, 395 N.Y.S.2d 774, 1977 N.Y. App. Div. LEXIS 11737 (N.Y. App. Div. 4th Dep't 1977)*.

While *Exec Law § 297* prohibits an aggrieved person from pursuing relief on a single discriminatory grievance in two separate forums, the statute cannot be employed to bar an aggrieved person from maintaining a proceeding before the State Division of

Human Rights based upon a discrimination complaint while contemporaneously maintaining an action in the courts based on the alleged breach of an employment contract. *Gondola v Center Moriches Union Free School Dist., 80 A.D.2d 600, 436 N.Y.S.2d 42, 1981 N.Y. App. Div. LEXIS 10289 (N.Y. App. Div. 2d Dep't 1981)*.

Court properly dismissed complaint alleging violation of CLS *Labor § 194* where plaintiff previously had filed complaint with City Commission on Human Rights alleging sexual discrimination arising out of same facts and circumstances, since filing of administrative complaint constituted election of remedies, barring maintenance of action. *Jones v New York City Transit Authority, 166 A.D.2d 293, 562 N.Y.S.2d 402, 1990 N.Y. App. Div. LEXIS 12051 (N.Y. App. Div. 1st Dep't 1990)*.

CLS *Exec § 297* sets forth election of remedies provision, and thus plaintiff was barred from bringing cause of action asserting discrimination after he filed claim with Division of Human Rights. *Scopelliti v Town of New Castle, 210 A.D.2d 308, 620 N.Y.S.2d 405, 1994 N.Y. App. Div. LEXIS 12598 (N.Y. App. Div. 2d Dep't 1994)*.

Plaintiff was barred from commencing action in state court for alleged discriminatory practices where she had elected to file complaint with Division of Human Rights based on same conduct. *Ehrlich v Kantor, 213 A.D.2d 447, 624 N.Y.S.2d 888, 1995 N.Y. App. Div. LEXIS 2709 (N.Y. App. Div. 2d Dep't 1995)*.

Former employer was entitled to summary judgment dismissing racial discrimination action where action was based on same issues charged in complaint brought before Equal Employment Opportunity Commission, which referred matter to Division of Human Rights. *McCain v Eaton Corp., 213 A.D.2d 462, 623 N.Y.S.2d 626, 1995 N.Y. App. Div. LEXIS 2721 (N.Y. App. Div. 2d Dep't 1995)*, app. denied, *88 N.Y.2d 801, 644 N.Y.S.2d 688, 667 N.E.2d 338, 1996 N.Y. LEXIS 1062 (N.Y. 1996)*.

Claimant could not avoid jurisdictional bar under CLS *Exec § 297(9)* by merely adding additional elements of damage arising out of same underlying conduct, by changing his legal theory, or couching his claim in such vague and conclusory terms as to thwart comparison of administrative and legal proceedings; further, given that administrative complaints of discrimination were dismissed due to absence of probable cause, and not "on the grounds of administrative convenience" (CLS *Exec § 297(9)*), failure to conduct hearing was irrelevant. *Bhagalia v State, 228 A.D.2d 882, 644 N.Y.S.2d 398, 1996 N.Y. App. Div. LEXIS 7256 (N.Y. App. Div. 3d Dep't 1996)*.

Administrative convenience dismissal of complaint with State Division of Human Rights alleging discriminatory discharge from employment on bases of race and physical disability was arbitrary where there was nothing in record to suggest that complainant intended to pursue his federal remedy before filing his administrative complaint or that he filed such complaint as prerequisite to commencing federal action, fact that over one year elapsed between filing of administrative complaint and commencement of federal action indicated that complainant initially intended to elect administrative remedy, and thus dismissal violated CLS *Exec § 297(9)* and CLS Div Hum Rts R § 465.5(e)(2) (*9 NYCRR § 465.5(e)(2)*). *Wegmans Food Mkts. v New York State Div. of Human Rights, 245 A.D.2d 685, 664 N.Y.S.2d 685, 1997 N.Y. App. Div. LEXIS 12602 (N.Y. App. Div. 3d Dep't 1997)*.

Dismissal of complaint by Division of Human Rights on ground of administrative convenience (ACD) was arbitrary, in contravention of CLS *Exec § 297(9)* and *9 NYCRR § 465.5(e)(2)(vi)*, where complainant filed administrative complaint with Division and thereafter sought ACD from Division in order to commence action in state court, and, before Division granted ACD, complainant commenced action in state Supreme Court. *Legg v Eastman Kodak Co., 248 A.D.2d 936, 670 N.Y.S.2d 291, 1998 N.Y. App. Div. LEXIS 2969 (N.Y. App. Div. 4th Dep't 1998)*.

Statute providing that person filing complaint with Division of Human Rights is precluded from also commencing action in court on claim of sex discrimination and that person commencing court action is precluded from filing complaint with Human Rights Division was intended to permit mandatory choice of seeking all such damages in court as could be established, including mental anguish, or of seeking administrative directives and orders which would benefit both themselves and others similarly situated, limiting recovery of damages to out-of-pocket expenses. *Allison v Board of Education, 70 Misc. 2d 215, 333 N.Y.S.2d 261, 1972 N.Y. Misc. LEXIS 1896 (N.Y. Sup. Ct. 1972)*.

Under statutes giving individual claiming unlawful discrimination in employment remedy of pursuing grievance in court and remedy of filing complaint with division of human rights, the two remedies are mutually exclusive, so that, except in the

situation where a complaint filed with the division of human rights has been dismissed for administrative convenience, where one remedy has been pursued, the other is not available. *Kramarsky v New York Police Dep't, 90 Misc. 2d 733, 395 N.Y.S.2d 937, 1977 N.Y. Misc. LEXIS 2142 (N.Y. Sup. Ct. 1977)*.

Since a lodge of a benevolent order was not a place of public accommodation, New York's Division of Human Rights could dismiss a woman's challenge to the denial of her application to join the lodge for lack of jurisdiction; however, it was arbitrary and capricious for the Division to have indicated in its dismissal that it was dismissing her action on the merits, because this deprived her of the opportunity to annul her election of remedies and pursue relief through a court action. *Orendorff v B.P.O.E. Lodge No. 96, 195 Misc. 2d 53, 753 N.Y.S.2d 703, 2003 N.Y. Misc. LEXIS 40 (N.Y. Sup. Ct. 2003)*.

Under CLS *Exec § 297*, once plaintiff has commenced administrative proceeding, he cannot bring court action while proceeding is ongoing. *Promisel v First Am. Artificial Flowers, 943 F.2d 251, 1991 U.S. App. LEXIS 20793 (2d Cir. N.Y. 1991)*, cert. denied, *502 U.S. 1060, 112 S. Ct. 939, 117 L. Ed. 2d 110, 1992 U.S. LEXIS 539 (U.S. 1992)*.

Former employee's election to seek redress of his race discrimination claims before New York State Division of Human Rights, prior to seeking redress in court, deprived federal district court of subject matter jurisdiction pursuant to CLS *Exec § 297(9)*. *Moodie v Federal Reserve Bank, 58 F.3d 879, 1995 U.S. App. LEXIS 16414 (2d Cir. N.Y. 1995)*.

Attorney's attempt to bring a discrimination claim pursuant to the New York Human Rights Law, *N.Y. Exec. Law § 290* et seq., in federal court was barred because the attorney had elected to initially pursue her claim with the New York State Department of Human Rights, and the election-of-remedies provisions applied to federal courts as well as state courts. *York v Ass'n of the Bar, 286 F.3d 122, 2002 U.S. App. LEXIS 5947 (2d Cir. N.Y.)*, cert. denied, *537 U.S. 1089, 123 S. Ct. 702, 154 L. Ed. 2d 633, 2002 U.S. LEXIS 9280 (U.S. 2002)*.

Executive Law § 297(9) requires that aggrieved party elect between administrative and judicial remedies; thus, plaintiff who seeks to redress his involuntary termination from his employment at state agency, is precluded from bringing action in any court on claim he alleges under New York Human Rights Law unless complaint before New York State Division of Human Rights is terminated without prejudice. *Rio v Presbyterian Hospital in New York, 561 F. Supp. 325, 1983 U.S. Dist. LEXIS 18031 (S.D.N.Y. 1983)*.

Former assistant vice-president and loan officer of bank is barred by doctrine of election of remedies from bringing action under CLS *Exec L § 296(1)(a)* for age discrimination, where claim was also filed with appropriate state agency, which rejected it. *Moylan v National Westminster Bank, 687 F. Supp. 54, 1988 U.S. Dist. LEXIS 5130 (E.D.N.Y. 1988)*.

Employment discrimination plaintiff's state claims under state human rights law are barred by CLS *Exec Law § 297(9)*, where plaintiff filed pro se complaint with state division of human rights (DHR), which found no probable cause for his discrimination claims, because filing with DHR constituted binding election of administrative remedy foreclosing access to state courts. *Stout v International Business Machs. Corp., 798 F. Supp. 998, 1992 U.S. Dist. LEXIS 10600 (S.D.N.Y. 1992)*.

Discharged stock manager may replead his claim under New York Human Rights Law (CLS *Exec Law §§ 290* et seq.), where he simply alleges that Human Rights Commission terminated its investigation for administrative convenience when it turned his claim over to EEOC investigator, because law requires that state administrative agency issue very specific order before manager can be released from initial choice of administrative, as opposed to judicial, forum for his sex/age discrimination claim. *Agugliaro v Brooks Bros., 802 F. Supp. 956, 1992 U.S. Dist. LEXIS 11261 (S.D.N.Y. 1992)*.

Former employee's discrimination claims against former employer are dismissed, where employee elected to pursue administrative remedies by filing complaint with state Division of Human Rights (DHR) and then requested that DHR dismiss her claim for administrative convenience, because dismissals for administrative convenience should be limited to cases where dismissal is truly for convenience of agency rather than due to change of litigation strategy by complainant. *Chachra v Katharine Gibbs Sch., Inc., 828 F. Supp. 176, 1993 U.S. Dist. LEXIS 11296 (E.D.N.Y. 1993)*.

In former employee's discrimination action against former employer, employee may not amend complaint to add claim under CLS Executive Law, where employee elected administrative forum in which to pursue this claim prior to July 15, 1991,

because, under CLS *Exec Law § 297(9)*, this election precludes later court action on same claim. *Clements v St. Vincent's Hosp. & Med. Ctr., 919 F. Supp. 161, 1996 U.S. Dist. LEXIS 3535 (S.D.N.Y. 1996)*.

Age discrimination claim under Human Rights Law and city anti-discrimination provisions is not barred by election of remedies provision in CLS *Exec § 297(7)* and *NYC Admin Code § 8-502*, where case is closed for administrative convenience. *Miles v North Gen. Hosp., 998 F. Supp. 377, 1998 U.S. Dist. LEXIS 3979 (S.D.N.Y. 1998)*.

Under *Exec § 297(1)*, employee's filing of Human Rights Law claims directly with state Division of Human Rights prior to commencing discrimination action under state law barred employee's action, where proceedings were not terminated for administrative convenience. *Woodcock v Montefiore Med. Ctr. the Univ. Hosp. of the Albert Einstein College of Med., Comprehensive Family Care Ctr., 48 F. Supp. 2d 231, 1999 U.S. Dist. LEXIS 5710 (E.D.N.Y. 1999)*.

If a litigant brings a discrimination complaint before the New York State Division of Human Rights (SDHR), she may not bring a subsequent judicial action under the New York Human Rights Law, *N.Y. Exec. Law § 296*, based on the same incident, unless the SDHR dismissed the complaint for administrative convenience. After the SDHR decides the claim, a litigant may only appeal that decision to the Supreme Court of the State of New York. *Gad-Tadros v Bessemer Venture Partners, 326 F. Supp. 2d 417, 2004 U.S. Dist. LEXIS 14165 (E.D.N.Y. 2004)*.

Former employee was permitted to bring suit against defendants under the the New York Human Rights Law, *N.Y. Exec. Law § 296*, after having filed a complaint with the New York State Division of Human Rights (SDHR), because the SDHR dismissed her complaint on the basis of administrative convenience. *Gad-Tadros v Bessemer Venture Partners, 326 F. Supp. 2d 417, 2004 U.S. Dist. LEXIS 14165 (E.D.N.Y. 2004)*.

Plaintiff employee's New York State Human Rights Law claims were barred by the election-of-remedies provision under *N.Y. Exec. Law § 297(9)*; the employee had filed a charge with the New York State Division of Human Rights (NYSDHR), setting forth the same issues as she alleged in her complaint before the court, and the NYSDHR had issued a no probable cause determination. *Benson v N. Shore-Long Island Jewish Health Sys., 482 F. Supp. 2d 320, 2007 U.S. Dist. LEXIS 28524 (E.D.N.Y. 2007)*.

Detective's claim that a village's sick leave policy was enforced in a discriminatory manner on the basis of gender, race, and disability in violation of the New York Human Rights Law, *N.Y. Exec. Law § 296*, was barred by the election of remedies provision of *N.Y. Exec. Law § 297(9)* because the detective had filed a discrimination complaint with the New York State Division of Human Rights and the detective's present claims of gender, race, and disability discrimination arose out of the same incident forming the basis of her claim before the Division even though the administrative complaint alleged only discrimination on the basis of creed. *Borum v Village of Hempstead, 590 F. Supp. 2d 376, 2008 U.S. Dist. LEXIS 103891 (E.D.N.Y. 2008)*.

Election of remedies provisions in *N.Y. Exec. Law §§ 297(9)* and *300* did not bar a former employee, who had previously filed a complaint with the New York Division of Human Rights (DHR), from asserting breach of contract claims against her former employer because there was an insufficient identity of issues raised in the DHR complaint and the instant action. The federal lawsuit required consideration of whether the employer breached the terms of a collective bargaining agreement by failing to provide written, specific reasons for the employee's suspension and whether there was sufficient cause for her termination, whereas the employee's DHR complaint asked whether the employer engaged in unlawful discrimination and harassment in violation of the New York Human Rights Law. *Gorenflo v Penske Logistics, 592 F. Supp. 2d 300, 2009 U.S. Dist. LEXIS 1032 (N.D.N.Y. 2009)*.

21. — —Where administrative claim is referred to state or to another administrative agency

Where Commissioner of Division of Human Rights was agency's general counsel at time charges were investigated and set down for hearing, she could not, having subsequently been named commissioner, act as impartial arbiter in same matter, notwithstanding that she was no longer general counsel at time of hearing. *State Div. of Human Rights v Dorik's Au Natural Restaurant, 203 A.D.2d 163, 610 N.Y.S.2d 266, 1994 N.Y. App. Div. LEXIS 4123 (N.Y. App. Div. 1st Dep't 1994)*.

Employee was not barred by CLS *Exec § 297* from bringing employment discrimination suit in state court on grounds that referral of her complaint from Equal Employment Opportunity Commission (EEOC) to New York State Division of Human Rights constituted election of remedies; statute limited class of persons who could not pursue their rights in state court to those aggrieved persons who had themselves filed complaint with Division of Human Rights, and since EEOC referred complaint to agency on behalf of employee, employee was not prohibited from commencing state court action involving same claim. *Scott v Carter-Wallace, Inc., 134 Misc. 2d 458, 511 N.Y.S.2d 767, 1986 N.Y. Misc. LEXIS 3119 (N.Y. Sup. Ct. 1986)*, dismissed, in part, *137 Misc. 2d 672, 521 N.Y.S.2d 614, 1987 N.Y. Misc. LEXIS 2698 (N.Y. Sup. Ct. 1987)*.

Claim by disabled person that hospital discriminated against him on basis of his disability in violation of CLS *Exec L § 296* must be dismissed under doctrine of election of remedies, where claim was addressed and decided by Division of Human Rights and matter was not dismissed for administrative convenience so as to provide exception under § 297(9). *Leake v Long Island Jewish Medical Center, 695 F. Supp. 1414, 1988 U.S. Dist. LEXIS 8361 (E.D.N.Y. 1988)*, aff'd, *869 F.2d 130, 1989 U.S. App. LEXIS 2447 (2d Cir. N.Y. 1989)*.

Pendent jurisdiction will not be exercised over state-law claims, where employee brought federal and state claims involving age discrimination, but it is unclear whether cause of action exists pursuant to CLS *Exec Law § 297* in that employee's EEOC claim was referred to state agency, thereby comprising election of remedies barring a claim in state courts, because state claim presents unsettled issues of state law such that comity counsels leaving the decision to state courts. *Dapelo v Banco Nacional De Mexico, 767 F. Supp. 49, 1991 U.S. Dist. LEXIS 8262 (S.D.N.Y. 1991)*.

"Journey person" electrician's claims under CLS *Exec Law § 296* may proceed to trial, where she claims employer subjected her to unequal treatment due to her sex and her pregnancy, even though she did file charge with EEOC which was automatically referred to state division of human rights which would ordinarily constitute election of administrative remedy barring action in state court under CLS *Exec Law § 297(9)*, because administrative complaint was withdrawn by plaintiff, eliminating barrier to court action under Second Circuit precedent. *Kelber v Forest Elec. Corp., 799 F. Supp. 326, 1992 U.S. Dist. LEXIS 9977 (S.D.N.Y. 1992)*.

22. — —Where state claim contains additional charge

Discharged employee of corrections department was precluded from maintaining Article 78 proceeding by election of remedies provision of CLS *Exec § 297* since he had previously filed complaint with Division of Human Rights based on same incident, allegations in his Article 78 petition were virtually identical with those in complaint, and although his petition added charge under CLS *CPLR § 7803*, its essential thrust was same as that contained in complaint. *James v Coughlin, 124 A.D.2d 728, 508 N.Y.S.2d 231, 1986 N.Y. App. Div. LEXIS 62032 (N.Y. App. Div. 2d Dep't 1986)*, app. denied, *69 N.Y.2d 609, 516 N.Y.S.2d 1025, 509 N.E.2d 360, 1987 N.Y. LEXIS 16420 (N.Y. 1987)*.

Court properly denied leave to amend complaint (for third time) to allege that defendant religious institution had discriminated against 3-year-old disabled child in violation of CLS *Exec § 296(4)* by expelling child from nursery school where plaintiff's own letters and pleadings revealed that his son frequently ran out of nursery school classroom for no apparent reason, that school had legitimate reason, implemented as school policy, for classroom door to remain open, and that plaintiff himself had voluntarily removed his son from nursery school after school refused to change its policy. *Posner v Central Synagogue, 202 A.D.2d 284, 609 N.Y.S.2d 195, 1994 N.Y. App. Div. LEXIS 2501 (N.Y. App. Div. 1st Dep't)*, app. dismissed, *83 N.Y.2d 953, 615 N.Y.S.2d 878, 639 N.E.2d 419, 1994 N.Y. LEXIS 1385 (N.Y. 1994)*.

Complaint alleging that discharge of plaintiff violated federal Rehabilitation Act and New York State Human Rights Law was not precluded by fact that plaintiff's employment application and application for promotion had omitted reference to 2 prior employers by whom he had been employed, since there was no evidence that plaintiff would have been discharged had those omissions been discovered while he was employed. *Jones v Associated Univs., 870 F. Supp. 1180, 1994 U.S. Dist. LEXIS 17920 (E.D.N.Y. 1994)*, aff'd, *71 F.3d 406, 1995 U.S. App. LEXIS 33395 (2d Cir. N.Y. 1995)*.

23. — —Third-party filing

Jury's finding that employer had discharged employee in retaliation for her sexual harassment complaint was not against weight of evidence, despite employer's contention that decision to terminate employee was made before she advised employer of her complaint and that decision was based on employee's poor job performance, where (1) employee received regular and intermittent raises, was scheduled to receive another raise after date of her complaint, and had never had poor job review, and (2) she was fired shortly after submitting her sexual harassment complaint to employer. *Gleason v Callanan Indus., 203 A.D.2d 750, 610 N.Y.S.2d 671, 1994 N.Y. App. Div. LEXIS 4163 (N.Y. App. Div. 3d Dep't 1994)*.

Determination by Commissioner of Division of Human Rights that employer did not unlawfully discriminate against employee on basis of her pregnancy was supported by evidence that employee misrepresented her hours on time card, that she refused to assist her coworkers in answering telephones, and that she kept irregular work hours. *Resnik v New York State Div. of Human Rights, 204 A.D.2d 330, 611 N.Y.S.2d 270, 1994 N.Y. App. Div. LEXIS 4511 (N.Y. App. Div. 2d Dep't 1994)*.

Cooperative corporation was entitled to summary judgment in action alleging discriminatory rejection of plaintiff's application to become shareholder where (1) it was undisputed that plaintiff's financial worth statement was overstated and that she altered letter of submission with intention of allowing her brother to stay overnight when she was not in apartment, which violated rules of cooperative, (2) cooperative cited those incidents as basis of disapproval, and (3) plaintiff's hearsay assertion—that real estate broker told her that cooperative discouraged elderly people from buying apartments because they were great burden to service staff—was unsupported by tally of number of elderly residents in building. *Hitter v Rubin, 208 A.D.2d 480, 617 N.Y.S.2d 730, 1994 N.Y. App. Div. LEXIS 10553 (N.Y. App. Div. 1st Dep't 1994)*.

CLS *Exec § 297* does not bar cause of action based upon state human rights laws on grounds of election of remedy where plaintiff himself does not file with the agency, but third party, such as EEOC, files on his behalf. *Kaczor v Buffalo, 657 F. Supp. 441, 1987 U.S. Dist. LEXIS 3346 (W.D.N.Y. 1987)*.

Former employee's state-law age discrimination action must be dismissed, even though attorney, not employee, filed administrative charge, because attorney's filing of administrative charge on behalf of his client operates as election of remedies under NYCLS Elec Law § 297(9), precluding judicial forum. *Bouker v Cigna Corp., 847 F. Supp. 337, 1994 U.S. Dist. LEXIS 2920 (E.D. Pa. 1994)*.

III. Time Limitations

24. In general

State Division of Human Rights was not authorized to dismiss, "for administrative convenience," age discrimination complaint which was time-barred by CLS *Exec § 297(5)*, and thus subsequent judicial proceeding could not be brought under more generous limitation period of CLS *CPLR § 214(2)*, since dismissal would contravene one-year time limitation of CLS *Exec § 297(5)* and election of remedies requirement of CLS *Exec § 297(9)*. *Marine Midland Bank, N. A. v New York State Div. of Human Rights, 75 N.Y.2d 240, 552 N.Y.S.2d 65, 551 N.E.2d 558, 1989 N.Y. LEXIS 4454 (N.Y. 1989)*.

Where relatively minor delays occur, statutory time limitations of Executive Law governing proceedings before State Division of Human Rights are directory rather than mandatory and noncompliance by Division is not cause for invalidating its proceedings or terminating its jurisdiction; however, protracted administrative delays in implementation of provisions of human rights law will constitute, as matter of law, prejudice to named proceeding respondents, warranting exercise of equitable powers of judiciary to divest Division of jurisdiction conferred by human rights law. Protracted administrative delays in implementation of provisions of human rights law, arising by virtue of seven-month delinquency in determination by State Division of Human Rights of jurisdiction and probable cause, nine-month delinquency in giving of notice, eight-month delinquency in holding of public hearing, 87-day delinquency in issuance of Division's determination, and delay in notifying parties of appeal board's decision, resulting in expiration of period in excess of three years from date of filing of complaint until date of serving of decision and order of appeal board, constituted, as matter of law, prejudice to named proceeding respondents, warranting exercise of equitable powers of judiciary to divest Division of jurisdiction conferred by human rights law. *State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div.*

LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976), aff'd, *42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977)*.

Where the State Division of Human Rights had a meritorious defense to a proceeding for a judgment prohibiting it from proceeding on a complaint because of its alleged unreasonable delay, and it moved promptly to vacate a default judgment entered against it in that proceeding, its default should be excused in the interest of justice so that the complainant may be permitted to pursue her charge of unlawful discrimination. *Tessy Plastics Corp. v State Div. of Human Rights, 62 A.D.2d 36, 403 N.Y.S.2d 946, 1978 N.Y. App. Div. LEXIS 10415 (N.Y. App. Div. 4th Dep't 1978)*, aff'd, *47 N.Y.2d 789, 417 N.Y.S.2d 926, 391 N.E.2d 1007, 1979 N.Y. LEXIS 2058 (N.Y. 1979)*.

Following a determination of the State Division of Human Rights after a hearing, that complainant, a psychologist who had applied for admission to the New York Psychoanalytic Institute and who was otherwise eminently qualified for admission, had been denied admission in violation of the Human Rights Law on the ground that she suffered from Hodgkin's disease, it was error, upon administrative appeal by the institute which has standing to appeal pursuant to section 297-a (subd 6, par c) of the Executive Law, which empowers the Appeal Board to hear appeals "by any party to any proceeding before the division", for the State Human Rights Appeal Board, without reaching the merits, to annul the division's order and dismiss the complaint on the ground that the division had unreasonably exceeded the statutory time limit, in violation of section 297 (subd 4, pars a, c) of the Executive Law, since the extended time limits provided by section 297 are directory, not mandatory, and absent a showing of substantial prejudice or such egregious delay as will constitute prejudice as a matter of law, delay attributable solely to the administrative agency should not operate to foreclose relief to an innocent complainant who is not responsible for it; there is no claim or evidence of actual prejudice to the institute as a result of delay and there is no claim of undue delay caused by petitioner. Accordingly, since the Appeal Board is limited upon review to the power of a court reviewing an administrative determination made after hearing (*Executive Law, § 297-a*, subd 7), the order of the Appeal Board is annulled and the order of the Division of Human Rights is confirmed, inasmuch as the record is sufficiently detailed to afford a reasonable basis for the administrative determination, despite the deliberate default by the institute at the hearing. *Goldsmith v New York Psychoanalytic Institute, 73 A.D.2d 16, 425 N.Y.S.2d 561, 1980 N.Y. App. Div. LEXIS 9711 (N.Y. App. Div. 1st Dep't 1980)*.

An action on behalf of women bus drivers alleging that transit authority's use of seniority as a factor to be considered in making provisional and permanent appointments of bus operators to the position of surface line dispatcher would be dismissed as time barred, where the complaint was premised upon the transit authority's prior practice of effectively precluding women from filling bus operator positions until 1978 by virtue of a five-foot four-inches height requirement, and where it did not allege any present impropriety. *People v New York City Transit Authority, 90 A.D.2d 766, 455 N.Y.S.2d 295, 1982 N.Y. App. Div. LEXIS 18975 (N.Y. App. Div. 2d Dep't 1982)*, modified, *59 N.Y.2d 343, 465 N.Y.S.2d 502, 452 N.E.2d 316, 1983 N.Y. LEXIS 3174 (N.Y. 1983)*.

The Appellate Division would not invalidate proceedings or divest the New York State Division of Human Rights of jurisdiction, although the period from the filing of the complaint until the final resolution by the State Human Rights Appeal Board was over five years, in the absence of a showing by petitioner, who had been found guilty of discrimination on the basis of sex, that it had been substantially prejudiced by the delay. *County of Nassau v New York State Div. of Human Rights, 96 A.D.2d 818, 465 N.Y.S.2d 566, 1983 N.Y. App. Div. LEXIS 19405 (N.Y. App. Div. 2d Dep't 1983)*.

An action commenced in 1982 predicated upon the Human Rights Law (*Executive Law § 290* et seq.) which alleged that plaintiff was refused any opportunity to be considered for employment as a specific trust officer until she was eventually promoted to that position in 1976, that she was placed in lower ranking and lower paying job titles as similarly or less qualified men during the period of 1974 through 1975, that she was denied promotions because of more stringent standards apply to her because of her sex, which promotions occurred more than three years prior to the commencement of the action, and that defendant gave female employees less frequent and smallest salary increases than male employees who were hired in or around 1974, was time barred by the three year statute of limitations applicable to court actions under the Human Rights Law and, although the impact of such alleged wrongs may have had a lasting effect, said discrimination claims were not continuing wrongs which result in the tolling of the statute of limitations. *Patrowich v Chemical Bank, 98 A.D.2d 318, 470 N.Y.S.2d 599, 1984 N.Y. App. Div. LEXIS 16482 (N.Y. App. Div. 1st Dep't)*, app. dismissed, *62 N.Y.2d 801 (N.Y. 1984)*, aff'd, *63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11, 1984 N.Y. LEXIS 4717 (N.Y. 1984)*.

Time limits set forth in CLS *Exec § 297* were enacted for benefit of complainants, not those charged with violating statute, and in absence of substantial prejudice to party charged, delay attributable solely to administrative agency should not operate to foreclose relief to innocent complainant who is not responsible for it. *Ambrosio v State Div. of Human Rights, 144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988)*.

Allegations that individual defendant made both physical and verbal sexual advances toward plaintiff that were unwelcome and repelled, that she was told her job evaluation was tied to her willingness to accept advances, and that she was forced to resign because corporate defendant did not provide vehicle of redress stated action for both hostile environment and quid pro quo sexual harassment under Human Rights Law; those same allegations also showed discriminatory conduct within limitations period sufficiently similar to alleged conduct without limitations period to justify conclusion that both were part of single discriminatory practice, and thus plaintiff's claim was timely in its entirety under continuing violation doctrine. *Walsh v Covenant House, 244 A.D.2d 214, 664 N.Y.S.2d 282, 1997 N.Y. App. Div. LEXIS 11535 (N.Y. App. Div. 1st Dep't 1997)*.

Plaintiffs' due process rights were not violated by failure of Human Rights Division to comply with time limits under CLS *Exec § 297*, where division delayed in hearing their complaints of housing discrimination, but they still either had complaints pending with division or had settled their cases and thus their complaints were not extinguished due to delay. *Housing Opportunities Made Equal, Inc. v Pataki, 277 A.D.2d 888, 716 N.Y.S.2d 215, 2000 N.Y. App. Div. LEXIS 11352 (N.Y. App. Div. 4th Dep't 2000)*, app. denied, *96 N.Y.2d 712, 729 N.Y.S.2d 439, 754 N.E.2d 199, 2001 N.Y. LEXIS 1062 (N.Y. 2001)*.

Claims relating to defendants' alleged discriminatory conduct preceding plaintiff's 15-month medical leave of absence were barred by time requirements for filing of notice of claim and complaint with Equal Employment Opportunity Commission; continuing violations exception was inapplicable since plaintiff's leave of absence, which was voluntary and thus could not be considered discrimination, interrupted alleged pattern of discrimination. *Sirota v N.Y. City Bd. of Educ., 283 A.D.2d 369, 725 N.Y.S.2d 332, 2001 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1st Dep't 2001)*.

Human rights division (HRD) was not entitled to an extension of time to serve a summons and complaint under N.Y. *C.P.L.R. 306-b* as: (1) a tenant had been sued by the landlords before she filed her administrative complaint, and her initial defense was that the landlords consented to her having a dog, (2) the tenant's request to later add a defense that the dog was an emotional support animal was denied, (3) the tenant then filed the administrative complaint and settled a holdover action by agreeing to remove the dog, (4) the HRD waited two years to file a summons and complaint after the landlords elected under *N.Y. Exec. Law § 297(9)* to have it file suit, (5) the HRD attempted service only on the landlords' attorneys in the administrative proceeding, (6) after the statute of limitations under N.Y. *C.P.L.R. 214(2)* had expired, the HRD moved for a default judgment and virtually conceded in responding to the landlords' motion to dismiss for lack of jurisdiction that service was improper, and (7) over four years had passed since the landlords' alleged discriminatory act, and the tenant no longer lived in the building. *New York State Div. of Human Rights v Giffuni, 40 A.D.3d 361, 836 N.Y.S.2d 125, 2007 N.Y. App. Div. LEXIS 6009 (N.Y. App. Div. 1st Dep't 2007)*.

Prohibition does not lie to prevent the Division of Human Rights from holding a hearing to determine whether a school district had kept a teacher from substitute teaching in retaliation for an earlier complaint although the school district was notified more than three years too late under the statutory requirements of charges and a hearing (*Executive Law, § 297*); the remedy for asserted error of law in jurisdiction or authority lies first in administrative review and after exhaustion of that remedy in judicial review; a court may not prohibit proceedings before the division no matter how long the delay or how substantial the prejudice. *Board of Education v New York State Div. of Human Rights, 99 Misc. 2d 643, 420 N.Y.S.2d 648, 1979 N.Y. Misc. LEXIS 2308 (N.Y. Sup. Ct. 1979)*, aff'd, *74 A.D.2d 987, 426 N.Y.S.2d 589, 1980 N.Y. App. Div. LEXIS 10804 (N.Y. App. Div. 3d Dep't 1980)*.

Three-month notice of claim requirements of CLS *Educ § 3813(1)* did not apply to action alleging that school district's denial of health insurance benefits to plaintiff's domestic partner constituted discrimination on basis of marital status and sexual orientation since action sought relief which would benefit plaintiff and teachers similarly situated. *Funderburke v Uniondale Union Free Sch. Dist. No. 15, 172 Misc. 2d 963, 660 N.Y.S.2d 659, 1997 N.Y. Misc. LEXIS 260 (N.Y. Sup. Ct. 1997)*, aff'd, *251 A.D.2d 622, 676 N.Y.S.2d 199, 1998 N.Y. App. Div. LEXIS 7881 (N.Y. App. Div. 2d Dep't 1998)*.

Employee's *N.Y. Exec. Law § 298* proceeding was dismissed because, inter alia, the administrative law judge (ALJ) noted that all the incidents cited by the employee in support of her hostile working environmental claim occurred well over a year before

she filed her complaint and were thus time-barred. *Matter of Price v Southwest Airlines, Inc., 66 A.D.3d 1267, 888 N.Y.S.2d 255, 2009 N.Y. App. Div. LEXIS 7618 (N.Y. App. Div. 3d Dep't 2009)*.

25. Time limitations as directory not mandatory

The statutory provision for speedy processing of complaints, providing for determination within 15 days that it had jurisdiction and there was probable cause, is to be regarded as merely directory and not as a limitation on the agency's authority. *Glen Cove Municipal Civil Service Com. v Glen Cove NAACP, 34 A.D.2d 956, 312 N.Y.S.2d 400, 1970 N.Y. App. Div. LEXIS 4640 (N.Y. App. Div. 2d Dep't)*, app. denied, (N.Y. App. Div. 1970).

Although the time provisions of *Executive Law § 297*, subd 4(a), (c) are directory and not mandatory, such interpretation of statute does not permit the Division of Human Rights to ignore completely the specific statutory provisions for timely action. *State Div. of Human Rights ex rel. Salamy v Rinas, 42 A.D.2d 388, 348 N.Y.S.2d 422, 1973 N.Y. App. Div. LEXIS 3276 (N.Y. App. Div. 4th Dep't 1973)*.

Time provisions of Executive Law, relating to when Division of Human Rights must hold hearing and make final determination, are directory, not mandatory. *State Div. of Human Rights ex rel. Hale v Great Atlantic & Pacific Tea Co., 46 A.D.2d 1001, 362 N.Y.S.2d 105, 1974 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 4th Dep't 1974)*.

Time schedules enjoined upon Division of Human Rights by law are directory and not for benefit of violators. *Guardian Capital Corp. v New York State Div. of Human Rights, 48 A.D.2d 753, 368 N.Y.S.2d 594, 1975 N.Y. App. Div. LEXIS 9834 (N.Y. App. Div. 3d Dep't)*, app. denied, *37 N.Y.2d 712, 1975 N.Y. LEXIS 2959 (N.Y. 1975)*.

Limitations set forth in Executive Law for handling of discrimination complaints by State Division of Human Rights are directory rather than mandatory, but in view of very egregious violations resulting in consumption of four years and two months for resolution of complaint, Division's proceedings were invalidated and its jurisdiction terminated. *State Div. of Human Rights v Board of Education, 59 A.D.2d 1048, 399 N.Y.S.2d 805, 1977 N.Y. App. Div. LEXIS 14335 (N.Y. App. Div. 4th Dep't 1977)*.

Where the Division of Human Rights did not make a finding as to jurisdiction and probable cause until seven months after the filing of a complaint and did not issue a notice of charges and hearing until nine months after the filing of the complaint, although *section 297 of the Executive Law*, as it then existed, prior to 1977 amendments (see L 1977, ch 729), required it to make a finding as to jurisdiction and probable cause within 15 days of the filing of the complaint and to issue the notice of charges and hearing within 60 days of the filing of the complaint, but no actual substantial prejudice was suffered by the party charged, dismissal of the division's proceedings because of the delay is not warranted. The time limitations set forth in *section 297 of the Executive Law* for, *inter alia*, the making of a finding as to jurisdiction and probable cause by the Division of Human Rights and for its issuance of a notice of charges and hearing, are directory and not mandatory, and were enacted for the benefit of the complainants, not those charged with violating the statute; in the absence of substantial prejudice to the party charged, delay attributable solely to the division, if not egregious, should not operate to foreclose relief to an innocent complainant. *Tessy Plastics Corp. v State Div. of Human Rights, 62 A.D.2d 36, 403 N.Y.S.2d 946, 1978 N.Y. App. Div. LEXIS 10415 (N.Y. App. Div. 4th Dep't 1978)*, aff'd, *47 N.Y.2d 789, 417 N.Y.S.2d 926, 391 N.E.2d 1007, 1979 N.Y. LEXIS 2058 (N.Y. 1979)*.

A delay in excess of seven years, between the time of filing of a complaint before the State Division of Human Rights and the time a determination was made, caused prejudice to the respondent employer as a matter of law and would warrant dismissal of the complaint. *State Div. of Human Rights ex rel. Schilagi v Bethlehem Steel Corp., 86 A.D.2d 977, 448 N.Y.S.2d 331, 1982 N.Y. App. Div. LEXIS 15683 (N.Y. App. Div. 4th Dep't 1982)*.

The complaint charging an employer with the unlawful discriminatory denial of pregnancy-related disability benefits, which complaint was filed three months after the cessation by the employer of enforcing the alleged discriminatory policy and 21 months after the end of the pregnancy-related disability, would be considered timely filed under *Exec L § 297(5)* since, when a discriminatory practice is one of a "continuing nature," the date of its occurrence is deemed to be any date subsequent to its inception up to the date of its cessation, and in assessing whether a discriminatory practice is of such a nature, the determining factor is whether the discriminatory practice had a continuing impact on the complainant; in the instant case the employer's

ongoing policy of denying such disability claims had an impact on the petition until the date of the cessation, at which point the one-year limitations period began to run; it is the cessation of the impact of the discriminatory practice and not the cessation of the disability which triggers the one-year period. *State Div. of Human Rights ex rel. McClary v Marine Midland Bank, 87 A.D.2d 982, 450 N.Y.S.2d 109, 1982 N.Y. App. Div. LEXIS 16519 (N.Y. App. Div. 4th Dep't 1982).*

The time schedules specified in *Exec Law § 297* for the performance of certain acts on the part of the Division of Human Rights are directory rather than mandatory, and the mere passage of time normally will not constitute substantial prejudice to a respondent in a discrimination proceeding in the absence of some showing of actual injury to the respondent. *Totem Taxi, Inc. v New York State Human Rights Appeal Bd., 98 A.D.2d 923, 471 N.Y.S.2d 358, 1983 N.Y. App. Div. LEXIS 21244 (N.Y. App. Div. 3d Dep't 1983)*, rev'd, *65 N.Y.2d 300, 491 N.Y.S.2d 293, 480 N.E.2d 1075, 1985 N.Y. LEXIS 15079 (N.Y. 1985)*.

Failure of division to conduct investigation within time limits prescribed by law does not support complainant's request for further investigation or public hearing since time limits are directory rather than mandatory. *State Div. of Human Rights ex rel. Clifford v Oneida, Ltd., 112 A.D.2d 793, 492 N.Y.S.2d 293, 1985 N.Y. App. Div. LEXIS 56039 (N.Y. App. Div. 4th Dep't 1985)*.

Determination of Division of Human Rights, which held that employer had discriminated against employee because of her sex by denying her pregnancy-related disability benefits, would be confirmed in proceeding pursuant to CLS *Exec § 298*, even though there had been substantial delay in proceedings, since time limitations enunciated in CLS *Exec § 297* are directory, rather than mandatory, and are for benefit of complainants rather than violators, and since commissioner legitimately found that correspondence between division and employee's attorney reflected desire of attorney to stay proceedings pending resolution of employee's workers' compensation claim, rather than withdrawal of claim. *Art Leather Mfg. Co. v State Div. of Human Rights, 144 A.D.2d 406, 533 N.Y.S.2d 1018, 1988 N.Y. App. Div. LEXIS 11795 (N.Y. App. Div. 2d Dep't 1988)*.

Where sole evidence of mental anguish was complainant's own testimony that she was "[e]motionally and physically screwed up", award of $35,000 for mental anguish is grossly excessive and new award should not exceed $5,000–award of back pay from complainant's discharge in February 1985 until her reinstatement by petitioner constitutes punitive assessment against petitioner rather than compensation; complainant obtained new employment at same pay in July 1985; Division of Human Rights may not award what would amount to punitive damages solely on finding that unlawful discrimination occurred; award of back pay must be reduced to cover only period that complainant was out of work as result of her unlawful discharge; however, Division did not abuse its discretion in ordering petitioner to reinstate complainant–three-year period between filing of complaint and issuance of Division's determination did not operate to divest Division of jurisdiction; absent showing of substantial prejudice, time limitations enunciated in *Executive Law § 297* are directory and not mandatory. *Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989)*.

Three-year period between filing of employment discrimination complaint and issuance of determination by Division of Human Rights did not operate to divest division of jurisdiction since, absent showing of substantial prejudice, time limitations in CLS *Exec § 297* are directory and not mandatory. *Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989)*.

Time limitations in CLS *Exec § 297(2)(a)* and (4)(a) are directory, not mandatory. *Tiffany & Co. v Smith, 224 A.D.2d 332, 638 N.Y.S.2d 454, 1996 N.Y. App. Div. LEXIS 1456 (N.Y. App. Div. 1st Dep't)*, app. denied, *88 N.Y.2d 806, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1723 (N.Y. 1996)*.

Former employee's 2003 claim against her corporate employer and its owner for sexual harassment by creating a hostile work environment that arose out of six months of employment in 1991 and 1992 was not untimely because the time limits contained in *N.Y. Exec. Law § 297* were directory only; in the absence of prejudice, which the owner and employer failed to demonstrate, the time limits did not affect the jurisdiction of the New York Division of Human Rights over the employee's claim. *Matter of R & B Autobody & Radiator, Inc. v New York State Div. of Human Rights, 31 A.D.3d 989, 819 N.Y.S.2d 599, 2006 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 3d Dep't 2006)*.

The enlarged time periods in *section 297 of the Executive Law*, as amended, providing that the time frame for the determination of jurisdiction by the State Division of Human Rights be extended from 15 to 180 days and that a notice of public hearing be

served within 270 rather than 60 days after the filing of the complaint, are mandatory rather than directory; accordingly, a delay by the division of 462 days in determining jurisdiction following the filing of a complaint and of 766 days before the issuance of a notice of public hearing requires the dismissal of the complaint. *General Railway Signal Co. v New York State Div. of Human Rights, 95 Misc. 2d 260, 407 N.Y.S.2d 417, 1978 N.Y. Misc. LEXIS 2413 (N.Y. Sup. Ct. 1978)*, rev'd, *73 A.D.2d 834, 423 N.Y.S.2d 768, 1979 N.Y. App. Div. LEXIS 14722 (N.Y. App. Div. 4th Dep't 1979)*.

Plaintiffs were entitled to mandatory injunction, enjoining Division of Human Rights to immediately schedule hearings and determine merit of housing discrimination complaints which had been pending for many years, where they demonstrated substantial likelihood of success on merits of their claim that they were denied due process due to division's failure to render prompt determination. *Housing Opportunities Made Equal, Inc. v Pataki, 180 Misc. 2d 778, 693 N.Y.S.2d 795, 1998 N.Y. Misc. LEXIS 699 (N.Y. Sup. Ct. 1998)*.

26. Time for determining jurisdiction and probable cause

Even though time limitations contained in *Executive Law § 297*, subd 4(a), (c) are directive and not mandatory, valid complaint for discriminatory housing practices was dismissed where delay of 5 months, 16 months, and 3 years respectively in hearing of complaint by division, in making determination and order by division, and in appeal board's affirmance of division's order, were unconscionable and so flagrant as to be prejudicial in law to respondent. *State Div. of Human Rights ex rel. Salamy v Rinas, 42 A.D.2d 388, 348 N.Y.S.2d 422, 1973 N.Y. App. Div. LEXIS 3276 (N.Y. App. Div. 4th Dep't 1973)*.

Requirement of *Executive Law § 297*, subd 4(a), that Division of Human Rights serve notice fixing date of hearing within 60 days after complaint is filed is directory, rather than mandatory, and noncompliance with such requirement did not divest Division of jurisdiction.*121-129 Broadway Realty, Inc. v N.Y. State Div. of Human Rights, 43 A.D.2d 754, 349 N.Y.S.2d 1003, 1973 N.Y. App. Div. LEXIS 2965 (N.Y. App. Div. 3d Dep't 1973)*.

Complaints alleging sex discriminations in employment were not subject to being dismissed because the State Division of Human Rights failed to comply with 60-day provision contained in the Executive Law with respect to serving notice as to answer and hearing after receiving complaints. *State Div. of Human Rights ex rel. Ellis v Jamestown Tel. Corp., 53 A.D.2d 1061, 386 N.Y.S.2d 141, 1976 N.Y. App. Div. LEXIS 15880 (N.Y. App. Div. 4th Dep't 1976)*, aff'd, *42 N.Y.2d 848, 397 N.Y.S.2d 630, 366 N.E.2d 290, 1977 N.Y. LEXIS 2174 (N.Y. 1977)*.

The limitations set forth in *section 297 of the Executive Law* concerning the timeliness of administrative actions in discrimination proceedings remain directory after amendment by chapter 729 of the Laws of 1977; accordingly, where a complaint, charging an employer with an unlawful discriminatory practice in that it denied complainant employment due to disability, was filed in August, 1975, public hearings were held on such charges in May of 1976, December of 1976 and May, 1977 and a determination was made thereon by the State Division of Human Rights in July, 1978, but the record discloses no substantial prejudice to the respondent employer resulting from said delay, the State Human Rights Appeal Board erred in reversing the division's order that complainant be hired with back pay and in dismissing the complaint on the ground that the administrative delay constituted prejudice as a matter of law. *Gamble v Adirondack Steel Casting Co., 71 A.D.2d 165, 422 N.Y.S.2d 487, 1979 N.Y. App. Div. LEXIS 13245 (N.Y. App. Div. 3d Dep't 1979)*, app. denied, *50 N.Y.2d 801, 1980 N.Y. LEXIS 2947 (N.Y. 1980)*.

A motion to prohibit a public hearing before the State Division of Human Rights for failure to serve notice of hearing within 60 days of the filing of the complaint was denied as Article 15 of the Executive Law delineates the way complaints to the Division shall be handled, how they shall be heard, to whom they shall be appealed and by which court the appeal shall be reviewed and when the Division determined that it has the jurisdiction to act, prohibition should not intrude into the statutory procedure. *McMillan Book Co. v State Div. of Human Rights, 64 Misc. 2d 692, 315 N.Y.S.2d 463, 1970 N.Y. Misc. LEXIS 1162 (N.Y. Sup. Ct. 1970)*.

27. Time for serving notice and holding hearing

Where commissioner of human right's order was not issued until 160 days after hearings before trial examiner and decision on appeal from that order was not handed down for more than a year, actions by commissioner and board of appeals were not timely and would be vacated. *Hillside Housing Corp. v State Div. of Human Rights, 44 A.D.2d 539, 353 N.Y.S.2d 460, 1974 N.Y. App. Div. LEXIS 5445 (N.Y. App. Div. 1st Dep't 1974)*.

Time provisions of Executive Law, relating to when Division of Human Rights must hold hearing and make final determination, are directory, not mandatory. *State Div. of Human Rights ex rel. Hale v Great Atlantic & Pacific Tea Co., 46 A.D.2d 1001, 362 N.Y.S.2d 105, 1974 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 4th Dep't 1974).*

Dismissal of complaint filed with Division of Human Rights by complainant, whose unlawful discriminatory discharge of employment due to his age was demonstrated by substantial evidence, on ground that the Division did not hold hearing or make final determination within time periods provided under Executive Law would be repugnant to purposes of the Executive Law. *State Div. of Human Rights ex rel. Hale v Great Atlantic & Pacific Tea Co., 46 A.D.2d 1001, 362 N.Y.S.2d 105, 1974 N.Y. App. Div. LEXIS 3385 (N.Y. App. Div. 4th Dep't 1974).*

Statutory time limits for division to render determination are directory and not mandatory and there is no remedy where petitioner fails to show that delay resulted in substantial prejudice. *State Div. of Human Rights ex rel. Spencer v Syracuse University School of Nursing, 112 A.D.2d 709, 492 N.Y.S.2d 197, 1985 N.Y. App. Div. LEXIS 56218 (N.Y. App. Div. 4th Dep't 1985).*

Although time schedules set forth in CLS *Exec § 297* are directory only, and noncompliance with them does not operate to oust State Division of Human Rights of jurisdiction absent some showing of substantial prejudice, unexplained 8 ½ -year delay between filing of complaint in proceeding under CLS *Exec § 298* and commissioner's final determination caused substantial prejudice to employer, requiring annulment of award, since employer was thereby subjected to exposure for 8 ½ -year award of back pay. *Corning Glass Works v Ovsanik, 199 A.D.2d 959, 606 N.Y.S.2d 475, 1993 N.Y. App. Div. LEXIS 12540 (N.Y. App. Div. 4th Dep't 1993)*, modified, aff'd, *84 N.Y.2d 619, 620 N.Y.S.2d 771, 644 N.E.2d 1327, 1994 N.Y. LEXIS 4438 (N.Y. 1994)*.

Physician was not entitled to summary judgment dismissing action for violation of CLS *Exec § 296* where (1) plaintiff alleged that she was permitted to register at hospital's high-risk prenatal care clinic based on her physical examination and history, that she consented to AIDS test which proved positive for HIV antibody, and that physician then refused to treat her at clinic, told her she should have abortion, and referred her to another hospital at which she had abortion, and (2) physician failed to establish absence of any triable fact issues. *Doe v Jamaica Hosp., 202 A.D.2d 386, 608 N.Y.S.2d 518, 1994 N.Y. App. Div. LEXIS 1922 (N.Y. App. Div. 2d Dep't 1994)*.

Defendant was entitled to dismissal of action for age discrimination since plaintiff had signed release whereby she released defendant from any and all causes of action arising from or during her employment, including claims for employment discrimination; plaintiff could not escape impact of release by claiming that she had misinterpreted terms of release. *Koster v Ketchum Communications, 204 A.D.2d 280, 611 N.Y.S.2d 298, 1994 N.Y. App. Div. LEXIS 4571 (N.Y. App. Div. 2d Dep't 1994)*, app. dismissed, *85 N.Y.2d 857, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 266 (N.Y. 1995)*.

Court would annul determination of Commissioner of Human Rights finding that employer engaged in unlawful discrimination where (1) public hearing did not commence until 7 years after complaint was filed, and commissioner's determination was not issued until nearly 4 years later, (2) delay was attributable to Division of Human Rights without explanation, and (3) during delay, employer lost access to 2 individuals who would have been called as witnesses, and it also lost access to documentary evidence that would have been used in its defense. *Pepsico, Inc. v Rosa, 213 A.D.2d 550, 624 N.Y.S.2d 622, 1995 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 2d Dep't)*, app. dismissed, *86 N.Y.2d 837, 634 N.Y.S.2d 445, 658 N.E.2d 223, 1995 N.Y. LEXIS 3707 (N.Y. 1995)*, app. denied, *86 N.Y.2d 709, 634 N.Y.S.2d 442, 658 N.E.2d 220, 1995 N.Y. LEXIS 3708 (N.Y. 1995)*.

Eleven-year delay between filing of discrimination complaint and scheduling of hearing by State Division of Human Rights (DHR), although egregious, did not deprive it of jurisdiction, and question of whether there were prejudicial consequences to employer that made fair hearing impossible should be determined in course of administrative proceeding or by subsequent judicial review; however, DHR should be prohibited from amending complaint with additional charges, since agency's power is limited under 9 NYCRR § 465.4(a) to making amendments "reasonably and fairly," and such standard had not been met.

Presbyterian Hosp. v State Div. of Human Rights, 241 A.D.2d 319, 659 N.Y.S.2d 283, 1997 N.Y. App. Div. LEXIS 7030 (N.Y. App. Div. 1st Dep't 1997).

Notice of claim requirements are inapplicable to *N.Y. Exec. Law § 297* claims timely filed with the New York Division of Human Rights. *Freudenthal v County of Nassau, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003)*.

To the extent that *Board of Educ. of Union Free School Dist. No. 2, East Williston, Town of North Hempstead v New York State Div. of Human Rights, 44 N.Y.2d 902, 407 N.Y.S.2d 636, 379 N.E.2d 163 (1978)*, suggests that a petitioner must file a notice of claim prior to pursuing administrative relief from the New York Division of Human Rights, it is not to be followed. *Freudenthal v County of Nassau, 99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003)*.

28. Time in which to make final determination

Delay of more than 5 years in resolving discrimination claim against Department of Correctional Services did not warrant dismissal of claim where witnesses were able to testify to relevant events with reasonable certainty, prejudice was not established by replacement of originally-assigned administrative law judge, and there was no indication of "repetitive, purposeless and oppressive" conduct on part of complainant or Human Rights Division. *New York State Dep't of Correctional Servs. v State Div. of Human Rights, 216 A.D.2d 658, 627 N.Y.S.2d 800, 1995 N.Y. App. Div. LEXIS 6117 (N.Y. App. Div. 3d Dep't 1995)*.

Delay of some 4 years from time of hearing to final determination of Division of Human Rights was not substantially prejudicial as matter of law so as to warrant dismissal of petition. *Comor v New York State Div. of Human Rights, 231 A.D.2d 715, 647 N.Y.S.2d 842, 1996 N.Y. App. Div. LEXIS 9693 (N.Y. App. Div. 2d Dep't 1996)*.

Delay in a determination by the State Division of Human Rights that found the Department of Corrections (DOC) guilty of an unlawful discriminatory practice was prejudicial and constituted an abuse of discretion because the time that elapsed from the employee's initial complaint until issuance of the final order was more than 18 years, the DOC did not contribute to the delay, and the complaint presented issues that were relatively simple and straightforward. *Matter of New York State Dept. of Corr. & Community Supervision v New York State Div. of Human Rights, 137 A.D.3d 1512, 29 N.Y.S.3d 558, 2016 N.Y. App. Div. LEXIS 2380 (N.Y. App. Div. 3d Dep't 2016)*.

29. Time in which to file complaint

Dismissal of a civil action alleging that plaintiff was discharged from his employment because of his age was improper based on the one-year period prescribed in *Exec Law § 297(5)*, where the prescriptive period was intended to apply only to the filing of unlawful discriminatory practice complaints with the Division of Human Rights and not to the institution of a civil action to recover damages for unlawful discriminatory practices under *Exec Law § 297(9)*, which is governed by the three-year limitations period prescribed in *CPLR § 214(2)*. *Murphy v American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 1983 N.Y. LEXIS 2925 (N.Y. 1983)*).

Where petitioner was employed by an airline, resigned, was married, and than applied for reinstatement, the time to file the complaint alleging discrimination ran from the refusal to reinstate. *Munger v State Div. of Human Rights, 32 A.D.2d 502, 304 N.Y.S.2d 407, 1969 N.Y. App. Div. LEXIS 3134 (N.Y. App. Div. 1st Dep't 1969)*.

Assistant professor's cause of action for discriminatory notice of nonreappointment accrued when she received notice of nonreappointment, and limitation period then began to run. *McD. v La P., 49 A.D.2d 765, 372 N.Y.S.2d 722 (N.Y. App. Div. 2d Dep't 1975)*.

Where school teacher because of illegal maternity leave policy of school district was required to take maternity leave on June 1, 1972 and not permitted to return to work until October 2, 1972, one-year statute of limitations for teacher's filing of claim for sick pay and back pay commenced when discrimination ceased on October 2 so that her complaint filed on July 24, 1973 was

timely. *State Div. of Human Rights ex rel. Mossler v Westmoreland Cent. School Dist., 56 A.D.2d 205, 392 N.Y.S.2d 149, 1977 N.Y. App. Div. LEXIS 10047 (N.Y. App. Div. 4th Dep't 1977)*.

In a sex discrimination case in which an elementary school teacher challenged a policy of compelling resignations due to pregnancy, the complaint was untimely filed, where, as required by the regulations of the board of education, she resigned due to pregnancy, was rehired and continued in employment, and did not file a complaint until the board prepared a seniority list for teachers in which it denied credit for her preresignation service. The cause of action arose at the time of her resignation, and not later when its effect may have been felt; the act of compelling maternity resignation was not a continuing act of discrimination. Furthermore, an isolated incident concerning a fellow male teacher who resigned and then was allowed to rescind his resignation and regain his position with no loss of preresignation credit did not by itself support a claim of discrimination. *Board of Education v New York State Div. of Human Rights, 82 A.D.2d 883, 440 N.Y.S.2d 308, 1981 N.Y. App. Div. LEXIS 14585 (N.Y. App. Div. 2d Dep't 1981)*, rev'd, *56 N.Y.2d 257, 451 N.Y.S.2d 700, 436 N.E.2d 1301, 1982 N.Y. LEXIS 3357 (N.Y. 1982)*.

CLS *Exec § 297(5)* requires complainant to file complaint within one year of alleged discriminatory action, but does not require complainant to serve respondent or necessary party with complaint; rather, statute requires State Division of Human Rights to promptly serve respondent and any necessary party with copy of complaint. Statute of limitations in CLS *Exec § 297(5)* did not bar joinder of union as necessary party in proceeding alleging religious discrimination by bus company against one of its employees, even though joinder occurred more than one year after alleged discriminatory action, since statute did not require complainant to serve necessary party with complaint, and State Division of Human Rights met its duty to "promptly" serve union with copy of complaint. *Ambrosio v State Div. of Human Rights, 144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988)*.

Cause of action for sex discrimination accrued on April 25 when board voted to terminate plaintiff, and not on February 5 when plaintiff's supervisor made his final evaluation of plaintiff's work, since (1) extent of plaintiff's damages could not be accurately assessed while assertedly discriminatory acts were still ongoing, and such acts continued for as long as supervisor continued to supervise plaintiff, and (2) impact of alleged discrimination was not ascertainable until plaintiff was terminated. *Hoger v Thomann, 189 A.D.2d 1048, 592 N.Y.S.2d 887, 1993 N.Y. App. Div. LEXIS 776 (N.Y. App. Div. 3d Dep't 1993)*.

Proceeding brought by African-American correctional officer under CLS *Exec § 298* alleging racial discrimination by his supervisor was timely commenced where he alleged that acts complained of occurred consistently during entire 2-year period during which officer was under supervisor's direct supervision, and officer brought complaint promptly after he was transferred. *New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827, 1996 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 1996)*.

Employee's claims under the New York State Human Rights Law, *N.Y. Exec. Law § 290* et seq., were time-barred because the employee never filed a complaint with the New York State Division of Human Rights as required by *N.Y. Exec. Law § 297(5)*. *Bedden-Hurley v N.Y. City Bd. of Educ., 385 F. Supp. 2d 274, 2005 U.S. Dist. LEXIS 321 (S.D.N.Y. 2005)*.

Former employee's suit for race and sex discrimination survived the motion to dismiss for failure to state a cause of action filed by the defending employer and union because her claims that she was deprived of her rights as an apprentice to be in an apprenticeship program free from discriminatory conduct in the workplace were timely since she pled that throughout her employment, a supervisor used racially derogatory terms and required her to clean the men's locker room, which contained sexually suggestive photographs; because the period of her employment overlapped with the 300-day period, and the allegations of racially charged remarks and exposure to sexually suggestive material sufficiently contributed to a hostile work environment claim based on sex or race, her hostile work environment claims were timely. *Langford v Int'l Union of Operating Eng'rs, Local 30, 765 F. Supp. 2d 486, 2011 U.S. Dist. LEXIS 17789 (S.D.N.Y. 2011)*.

30. —Amended complaint

Where, in September 1970, female assistant professor and two male professors were promoted but salaries for male professors were higher than that for female professor, and in October 1971, female professor filed complaint with Division of Human

Rights charging college with unlawful discrimination and complaint was thereafter amended to allege that her salary continued to be less than salaries for male faculty members of similar rank and experience, lapse of more than one year since original promotion did not preclude Division of Human Rights from conducting hearing. *Russell Sage College v State Div. of Human Rights, 45 A.D.2d 153, 357 N.Y.S.2d 171, 1974 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 3d Dep't 1974)*, aff'd, *36 N.Y.2d 985, 374 N.Y.S.2d 603, 337 N.E.2d 119, 1975 N.Y. LEXIS 2069 (N.Y. 1975)*.

Court erred in dismissing, as untimely, second cause of action in second amended complaint, alleging violation of Federal Age Discrimination in Employment Act (*29 USCS § 623*) (ADEA), since that action arose out of same facts and circumstances which gave rise to first and third causes of action, alleging violations of Human Rights Law (CLS Exec Art 15), which were interposed in timely fashion in original complaint, and defendants were at all times on notice of facts and occurrences giving rise to ADEA claim and did not show any prejudice or surprise. *Schutz v Finkelstein Bruckman Wohl Most & Rothman, 247 A.D.2d 460, 668 N.Y.S.2d 669, 1998 N.Y. App. Div. LEXIS 1024 (N.Y. App. Div. 2d Dep't 1998)*.

In a discrimination action, a petition to annul was granted on the basis that the proceeding was untimely commenced against petitioner employer because complainant who filed second amended complaint was not entitled to benefit of the relation back doctrine to comply with the time limitations of this statute, due to the fact that respondents were not united in interest. *Matter of 130-10 Food Corp. v New York State Div. of Human Rights, 166 A.D.3d 962, 89 N.Y.S.3d 215, 2018 N.Y. App. Div. LEXIS 8074 (N.Y. App. Div. 2d Dep't 2018)*.

An amended cause of action alleging unlawful age discrimination based upon plaintiff's discharge from his position with defendant corporation at age 59 after 23 years of service pursuant to *Exec Law § 296* was time barred by the mandatory one-year statute of limitations applicable to such an action where the age discrimination amendment did not relate back to the original complaint to which it was added for purposes of the period of limitations, in that the original complaint failed to indicate any facts connecting plaintiff's discharge to the newly added age discrimination theory. *Murphy v American Home Products Corp., 112 Misc. 2d 507, 447 N.Y.S.2d 218, 1982 N.Y. Misc. LEXIS 3157 (N.Y. Sup. Ct.)*, modified, *88 A.D.2d 870, 451 N.Y.S.2d 770, 1982 N.Y. App. Div. LEXIS 17189 (N.Y. App. Div. 1st Dep't 1982)*.

Division erred in amending an administrative discrimination complaint by adding the president as a respondent because this amendment was made after the one-year limitations period of *N.Y. Exec. Law § 297(5)* had expired and the president had already appeared pro se on behalf of the employer at the public hearing on the complaint. *Matter of Murphy v Kirkland, 88 A.D.3d 267, 928 N.Y.S.2d 333, 2011 N.Y. App. Div. LEXIS 6152 (N.Y. App. Div. 2d Dep't 2011)*.

31. —Three years for court complaint

A civil action against the State as an employer to recover damages pursuant to the Human Rights Law for discriminatory discharge (Exec Law, art 15) is governed by the three-year Statute of Limitations applicable to such actions against private employers (*CPLR § 214*); the Legislature did not intend to subject the injured person to a shorter limitations period when the wrong was committed by the State. *Koerner v State, 62 N.Y.2d 442, 478 N.Y.S.2d 584, 467 N.E.2d 232, 1984 N.Y. LEXIS 4406 (N.Y. 1984)*.

Action alleging unlawful discriminatory practice pursuant to CLS *Exec § 296* would not be dismissed as time barred, even though total elapsed time between accrual of claim and commencement of action exceeded 3 years, where during pendency of employee's federal litigation—filed subsequent to State Division of Human Rights (SDHR) complaint but arising from same allegations—SDHR complaint had been stayed, and when SDHR dismissed employee's complaint on grounds of administrative convenience, it made clear that although SDHR agreed with conclusion of federal courts that employee's claim was time barred, its dismissal was not premised on that ground so as to permit employee to pursue remedy in state courts, and thus total elapsed time between date of claim accrual and claim interposition, after deduction of toll period, was only 2 years 11 months; dismissal of complaint filed with SDHR on ground of administrative convenience was not beyond scope of SDHR's authority even if complaint was clearly untimely. *Miller v International Tel. & Tel. Corp., 153 A.D.2d 925, 545 N.Y.S.2d 732, 1989 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 2d Dep't 1989)*.

One-year filing requirement of CLS *Exec § 297(5)* did not apply to action by school district employee alleging unlawful suspension without pay due solely to his national origin or ancestry in violation of CLS *Exec § 296*; institution of civil actions to recover damages for unlawful discriminatory practices under § 296 is governed by 3-year statute of limitations prescribed in CLS *CPLR § 214(2)*. *Stoetzel v Wappingers Cent. School Dist., 166 A.D.2d 643, 561 N.Y.S.2d 71, 1990 N.Y. App. Div. LEXIS 12920 (N.Y. App. Div. 2d Dep't 1990)*.

An action by an individual of Hispanic descent, alleging improper termination by reason of her supervisor's racial prejudice, properly set forth a cause of action under *Exec Law §§ 296*, *297(9)*, but was time-barred by *Ct Cl Act § 10(3)* where the claimant elected to assert the claim in the Court of Claims, notwithstanding that the same action brought against the State in its role as claimant's employer, if brought in Supreme Court, would be governed by a three-year statute of limitations. *Figueroa v State, 126 Misc. 2d 304, 481 N.Y.S.2d 946, 1984 N.Y. Misc. LEXIS 3606 (N.Y. Ct. Cl. 1984)*.

Civil action to recover damages for alleged unlawful discriminatory practices under CLS *Exec § 297(9)* is governed by 3-year statute of limitations of CLS *CPLR § 214(2)* applicable to actions to recover upon liability, penalty or forfeiture created or imposed by statute. *Benedict v Xerox Corp., 144 Misc. 2d 490, 544 N.Y.S.2d 418, 1989 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1989)*.

Claim for Human Rights Law violation under CLS *Exec § 297(9)* was barred by applicable 3-year statute of limitations, CLS *CPLR § 214(2)*, where plaintiff opted into federal class action within 3 years after alleged discriminatory act but failed to commence state action until 6 years after such act, since notice of decertification of federal class action stated that only statutes of limitations applicable to federal age discrimination claims would be tolled from time of opting into federal class action. *Benedict v Xerox Corp., 144 Misc. 2d 490, 544 N.Y.S.2d 418, 1989 N.Y. Misc. LEXIS 407 (N.Y. Sup. Ct. 1989)*.

Former employee's claims under the New York State Human Rights Law (State Law) and the New York City Human Rights Law of sexual harassment, discrimination based on gender and national origin, and retaliation, arising out of his employment as a lab technologist, were subject to the three-year statute of limitations of *CPLR 214(2)* and were not tolled for the period in which his claim was pending in the administrative process because, pursuant to *N.Y. Executive Law § 297(9)* of the State Law, he had annulled his initial election to pursue an administrative remedy. *Farrugia v North Shore Univ. Hosp., 820 N.Y.S.2d 718, 13 Misc. 3d 740, 2006 N.Y. Misc. LEXIS 2277 (N.Y. Sup. Ct. 2006)*.

Thruway Authority employee's requests for back pay and other compensatory damages on her Human Rights Law (CLS *Exec Law §§ 290* et seq.) gender discrimination and sexual harassment claims will be submitted to jury, where her administrative complaint was dismissed for administrative convenience, because claim was timely filed within 3 years of last act of harassment alleged under applicable § 297(9). *Ryan v New York State Thruway Auth., 889 F. Supp. 70, 1995 U.S. Dist. LEXIS 9052 (N.D.N.Y. 1995)*.

Employment discrimination claim was not time barred where Division of Human Rights dismissed complaint for administrative convenience because employee wished to pursue court action, and action was filed within 3-year period for bringing plenary action under Human Rights Law; employer was collaterally estopped from asserting that administrative complaint should have been dismissed on basis that it was not timely filed under administrative statute of limitations. *Ryan v New York State Thruway Auth., 889 F. Supp. 70, 1995 U.S. Dist. LEXIS 9052 (N.D.N.Y. 1995)*.

32. —On year for administrative complaint

Employee's complaint of employment discrimination was not time-barred where she filed it within one year of acquiring knowledge that coworker (whose promotion triggered action) had been promoted several months earlier while employee was on maternity leave. *Consolidated Edison Co. v New York State Div. of Human Rights, 77 N.Y.2d 411, 568 N.Y.S.2d 569, 570 N.E.2d 217, 1991 N.Y. LEXIS 363 (N.Y. 1991)*.

Incidental references in complaint to section of Labor Law prohibiting differential in rate of pay because of sex, even under most liberal rules of pleading, were insufficient to transmute complaint, which was specifically predicated on section of Executive Law giving any person claiming to be aggrieved by any unlawful discriminatory practice a cause of action for

damages and other relief, into one seeking relief under Labor Law, and thus one-year statute of limitations provided for in the Executive Law was applicable. *Lanzer v Fairchild Publications, Inc., 46 A.D.2d 644, 360 N.Y.S.2d 437, 1974 N.Y. App. Div. LEXIS 3760 (N.Y. App. Div. 1st Dep't 1974).*

Record consisting of documentary and testimonial proof established that waiter's complaint charging sex discrimination on part of employer which replaced staff of waiters at dining facility with waitresses was timely filed with Division of Human Rights within one year of alleged discriminatory practice. *Guardian Capital Corp. v New York State Div. of Human Rights, 48 A.D.2d 753, 368 N.Y.S.2d 594, 1975 N.Y. App. Div. LEXIS 9834 (N.Y. App. Div. 3d Dep't)*, app. denied, *37 N.Y.2d 712, 1975 N.Y. LEXIS 2959 (N.Y. 1975).*

Where sex discrimination in employment complaint was filed more than one year after male employee was promoted instead of female complainant, complaint was barred insofar as it related to that promotion. *State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976)*, aff'd, *42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977).*

Despite fact that employee filed formal employment discrimination complaint more than one year after termination of his employment, where employee claimed that he had visited staff member of division of human rights six months after termination of employment and that employee had been assured by staff member that informal complaint was timely and that complaint would be deemed filed as of time of visit, interest of justice required that division of human rights conduct investigatory hearing to determine whether delay in filing formal complaint was due to division's own failure to render effectual assistance to employee, in which case division would be under duty to process complaint. *Stacey v McDaniel, 54 A.D.2d 645, 387 N.Y.S.2d 631, 1976 N.Y. App. Div. LEXIS 14153 (N.Y. App. Div. 1st Dep't 1976).*

Time limitation in Executive Law providing that any complaint must be filed within one year after alleged unlawful discriminatory practice is mandatory and is in nature of a condition upon the substantive right conferred by the Human Rights Law. *State Div. of Human Rights ex rel. Mossler v Westmoreland Cent. School Dist., 56 A.D.2d 205, 392 N.Y.S.2d 149, 1977 N.Y. App. Div. LEXIS 10047 (N.Y. App. Div. 4th Dep't 1977)*.

For purposes of determining whether age discrimination complaint was filed within statutorily prescribed one-year period, discrimination against complainant commenced when she was rejected for employment because of age and continued for as long as that rejection denied her certification to list of persons eligible for position applied for. *New York City Dep't of Personnel v New York State Div. of Human Rights, 56 A.D.2d 795, 392 N.Y.S.2d 641, 1977 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 1st Dep't 1977)*.

In a proceeding pursuant to *Exec Law § 298* to review an order of the State Human Rights Appeal Board affirming a determination of the State Division of Human Rights, which found the petitioner guilty of having unlawfully discriminated against complainant by having denied her disability benefits for disability based on pregnancy, the petitioner's contention that the complaint was untimely was without merit, where the complaint was filed within one year after the complainant received notice from her employer's insurer that her claim for disability by reason of pregnancy had been denied. *Hillcrest General Hospital-GHI v New York State Human Rights Appeal Bd., 90 A.D.2d 481, 454 N.Y.S.2d 549, 1982 N.Y. App. Div. LEXIS 18487 (N.Y. App. Div. 2d Dep't 1982).*

The complaint of an insurance company employee was time barred under *Exec Law § 297(5)*, where his complaint was not filed with the State Division of Human Rights until more than one year after he was allegedly forced into announcing his retirement. *Burke v Continental Ins. Co., 104 A.D.2d 1034, 481 N.Y.S.2d 11, 1984 N.Y. App. Div. LEXIS 20470 (N.Y. App. Div. 2d Dep't 1984).*

The State Division of Human Rights properly dismissed two complaints for unlawful discriminatory practices (forced maternity leave; denial of additional leave), where the complaints were not filed within one year of the alleged practices as required by *Exec Law § 297(5)*. *Syracuse v New York State Human Rights Appeal Bd., 107 A.D.2d 804, 484 N.Y.S.2d 638, 1985 N.Y. App. Div. LEXIS 42723 (N.Y. App. Div. 2d Dep't 1985)*.

Where resignation or leave is improperly forced due to pregnancy, one-year statute of limitations begins to run from date of discriminatory act; subsequently adopted seniority system which fails to take into account period of forced resignation imposes

distinct discriminatory wrong, and in such circumstances period of limitation begins to run on date complainant learned of seniority list. *State Div. of Human Rights v Board of Education, 112 A.D.2d 435, 492 N.Y.S.2d 412, 1985 N.Y. App. Div. LEXIS 56182 (N.Y. App. Div. 2d Dep't 1985).*

Determination of New York State Division of Human Rights dismissing petition charging discriminatory discharge was proper where cause of action accrued on December 22, 1981, when she was discharged, and complaint was not filed until December 30, 1982, since complaint was not filed within one year after alleged discriminatory practice occurred. *Morehead v Lind, 112 A.D.2d 996, 492 N.Y.S.2d 804, 1985 N.Y. App. Div. LEXIS 52206 (N.Y. App. Div. 2d Dep't 1985).*

Complaint filed within one year of alleged discriminatory practice was not rendered untimely by Division of Human Rights' failure to act thereon through no fault of petitioner. *Crayton v County of Suffolk, 139 A.D.2d 577, 527 N.Y.S.2d 79, 1988 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't 1988).*

Division of Human Rights properly determined that petitioner's complaint was time-barred where it was filed more than one year after petitioner was terminated by his employer; petitioner's subsequent attempts to compel employer to reconsider his termination and reinstate him did not toll statute of limitations found in CLS *Exec § 297(5)*. *Patel v New York State Div. of Human Rights, 216 A.D.2d 469, 628 N.Y.S.2d 379, 1995 N.Y. App. Div. LEXIS 6403 (N.Y. App. Div. 2d Dep't)*, app. dismissed, *87 N.Y.2d 893, 640 N.Y.S.2d 873, 663 N.E.2d 914, 1995 N.Y. LEXIS 5019 (N.Y. 1995).*

Petitioner's claims that respondent unlawfully discriminated against her on basis of sex when they failed to hire her each time vacancy arose alleged discriminatory practice of continuing nature for purposes of determining whether complaint was time barred under CLS *Exec § 297(5)*. *Gordineer v New York State Div. of Human Rights, 234 A.D.2d 371, 651 N.Y.S.2d 92, 1996 N.Y. App. Div. LEXIS 12912 (N.Y. App. Div. 2d Dep't 1996)*, app. denied, *89 N.Y.2d 812, 657 N.Y.S.2d 405, 679 N.E.2d 644, 1997 N.Y. LEXIS 438 (N.Y. 1997).*

Complaints filed more than one year after complainants' allegedly discriminatory discharges from employment were time-barred under CLS *Exec § 297(5)*. *Garrison v State Div. of Human Rights, 238 A.D.2d 591, 656 N.Y.S.2d 389, 1997 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 1997).*

Employer's contention that an employee's back pay award for discrimination was limited to the one-year period of *N.Y. Exec. Law § 297(5)* was rejected because, by failing to raise that contention prior to the appeal, the employer implicitly waived the applicability of the limitation. *Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't)*, app. denied, *13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009).*

Since plaintiff was precluded from commencing a court action for damages based upon an alleged discriminatory practice occurring on September 16, 1976 while his complaint before the State Division of Human Rights was still pending (*Executive Law, § 300*), the filing of a summons with the clerk of the court on September 15, 1977, the same date that he requested the dismissal of the complaint before the Division of Human Rights, but two weeks before the complaint was actually dismissed on the ground of administrative convenience, was a nullity rendering the subsequent service of the summons and complaint on defendant on October 31, 1977 time-barred as not being served within one year of the date of the alleged discriminatory act (*Executive Law, § 297*, subd 5). The statute which provides that a dismissal of a complaint before the Division of Human Rights on the ground of administrative convenience does not bar the bringing of a court action (*Executive Law, § 297*, subd 9) only serves to preserve plaintiff's right to sue but does not provide him with an extension of the mandatory one-year time limitation. *Cheselka v Eastern Air Lines, Inc., 93 Misc. 2d 219, 402 N.Y.S.2d 159, 1978 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1978)*.

Division of Human Rights properly added union local president as necessary party under CLS *Exec § 297* in job discrimination action brought by union member, even though statute establishes one-year limitations period and president was added more than 2 years after member had filed complaint, since period applies only to initial filing of complaint with division, not to division's subsequent action either to notify respondent or to add necessary parties; moreover, president showed no prejudice by delay. *Ambrosio v State Div. of Human Rights, 138 Misc. 2d 423, 524 N.Y.S.2d 600, 1987 N.Y. Misc. LEXIS 2802 (N.Y. Sup. Ct. 1987)*, aff'd, *144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988)*.

Employment discrimination action found in New York *Executive Law §§ 290* et seq. is subject to one-year statute of limitations by reason of § 295(5). *Theobald v Botein, Hays, Sklar & Herzberg, 493 F. Supp. 1, 1979 U.S. Dist. LEXIS 13991 (S.D.N.Y. 1979)*.

33. — —Tolling of limitations statute

Community college employee's employment discrimination cause of action arose when she was given notice that she would not be reappointed, not when she completed her current term of employment, and complaint was therefore untimely filed when it was filed more than one year after such notice was given; one-year limitation was not tolled by employee's invocation of grievance procedure, which was merely an alternative remedy. *Queensborough Community College of City University of New York v State Human Rights Appeal Board, 41 N.Y.2d 926, 394 N.Y.S.2d 625, 363 N.E.2d 349, 1977 N.Y. LEXIS 1990 (N.Y. 1977)*.

Where complaint, alleging sex discrimination as a result of employer's refusal to apply accrued sick leave benefits to maternity leave absence of employee, was filed more than a year after her voluntary resignation and there was no basis for tolling the one-year statute of limitations, complaint, which was filed more than a year after cessation of the alleged continuing discriminatory practice, was time barred. *State Div. of Human Rights ex rel. Bailey v Board of Education, 53 A.D.2d 1043, 386 N.Y.S.2d 166, 1976 N.Y. App. Div. LEXIS 15855 (N.Y. App. Div. 4th Dep't 1976)*, aff'd, *42 N.Y.2d 862, 397 N.Y.S.2d 791, 366 N.E.2d 878, 1977 N.Y. LEXIS 2186 (N.Y. 1977)*.

An assertion by an ex-employee that the refusal of his former employer to give him a recommendation for the purpose of obtaining a new job amounted to retaliation for having previously filed an earlier complaint against his former employer charging discrimination, was untimely where it was not filed within one year of the alleged unlawful practice. *Ghartey v Santaella, 86 A.D.2d 695, 446 N.Y.S.2d 515, 1982 N.Y. App. Div. LEXIS 15242 (N.Y. App. Div. 3d Dep't 1982)*.

An action commenced in 1982 predicated upon the Human Rights Law (*Executive Law § 290* et seq.) which alleged that plaintiff was refused any opportunity to be considered for employment as a specific trust officer until she was eventually promoted to that position in 1976, that she was placed in lower ranking and lower paying job titles as similarly or less qualified men during the period of 1974 through 1975, that she was denied promotions because of more stringent standards apply to her because of her sex, which promotions occurred more than three years prior to the commencement of the action, and that defendant gave female employees less frequent and smallest salary increases than male employees who were hired in or around 1974, was time barred by the three year statute of limitations applicable to court actions under the Human Rights Law and, although the impact of such alleged wrongs may have had a lasting effect, said discrimination claims were not continuing wrongs which result in the tolling of the statute of limitations. *Patrowich v Chemical Bank, 98 A.D.2d 318, 470 N.Y.S.2d 599, 1984 N.Y. App. Div. LEXIS 16482 (N.Y. App. Div. 1st Dep't)*, app. dismissed, *62 N.Y.2d 801 (N.Y. 1984)*, aff'd, *63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11, 1984 N.Y. LEXIS 4717 (N.Y. 1984)*.

Age discrimination claimants' allegations that employer declined to hire them for new positions after they had been discharged did not convert their discharge claims into claims for continuing violations such that limitations period would be tolled. *Garrison v State Div. of Human Rights, 238 A.D.2d 591, 656 N.Y.S.2d 389, 1997 N.Y. App. Div. LEXIS 4427 (N.Y. App. Div. 2d Dep't 1997)*.

Complaint filed with New York City Human Rights Commission alleging, inter alia, employment discrimination based on plaintiff's sexual orientation, was properly dismissed for "administrative convenience" under *NYC Admin Code § 8-113(a)(5)* and thus, in subsequent civil action, 3-year statute of limitations applicable to administrative claims was tolled under *NYC Admin Code § 8-502(d)* during pendency of administrative complaint; however, plaintiff's assault and battery claims were unrelated to his Human Rights Law claims and as such were unaffected by toll of applicable one-year statute of limitations. *Acosta v Loews Corp., 276 A.D.2d 214, 717 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 1st Dep't 2000)*.

Division of Human Rights erred in finding that harassment complaint was timely filed against employer on June 12, 1987, under continuous violation exception to one-year statute of limitations, on basis that allegation that 4 separate referrals for being absent without leave between July 1986 and June 1987 reflected "pattern of continuous harassment," with complainant's

alleged lateness of June 1, 1987 falling within one-year statutory time period, where complainant proffered no evidence that accusation respecting his June 1, 1987 lateness had discriminatory motive, and thus he failed to show that this incident was part of employer's alleged discriminatory pattern of referring him for tests based on "perceived disability" in connection with charges of his attendance and conduct deficiencies. *Robinson v New York State Div. of Human Rights, 277 A.D.2d 76, 716 N.Y.S.2d 47, 2000 N.Y. App. Div. LEXIS 12002 (N.Y. App. Div. 1st Dep't 2000)*, app. dismissed, *96 N.Y.2d 775, 725 N.Y.S.2d 633, 749 N.E.2d 202, 2001 N.Y. LEXIS 586 (N.Y. 2001)*.

Action commenced against employer in 1998 was time-barred insofar as it alleged discrimination based on denial of plaintiff's application for promotion in 1993; denial of promotion was single act and, as such, did not fall within continuing violation exception to Title VII limitations' period for Equal Employment Opportunity Claims as part of ongoing policy of discrimination. *Martinez-Tolentino v Buffalo State College, 277 A.D.2d 899, 715 N.Y.S.2d 554, 2000 N.Y. App. Div. LEXIS 11646 (N.Y. App. Div. 4th Dep't 2000)*.

Commissioner of the New York State Division of Human Rights properly dismissed, as untimely a former volunteer firefighter's hostile work environment claim based on allegations of sexual harassment against a hook and ladder company because, while the volunteer established at the hearing a hostile work environment premised upon incidents of sexual harassment, those incidents occurred outside the limitations period, and she failed to prove that a specified related incident took place within the limitations period, which would have invoked the continuous violation doctrine. *Matter of Lozada v Elmont Hook & Ladder Co. No. 1, 151 A.D.3d 860, 54 N.Y.S.3d 688, 2017 N.Y. App. Div. LEXIS 4763 (N.Y. App. Div. 2d Dep't 2017)*.

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CPLR 203 (subd [b], par 5) which tolls the running of the Statute of Limitations when the summons is filed with the clerk of the court provided the summons is served on the defendant within 60 days after the period of limitation would have expired, did not toll the one-year time limitation applicable to a claim based on an alleged discriminatory practice under the Human Rights Law (*Executive Law, § 297*, subd 5) where the filing of the summons with the clerk within the one-year period but while a complaint before the State Division of Human Rights was still pending, was a nullity (*Executive Law, § 300*). The action would have been timely had the dismissal of the complaint before the Division of Human Rights at plaintiff's request on the ground of administrative convenience been made retroactive to the date the summons was filed with the clerk. *Cheselka v Eastern Air Lines, Inc., 93 Misc. 2d 219, 402 N.Y.S.2d 159, 1978 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1978)*.

Trial court properly determined that the injured party's sexual discrimination action filed pursuant to *N.Y. Exec. Law § 296(1)* against the Town of Van Buren and the Town's Board member was time-barred, where the action was filed three years and two months after the last of the alleged conduct occurred; this exceeded both the three-year statute of limitations under N.Y. *C.P.L.R. 214(2)* and the one-year and 90-day statute of limitations for an action against the Town under *N.Y. Town Law § 67(2)*, and the statutes were not tolled during the pendency of the injured party's complaints filed with the New York State Division of Human Rights since they were dismissed, not for administrative convenience, but so that the injured party could file the instant action pursuant to *N.Y. Exec. Law § 297(9)*. *Henderson v Town of Van Buren, 15 A.D.3d 980, 789 N.Y.S.2d 355, 2005 N.Y. App. Div. LEXIS 1187 (N.Y. App. Div. 4th Dep't)*, app. denied, *4 N.Y.3d 710, 797 N.Y.S.2d 817, 830 N.E.2d 1146, 2005 N.Y. LEXIS 1106 (N.Y. 2005)*.

Assuming that filing sexual harassment complaint with EEOC would not be deemed filing with state agency, despite existence of inter-agency agreement under which complaint filed with one agency would be deemed filed with other, filing with EEOC would equitably toll one-year filing period under *Exec § 297(5)*. *Cooper v Wyeth Ayerst Lederle, 34 F. Supp. 2d 197, 1999 U.S. Dist. LEXIS 920 (S.D.N.Y. 1999)*, dismissed, *106 F. Supp. 2d 479, 2000 U.S. Dist. LEXIS 9541 (S.D.N.Y. 2000)*.

Continuing violation doctrine tolled the statute of limitations for the *42 U.S.C.S. § 1983* claim, and the State and City Human Rights claims of a judge's former secretary because the secretary's claims were based on a hostile work environment created by

the judge, her supervisor, and the last acts constituting part of that claim took place within the limitations period. *Bland v New York, 263 F. Supp. 2d 526, 2003 U.S. Dist. LEXIS 5521 (E.D.N.Y. 2003)*.

Based on the fact that language in the New York State Human Rights Law (NYSHRL) prohibited filing of a claim with the state court while that same claim was pending before the New York State Division of Human Rights and based upon the fact that under New York State law, a statute of limitations was tolled where the commencement of an action was prohibited by statute, the court held that plaintiff's NYSHRL claims were tolled while her federal Title VII claims were pending before the EEOC. *Kennedy v Fed. Express Corp., 2016 U.S. Dist. LEXIS 133146 (N.D.N.Y. Sept. 28, 2016)*, aff'd in part, vacated in part, *698 Fed. Appx. 24, 2017 U.S. App. LEXIS 19617 (2d Cir. N.Y. 2017)*.

IV. Hearings

34. In general

Section 297 (subd 4, par a) of the Executive Law only requires that a public hearing be held on an unlawful discriminatory practice charge where the complaint is not dismissed by the State Division of Human Rights or conciliated, and, since that section does not prescribe a dismissal procedure, a regulation which empowers the State Commissioner of Human Rights to review the dismissal process (*9 NYCRR 465.18*) does not conflict with the statute. Accordingly, although a public hearing was never conducted on the matter, there is no infirmity in an order of the commissioner which reopened a proceeding held before a regional director of the division, directed further investigation of the charge and altered the director's determination that there was probable cause to believe an allegation that respondent employer had practiced discrimination because of disability, finding, instead, no probable cause to believe that respondent had engaged in said practice, and dismissed the complaint; a contrary view would deny the division the authority to qualify the power conferred upon regional directors, officers created and designated by the commissioner to administer a regional office of the Division of Human Rights. *State Div. of Human Rights ex rel. Valdemarsen v Genesee Hosp., 50 N.Y.2d 113, 428 N.Y.S.2d 210, 405 N.E.2d 692, 1980 N.Y. LEXIS 2273 (N.Y. 1980)*.

Once Human Rights Division found probable cause to believe discrimination had occurred and set matter down for hearing, it was incumbent on employer to come forward with whatever proof it had to show that accommodation could not have been accomplished for its Sabbath-observing employee without undue economic hardship. *New York City Transit Auth. v Executive Dep't, Div. of Human Rights, 89 N.Y.2d 79, 651 N.Y.S.2d 375, 674 N.E.2d 305, 1996 N.Y. LEXIS 3162 (N.Y. 1996)*.

Defendant employer was not entitled to dismissal of gender discrimination complaint under CLS *Exec § 296* on basis that State Division of Human Rights (SDHR) delayed 11 years before holding hearing on complaint and then delayed its order for another 3 years, where no substantial actual prejudice resulted in that employer's witnesses were able to testify without difficulties owing to memory loss regarding issues on which SDHR based its finding of discrimination. *Diaz Chem. Corp. v New York State Div. of Human Rights, 91 N.Y.2d 932, 670 N.Y.S.2d 397, 693 N.E.2d 744, 1998 N.Y. LEXIS 599 (N.Y. 1998)*.

Where the Director of Human Rights received information concerning the complaint by holding a conference and by investigation, but there was no hearing, and complainant had had no opportunity to present his case in a formal manner, for the Division of Human Rights to dismiss his complaint under such circumstances, it must appear that as a matter of law the complaint lacks merit. *Mayo v Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 307 N.Y.S.2d 691, 1970 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 4th Dep't)*, app. dismissed, *26 N.Y.2d 612, 1970 N.Y. LEXIS 1802 (N.Y. 1970)*.

The statute contemplates a preliminary investigation, conference and action by the Division of Human Rights, and if the complaint is not dismissed or a conciliation agreement is not reached, the respondents must be given an opportunity to answer and a public hearing must be held. Remand to State Division of Human Rights "for further investigation and action" on grounds that Division "should have looked into the question (of alleged discrimination) rather than discharging the complaint" did not require a hearing be conducted if the matter could be concluded by conciliation procedure. *Berry v Donner-Hanna Coke Corp., 42 A.D.2d 404, 348 N.Y.S.2d 414, 1973 N.Y. App. Div. LEXIS 3280 (N.Y. App. Div. 4th Dep't 1973)*, aff'd, *34 N.Y.2d 893, 359 N.Y.S.2d 283, 316 N.E.2d 717, 1974 N.Y. LEXIS 1445 (N.Y. 1974)*.

Complainant was not entitled to a formal hearing under *Exec L § 297*, subd 2 on probable cause issue, and State Division of Human Rights did not act arbitrarily or capriciously in dismissing a complaint which alleged discrimination on basis of national origin, where evidence indicated that complainant was demoted due to substandard work performance and that he was given the same terms, conditions, and privileges of employment which were given to other employees. *Jwayyed v New York Tel. Co., 42 A.D.2d 663, 345 N.Y.S.2d 233, 1973 N.Y. App. Div. LEXIS 4025 (N.Y. App. Div. 3d Dep't 1973).*

More than a simple question of a fact must appear in order to obtain a hearing pursuant to *Executive L § 297*, subdivision 4(a), otherwise a hearing would be mandated in all cases and the conference and conciliation procedures established by the statute would serve no purpose. Thus a hearing is required when question of fact results from a conference and, upon granting full credence, as the Division must to the complainant's version of events, there is evidence of unlawful discrimination. *State Div. of Human Rights v Buffalo Auto Glass Co., 42 A.D.2d 678, 344 N.Y.S.2d 374, 1973 N.Y. App. Div. LEXIS 4289 (N.Y. App. Div. 4th Dep't 1973).*

The Comptroller was properly not joined as a party in administrative proceedings before the Commissioner of Human Rights in a proceeding against a State agency to recover for alleged unlawful discriminatory practices, since the Comptroller's role in paying such an award would be purely a ministerial one of auditor under the *New York State Constitution, art V, § 1*, and *State Finance Law § 109*. *State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982)*.

Confrontation conference is not required where complainant fails to offer evidence demonstrating that discharge was for reasons other than unsatisfactory work performance. *State Div. of Human Rights ex rel. Clifford v Oneida, Ltd., 112 A.D.2d 793, 492 N.Y.S.2d 293, 1985 N.Y. App. Div. LEXIS 56039 (N.Y. App. Div. 4th Dep't 1985)*.

In proceeding against private employer in which employee alleged age and sex discrimination in denial of promotion and encouragement to retire, there was no basis to annul, as arbitrary or capricious, determination of state Division of Human Rights that no probable cause existed for complaints, even though division held no hearings or conferences on matter, where employee was given opportunity to present lengthy and detailed written submissions which were thoroughly considered by division. *Chirgotis v Mobil Oil Corp., 128 A.D.2d 400, 512 N.Y.S.2d 686, 1987 N.Y. App. Div. LEXIS 44111 (N.Y. App. Div. 1st Dep't 1987).*

Commissioner of Human Rights abused his discretion in refusing request by petitioner's appointed counsel to reopen hearing to consider evidence on issue of damages where (1) petitioner filed complaint with Division of Human Rights claiming that respondents determined that he was ineligible for position as parole officer due to his vision, (2) matter was referred to public hearing and petitioner was assigned to attorney employed by division, (3) after hearing, administrative law judge (ALJ) found that respondents had engaged in unlawful discriminatory action but made no award for compensatory damages because of absence of testimony with respect thereto, and (4) petitioner's attorney made application to reopen hearing to establish damages and urged that petitioner not be penalized due to her oversight, but commissioner upheld ALJ's decision and denied request to reopen; commissioner should have permitted reopening of case since hearing was not yet deemed complete at time petitioner's attorney requested that hearing be reopened, and record was incomplete and failed to provide basis for informed decision on issue of damages through no fault of petitioner. *Farley v New York State Dep't of Civil Service, 142 A.D.2d 783, 530 N.Y.S.2d 329, 1988 N.Y. App. Div. LEXIS 7271 (N.Y. App. Div. 3d Dep't 1988)*.

Determination by State Division of Human Rights that there was no probable cause to believe that employer unlawfully discriminated against petitioner on basis of his age was not arbitrary and capricious merely because no hearing was held since petitioner was given full opportunity to present his evidence and to discuss with Division status of investigation, and his submissions were in fact considered. *Gleason v W.C. Dean Sr. Trucking, 228 A.D.2d 678, 646 N.Y.S.2d 20, 1996 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 2d Dep't 1996).*

It is within discretion of State Division of Human Rights to decide method to be used in investigating claim, and as long as petitioner has full opportunity to present claim, neither hearing nor confrontation conference is mandated. *Gleason v W.C. Dean Sr. Trucking, 228 A.D.2d 678, 646 N.Y.S.2d 20, 1996 N.Y. App. Div. LEXIS 7390 (N.Y. App. Div. 2d Dep't 1996).*

In deciding to dismiss police officer for misconduct at memorial service for slain police officers, city police commissioner properly considered police officer's statements made during official interview conducted pursuant to police patrol guide, even

though statements were made in response to matters that occurred while officer was off duty. *Hagmaier v Bratton, 245 A.D.2d 147, 665 N.Y.S.2d 880, 1997 N.Y. App. Div. LEXIS 13034 (N.Y. App. Div. 1st Dep't 1997)*.

Court would annul determination by administrative law judge (ALJ) finding that railroad company's termination of respondent for violent behavior against fellow worker was pretextual, wherein ALJ asserted that she was not bound by prior determination that assault took place, where prior determination to dismiss respondent was upheld on appeal by Special Board of Adjustment, arbitration panel authorized by Railway Labor Act (45 USCS § 153), respondent conceded that Board had administrative status, and Board conclusively determined that respondent violently assaulted and then threatened fellow worker. *Metro-North Commuter R.R. Co. v New York State Exec. Dep't Div. of Human Rights, 271 A.D.2d 256, 707 N.Y.S.2d 50, 2000 N.Y. App. Div. LEXIS 4101 (N.Y. App. Div. 1st Dep't 2000)*.

Since the power of the State Commission for Human Rights is not limited to providing relief for a particular complaint, and the Commission has the power to order a respondent to cease and desist from continuing a general policy of discrimination, the Commission would not be enjoined from conducting a hearing as to whether certain real estate brokers were engaging in a general policy of unlawful discrimination in their real estate practice despite the fact that the realtors had already sold a house to the alleged aggrieved individual. *Neidich v State Com. for Human Rights, 53 Misc. 2d 984, 280 N.Y.S.2d 463, 1967 N.Y. Misc. LEXIS 1893 (N.Y. Sup. Ct. 1967)*.

35. Disqualification of judge

Even if actual bias or prejudice on part of regional director of State Division of Human Rights had been shown to have resulted from fact that his daughter was employed as mail clerk by employer against whom complaints were filed, such showing would not be grounds for director's disqualification under section of Judiciary Law requiring disqualification of judge in proceeding if he is related within the sixth degree of consanguinity to party to proceeding, since actual bias of judge is not grounds for disqualification under such law. Although section of Judiciary Law providing that judge would be disqualified if he were related within sixth degree of consanguinity to party to proceeding does not apply to quasi-judicial administrative officers, Appellate Division would look to such law, in absence of any comparable statute setting forth grounds for disqualification of administrative officer, in deciding whether regional director of Division of Human Rights decision dismissing certain employees' complaints against their employer was abuse of discretion merely because director's daughter was employed as mail clerk by employer complained against. *State Div. of Human Rights v Merchants Mut. Ins. Co., 59 A.D.2d 1054, 399 N.Y.S.2d 813, 1977 N.Y. App. Div. LEXIS 14344 (N.Y. App. Div. 4th Dep't 1977)*.

36. Sufficiency of complaint

Where the Director of Human Rights received information concerning the complaint by holding a conference and by investigation, but there was no hearing, and complainant had had no opportunity to present his case in a formal manner, for the Division of Human Rights to dismiss his complaint under such circumstances, it must appear that as a matter of law the complaint lacks merit. *Mayo v Hopeman Lumber & Mfg. Co., 33 A.D.2d 310, 307 N.Y.S.2d 691, 1970 N.Y. App. Div. LEXIS 5481 (N.Y. App. Div. 4th Dep't)*, app. dismissed, *26 N.Y.2d 612, 1970 N.Y. LEXIS 1802 (N.Y. 1970)*.

In course of investigating complaint of discrimination, commissioner of Division of Human Rights should interview respondent's witnesses and receive its responses to complaint, and at such point, statute places upon commissioner responsibility to determine whether there is reasonable basis for sustaining complaint, based upon complainant's evidence, and for requiring employer or other respondent to answer and submit to hearing. *State Div. of Human Rights v New York State Drug Abuse Control Com., 59 A.D.2d 332, 399 N.Y.S.2d 541, 1977 N.Y. App. Div. LEXIS 13571 (N.Y. App. Div. 4th Dep't 1977)*.

Employee's allegations had sufficient substance to warrant public hearing where after over 10 years of employment with employer's predecessor company and over 2 years with employer, employee alleged that she was discharged because she declined to respond to sexual advances of her superior, record contained written statements of 5 former co-workers stating that petitioner was target of sexual advances and sexual harassment by supervisor, record contained no denial, nor any statement whatsoever, by supervisor who allegedly made sexual advances to employee, although employer's answer stated that employee

was laid off as result of work force consolidation and denied that employee was laid off due to her failure to succumb to sexual advances. *Ragnetti v State Div. of Human Rights, 110 A.D.2d 895, 488 N.Y.S.2d 446, 1985 N.Y. App. Div. LEXIS 48798 (N.Y. App. Div. 2d Dep't 1985)*.

Complainant's burden is simply to establish that there is probable cause to believe that she has been victim of unlawful discrimination; determinations of no probable cause may be overturned for failure of division to conduct in-depth investigation. *State Div. of Human Rights ex rel. Beckman v Gaylord Bros., Inc., 112 A.D.2d 726, 492 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 56237 (N.Y. App. Div. 4th Dep't 1985)*.

Action to recover damages for unlawful discriminatory practices in housing was properly dismissed as to plaintiffs who were employees of antidiscrimination organization and who had visited defendants' apartment building only as "testers" under pretense of being prospective tenants after others had reportedly been denied accommodations there because of race, since testers conceded that they did not wish to rent apartment and had acted only on behalf of others. *Dunn v Fishbein, 123 A.D.2d 659, 507 N.Y.S.2d 29, 1986 N.Y. App. Div. LEXIS 60809 (N.Y. App. Div. 2d Dep't 1986)*.

Evidence supported determination finding correctional facility guilty of unlawful discriminatory practice based on race where complainant and other black correction officers testified as to "hostile situation" at facility, black officers were placed in different "class" from white employees, they were denied more desirable assignments and shifts, they had their orders and directions disregarded by subordinates or countermanded by their superior officers, and they were disciplined more frequently and more harshly than white employees; furthermore, of 16 cases of alleged inmate abuse occurr-ing at facility, complainant was sole correction officer who was dis-charged. *New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995)*.

Plaintiff's age discrimination action was barred by release where it was undisputed that he executed employment termination agreement expressly releasing defendant from all claims including those "arising under federal, state or local laws prohibiting employment discrimination." *Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't)*, app. denied, *89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996)*.

Bare allegation that plaintiff was forced to resign due to his age was insufficient to state action to set aside release on ground that it was procured by duress. *Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't)*, app. denied, *89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996)*.

Assertion that plaintiff "Annette Cramer" was terminated "because she was married to Joseph Cramer" did not set forth cognizable action under CLS *Exec § 296(1)(a)*, which prohibits discrimination based on individual's marital status rather than on fact that individual is married to any particular partner. *Cramer v Newburgh Molded Prods., 228 A.D.2d 541, 645 N.Y.S.2d 46, 1996 N.Y. App. Div. LEXIS 7114 (N.Y. App. Div. 2d Dep't)*, app. denied, *89 N.Y.2d 803, 653 N.Y.S.2d 280, 675 N.E.2d 1233, 1996 N.Y. LEXIS 4267 (N.Y. 1996)*.

Complaint was properly dismissed where plaintiffs did not plead that they offered to bear expense of building modifications they requested (CLS *Exec § 296(18)(1)*), they admitted that originally alleged discriminatory practices and policies were corrected, and they failed to adduce evidence of any other discriminatory practices and policies. *Mansolino v Haberman, 239 A.D.2d 276, 658 N.Y.S.2d 843, 1997 N.Y. App. Div. LEXIS 5425 (N.Y. App. Div. 1st Dep't 1997)*.

Terminated correction officer's due process rights were not violated by alleged lack of specificity of dates in charges of sexual harassment of subordinates where charges were sufficiently specific to apprise officer of their nature and to allow for preparation of adequate defense; correction commissioner did not act in bad faith in failing to provide more precise dates where numerous and extensive investigations occurred before charges were filed, and one complaining witness delayed filing formal complaint. *Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997)*.

Plaintiffs, licensed practical nurses, stated action under CLS *Exec § 296(1)(a)* by alleging that they showed religious or moral belief held by them, that defendants were aware thereof, and that defendants failed to reasonably accommodate such religious

belief by summarily terminating plaintiffs for their refusal to the form abortive procedures. *Larson v Albany Med. Ctr., 252 A.D.2d 936, 676 N.Y.S.2d 293, 1998 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 3d Dep't 1998)*.

Job applicant stated cause of action for employment discrimination based on disability in violation of CLS *Exec § 296(1)(a)* by alleging that employer subjected him to urinalysis test as condition of employment without demonstrating that such test was job related and that employer refused to hire applicant on basis of such test result (which revealed presence of opiates) without evaluating his capacity to reasonably perform in position sought. *Doe v Roe, Inc., 143 Misc. 2d 156, 539 N.Y.S.2d 876, 1989 N.Y. Misc. LEXIS 187 (N.Y. Sup. Ct. 1989)*, aff'd, *160 A.D.2d 255, 553 N.Y.S.2d 364, 1990 N.Y. App. Div. LEXIS 3749 (N.Y. App. Div. 1st Dep't 1990)*.

Cause of action based on claim of sexual harassment arising out of plaintiff actress' employment relationship with defendant, who coerced her into sexual activity with his business associates to further his own business interests, was cognizable under Human Rights Law, CLS *Exec § 297(9)*, since actions of employer which discriminate against person in terms and conditions of employment because of person's sex are encompassed within ambit of wrongs actionable under statute. *Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990)*, modified, *179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992)*.

Probationary correction officer met her burden of demonstrating that there were disputed issues of material fact as to whether she was fired for good faith reasons or for discriminatory reasons and thus she was entitled to hearing at which corrections department would have burden of proving, by preponderance of evidence, that it terminated her in good faith, where she claimed that she was terminated because of pregnancy discrimination and it appeared that corrections department decided to terminate her based in part on some absences which were pregnancy-related. *Card v Sielaff, 154 Misc. 2d 239, 586 N.Y.S.2d 191, 1992 N.Y. Misc. LEXIS 221 (N.Y. Sup. Ct. 1992)*.

Where a former employee alleged her male supervisor sexually harassed her, as the complaint made no allegations against her female supervisor, it failed to state a claim against her or to provide notice of the allegations against her, as required by due process and *N.Y. Exec. Law 297*; thus, the New York State Division of Human Right could not enforce a damage award in favor of the employee against the female supervisor. *Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011)*.

Former employees' action under Human Rights Law against owner of employer is dismissed, where employees failed to plead facts regarding owner's involvement in creation, design, or implementation of employer's alleged discriminatory plan to terminate employees and failed to plead facts from which inference can be made that owner intended to discriminate against plaintiffs, because plaintiffs' use of word "defendants" is insufficient to allege individual action by owner where no other facts are alleged in support of individual liability. *Leykis v NYP Holdings, 899 F. Supp. 986, 1995 U.S. Dist. LEXIS 20524 (E.D.N.Y. 1995)*.

37. Sufficiency of proof

Record supported conclusion that employee was victim of quid pro quo sexual harassment, and thus was entitled to compensatory damages, where employer exploited employee by, among other things, coercing her, as implicit condition of her employment, into having sexual liaisons with 2 business associates of employer's chairman and principal shareholder. *Thoreson v Penthouse Int'l, 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, 1992 N.Y. LEXIS 4231 (N.Y. 1992)*.

A determination of the commission and its cease and desist order against the operator of an employment agency who made oral and written inquiries in respect of an applicant's creed and national origin should be sustained. *Holland v Edwards, 282 A.D. 353, 122 N.Y.S.2d 721, 1953 N.Y. App. Div. LEXIS 4474 (N.Y. App. Div. 1953)*, aff'd, *307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954)*.

Evidence in support of complaint which alleged that demotion was based on discrimination by reason of age, including coworkers' testimony as to satisfactory nature of complainant's work, supported finding that demotion was based on discrimination by reason of age. *Winitt v State Div. of Human Rights, 50 A.D.2d 767, 377 N.Y.S.2d 60, 1975 N.Y. App. Div. LEXIS 11562 (N.Y. App. Div. 1st Dep't 1975)*.

School district would be required to pay any teacher physically disabled by reason of maternity accrued sick leave benefits for that portion of school year coinciding with such disability or aggravation of such disability, unless such teacher elected to take unpaid maternity leave during which sick leave was not applicable, provided she furnished to district certificate from her attending physician to effect that during such period of time she was, in fact, physically disabled. *State Div. of Human Rights v Board of Education, 51 A.D.2d 357, 381 N.Y.S.2d 544, 1976 N.Y. App. Div. LEXIS 11080 (N.Y. App. Div. 3d Dep't)*, aff'd, *40 N.Y.2d 1021, 391 N.Y.S.2d 532, 359 N.E.2d 1327, 1976 N.Y. LEXIS 3155 (N.Y. 1976)*.

Evidence showing, inter alia, city employee's chronic lateness, absenteeism, insubordination and poor work performance supported finding of division of human rights of no probable cause to believe that employee was victim of discrimination so that Human Rights Appeal Board exceeded its limited scope of review in determining that division's order dismissing employee's complaint was arbitrary, capricious and an abuse of discretion. *New York City Housing Authority v State Div. on Human Rights, 53 A.D.2d 844, 385 N.Y.S.2d 785, 1976 N.Y. App. Div. LEXIS 13674 (N.Y. App. Div. 1st Dep't 1976)*.

In a proceeding pursuant to *Exec Law § 298* brought by a 59-year-old engineer alleging age discrimination in his employer's reorganization of his engineering section that resulted in the abolishment of the engineer's position and his transfer to another unit, the complaint was properly dismissed where the engineer's salary was not reduced, and where the engineer was on a special assignment that was terminated only for business reasons. *Boiko v New York State Human Rights Appeal Bd., 88 A.D.2d 1045, 452 N.Y.S.2d 691, 1982 N.Y. App. Div. LEXIS 17467 (N.Y. App. Div. 3d Dep't 1982)*.

In an action brought by a former medical center employee who alleged that the medical center and various individual defendants had discriminated against her on the basis of her sex and marital status in violation of *Exec Law § 296(1)(a)*, and had retaliated against her in violation of *Exec Law § 296(1)(e)*, the trial court properly denied defendants' motion for summary judgment where issues of fact existed as to whether the individual defendants' treatment of plaintiff constituted discrimination and whether the medical center had had knowledge of or had acquiesced in any such discriminatory conduct, and where, in light of such issues of fact as to the first cause of action, there was no need for the trial court to have decided whether plaintiff had a cause of action for retaliatory discrimination absent any finding that the alleged discrimination had actually occurred. *Belanoff v Grayson, 98 A.D.2d 353, 471 N.Y.S.2d 91, 1984 N.Y. App. Div. LEXIS 16486 (N.Y. App. Div. 1st Dep't 1984)*.

The State Division of Human Rights did not abuse its discretion when investigating a complaint alleging age discrimination and dismissing the complaint upon finding no probable cause, where the division's field representative reviewed the complaint itself and a letter from the associate personnel director of respondent, interviewed respondent's associate personnel director, and spoke with complainant when he visited the division office to review his file, in that the investigation was not so abbreviated and one sided that it resulted in a record which did not afford a reasonable basis for an administrative determination. *Tirino v Long Island Jewish-Hillside Medical Center, 99 A.D.2d 513, 471 N.Y.S.2d 16, 1984 N.Y. App. Div. LEXIS 16720 (N.Y. App. Div. 2d Dep't 1984)*.

The State Division of Human Rights did not act arbitrarily in dismissing petitioner's complaint for unlawful employment discrimination where petitioner failed to rebut defendant's evidence that the job he had applied for was eliminated due to budget considerations. *Baranowski v Cornell University, 106 A.D.2d 814, 484 N.Y.S.2d 202, 1984 N.Y. App. Div. LEXIS 21725 (N.Y. App. Div. 3d Dep't 1984)*, app. denied, *64 N.Y.2d 607, 1985 N.Y. LEXIS 16226 (N.Y. 1985)*.

Unsupported allegations of age discrimination were insufficient to meet petitioner's burden of showing that unlawful discriminatory acts were committed against him. *Murphy v Russell Sage College, 134 A.D.2d 716, 521 N.Y.S.2d 199, 1987 N.Y. App. Div. LEXIS 50907 (N.Y. App. Div. 3d Dep't 1987)*.

To make out prima facie case of age discrimination in employment, plaintiff must show that he or she was member of protected class, prove that he or she was discharged, prove that he or she was qualified for position, and either show that he or she was replaced by younger person, produce direct evidence of discriminatory intent, or produce statistical evidence of discriminatory conduct. *Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't)*, app. denied, *87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996)*, app. denied, *88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996)*.

Defendants rebutted plaintiff's prima facie case of age discrimination where employer's general manager testified that he was hired, inter alia, to remedy serious deficiencies in management of employer's maintenance operations, general manager

interviewed plaintiff, but found that plaintiff failed to make any suggestions to correct problems, claimed that problems were overstated, and blamed uncooperative union employees and poor conditions for problems, and general manager testified that he replaced plaintiff with another employee who ran efficient and organized repair facility and who presented sound and specific suggestions for improving operations. *Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't)*, app. denied, *87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996)*, app. denied, *88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996)*.

Evidence did not support determination that rescue mission, in conditioning complainant's stay on further discussing her HIV status, denied her privilege and advantage of place of public accommodation where (1) all witnesses, including complainant, testified that complainant was asked whether she had any medications with her and was told that, if she did, they had to be put away, that she refused to respond to that inquiry, that if she wished to stay, she had to respond, and that she left rather than answering, and (2) question as to medications was not based on her HIV status, but rather was as matter of policy asked of all potential admittees. *Rescue Mission Alliance v Mercado, 224 A.D.2d 934, 637 N.Y.S.2d 580, 1996 N.Y. App. Div. LEXIS 1571 (N.Y. App. Div. 4th Dep't)*, app. denied, *88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1714 (N.Y. 1996)*.

Court would annul determination that certain acts of dentist constituted refusal to treat complainant based on his status as person perceived to be at risk for HIV infection where dental office in question did not constitute "place of public accommodation." *Schulman v State Div. of Human Rights, 89 N.Y.2d 934, 226 A.D.2d 645, 641 N.Y.S.2d 134, 677 N.E.2d 284, 1996 N.Y. App. Div. LEXIS 4389 (N.Y. App. Div. 2d Dep't 1996)*, rev'd, *89 N.Y.2d 934, 654 N.Y.S.2d 713, 677 N.E.2d 284, 1997 N.Y. LEXIS 1802 (N.Y. 1997)*.

Age discrimination claims filed against airline based on airline's use of weight standards in hiring flight attendants, which allegedly discriminated against women with "large framed bodies," as well as older women, was properly dismissed where petitioners failed to show that age was major factor in weight gain, that airline's weight restrictions had had disparate impact on older employees, or that airline had used its restrictions to avoid hiring older individuals. *Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996)*, app. dismissed, *90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997)*, aff'd, *91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997)*.

Airline did not engage in sex discrimination based on its use of weight standards in hiring flight attendants where there was no evidence that it intended to deprive one sex of equal opportunity or treatment, or that weight requirements were applied in discriminatory manner, and airline showed that approximately 90 percent of its flight attendants were female, thereby negating claim that weight charts were somehow utilized to discriminate against women. *Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996)*, app. dismissed, *90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997)*, aff'd, *91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997)*.

Airline did not engage in unlawful discrimination based on its preemployment questions as to petitioners' national origin and gender where there was nothing to support conclusion that those questions, either expressly or intentionally, led to petitioners not being hired; rather, petitioners received good reviews from airline's interviewers and were not hired due to their failure to meet airline's weight guidelines or hiring eligibility deadline. *Delta Air Lines v New York State Div. of Human Rights, 229 A.D.2d 132, 652 N.Y.S.2d 253, 1996 N.Y. App. Div. LEXIS 12963 (N.Y. App. Div. 1st Dep't 1996)*, app. dismissed, *90 N.Y.2d 882, 661 N.Y.S.2d 825, 684 N.E.2d 274, 1997 N.Y. LEXIS 2331 (N.Y. 1997)*, aff'd, *91 N.Y.2d 65, 666 N.Y.S.2d 1004, 689 N.E.2d 898, 1997 N.Y. LEXIS 3710 (N.Y. 1997)*.

Petitioner committed unlawful discriminatory practice by refusing to sell piece of real property to complainant because of her race; realtor who represented complainant, and who was also black, was also victim of petitioner's discrimination insofar as petitioner refused to deal with realtor because of complainant's race. *Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996)*.

Complaint alleging that plaintiff was denied appointment to permanent status, and was terminated from his employment with county agency as result of race discrimination, was properly dismissed where (1) several agency employees who had frequent contact with plaintiff testified that he was ill-prepared for meetings, failed to participate in discussions, had difficulty

communicating and sharing information, and was generally unable to function as team member of work force, and (2) plaintiff failed to show that stated reason for his discharge was pretextual based on 3 witnesses' general testimony about his efficient and professional managerial style, and unsubstantiated assertions of animus toward him because of his race. *Broome v Keener, 236 A.D.2d 498, 654 N.Y.S.2d 618, 1997 N.Y. App. Div. LEXIS 1343 (N.Y. App. Div. 2d Dep't 1997)*.

Court would affirm city's determination terminating petitioner's employment as parking lot attendant where he did not contest substantial evidence of his misconduct while on duty, including drinking and refusing to undergo breathalyzer test as directed by supervisor, and although he established prima facie case that conduct which formed basis for his discharge was causally related to his alcoholism, city showed that subsequent to his completion of alcohol treatment program, he had relapse while on duty and was immediately charged with misconduct. *Myszczenko v City of Poughkeepsie, 239 A.D.2d 584, 657 N.Y.S.2d 455, 1997 N.Y. App. Div. LEXIS 5639 (N.Y. App. Div. 2d Dep't 1997)*.

Determination that dentist discriminated against complainant based on his HIV status would be annulled where dentist performed complete oral examination of complainant, and concluded that further treatment, in form of root canal therapy, was needed, it was undisputed that dentist did not perform root canal work, and that his associate, who performed root canal work on only 30 to 40 percent of practice's patients, was away on vacation, it was dentist's professional judgment that complainant needed immediate treatment because he was in pain, and that dental unit of university hospital would best provide that treatment in view of risk of secondary infection, no evidence was presented that such recommendation was inappropriate or medically unsound, and complainant contacted dentist's secretary to request additional referrals, but he sought no further treatment from dentist or his associates. *Schulman v State Div. of Human Rights, 239 A.D.2d 588, 658 N.Y.S.2d 70, 1997 N.Y. App. Div. LEXIS 5622 (N.Y. App. Div. 2d Dep't 1997)*, app. denied, *92 N.Y.2d 801, 677 N.Y.S.2d 71, 699 N.E.2d 431, 1998 N.Y. LEXIS 1454 (N.Y. 1998)*.

Substantial evidence supported correction commissioner's decision that terminated correction officer had sexually harassed his subordinates where testimony of 2 complainants proved that officer sexually harassed them by exposing himself to them, and testimony of third complainant proved that officer sexually assaulted her. *Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997)*.

Court would annul determination finding that employer unlawfully discriminated against employee on basis of sex and pregnancy-related disability where she presented no proof that she was incapacitated by severe sickness or injury when she applied for 3 days from sick leave bank established under collective bargaining agreement or that her application was treated in manner less liberal than those applications from employees with conditions unrelated to pregnancy and recovery from childbirth. *Cheektowaga Cent. Sch. Dist. v Graziadei, 267 A.D.2d 985, 700 N.Y.S.2d 334, 1999 N.Y. App. Div. LEXIS 13715 (N.Y. App. Div. 4th Dep't 1999)*, app. denied, *2000 N.Y. App. Div. LEXIS 14175 (N.Y. App. Div. 4th Dep't Mar. 29, 2000)*, app. denied, *95 N.Y.2d 756, 712 N.Y.S.2d 448, 734 N.E.2d 760, 2000 N.Y. LEXIS 1844 (N.Y. 2000)*.

There was sufficient unrebutted evidence in record to warrant public hearing on complaint that Delta Airlines discriminated on basis of age against 57-year-old automotive mechanic with 19 years of service with Pan American Airways when it did not hire him as part of its 1991 purchase of Pan Am's assets, where complaint alleged that specifically identified younger Pan Am mechanics with less seniority were hired in his stead. *Sauer v N.Y. State Div. of Human Rights, 285 A.D.2d 372, 727 N.Y.S.2d 113, 2001 N.Y. App. Div. LEXIS 7370 (N.Y. App. Div. 1st Dep't 2001)*.

Administrative law judge (ALJ) did not err in finding that a complainant was subjected to a hostile work environment, as substantial evidence supported the ALJ's findings that petitioners were informed of sexually inappropriate conduct directed toward the complainant and condoned that conduct and that she was constructively discharged from employment; her use of sexual innuendo in a consensual setting did not waive her legal protections against unwelcome harassment. *Matter of Amg Managing Partners, LLC v New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764, 2017 N.Y. App. Div. LEXIS 2515 (N.Y. App. Div. 4th Dep't 2017)*.

A landlord's prior verbal commitment to another prospective tenant to hold an apartment for her for a few days, whether it bound him legally or morally, did not justify his refusal to show the apartment to the Negro complainant after he had arranged to do so. *Barnes v Goldberg, 54 Misc. 2d 676, 283 N.Y.S.2d 347, 1966 N.Y. Misc. LEXIS 1403 (N.Y. Sup. Ct. 1966)*.

Where a former employee alleged her male supervisor sexually harassed her, as the New York State Division of Human Rights (SDHR) failed to satisfy its burden to prove that the employee's female supervisor condoned the discriminatory conduct., SDHR could not enforce a damage award in favor of the employee against the female supervisor. *Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011)*.

Where a former employee testified that her male supervisor made offensive sexual comments, pressured her to come to his apartment, forced her to engage in sexual intercourse there, and fired her when she refused to return to his apartment, and he did not controvert her testimony, the evidence supported the administrative law judge's finding that she had been subjected to quid pro quo and hostile work environment sexual harassment. *Matter of New York State Div. of Human Rights v Young Legends, LLC, 90 A.D.3d 1265, 934 N.Y.S.2d 628, 2011 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. 3d Dep't 2011)*.

Jury instruction in employment discrimination case under Human Rights Law is proper where it allows jury to determine (1) whether illegitimate criterion was substantial or motivating factor in adverse employment decision, and (2) if so, whether employer has met its burden of proving that employment decision would have happened anyway; goal of Human Rights Law claim is to determine whether adverse employment decision was made "because of" illegitimate factor. Jury was properly charged in case brought by worker who alleged that he was discriminated against because of his age where judge stated, inter alia, that jury should consider whether "plaintiff established...that the termination or denial of transfer occurred under circumstances giving rise to an inference that age was a motivating factor in the decision"; jury may reach its ultimate conclusion on issue of discrimination through either "direct" or "circumstantial" evidence. *Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.)*, cert. denied, *506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992)*.

District Court erred in concluding that plaintiffs, pilots of bankrupt airline, failed to create inference of age discrimination in violation of CLS *Exec § 296* where plaintiffs showed that airline management representative assigned to investigate and evaluate acquisition of bankrupt airline made numerous comments about age of bankrupt airline's pilot force, referring to them as "contaminated" and " *Abdu-Brisson v Delta Air Lines, Inc., 239 F.3d 456, 2001 U.S. App. LEXIS 2041 (2d Cir. N.Y.)*, cert. denied, *534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378, 2001 U.S. LEXIS 9990 (U.S. 2001)*.

Complainant, store cashier, failed to show that employer acted unlawfully in discharging her for failing to produce receipt for store merchandise placed in bag underneath her register, even though she showed that she was discharged on very day that she said she told employer's coordinator of detectives that she was breaking off their sexual relationship. 1999 Order Comm HR No. 9S-E-S-90-144553.

Complainant failed to show that she was denied employment opportunity on ground she rebuffed amorous advances of employer's vice president of finance where employer's chief financial officer and employer's executive board, not vice president, had final say in both offering complainant job and later revoking that offer of employment, and employer was motivated by financial considerations when it revoked its offer of employment to complainant and hired someone at roughly half salary. 1999 Order Comm HR No. 9D-E-S-89-136970-E.

Respondent, owner of insurance brokerage firm, did not engage in unlawful practices of sexual discrimination and harassment against complainant, respondent's office manager, where complainant's employment was ended because of her admitted falsification of clients' signatures, and because of statements made, or believed by respondent that complainant made, to insurance company which were inimical to respondent's financial interest. 2000 Order Comm HR No. 9S-E-S 95-7940446.

Complainant, part-time legal secretary, was not subjected to hostile work environment by exposure to sexually explicit materials that were mailed to law office where, inter alia, owner of law firm was involuntarily placed on mailing lists of several direct marketers selling sexual materials, materials were marked with warning notices stating that contents were sexually explicit, materials were not directed toward complainant, or displayed by law firm, and complainant opened mail knowing it contained sexual materials. 2000 Order Comm HR No. 9S-E-S-96-7940895.

Complainant's failure to receive promotion to associate professor did not constitute unlawful retaliation for filing previous complaints with Division of Human Rights where he was denied promotion for having failed to meet standards contained in

parties' collective bargaining agreement as to any significant community activities or college service, same reasons that he was not promoted in preceding years. 2000 Order Comm HR No. 5-E-O-86-111682-E.

Town's decision to layoff complainant from his maintenance position at town recreation center and its decision not to rehire complainant as seasonal security guard did not constitute age discrimination where layoff was based on complaints as to complainant's performance and supervisor's assessment of his performance, and security guard positions were committed to otherwise qualified people before complainant verbally announced his interest in position. 2000 Order Comm HR No. 9D-E-A-92-1200959A.

Employer discriminated against complainant, native of Columbia, where she had been promoted to forelady after working as cleaning lady for 3 full years, shortly thereafter building supervisor removed her as forelady and replaced her with someone of national origin similar to building supervisor, Albanian national, and employer merely proffered single statement allegedly made by complainant's former supervisor that complainant was demoted because she did not work out. 2000 Order Comm HR No. 9D-E-O-89-136156E.

V. Review and Enforcement

38. Judicial review

An objection that the commission did not have jurisdiction because the applicant could not be considered a person "aggrieved" within the meaning of the law is not open for review by the court where such objection was not urged before the commission. Objections in respect of the commission's directives which were not made until after the commission had gone into court to secure enforcement of its orders, were too late for judicial review. *Holland v Edwards, 307 N.Y. 38, 119 N.E.2d 581, 307 N.Y. (N.Y.S.) 38, 1954 N.Y. LEXIS 1009 (N.Y. 1954)*.

The dismissal of petitioner's complaint of unlawful discrimination upon a determination by a single member of the State Commission Against Discrimination, whose decision was not disturbed by the commission chairman was reviewable by the courts. *Jeanpierre v Arbury, 4 N.Y.2d 238, 173 N.Y.S.2d 597, 149 N.E.2d 882, 1958 N.Y. LEXIS 1072 (N.Y. 1958)*.

The jurisdiction of the State Human Rights Appeals Board is restricted by § 297 of the Executive Law and Rule III(10)(4) of the appeals board to final dispositions. *South African Airways v New York State Div. of Human Rights, 35 A.D.2d 516, 312 N.Y.S.2d 111, 1970 N.Y. App. Div. LEXIS 4160 (N.Y. App. Div. 1st Dep't 1970)*.

Where Commissioner of Human Rights found complaint of discriminatory discharge by reason of race justified and ordered that petitioner be rehired, his further order of guidance and training programs for, and recruitment of, minority reporters was ultra vires of the division's powers, being excessive and not sufficiently related to the particular complaint, and Human Rights Appeal Board compounded error by making new findings not warranted by the original record rather than limiting its decision to ruling on the presence or absence of substantial supporting evidence. *Artis v State Human Rights Appeal Bd., 42 A.D.2d 557, 345 N.Y.S.2d 570, 1973 N.Y. App. Div. LEXIS 4010 (N.Y. App. Div. 1st Dep't 1973)*.

In view of evidence that, although Ecuadorian professor voluntarily quit as acting chairman of Puerto Rican sequence in department of black and Puerto Rican studies because of protest directed at fact that he was non-Puerto Rican, he had functioned well as acting director, and that the professor was never accorded the opportunity to present his case in a formal manner in support of allegations, dismissal of his complaint that college had terminated him because of national origin was arbitrary and capricious. *Rodriguez-Abad v Hurst, 49 A.D.2d 115, 373 N.Y.S.2d 583, 1975 N.Y. App. Div. LEXIS 10558 (N.Y. App. Div. 1st Dep't 1975)*.

It was improper for Supreme Court to transfer Article 78 proceeding, seeking review of determination by Division of Human Rights finding no probable cause to believe there had been unlawful discriminatory practice, where no public hearing had been held pursuant to CLS *Exec § 297*; only where such hearing has been held shall Supreme Court transfer proceeding to appropriate Appellate Division. *Bentkowsky v Tokio Re Corp., 139 A.D.2d 436, 527 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1st Dep't 1988)*.

It was error for Supreme Court to review determination of Division of Human Rights reached after hearing, and matter should simply have been transferred to Appellate Division, which has exclusive jurisdiction over such cases under CLS *Exec § 298*. *State Div. of Human Rights ex rel. Albino v YMCA of Greater New York, 139 A.D.2d 440, 527 N.Y.S.2d 219, 1988 N.Y. App. Div. LEXIS 3983 (N.Y. App. Div. 1st Dep't)*, app. denied, *72 N.Y.2d 807, 532 N.Y.S.2d 848, 529 N.E.2d 178, 1988 N.Y. LEXIS 2531 (N.Y. 1988)*.

Supreme Court did not abuse its discretion in denying application of union to review determination of State Division of Human Rights (SDHR) to join it as necessary party in proceeding alleging religious discrimination by bus company against one of its employees, even though joinder occurred 2 years after complaint was filed, since delay was caused by SDHR and union failed to substantiate claim that it was injured by delay. *Ambrosio v State Div. of Human Rights, 144 A.D.2d 662, 535 N.Y.S.2d 381, 1988 N.Y. App. Div. LEXIS 12444 (N.Y. App. Div. 2d Dep't 1988)*.

After initially upholding human rights commission's finding of lack of probable cause to believe that corrections department refused to employ petitioner because of his Maryland arrest record, court properly granted reargument on basis that it had failed to apprehend that Maryland court documents in department's possession actually indicated that criminal proceedings against petitioner were disposed of in manner analogous to New York's adjournment in contemplation of dismissal. *Johnson v New York City Comm'n of Human Rights, 270 A.D.2d 186, 706 N.Y.S.2d 18, 2000 N.Y. App. Div. LEXIS 3297 (N.Y. App. Div. 1st Dep't 2000)*.

New York State Division of Human Rights (DHR) abused its discretion by increasing an employer's civil fine to $ 60,000, because the DHR factored the employer's behavior during the administrative proceedings as part of the calculus to increase the fine, as opposed to focusing only whether the employer's discrimination was willful, wanton, or malicious. *Matter of JPK Imports/Oneonta, Inc. v New York State Div. of Human Rights, 165 A.D.3d 1410, 86 N.Y.S.3d 638, 2018 N.Y. App. Div. LEXIS 6939 (N.Y. App. Div. 3d Dep't 2018)*, app. denied, *2019 N.Y. LEXIS 606 (N.Y. Mar. 26, 2019)*.

The protection against discrimination afforded by *Executive Law § 296* is at least as broad as that afforded by the Federal Constitution and civil rights statutes. Thus, the determination of the Appellate Division affirming the Appeal Board's affirmance of the State Division of Human Rights' dismissal of former employee's race discrimination claim against former employer on the ground of lack of probable cause, res judicata of all other state actions as a matter of statutory law, would be entitled to full faith and credit in a federal court hearing federal constitutional and civil rights claims. *Mitchell v National Broadcasting Co., 553 F.2d 265, 1977 U.S. App. LEXIS 13960 (2d Cir. N.Y. 1977)*.

Administrative dismissal of age discrimination claim for administrative convenience under CLS *Exec Law § 297(9)* may not be reviewed by federal court, where employer argues that claim actually was dismissed at employee's request to avoid unfavorable result and thus was not dismissed for administrative convenience, and employee's election of administrative remedy bars judicial remedy. *Rivers v Standard & Poor's Corp., 764 F. Supp. 54, 1991 U.S. Dist. LEXIS 7351 (S.D.N.Y. 1991)*.

39. Judicial enforcement

In proceedings brought by several airline company employees who had allegedly been discharged because of their age, the State Human Rights Appeal Board exceeded its powers by reinstating the complaints that had been dismissed on the grounds of administrative convenience by the State Division of Human Rights, since the Division was authorized to dismiss a complaint on such basis in its "unreviewable discretion", under *Exec Law § 297(3)*, notwithstanding that the Board is empowered to review the dismissal to determine whether it contravenes any statute, constitutional right, or divisional regulation, where there was no claim that the Division's decision was improper under its regulations or any statute, and dismissal for administrative convenience following settlement of a federal action involving similar allegations did not finally deprive the employees of their interests under the Human Rights Law since they could maintain the same type of action in a state court and receive a hearing on the merits. *Pan American World Airways, Inc. v New York State Human Rights Appeal Bd., 61 N.Y.2d 542, 475 N.Y.S.2d 256, 463 N.E.2d 597, 1984 N.Y. LEXIS 4178 (N.Y. 1984)*.

Where Special Term modified an order of the State Commission on Human Rights by deleting a paragraph requiring certain apartment owners to maintain records for one year showing the number of apartments rented, the number unrented, and as to

each vacant apartment the number of rooms, required rental, and names and addresses of accepted and rejected applicants with reasons for rejection, such paragraph was reinstated as being reasonably related to the unlawful act which such owners were found to have committed and as not imposing undue hardship upon them. *Kindt v State Com. for Human Rights, 23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't)*, aff'd, *16 N.Y.2d 1001, 265 N.Y.S.2d 662, 212 N.E.2d 898, 1965 N.Y. LEXIS 1001 (N.Y. 1965)*.

Before the court exercises its discretion in issuing an enforcement order, there must be an appropriate record basis, i.e., that the papers disclose the results of the investigation made and that the Division has made findings as a result thereof. *State Div. of Human Rights v Union Carbide Corp., 34 A.D.2d 636, 310 N.Y.S.2d 396, 1970 N.Y. App. Div. LEXIS 5023 (N.Y. App. Div. 1st Dep't 1970)*, dismissed, *28 N.Y.2d 555, 319 N.Y.S.2d 447, 268 N.E.2d 127, 1971 N.Y. LEXIS 1595 (N.Y. 1971)*.

The directions of the Commissioner of Human Rights are not self-enforcing and they are not brought into play unless there has been a violation of a Division Order, and then the Division must seek an enforcement order for non-compliance. *State Div. of Human Rights v Janica, 37 A.D.2d 444, 326 N.Y.S.2d 854, 1971 N.Y. App. Div. LEXIS 2745 (N.Y. App. Div. 4th Dep't 1971)*.

Supreme Court improperly reinstated petitioner as permanent employee on finding of unlawful discriminatory discharge where, at time of discharge, he had completed only 8 months of one-year probationary period; petitioner was only entitled to reinstatement to probationary title he held at time of discharge. *Obas v Kiley, 149 A.D.2d 422, 539 N.Y.S.2d 767, 1989 N.Y. App. Div. LEXIS 4393 (N.Y. App. Div. 2d Dep't 1989)*.

In an action to punish a landlord for contempt of court for wilful failure to obey the provisions of a court order enforcing an order of the Civil Rights Commission, an intervenor was relegated to a plenary action pursuant to *Executive Law § 297(9)* and any award for compensatory or punitive damages would have to be made by the court having jurisdiciton of that action. *State Com. for Human Rights v Kennelly, 59 Misc. 2d 278, 299 N.Y.S.2d 342, 1969 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1969)*.

In Article 78 proceeding by petitioner who was terminated from his job as school bus driver for failing to complete alcoholism treatment program (pursuant to CLS *Veh & Tr § 509-b*), petitioner could not assert discrimination claim under CLS *Exec § 296*; such claims must be initiated by administrative proceeding before State Division of Human Rights or by bringing action for damages. *Marcotte v Corinth Cent. Sch. Dist., 166 Misc. 2d 881, 635 N.Y.S.2d 1021, 1995 N.Y. Misc. LEXIS 593 (N.Y. Sup. Ct. 1995)*.

40. Administrative review

Appellate Division can only set aside determination of commissioner of Division of Human Rights if such determination is arbitrary or capricious; thus, it improperly set aside commissioner's award of back pay after having affirmed its finding of discrimination. *Mize v State Div. of Human Rights, 33 N.Y.2d 53, 349 N.Y.S.2d 364, 304 N.E.2d 231, 1973 N.Y. LEXIS 1002 (N.Y. 1973)*.

Scope of State Human Rights Appeal Board's review is limited by statute and Board may not reverse a decision of the Division of Human Rights "in the interests of justice" nor may it substitute its judgment for that of the Division. *State Div. of Human Rights ex rel. Powers v Mecca Kendall Corp., 53 A.D.2d 201, 385 N.Y.S.2d 665, 1976 N.Y. App. Div. LEXIS 12506 (N.Y. App. Div. 4th Dep't 1976)*.

Complainant, who filed a complaint with the State Division of Human Rights two and one-half months after his job demotion alleging a violation of the Human Rights Law, is entitled to have an order of the Human Rights Appeal Board dismissing an appeal to the board annulled and the matter remanded for further proceedings where after nearly a year passed following complainant's demotion without the matter being scheduled for a hearing, the division, pursuant to a request by complainant's counsel, ordered the matter dismissed for administrative convenience in order that complainant could obtain redress through court action, and subsequently amended its prior order such that the dismissal was effective *nunc pro tunc* as of the date of the original request following dismissal of the court action commenced by complainant due to untimeliness because the division's jurisdiction was exclusive while the matter was pending before it (*Executive Law, § 297*, subd 9) and the prior order of dismissal was made more than one year after the date of complainant's demotion; the dismissal of an appeal by complainant's

employer from the division's amended order to the appeal board on the ground that it had no jurisdiction to review dismissal of the complaint grounded on administrative convenience (*Executive Law, § 297*, subd 3, par c) is annulled since although the division may in its unreviewable discretion dismiss the complaint on the grounds of administrative convenience and shall then issue an order containing notice of a right to appeal to the appeal board (*9 NYCRR 465.5 [d] [1]*, [3]), the board has jurisdiction over appeals from any order of the Commissioner of Human Rights (*9 NYCRR 550.2*) and order of the commissioner is defined as "any order dismissing a complaint, other than a dismissal on grounds of administrative convenience" (*9 NYCRR 550.3 [i] [3]*). What is prohibited is review by the appeal board of the discretionary act of the division in determining to dismiss a complaint for administrative convenience, and inasmuch as that action differs from the action in determining the date such dismissal is to be effective, the latter act is not proscribed from administrative appellate review, for if there were no review, complainant would be deprived of a forum in which to air his claim; the principle of administrative finality may not be applied to preclude correction of error by the administrative agency itself where the determination is the result of irregularity in vital matters. *Eastern Airlines, Inc. v State Human Rights Appeal Board, 66 A.D.2d 581, 413 N.Y.S.2d 925, 1979 N.Y. App. Div. LEXIS 10057 (N.Y. App. Div. 1st Dep't 1979)*.

Commissioner is required to make prompt investigation by field visit, written or oral inquiry, conference, or any method or combination thereof; matter is remitted to division for full and thorough investigation where probable cause issue was investigated in cursory and abbreviated manner and no independent inquiry was conducted to verify complainant's assertions prior to issue of no probable cause determination; investigation consisting of one interview with employer's personnel officer, obtaining copies of leave of absence policy and office memoranda together with letters from employer's attorney is insufficient. *State Div. of Human Rights ex rel. Beckman v Gaylord Bros., Inc., 112 A.D.2d 726, 492 N.Y.S.2d 217, 1985 N.Y. App. Div. LEXIS 56237 (N.Y. App. Div. 4th Dep't 1985)*.

Determination by Division of Human Rights finding no probable cause to believe that employee was terminated due to her religious beliefs would be annulled and matter remanded for public hearing where sparseness of record prevented proper review. *Bentkowsky v Tokio Re Corp., 139 A.D.2d 436, 527 N.Y.S.2d 25, 1988 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1st Dep't 1988)*.

State Division of Human Rights properly denied landlord's application to reopen hearing into determination entered on default that landlord unlawfully discriminated on basis of race and marital status, where only excuse offered for failing to answer was that landlord "found it unimaginable that the complaint would be sustained because there was no discrimination in refusing to rent to [complainant] an apartment in a building which was and is predominantly tenanted by persons of the same race as [complainant]," and landlord offered only bare allegations regarding meritorious defense and failed to serve proposed answer to underlying complaint with application to reopen hearing. *Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988)*.

Appropriate standard of review of no probable cause determination of Division of Human Rights regarding possible violations of CLS *Exec § 298*, where no public hearing was held under CLS *Exec § 297(4)(a)*, was whether determination was arbitrary and capricious, or lacking in rational basis, and not substantial evidence test. *Giles v State Div. of Human Rights, 166 A.D.2d 779, 563 N.Y.S.2d 142, 1990 N.Y. App. Div. LEXIS 12018 (N.Y. App. Div. 3d Dep't 1990)*.

Mandamus to compel Division of Human Rights (DHR) to determine motion to dismiss complaint prior to substantive hearing on charge of unlawful discriminatory employment practice was not appropriate remedy since petitioners failed to demonstrate existence of duty which was ministerial in nature; neither CLS *Exec § 297* nor Rules of Practice of DHR provided for prehearing motion practice. *Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989)*.

In proceeding challenging State Division of Human Rights' dismissal of race discrimination complaint at complainant's request on ground of "administrative inconvenience" under CLS *Exec § 297*, petitioner's request for admissions of fact that division had not dismissed any complaints on such ground within last 2 years except where first requested by complainant, in order to establish arbitrary or capricious activity on division's part, would be denied on ground that it sought conclusions about material issues for which notice to admit may not be utilized. *New York Tel. Co. v New York State Div. of Human Rights, 148 Misc. 2d 765, 561 N.Y.S.2d 401, 1990 N.Y. Misc. LEXIS 536 (N.Y. Sup. Ct. 1990)*.

Determination made by State Division of Human Rights (SDHR) which, after reopening previous finding of probable cause, found "no probable cause" and dismissed petitioner's complaint, was arbitrary and capricious where (1) reopening order specifically contemplated remand to regional director for further investigation, but petitioner's counsel was never formally advised what additional evidence was needed and was not specifically asked to produce particular additional evidence, (2) record failed to show that any additional post-reopening investigation was conducted, and (3) SDHR did not explain its reversal of initial assessment finding probable cause. *Boyea v New York State Exec. Dep't, Div. of Human Rights, 178 Misc. 2d 398, 679 N.Y.S.2d 548, 1998 N.Y. Misc. LEXIS 471 (N.Y. Sup. Ct. 1998)*.

41. Validity of administrative orders

In a proceeding alleging sex discrimination, an order properly directed a non-profit, tax-exempt foreign corporation and three of its local charter organizations located in New York to discontinue in New York their male-only membership practices, to extend membership invitations to female complainants and to submit annual statistical reports detailing the number of male and female members in the New York organizations as that remedy was neither overbroad nor excessive. *United States Power Squadrons v State Human Rights Appeal Bd., 59 N.Y.2d 401, 465 N.Y.S.2d 871, 452 N.E.2d 1199, 1983 N.Y. LEXIS 3181 (N.Y. 1983)*.

Under regulation of the Human Rights Appeal Board authorizing Board to consider and decide issues presented by record but not specifically indicated in notice of appeal or requested when there is not resulting prejudice to a party's rights, where there was no objection to Board's right to amend determination of Division of the Human Rights, modification did not prejudice substantial right of party and there was no cross appeal, Board had authority to make modification in favor of complainant. *State Div. of Human Rights ex rel. Mossler v Westmoreland Cent. School Dist., 56 A.D.2d 205, 392 N.Y.S.2d 149, 1977 N.Y. App. Div. LEXIS 10047 (N.Y. App. Div. 4th Dep't 1977)*.

Notwithstanding that a union was properly found to have discriminated against its minority trainees through various means which resulted in blocking the trainees' attainment of class "A" journeyman status with the union, the provision of the remedial order which provided for issuance to minority trainees of "A" cards regardless of training, qualification, or status was improper, where every other union member had to pass the "A" examination to become an "A" journeyman and therefore minority trainees who complete the required training were to be afforded an opportunity to take the next scheduled "A" examination. *Schuck v State Div. of Human Rights, 102 A.D.2d 673, 478 N.Y.S.2d 279, 1984 N.Y. App. Div. LEXIS 18838 (N.Y. App. Div. 1st Dep't 1984)*.

In proceeding under Human Rights Law alleging racial discrimination, Commissioner of State Division of Human Rights erred in failing to set forth rationale for ordering damages for embarrassment, hurt and public humiliation in amount of $10,000 each for 4 complainants and $7,500 for fifth complainant. *Specialty Restaurants v New York State Div. of Human Rights, 179 A.D.2d 1036, 579 N.Y.S.2d 299, 1992 N.Y. App. Div. LEXIS 2377 (N.Y. App. Div. 4th Dep't 1992)*.

Employer was denied due process where individual who appeared as counsel for Division of Human Rights in early stages of employment discrimination proceeding later became Commissioner of Human Rights and thereafter issued final determination in instant matter. *Pepsico, Inc. v Rosa, 213 A.D.2d 550, 624 N.Y.S.2d 622, 1995 N.Y. App. Div. LEXIS 4449 (N.Y. App. Div. 2d Dep't)*, app. dismissed, *86 N.Y.2d 837, 634 N.Y.S.2d 445, 658 N.E.2d 223, 1995 N.Y. LEXIS 3707 (N.Y. 1995)*, app. denied, *86 N.Y.2d 709, 634 N.Y.S.2d 442, 658 N.E.2d 220, 1995 N.Y. LEXIS 3708 (N.Y. 1995)*.

As respects statute prohibiting any educational corporation or association that holds itself out to public to be nonsectarian and exempt from taxation from denying "use of its facilities" to any person otherwise qualified, by reason of race, color, religion, or national origin, attempt to distinguish between "denial of use of facilities" and "denial of admission" is a strained and tenuous construction not consonant with plain meaning in language; "use of facilities" covers admission of qualified students. *New York University v New York State Div. of Human Rights, 84 Misc. 2d 702, 378 N.Y.S.2d 842, 1975 N.Y. Misc. LEXIS 3202 (N.Y. Sup. Ct.)*, aff'd, *49 A.D.2d 821, 373 N.Y.S.2d 719, 1975 N.Y. App. Div. LEXIS 10940 (N.Y. App. Div. 1st Dep't 1975)*.

Grand Jury minutes, sealed pursuant to *CPL 160.50* upon the dismissal of indictments against physicians accused of assault in the second degree, may not be disclosed to the Attorney-General for the purpose of aiding an investigation of the physicians'

alleged professional misconduct since the purpose of *CPL 160.50* and the related subdivision 14 of *section 296 of the Executive Law* is to protect individuals from adverse consequences based upon unsustained accusations, statutorily allowed judicial discretion to release Grand Jury minutes does not permit the disclosure of minutes sealed pursuant to *CPL 160.50* except in limited circumstances and the instant action is not an appropriate case, as the key witness has published a book in which his activities as a "ghost surgeon" are detailed; the Attorney-General has, therefore, failed to demonstrate any overriding need for the Grand Jury minutes. *In re Attorney-General of New York, 101 Misc. 2d 36, 420 N.Y.S.2d 685, 1979 N.Y. Misc. LEXIS 2624 (N.Y. Sup. Ct. 1979)*.

State Division of Human Rights' administrative convenience dismissal of retaliation complaint was not "purely arbitrary" in view of plaintiff's plan to pursue her state-based claims of continuing sexual harassment and retaliation in federal court action. *Universal Packaging Corp. v New York State Div. of Human Rights, 179 Misc. 2d 167, 683 N.Y.S.2d 735, 1998 N.Y. Misc. LEXIS 616 (N.Y. Sup. Ct. 1998)*, aff'd, *270 A.D.2d 586, 704 N.Y.S.2d 332, 2000 N.Y. App. Div. LEXIS 2647 (N.Y. App. Div. 3d Dep't 2000)*.

It is within the legitimate police powers of the state for the New York Legislature to determine the effects of the so-called "Arab Boycott" in New York, to educate the public accordingly, and to monitor and otherwise evaluate new legislation passed to eradicate discrimination against citizens of New York in terms of such boycotts or black listing because of race, color, creed or national origin. *General Electric Co. v New York State Assembly Committee on Governmental Operations, 425 F. Supp. 909, 1975 U.S. Dist. LEXIS 14579 (N.D.N.Y. 1975)*.

42. —Orders re housing

Division of Human Rights acted in excess of its authority where, after dismissing complainant's charge that apartment owners discriminated against him by denying him housing accommodations because of his natural origin on the ground of insufficient evidence, went on to find that housing owner had engaged in discriminatory rental practices; if Division had wished to challenge overall rental practices, it should have followed procedures set forth in *Executive Law § 297*. *Hillside Housing Corp. v State Div. of Human Rights, 44 A.D.2d 539, 353 N.Y.S.2d 460, 1974 N.Y. App. Div. LEXIS 5445 (N.Y. App. Div. 1st Dep't 1974)*.

Order of commission issued after hearing under above statute may not extend beyond premises involved in complaint to include also other accommodations owned or controlled by same landlord. *Kindt v State Com. for Human Rights, 44 Misc. 2d 896, 254 N.Y.S.2d 933, 1964 N.Y. Misc. LEXIS 1600 (N.Y. Sup. Ct. 1964)*, modified, *23 A.D.2d 809, 258 N.Y.S.2d 250, 1965 N.Y. App. Div. LEXIS 4484 (N.Y. App. Div. 4th Dep't 1965)*.

Commission order which directed that real estate firm and its officers make listings available to "prospective purchasers without regard to their race, creed, color or national origin," was far too vague and went beyond the reasonable authority of the Commission since a broker should be free to exercise his own business judgment as to how much time and effort he will expend on a person who claims to be a prospective purchaser. *State Com. for Human Rights v Suburban Associates, Inc., 55 Misc. 2d 920, 286 N.Y.S.2d 733, 1967 N.Y. Misc. LEXIS 1016 (N.Y. Sup. Ct. 1967)*, modified, *34 A.D.2d 662, 310 N.Y.S.2d 1019, 1970 N.Y. App. Div. LEXIS 5125 (N.Y. App. Div. 2d Dep't 1970)*.

43. —Orders re employment

Retroactive seniority ordered by New York City Human Rights Commission in favor of female police officers of New York City Police Department (NYPD), based on pattern of gender-based discrimination engaged in by NYPD, did not violate discretionary appointive authority of police commissioner under "one-in-three rule" of CLS *Civ S § 61*; commission may fashion remedy to make victim whole for injuries suffered as result of discriminatory employment practices, and commissioner has broad powers to adopt measures which he (or she) reasonably deems necessary to redress injury. *Beame v DeLeon, 87 N.Y.2d 289, 639 N.Y.S.2d 272, 662 N.E.2d 752, 1995 N.Y. LEXIS 4747 (N.Y. 1995)*.

New York City Human Rights Commission, as remedy for pattern of gender-based discrimination engaged in by New York City Police Department against female police officer, exceeded its powers by directing promotion of officer to police captain even before announcement of results of promotional examination she took for position; such promotion without establishment of her eligibility by passing competitive examination violated Merit and Fitness Clause of CLS *NY Const Art V § 6*, and salutary purposes of city's Human Rights Law (*NYC Admin Code § 8-101* et seq.) to combat and remedy results of gender-based employment discrimination must give way to higher law of state constitution. *Beame v DeLeon, 87 N.Y.2d 289, 639 N.Y.S.2d 272, 662 N.E.2d 752, 1995 N.Y. LEXIS 4747 (N.Y. 1995)*.

New York City Human Rights Commission, as remedy for pattern of gender-based discrimination engaged in by New York City Police Department (NYPD) against female police officers, had legal authority to backdate retroactive appointments of all subject officers for seniority purposes earlier than December 13, 1965 effective date of amendment of New York City Human Rights Law that first prohibited gender-based discrimination, since sex-based discriminatory seniority system in NYPD had roots preceding statutory prohibition against sex discrimination and was later applied in way that had prejudicial impact on women officers well after sex discrimination was outlawed; Commission's eradication of all gender-based seniority inequality by directing retroactive adjustments of officers' appointment dates even earlier than 1965 was thus rationally related to redress and prevention of recurrence of injuries suffered by officers after anti-sex discrimination legislation was enacted. *Beame v DeLeon, 87 N.Y.2d 289, 639 N.Y.S.2d 272, 662 N.E.2d 752, 1995 N.Y. LEXIS 4747 (N.Y. 1995)*.

An order of the State Division of Human Rights, which directs a company to "cease and desist from publishing any employment advertisement in any of its newspapers which specifies a preference for applicants on the basis of sex without first securing from the prospective employer or agent thereof a written certification that the job is not covered by the Human Rights Law or is instinct with a bona fide occupational qualification", should not be set aside as the Human Rights Law (Executive Law, art 15) authorizes the Commissioner of Human Rights to direct that an offending party cease and desist from an unlawful discriminatory practice and further authorizes him to direct that affirmative action be taken as will effectuate the purposes of the law (*Executive Law, § 297*, subd 4, par [c]); while it would be unreasonable to impose upon a newspaper the burden of making an independent investigation to determine whether a particular job is instinct with a bona fide occupational qualification, the purpose and effect of requiring a newspaper to procure the written certification in advance of publication is to eliminate the need for the independent investigation and to insulate the newspaper from the imposition of penalties under the Human Rights Law. *State Div. of Human Rights v Binghamton Press Co., 67 A.D.2d 231, 415 N.Y.S.2d 523, 1979 N.Y. App. Div. LEXIS 10097 (N.Y. App. Div. 4th Dep't 1979)*.

In an action by a former employee against her employer charging a violation of the Human Rights Law, the employee, having invoked the jurisdiction of New York State, was properly ordered to appear for oral examination prior to trial in New York City, although she lived in South Carolina. Moreover, the employee, who had moved for class action certification, could not validly contend that she lacked financial resources to travel to New York for examination when she was simultaneously attempting to show that she would fairly and adequately protect the class. *Mack v J. C. Penney Co., 81 A.D.2d 761, 439 N.Y.S.2d 118, 1981 N.Y. App. Div. LEXIS 11395 (N.Y. App. Div. 1st Dep't 1981)*.

The decision of the Human Rights Appeals Board finding the employer guilty of an unlawful discriminatory practice by discriminating against a female employee because she had opposed practices which were forbidden by the Human Rights Law could not stand where the employer did not discriminate against the complaining employee and other female office workers on the basis of sex and thus the employer could not be found to have retaliated against the complaining employee for having opposed an unlawful practice; however, employees who feel victimized by unlawful discrimination do not act at their peril in trying to expose such practices, since absolute protection is afforded those who seek redress by the commencement of an administrative proceeding. *Mohawk Finishing Products, Inc. v State Div. of Human Rights, 83 A.D.2d 970, 442 N.Y.S.2d 816, 1981 N.Y. App. Div. LEXIS 15431 (N.Y. App. Div. 3d Dep't 1981)*, aff'd, *57 N.Y.2d 892, 456 N.Y.S.2d 749, 442 N.E.2d 1260, 1982 N.Y. LEXIS 3772 (N.Y. 1982)*.

Retaliation complaint alleging that the employer failed to promote complainant during the pendency of an earlier-filed sex discrimination complaint was properly dismissed where complainant had not taken the required competitive examination needed to qualify for one position in question and where the person promoted to the other position in question had three months actual work experience in that specific position, which experience complainant lacked. *Engel v New York State Human Rights Appeal Bd., 84 A.D.2d 640, 444 N.Y.S.2d 288, 1981 N.Y. App. Div. LEXIS 15761 (N.Y. App. Div. 3d Dep't 1981)*.

In a proceeding against a county alleging unlawful discrimination on the basis of sex, the county was properly directed to place complainant's name on the list of eligibles for employment as a police officer where, when the administrative complaint was filed, the complainant's name appeared on the outstanding eligibility list and the complainant was within the age group eligible for appointment as an officer, where the county failed to prosecute an appeal from the administrative review board's affirmance of the original order directing reinstatement to the eligibility list, and where, due to the county's discriminatory practices and the necessity for administrative enforcement of the reinstatement order, the eligibility list expired before complainant's name could be placed thereon; where it is demonstrated that errors have rendered an eligibility list in derogation of the merit and fitness standards and candidates have demonstrated that they were aggrieved by those errors, the statutory durational period does not begin to run until the list is corrected, and *Civ S Law § 58* does not provide an absolute bar to eligibility of persons over 29 in such circumstances. *State Div. of Human Rights ex rel. Farella v County of Onondaga, 84 A.D.2d 931, 447 N.Y.S.2d 61, 1981 N.Y. App. Div. LEXIS 16194 (N.Y. App. Div. 4th Dep't 1981).*

In a proceeding by the state correctional services department and a correctional facility to review a determination of the Commissioner of the State Division of Human Rights that a woman was wrongfully denied the position of assistant cook at the correctional facility on the basis of her sex, the correctional services department and the facility would not be directed to appoint the woman to the position of assistant cook since the Commissioner lacked the power to direct another state agency to appoint the woman in that directing her appointment would in effect deprive the appointing authority of the power of selection, despite the fact that there had been no question that the woman had been wrongfully denied the position on the basis of her sex. *State Div. of Human Rights ex rel. Cox v New York State Dep't of Correctional Services, 91 A.D.2d 832, 458 N.Y.S.2d 422, 1982 N.Y. App. Div. LEXIS 19737 (N.Y. App. Div. 4th Dep't 1982)*.

The Division of Human Rights properly directed a city school board to reinstate a former employee to his prior position as an assitant principal where, though the employee had earlier rejected an offer by the school board to reinstate him to another position due to his feeling that he would be unable to function in the existing discriminatory environment, the division's order merely sought to restore the status quo after the discriminatory climate apparently had been eliminated, and where the school board could not properly complain about such order in that the employee's rejection of the earlier offer had resulted from the school board's own discriminatory conduct. *New York City Bd. of Education v Sears, 97 A.D.2d 502, 468 N.Y.S.2d 21, 1983 N.Y. App. Div. LEXIS 20099 (N.Y. App. Div. 2d Dep't 1983)*, app. dismissed, *61 N.Y.2d 605, 1984 N.Y. LEXIS 7121 (N.Y. 1984).*

Commissioner of Human Rights improperly awarded back pay commencing on date when employer denied complainant's request for 3-year term of renewal of employment, and ending on date when order was entered, where final decision was not rendered until 9 years after proceeding was commenced and delay was attributable to Division of Human Rights, since employer was thereby penalized for division's failure to act in timely manner. *State University Agricultural & Technical College v State Div. of Human Rights, 134 A.D.2d 339, 520 N.Y.S.2d 814, 1987 N.Y. App. Div. LEXIS 50516 (N.Y. App. Div. 2d Dep't 1987)*.

Penalty of termination of correction officer's employment was not so disproportionate to offenses as to shock Appellate Division's sense of fairness where 2 complainants testified that officer sexually harassed them by exposing himself to them, and third complainant testified that officer sexually assaulted her; either set of charges was sufficient, by itself, to support dismissal. *Arroyo v City of New York, 245 A.D.2d 186, 666 N.Y.S.2d 168, 1997 N.Y. App. Div. LEXIS 13150 (N.Y. App. Div. 1st Dep't 1997).*

Court erred in annulling Division of Human Rights' finding of no probable cause and remanding race discrimination case for further investigation based on division's purportedly one-sided and abbreviated investigation where (1) fact-finding conference had lasted several hours, (2) employer's uncontroverted witnesses and documentary evidence showed that petitioner's work performance was subject of numerous complaints, and that he was discharged because he failed to improve despite numerous warnings and counseling sessions, (3) petitioner was replaced by another black employee, and (4) employer had significant percentage of black employees and discharged various employees of different races in same year as it discharged petitioner. *McFarland v New York State Div. of Human Rights, 241 A.D.2d 108, 671 N.Y.S.2d 461, 1998 N.Y. App. Div. LEXIS 4041 (N.Y. App. Div. 1st Dep't 1998)*.

Selection of number of members of minority groups for position of state trooper for purpose of obtaining more minority representation in state police, without regard to their standing on eligibility list based on competitive examination for such position, would violate state constitutional provision that "Appointments . . . in the civil service . . . shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." *Ruddy v Connelie, 89 Misc. 2d 413, 391 N.Y.S.2d 819, 1977 N.Y. Misc. LEXIS 1880 (N.Y. Sup. Ct. 1977)*, aff'd, *61 A.D.2d 372, 402 N.Y.S.2d 245, 1978 N.Y. App. Div. LEXIS 9748 (N.Y. App. Div. 3d Dep't 1978)*.

Female umpire's state human rights law claim against major and minor baseball leagues may proceed in federal court, despite EEOC's referral of administrative complaint to state human rights division, division's notice to umpire of her options upon EEOC decision, EEOC's unfavorable determination, and umpire's failure to timely notify division of her intentions, because division's compliance with late request for administrative convenience dismissal to permit lawsuit under CLS *Exec Law § 297(9)* was well within unreviewable discretion granted it. *Postema v National League of Professional Baseball Clubs, 799 F. Supp. 1475, 1992 U.S. Dist. LEXIS 10979 (S.D.N.Y. 1992)*, rev'd, *998 F.2d 60, 1993 U.S. App. LEXIS 15504 (2d Cir. N.Y. 1993)*.

VI. Other Procedural Matters

44. Filing notice of claim

In an employment discrimination action against a county, the Appellate Division properly dismissed the complaint which alleged that employment with defendant county was terminated on the basis of plaintiff's race and national origin in violation of *Exec Law § 296* where plaintiff's failure to timely file a notice of claim under *Gen. Mun L § 50-e* was fatal in that the action had not been brought to indicate a public interest and leave to serve a late notice of claim had not been granted. *Mills v County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, 1983 N.Y. LEXIS 3161 (N.Y.)*, cert. denied, *464 U.S. 1018, 104 S. Ct. 551, 78 L. Ed. 2d 725, 1983 U.S. LEXIS 2750 (U.S. 1983)*.

Teacher was not required to comply with notice provisions of *Education Law § 3813*, subd 1 prior to commencing action before State Division of Human Rights, alleging school board's discriminatory maternity leave policy, to enforce her right to return to her teaching position 5 months earlier than board would permit, and to preserve her right to fringe benefits, even though an award of money damages as back pay was a necessary concomitant of such relief; provisions of *Executive Law § 297*, subds 2, *4(a)*, being discretionary, did not deprive Division of jurisdiction to hear claim. *Union Free School Dist. v New York State Human Rights Appeal Bd., 43 A.D.2d 749, 350 N.Y.S.2d 735, 1973 N.Y. App. Div. LEXIS 2818 (N.Y. App. Div. 2d Dep't 1973)*, aff'd, *35 N.Y.2d 371, 362 N.Y.S.2d 139, 320 N.E.2d 859, 1974 N.Y. LEXIS 1177 (N.Y. 1974)*.

Although action brought under CLS *Exec § 296* is not tort claim which falls under notice provisions of General Municipal Law, notice of claim was nevertheless required by CLS Town § 67(1) and (2). *Scopelliti v Town of New Castle, 210 A.D.2d 308, 620 N.Y.S.2d 405, 1994 N.Y. App. Div. LEXIS 12598 (N.Y. App. Div. 2d Dep't 1994)*.

Actions against municipality to recover damages for unlawful discriminatory practices brought under CLS *Exec § 296* are not subject to notice of claim requirement set down in CLS *Gen Mun § 50-e* for tort claims involving personal injury, wrongful death, or property damage. *Morrison v New York City Police Dep't, 214 A.D.2d 394, 625 N.Y.S.2d 174, 1995 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1st Dep't 1995)*, app. denied, sub. op., *1995 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 1st Dep't June 20, 1995)*.

Actions against municipality to recover damages for unlawful discriminatory practices brought under CLS *Exec § 296* are not subject to notice of claim requirement set down in CLS *Gen Mun § 50-e* for tort claims involving personal injury, wrongful death, or property damage. *Morrison v New York City Police Dep't, 214 A.D.2d 394, 625 N.Y.S.2d 174, 1995 N.Y. App. Div. LEXIS 4208 (N.Y. App. Div. 1st Dep't 1995)*, app. denied, sub. op., *1995 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 1st Dep't June 20, 1995)*.

Complaint alleging that termination of school teacher's employment was unlawfully based on acts of sex discrimination by principals employed by school district should have been dismissed for failure to comply with notice of claim requirement under CLS *Educ § 3813(1)*. *Saranac Lake Cent. Sch. Dist. v New York State Div. of Human Rights, 226 A.D.2d 794, 640 N.Y.S.2d 303, 1996 N.Y. App. Div. LEXIS 3503 (N.Y. App. Div. 3d Dep't)*, app. denied, *88 N.Y.2d 816, 651 N.Y.S.2d 406, 674 N.E.2d 336, 1996 N.Y. LEXIS 3340 (N.Y. 1996)*).

Employment discrimination action brought against board of education was properly dismissed for failure to timely file notice of claim under CLS *Educ § 3813(1)*, even though such failure is not fatal where action is brought to vindicate public interest, since plaintiffs were merely seeking damages for lost retirement benefits. *Doyle v Board of Educ., 230 A.D.2d 820, 646 N.Y.S.2d 842, 1996 N.Y. App. Div. LEXIS 8550 (N.Y. App. Div. 2d Dep't 1996)*.

Compliance with notice of claim requirements of CLS Town § 67 and CLS *Gen Mun § 50-e* is condition precedent to pursuit of employment discrimination claim against town, regardless of whether claimant files complaint with Division of Human Rights under CLS *Exec § 297(1)* or commences court action under CLS *Exec § 297(9)*. *Town of Brookhaven v N.Y. State Div. of Human Rights, 282 A.D.2d 685, 723 N.Y.S.2d 410, 2001 N.Y. App. Div. LEXIS 3965 (N.Y. App. Div. 2d Dep't 2001)*.

Biologist claiming age and sex discrimination in termination of her employment with county health department was entitled to judgment declaring that she was not required to file notice of claim as prerequisite to maintaining that claim under CLS *Exec § 296* with State Division of Human Rights (DHR) where (1) notice of claim requirements for tort claims against municipality apply to private discriminatory practice claims under § 296 that are commenced in court of law, not before administrative agency, (2) once person has elected to pursue § 296 claim with administrative agency, he or she is precluded by CLS *Exec § 297(9)* from pursuing same claim in court of law and thus should not be subjected to rules applicable to court claims, and (3) underlying purpose of notice of claim requirements was satisfied by DHR's compliance with administrative procedures set forth in Human Rights Law that gave county ample opportunity to investigate claim *Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001)*, aff'd, *99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003)*.

Before formal complaint was filed, county health department was on notice of potential claim against it under CLS *Exec § 296* for age and sex discrimination in termination of biologist's employment and had ample opportunity to investigate and address that claim, and thus underlying purpose of statutory notice of claim requirements was satisfied despite lack of formal notice of claim with county, where (1) within weeks after termination on January 9, 1992, county human rights commission began investigating biologist's claim, (2) that investigation included conversations with some of biologist's former colleagues, including at least one bureau chief, (3) formal charges of discrimination were filed with State Division of Human Rights (DHR) on April 21, 1992, less than 4 months after termination, (4) DHR requested that county health department respond to discovery requests no later than June 24, 1992, and (5) at least twice between July and September 1992, county health department offered to DHR documentation and explanations to support its actions. *Freudenthal v County of Nassau, 283 A.D.2d 6, 726 N.Y.S.2d 116, 2001 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2001)*, aff'd, *99 N.Y.2d 285, 755 N.Y.S.2d 56, 784 N.E.2d 1165, 2003 N.Y. LEXIS 139 (N.Y. 2003)*.

Lower court did not have authority to grant the employee leave to file a late claim for discrimination, pursuant to *N.Y. Gen. Mun. Law § 50-e(5)* because *N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 618* did not contain any provision permitting the service of a late notice of claim. A cause of action under the New York Human Rights Law was not categorized as a tort for notice of claim purposes. *Marino v N.Y. City Off-Track Betting Corp., 12 A.D.3d 606, 785 N.Y.S.2d 481, 2004 N.Y. App. Div. LEXIS 14216 (N.Y. App. Div. 2d Dep't 2004)*.

Gender discrimination claim against city and its Health and Hospitals Corporation under CLS *Exec § 296* was not barred by plaintiff's failure to file notice of claim under CLS *Gen Mun § 50-e* and CLS Unconsol Ch 214-A § 20, since New York courts do not regard claims under § 296 as tort claims. *Dortz v City of New York, 904 F. Supp. 127, 1995 U.S. Dist. LEXIS 14438 (S.D.N.Y. 1995)*.

Cause of action, alleging that plaintiff was falsely imprisoned by his supervisor on day he was discharged, was independent of employment discrimination claim arising from plaintiff's discharge; thus, one-year statute of limitations under CLS *CPLR § 215* was not tolled by CLS *Exec § 297*, which prohibits plaintiff who has filed discrimination claim with Division of Human

Rights from bringing same claim to courts until conclusion of division proceeding. *Lugo v Milford Mgmt. Corp., 956 F. Supp. 1120, 1997 U.S. Dist. LEXIS 2004 (S.D.N.Y. 1997)*.

Former employee's claims under *N.Y. Exec. Law §§ 296* and *297* failed because (1) the plain language of *N.Y. County Law § 52* clearly incorporated the notice of claim requirement contained in *N.Y. Gen. Mun. Law § 50-e* and applied it to any claim or notice of claim against a county for invasion of personal or property rights, of every name and nature; (2) the notice of claim provision covered the employee's claims against the county and its entities, which included a community college, an entity that was owned and operated by the county and whose employees were considered county employees; (3) the employee failed to satisfy the notice of claim requirement contained in *N.Y. Gen. Mun. Law § 50-e* because the employee failed to file a notice of claim; (4) the action was a private civil rights lawsuit and had not been brought in the public interest; (5) the employee never sought leave to serve a late notice of claim; and (6) the employee failed to offer a single case in which a court held that the filing of a complaint with the New York State Department of Human Rights, or the Equal Employment Opportunity Commission, satisfied the notice requirement of *N.Y. Gen. Mun. Law § 50-e*. *Cody v County of Nassau, 577 F. Supp. 2d 623, 2008 U.S. Dist. LEXIS 72262 (E.D.N.Y. 2008)*, aff'd, *345 Fed. Appx. 717, 2009 U.S. App. LEXIS 20662 (2d Cir. N.Y. 2009)*.

45. Prehearing motion practice

A proceeding in the nature of mandamus to compel the State Division of Human Rights to determine a prehearing motion to dismiss a complaint filed with the Division against petitioner does not lie where petitioner failed to demonstrate the existence of a duty which is ministerial in nature, not calling for the exercise of judgment or discretion; neither *Executive Law § 297*, nor the Rules of Practice of the Division (see, *9 NYCRR 465.1* et seq.) provide for prehearing motion practice. *Central New York Centro, Inc. v New York State Div. of Human Rights, 142 Misc. 2d 935, 539 N.Y.S.2d 626, 1989 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1989)*.

Petitioner, who took written and practical exams for master plumber's license in 1992-1994 and anticipated bringing discrimination action against city on ground that she was denied passing grade because she was female, was entitled to preaction discovery order directing city to preserve and produce for inspection work submitted by applicants for master plumber's license in those years since (1) petitioner had not requested information as to other employees or applicants without limit as to time, nature, or geographical location, but only asked for preservation of testing materials that were directly relevant to proving her discrimination case, and (2) it is in interests of clearly expressed state policy, judicial economy, and speedy enforcement of civil rights to afford prompt and broad discovery in civil rights and discrimination actions. *O'Grady v City of New York, 164 Misc. 2d 171, 624 N.Y.S.2d 337, 1995 N.Y. Misc. LEXIS 75 (N.Y. Sup. Ct. 1995)*.

46. Right to counsel

Petitioner who is dissatisfied with performance of division's attorney may secure his own attorney, and accordingly court is unmoved by claim of inadequate legal representation by division's attorney. *State Div. of Human Rights ex rel. Campbell v Rochester Products Div. of General Motors Corp., 112 A.D.2d 785, 492 N.Y.S.2d 282, 1985 N.Y. App. Div. LEXIS 56028 (N.Y. App. Div. 4th Dep't 1985)*.

Executive Law § 297(4)(a) does not provide that private complainant appearing before New York Division of Human Rights has option of being represented by counsel provided by Division; language of statute provides for Division lawyers to present case "in support of the complaint" not in support of plaintiff; in early investigative stage no Division attorney is provided to represent private employee and in later appellate stage Division attorney, if present at all, appears only as advocate of decision rendered by Division or of Appeal Board, which may have denied employee's claim or granted less relief than complainant sought. *Carey v New York Gaslight Club, Inc., 598 F.2d 1253, 1979 U.S. App. LEXIS 14825 (2d Cir. N.Y. 1979)*, aff'd, *447 U.S. 54, 100 S. Ct. 2024, 64 L. Ed. 2d 723, 1980 U.S. LEXIS 128 (U.S. 1980)*.

47. Right to jury trial

Plaintiff was entitled to jury trial in age discrimination action brought under CLS *Exec § 297* where sole relief sought was money damages to compensate him for what he would have earned, both by way of salary and other benefits, had he remained in defendant's employ until his normal retirement, and additional award for punitive damages; plaintiff's ritualistic use in prayer for relief of language "and such other and further relief as...seems just and proper" did not change legal character of relief demanded, which was monetary and would afford plaintiff full and complete remedy as required under CLS *CPLR § 4101*, and fact that he sought damages for past and future lost earnings did not render relief sought equitable. Age discrimination suit brought under CLS *Exec § 297*, seeking monetary relief only, is for legal wrong triable by jury; thus, it was error for court to strike plaintiff's jury demand on ground of "an always present possibility" that it might grant nonmonetary equitable relief pursuant to CLS *CPLR § 3017*, since plaintiff had made clear that he did not seek or wish reinstatement or other injunctive relief but wished to be compensated by appropriate monetary award, and there was nothing in facts set forth by him to prevent entry of money judgment only for attainment of full and complete relief. *Murphy v American Home Products Corp., 136 A.D.2d 229, 527 N.Y.S.2d 1, 1988 N.Y. App. Div. LEXIS 3730 (N.Y. App. Div. 1st Dep't 1988)*.

In action for employment discrimination and sexual harassment, plaintiff was entitled to jury trial where she sought back pay and compensatory money damages for mental pain and suffering and alleged wrongful infliction of mental distress, and did not seek equitable relief, since (1) although plaintiff's complaint cited *42 USCS §§ 2000e* et seq., which provides for equitable relief only, it was clear that she was proceeding primarily under state law, (2) although plaintiff sought "appropriate relief in contract," it was clear that she would be able to receive full redress from award of money damages only, and (3) although plaintiff sought "such other and further relief as the Court deems appropriate and in the interest of justice," use of that ritualistic language did not change nature of relief sought. *Vega v Metropolitan Life Ins. Co., 146 A.D.2d 495, 536 N.Y.S.2d 451, 1989 N.Y. App. Div. LEXIS 228 (N.Y. App. Div. 1st Dep't 1989)*.

Plaintiff was not entitled to jury trial in action alleging age discrimination in employment where he sought both monetary damages and equitable relief in form of judgment setting aside his retirement and reinstating him to his former position. *Bockino v Metropolitan Transp. Auth., 224 A.D.2d 471, 638 N.Y.S.2d 137, 1996 N.Y. App. Div. LEXIS 1204 (N.Y. App. Div. 2d Dep't)*, app. denied, *87 N.Y.2d 1017, 644 N.Y.S.2d 150, 666 N.E.2d 1064, 1996 N.Y. LEXIS 1204 (N.Y. 1996)*, app. denied, *88 N.Y.2d 805, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1688 (N.Y. 1996)*.

In action under Human Rights Law (CLS *Exec §§ 290* et seq.), plaintiff was denied his constitutional right to jury trial when court granted defendant's motion for remittitur, reducing jury award from $750,000 to $75,000, without offering plaintiff option of new trial on damages. *Lightfoot v Union Carbide Corp., 110 F.3d 898, 1997 U.S. App. LEXIS 5785 (2d Cir. N.Y. 1997)*.

Terminated teacher's jury demand is stricken, where she asserted entitlement to jury trial under CLS *Exec Law § 297* only after it became clear that she had no right to jury trial under Title VII (*42 USCS §§ 2000e* et seq.), because complaint does not even suggest that action was brought pursuant to state law. *Smith v New York City Bd. of Educ., 918 F. Supp. 120, 1996 U.S. Dist. LEXIS 2679 (S.D.N.Y. 1996)*.

48. Subpoenas

In a human rights proceeding against a stock brokerage company, a subpoena duces tecum issued by the Division of Human Rights which demanded that the company produce copies of the EEO-1 form for specified years would be quashed, since such forms were available to the Division from the Equal Employment Opportunity Commission upon request, and the brokerage company was under no affirmative duty to furnish them; additionally, a subpoena duces tecum that sought the complete personnel files of certain enumerated brokerage employees would be quashed, since the Division failed to demonstrate the requisite necessity and relevancy of such material to overcome the employees' rights of privacy in the information contained in their personnel records; finally, a subpoena duces tecum that requested names, dates of hire, dates of termination, race and color, and performance evaluations for all persons who had been terminated by the brokerage company during specified periods on the basis of tardiness would be modified so as to permit the brokerage company to delete the names of the individuals concerned from such records so as to protect their confidentiality. *Dean Witter Reynolds, Inc. v New York State Executive Dep't Div. of Human Rights, 98 A.D.2d 676, 469 N.Y.S.2d 412, 1983 N.Y. App. Div. LEXIS 20967 (N.Y. App. Div. 1st Dep't 1983)*.

Subpoena issued by complainant in proceeding before state division of human rights is nonjudicial subpoena under *CPLR 2302* which may be enforced under *CPLR 2308*; however, contempt punishment cannot be sought until compliance has been judicially ordered but not forthcoming. *Dias v Consolidated Edison Co., 116 A.D.2d 453, 496 N.Y.S.2d 686, 1986 N.Y. App. Div. LEXIS 51309 (N.Y. App. Div. 1st Dep't 1986).*

49. Summary Judgment

Insurance company was properly granted summary judgment in discrimination action brought by insurance agent under CLS *Exec § 296(1)(a)* where company's submissions showed that agent was responsible for financing her own operating expenses and support staff, she was paid by performance rather than salary, she did not have federal, state or local taxes withheld from her pay, she could sell competitors' products, and she had agreed by contract to operate as independent contractor; facts that agent was compelled to attend regular company meetings and was asked to draw up job description for her position were not inconsistent with her status as independent contractor. *Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995)*.

Absence of evidence of formal boycott or blacklisting campaign will not be fatal to discrimination claim under CLS *Exec § 296(13)*; for example, evidence establishing that defendant engaged in pattern of conduct that commercially disadvantaged only members of protected class may be sufficient to defeat summary judgment. *Scott v Massachusetts Mut. Life Ins. Co., 86 N.Y.2d 429, 633 N.Y.S.2d 754, 657 N.E.2d 769, 1995 N.Y. LEXIS 3548 (N.Y. 1995)*.

Employer was entitled to summary judgment dismissing employee's action for age discrimination where employee admitted that his computer skills were not up to par, that he had been warned about this problem and took no action to become more proficient, and that he failed to complete inventory project by his self-imposed deadline; single good performance appraisal, more than year prior to his termination, was not sufficient to raise question of fact with regard to reason for termination. *Brooks v Blue Cross, 195 A.D.2d 814, 600 N.Y.S.2d 346, 1993 N.Y. App. Div. LEXIS 7251 (N.Y. App. Div. 3d Dep't 1993)*.

Defendants were entitled to summary judgment in action allegedly racial discrimination and retaliation in violation of CLS *Exec §§ 296* and *297(9)* where plaintiff put forth nothing to counter defendants' strong showing that actions complained of were taken as result of his hostile, aggressive confrontations with his co-workers and with employees of outside agencies, his large number of unauthorized absences, and his failure to complete assigned work on schedule; moreover, he failed to document single instance when he was treated differently from any other employee who was similarly situated. *Hall v Paladino, 210 A.D.2d 595, 619 N.Y.S.2d 402, 1994 N.Y. App. Div. LEXIS 12458 (N.Y. App. Div. 3d Dep't 1994)*, app. dismissed, *85 N.Y.2d 923, 627 N.Y.S.2d 324, 650 N.E.2d 1326, 1995 N.Y. LEXIS 1367 (N.Y. 1995)*.

Employer was not entitled to summary judgment in action arising from termination of plaintiff's employment on basis of alleged reduction in work force where plaintiff was part of protected age group, and evidence indicated that plaintiff might have been qualified for other positions which were awarded to other younger employees. *Landwehr v Grey Advertising, 211 A.D.2d 583, 622 N.Y.S.2d 17, 1995 N.Y. App. Div. LEXIS 850 (N.Y. App. Div. 1st Dep't 1995)*.

Court should have granted employer's motion for summary judgment where employee failed to show that employer's justification for his discharge was pretextual, existence of fact issue that he satisfactorily performed his job during period in question, or that his involuntary retirement was for other, impermissible reasons than those attested to by his supervisors. *Burkland v IBM, 226 A.D.2d 316, 642 N.Y.S.2d 501, 1996 N.Y. App. Div. LEXIS 4631 (N.Y. App. Div. 1st Dep't 1996).*

Employer was not entitled to summary judgment dismissing plaintiff's age discrimination claim where employer's favorable evaluations of plaintiff's job performance for over decade and up until time plaintiff turned 60 years old raised fact issues as to whether poor job performance was pretext for age discrimination. *Cella v Fordham Univ., 228 A.D.2d 300, 644 N.Y.S.2d 53, 1996 N.Y. App. Div. LEXIS 7146 (N.Y. App. Div. 1st Dep't 1996).*

Defendants were entitled to summary judgment in action alleging numerous violations of CLS *Exec § 296* predicated on hostile work environment created by plaintiff's co-workers, even though plaintiff, who was male, was subjected to tasteless, offensive, and insulting remarks, since there was nothing to indicate that alleged harassment was based on his gender. *Yukoweic v IBM,*

228 A.D.2d 775, 643 N.Y.S.2d 747, 1996 N.Y. App. Div. LEXIS 6418 (N.Y. App. Div. 3d Dep't), app. denied, *88 N.Y.2d 816, 651 N.Y.S.2d 17, 673 N.E.2d 1244, 1996 N.Y. LEXIS 3317 (N.Y. 1996)*.

Court properly denied defendant' s summary judgment motion in action alleging disability discrimination since purportedly inconsistent position that plaintiff took before Social Security Administration in applying for disability benefits was not asserted against defendant and did not involve same standard as one at issue herein; moreover, plaintiff's appearance before Social Security Administration, which did not entail hearing, did not constitute type of prior legal proceeding that could form basis for application of judicial estoppel. *Ferring v Merrill Lynch & Co., 244 A.D.2d 204, 664 N.Y.S.2d 279, 1997 N.Y. App. Div. LEXIS 11386 (N.Y. App. Div. 1st Dep't 1997)*.

Court should have granted defendant employer's summary judgment motion in action alleging sex discrimination where evaluations made of plaintiff's work by various partners of defendant over years of her employment provided ample support for decision to terminate her employment, and plaintiff relied primarily on mere unsupported hearsay statements contained in her own affidavit and deposition testimony, despite 6 years of discovery. *Schwaller v Squire Sanders & Dempsey, 249 A.D.2d 195, 671 N.Y.S.2d 759, 1998 N.Y. App. Div. LEXIS 4661 (N.Y. App. Div. 1st Dep't 1998)*.

Defendants were not entitled to summary judgment in employee's action for age discrimination where there were triable issues of fact as to whether employee was replaced by younger person and whether reason advanced by defendants was pretext. *Dolgon v Standard Motor Prods., Inc., 251 A.D.2d 281, 671 N.Y.S.2d 1023, 1998 N.Y. App. Div. LEXIS 6360 (N.Y. App. Div. 2d Dep't 1998)*.

Court erred in denying defendant's summary judgment motion in action under CLS *Exec § 296* for unlawful termination of employment where there was no evidence that defendant's president knew of plaintiff's pregnancy before he terminated her employment, and it was undisputed that president was negotiating with third party to be plaintiff's replacement before he learned of her pregnancy. *Smith v Paris Int'l Corp., 267 A.D.2d 223, 699 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 12616 (N.Y. App. Div. 2d Dep't 1999)*.

Defendants, plaintiffs' employer and owner, should have been granted summary judgment in action alleging national origin discrimination where there was no evidence that they encouraged, condoned, or approved of employee's allegedly discriminatory conduct. *Escobar v Spartan Assemblies, Inc., 267 A.D.2d 272, 700 N.Y.S.2d 206, 1999 N.Y. App. Div. LEXIS 12942 (N.Y. App. Div. 2d Dep't 1999)*.

Defendant was properly granted summary judgment in action alleging that plaintiff, licensed architect, was fired from her position as associate, after 14 years of increasingly responsible employment with defendant, because of her sex where plaintiff presented no evidence that she was replaced by male employee; further, defendant showed that plaintiff was discharged for poor work performance. *Kapila v Divney, 269 A.D.2d 127, 702 N.Y.S.2d 56, 2000 N.Y. App. Div. LEXIS 985 (N.Y. App. Div. 1st Dep't 2000)*.

Court improperly granted defendants' summary judgment motion on ground that award of Workers' Compensation benefits barred instant claim for sexual discrimination by plaintiff against her employers where workers' compensation award resulted solely from attempted videotaping of plaintiff by co-worker while she was in company locker room, and did not implicate alleged, intentional activities of company officer in subjecting her to hostile work environment by directing inappropriate sexual remarks and jokes toward her, and making demands on her for sexual relations in exchange for forgiving loan. *Hanford v Plaza Packaging Corp., 284 A.D.2d 179, 727 N.Y.S.2d 407, 2001 N.Y. App. Div. LEXIS 6182 (N.Y. App. Div. 1st Dep't 2001)*, app. denied, *2001 N.Y. App. Div. LEXIS 9220 (N.Y. App. Div. 1st Dep't Sept. 25, 2001)*.

Court properly dismissed plaintiff's action alleging hostile work environment where defendant's alleged misconduct consisted merely of occasional sarcastic remarks about plaintiff's weight and heightened awareness of plaintiff's medical condition. *Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001)*.

Court properly denied defendants' summary judgment motion in action alleging disparate treatment as to terms and conditions of plaintiff's employment due to his disability where affidavit of plaintiff's treating endocrinologist raised fact issue on whether plaintiff's disability prevented him from being able to perform job duties as of time of his actual termination, despite clear

conflict between opinion stated in present affidavit and that previously expressed by endocrinologist, where endocrinologist gave rational explanation for discrepancy. *Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001)*.

Plaintiff's application for and acceptance of disability benefits was not fatal to his action alleging disparate treatment as to terms and conditions of his employment due to disability where employer, by purposefully relieving plaintiff of his duties and "plac(ing) him in a non-salary status unless he fulfill(ed) the requirements for short-term disability," effectively required plaintiff to file application for disability benefits. *Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001)*.

In action to impose individual liability against employer's manager (defendant) based on his actions in discriminating against plaintiff on basis of his illness, court improperly denied defendant's summary judgment motion since plaintiff's conclusory allegations that "everyone at (employer) knew, as I did, that (defendant) as head of our employer ... had the power to hire, fire, transfer and promote employees in (employer's) headquarters" was insufficient to raise fact issue as to whether defendant had any ownership in employer or any power to do more than carry out personnel decisions made by others. *Novak v Royal Life Ins. Co. of N.Y., 284 A.D.2d 892, 726 N.Y.S.2d 784, 2001 N.Y. App. Div. LEXIS 6849 (N.Y. App. Div. 3d Dep't 2001)*.

Court should have granted employer's motion for summary judgment where employee failed to show that employer's justification for his discharge was pretextual, existence of fact issue that he satisfactorily performed his job during period in question, or that his involuntary retirement was for other, impermissible reasons than those attested to by his supervisors. Burkland 226 ad2d 316.

Defendants were not entitled to summary judgment in action for employment discrimination in violation of CLS *Exec § 296* where (1) plaintiff was hired by defendants to reprise his role as voice of character in commercial, (2) after commercial was shown and defendants decided to make additional commercials with same character, defendant auditioned actors for commercial and did not even contact plaintiff, allegedly due to his age and handicap, (3) defendants claimed that their conduct was based on demands made by plaintiff in connection with first commercial, and (4) plaintiff contended that he conveyed information to defendants that he was willing to work pursuant to their conditions on future commercials; resolution of why defendants refused to hire plaintiff involved fact issues inappropriate for summary judgment. *Maxwell v N.W. Ayer, Inc., 159 Misc. 2d 454, 605 N.Y.S.2d 174, 1993 N.Y. Misc. LEXIS 470 (N.Y. Sup. Ct. 1993)*.

Defendants, plaintiff's immediate supervisor and employee in company's personnel department who allegedly became aware of sexual harassment and did nothing to remedy it, were entitled to summary judgment in sexual harassment action where plaintiff failed to raise fact issue under "economic reality" test as to whether either defendant should be considered "employer." *Foley v Mobil Chem. Co., 170 Misc. 2d 1, 647 N.Y.S.2d 374, 1996 N.Y. Misc. LEXIS 302 (N.Y. Sup. Ct. 1996)*.

Defendant was not entitled summary judgment, even though it showed legitimate, nondiscriminatory reason for plaintiff's termination, reduction-in-force policy which caused plaintiff's termination in favor of 2 mail co-workers who had vocational training and could work in both electrical and mechanical departments, where plaintiff, who had been employed in electrical department, submitted affidavits by co-workers and supervisors that she could perform more sophisticated wiring tasks than men, and that there was policy of gender segregation. *Hughes v Prim Hall Enters., 182 Misc. 2d 892, 701 N.Y.S.2d 839, 1999 N.Y. Misc. LEXIS 544 (N.Y. Sup. Ct. 1999)*.

District Court properly granted defendant airline's summary judgment motion dismissing age discrimination action, even though plaintiff pilots demonstrated prima facie case, where there was no evidence to suggest that defendant's stated non-discriminatory reasons for challenged employment actions were false. *Abdu-Brisson v Delta Air Lines, Inc., 239 F.3d 456, 2001 U.S. App. LEXIS 2041 (2d Cir. N.Y.)*, cert. denied, *534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378, 2001 U.S. LEXIS 9990 (U.S. 2001)*.

50. Damages, generally

Record of proceeding before State Human Rights Division on appeal and on review demonstrated that, had complainant accepted employment offered, her damages would have been minimal, if not eliminated. *State Div. of Human Rights v Board of Education, 59 A.D.2d 1048, 399 N.Y.S.2d 805, 1977 N.Y. App. Div. LEXIS 14335 (N.Y. App. Div. 4th Dep't 1977)*.

In a proceeding alleging that the State Parks and Recreation Commission committed an unlawful discriminatory practice against complainant based upon religion in refusing to hire complainant, an award by the Commissioner of Human Rights granting damages representing earnings complainant lost when he was denied a noncompetitive summer position was properly made, since there was no reasonable probability that complainant would not have been certified for the position, in that the Civil Service Department did not suggest any grounds for disqualification and therefore, the award purportedly representing back pay less ordinary payroll deductions was legally an award for a violation of complainant's civil rights requiring no discount in the amount of lost wages to reflect the contingency of nonappointment. *State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982)*.

Petitioner was not entitled to money damages on showing that he was wrongfully denied admission, on basis of his sex, to promotional test for position of county correction officer II where (1) he had later received provisional appointment to that position, (2) his provisional status had been revoked, not because of discriminatory action in connection with prior examination, but due to his failure to rank high enough on new promotional list based on later examination, and (3) there was insufficient evidence that he suffered any mental anguish. *Crayton v County of Suffolk, 139 A.D.2d 577, 527 N.Y.S.2d 79, 1988 N.Y. App. Div. LEXIS 3907 (N.Y. App. Div. 2d Dep't 1988)*.

Damage award of $7,080 for landlord's refusal to rent to complainant because of race and marital status was excessive and matter would be remanded for reassessment of award. *Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988)*.

Court would direct on remittitur that State Division of Human Rights (SDHR) retain neutral hearing officer for purpose of reassessing damages where potential conflict of interest existed from complainant's status as employee of SDHR; matter should be referred to New York City Commission on Human Rights, which had concurrent jurisdiction, or outside hearing officer. *Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988)*.

Award of back pay in action against college for discrimination would be reduced to limit compensation to period of 1 ½ years following unlawful termination since respondent testified that she expected to remain in job only as long as she was student and that she expected to be student for only additional 1 ½ years before obtaining college degree. *SUNY College of Environmental Science & Forestry v State Div. of Human Rights, 144 A.D.2d 962, 534 N.Y.S.2d 270, 1988 N.Y. App. Div. LEXIS 14449 (N.Y. App. Div. 4th Dep't 1988)*.

Division of Human Rights properly determined that complainant was entitled to award of back pay to be calculated at rate of assistant principal where substantial evidence supported finding that complainant would have received assistant principal's salary had he not been wrongfully removed from his position as interim acting assistant principal. *New York City Bd. of Education v New York State Div. of Human Rights, 154 A.D.2d 679, 546 N.Y.S.2d 883, 1989 N.Y. App. Div. LEXIS 13781 (N.Y. App. Div. 2d Dep't 1989)*.

Although substantial evidence supported determination of Commissioner of Human Rights that complainant's employment was terminated solely due to her pregnancy, her backpay award should have been reduced to reflect fact that she obtained other employment. *Empbanque Capital Corp. v White, 158 A.D.2d 686, 551 N.Y.S.2d 957, 1990 N.Y. App. Div. LEXIS 2356 (N.Y. App. Div. 2d Dep't 1990)*.

Because of strong state policy underlying broad hiring discretion vested in city and its appointing authorities under CLS *Civ S § 61*, plaintiff had merely "a hope of appointment" from having passed civil service examination, not legally protectable interest in appointment; thus, award of summary judgment in favor of plaintiff on her cause of action for unlawful disability discrimination against city did not entitle her to award of back pay or other retroactive benefits. *Carro v City of New York, 214 A.D.2d 450, 625 N.Y.S.2d 516, 1995 N.Y. App. Div. LEXIS 4423 (N.Y. App. Div. 1st Dep't 1995)*, reh'g denied, *1995 N.Y. App.*

Div. LEXIS 8602 (N.Y. App. Div. 1st Dep't Aug. 3, 1995), app. denied, *87 N.Y.2d 804, 639 N.Y.S.2d 782, 662 N.E.2d 1072, 1995 N.Y. LEXIS 5696 (N.Y. 1995).*

Judicial Hearing Officer (JHO), in purporting to hold tenant liable to landlord for back rent, acted beyond his jurisdiction where court had consolidated landlord's summary holdover proceeding with tenant's discrimination action, deeming holdover proceeding to be counterclaim, and on landlord's default in failing to comply with discovery demands, court struck his answer, referring case to JHO for determination of tenant's damages. *Likoua v Saudi, 231 A.D.2d 609, 647 N.Y.S.2d 540, 1996 N.Y. App. Div. LEXIS 9469 (N.Y. App. Div. 2d Dep't 1996)*.

Award of back pay should have been reduced by amount of unemployment insurance petitioner received during period covered by award. *Allender v Mercado, 233 A.D.2d 153, 649 N.Y.S.2d 144, 1996 N.Y. App. Div. LEXIS 11498 (N.Y. App. Div. 1st Dep't 1996)*, app. dismissed, app. denied, *89 N.Y.2d 1055, 659 N.Y.S.2d 846, 681 N.E.2d 1292, 1997 N.Y. LEXIS 765 (N.Y. 1997).*

Because an employee was subjected to a hostile work environment, based on sex, that led to the employee's constructive discharge, pursuant to *N.Y. Exec. Law §§ 296(1)*, *297(4)(c)*, the employer and its president were liable for the discriminatory conduct, and the employee was entitled to back pay, compensatory damages, and pre-determination interest. *Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights, 71 A.D.3d 890, 897 N.Y.S.2d 177, 2010 N.Y. App. Div. LEXIS 2066 (N.Y. App. Div. 2d Dep't 2010)*.

Award of damages for lost pay and reimbursement for counseling services in the amount of $4,776, and compensatory damages for pain and suffering in the amount of $10,000, in case of employment discrimination were proper; the award for compensatory damages was based on the employer's conduct that resulted in, among other things, suicidal thoughts and the employee's need to attend counseling for nine months at an out-of-pocket cost of $200. In this regard, the award for emotional pain and suffering did not deviate markedly from comparable awards for similar injuries. *Matter of Tosha Rests., LLC v New York State Div. of Human Rights, 79 A.D.3d 1337, 911 N.Y.S.2d 734, 2010 N.Y. App. Div. LEXIS 9173 (N.Y. App. Div. 3d Dep't 2010)*.

Award of $200,000 to a student who had been subjected to racial discrimination at a school was supported by the evidence; however, although the student's mother was entitled to relief, a $200,000 award to her was reduced to $50,000. Injunctive relief ordered by the division was appropriate. *Matter of Ithaca City School Dist. v New York State Div. of Human Rights, 87 A.D.3d 268, 926 N.Y.S.2d 686, 2011 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 3d Dep't 2011)*, rev'd, *19 N.Y.3d 481, 950 N.Y.S.2d 67, 973 N.E.2d 162, 2012 N.Y. LEXIS 1353 (N.Y. 2012)*.

Jury award of $310,000 in back pay in case of age discrimination did not shock conscience, nor did it deviate substantially from what would be reasonable compensation, even though it was slightly higher than plaintiff's expert's calculation of $266,106. Jury award of $667,000 in future lost earnings ("front pay") in case of age discrimination was neither arbitrary, unreasonable nor speculative where it fell well within plaintiff's expert's projection of maximum $915,105 based on average working life and rate of increase, and it averaged $39,235 per year, which was less than plaintiff had made on average during previous 7 years. *Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.)*, cert. denied, *506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992).*

51. —Compensatory damages

Evidence, in hearing before Commissioner of Human Rights on complaints charging private club with discrimination against blacks with regard to use of barroom during fashion show, warranted Commissioner's award of $250 compensatory damages to each complainant because of club's commission of willful discriminatory acts. *Batavia Lodge No. 196, etc. v New York State Div. of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318, 1974 N.Y. LEXIS 1377 (N.Y. 1974)*.

Petitioner who was improperly disqualified from consideration for employment on basis of disability was entitled to compensatory damages awarded by State Division of Human Rights (SDHR) although court annulled portion of SDHR's determination which directed creation of special eligible list and retroactive seniority pursuant to CLS *Soc Serv § 56(3)* on

ground that § 56(3) violated Merit and Fitness Clause (CLS *NY Const Art V § 6)*. *City of New York v New York State Div. of Human Rights, 93 N.Y.2d 768, 698 N.Y.S.2d 594, 720 N.E.2d 870, 1999 N.Y. LEXIS 3434 (N.Y. 1999)*.

Executive Law § 297 gives individuals a choice. They can either elect to sue in court and recover in damages which they can establish, including mental anguish, or they can elect to seek administrative relief under the Human Rights Law. Whether they elect to seek this latter relief, complainants may obtain directives and orders which will benefit both themselves and others in their position but they limit their recovery for damages to actual out-of-pocket expenses. *State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970)*, aff'd, *29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971)*.

The compensatory damages which may be awarded to a complainant in a proceeding under the Executive Law is limited to out-of-pocket expenses and does not include damages for mental distress. *Ernsteins v State Div. of Human Rights, 35 A.D.2d 599, 313 N.Y.S.2d 856, 1970 N.Y. App. Div. LEXIS 3953 (N.Y. App. Div. 2d Dep't 1970)*, app. dismissed, *28 N.Y.2d 802, 321 N.Y.S.2d 907, 270 N.E.2d 725, 1971 N.Y. LEXIS 1426 (N.Y. 1971)*.

Although the State Human Rights Appeals Board did not abuse its discretion in finding that a construction company refused to build a house because of the customer's racial origins, the Board erred as to the measure of damages to be applied in determining compensation. *Kaval Constr. Corp. v State Div. of Human Rights, 39 A.D.2d 347, 334 N.Y.S.2d 341, 1972 N.Y. App. Div. LEXIS 4110 (N.Y. App. Div. 2d Dep't)*, app. denied, *31 N.Y.2d 641, 1972 N.Y. LEXIS 1662 (N.Y. 1972)*.

Even though New York City Department of Personnel committed unlawful age discrimination in rejecting applicant for position of parking enforcement agent on grounds of her age, it could not be required to offer such applicant next available position of parking enforcement agent, since such requirement would deprive appointing authority of the power to select from among eligible persons; Department likewise could not be required to pay applicant compensatory damages for period from date she would have been appointed had she not been rejected to date when position was finally offered her. *New York City Dep't of Personnel v New York State Div. of Human Rights, 56 A.D.2d 795, 392 N.Y.S.2d 641, 1977 N.Y. App. Div. LEXIS 11090 (N.Y. App. Div. 1st Dep't 1977)*.

In a proceeding alleging unlawful discrimination against a state agency, an award of compensatory damages pursuant to *Exec Law § 297* to the person aggrieved by the discriminatory practice properly included compensation for mental anguish and, furthermore, the award of interest on "back pay" awards to the aggrieved civil servant was also proper. *State Div. of Human Rights ex rel. Geraci v New York State Dep't of Correctional Services, 90 A.D.2d 51, 456 N.Y.S.2d 63, 1982 N.Y. App. Div. LEXIS 18809 (N.Y. App. Div. 2d Dep't 1982)*.

In awarding back pay to 63-year-old employee who was wrongfully terminated due to his age, Division of Human Rights should have reduced award by unemployment insurance benefits and social security benefits received by employee. *Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS 8381 (N.Y. App. Div. 4th Dep't 1995)*, rev'd, *88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996)*.

Damages awarded for back pay based on racial discrimination were excessive to extent that order of Commissioner of State Division of Human Rights misstated date of complainant's termination as one year prior to correct date. *American Int'l Group v Rosa, 224 A.D.2d 179, 637 N.Y.S.2d 121, 1996 N.Y. App. Div. LEXIS 773 (N.Y. App. Div. 1st Dep't)*, app. denied, *87 N.Y.2d 807, 641 N.Y.S.2d 829, 664 N.E.2d 895, 1996 N.Y. LEXIS 167 (N.Y. 1996)*.

It was proper to award $5,000 damages each to complainant and to realtor who represented her, was also black, for petitioner's unlawful discriminatory practice of refusing to sell piece of real property to complainant because of her race. *Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996)*.

Award of compensatory damages under CLS *Exec § 297* must be based on pecuniary loss and emotional injuries actually suffered as result of discrimination, and care must be taken to assure that award is not punitive. *New York State Dep't of Correctional Servs. v State Div. of Human Rights, 241 A.D.2d 811, 661 N.Y.S.2d 85, 1997 N.Y. App. Div. LEXIS 7816 (N.Y. App. Div. 3d Dep't 1997)*, app. denied, *92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229, 1998 N.Y. LEXIS 2800 (N.Y. 1998)*.

Awards of compensatory damages for back pay, lost wages, lost tips and emotional distress were reasonably related to discriminatory conduct of restaurant in giving Asian waitresses preference over Caucasian waitresses with respect to hours and table assignments. *Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997)*.

While a former employee was entitled to compensatory damages under *N.Y. Exec. Law § 297(4)* as the victim of racial discrimination and a constructive discharge, the Commissioner of the State Division of Human Rights erred in adding a supervisor as a respondent after the statute of limitations in N.Y. *C.P.L.R. 203(b)* had run. *Matter of New York State Div. of Human Rights v A.R. Heflin Painting Contr., Inc., 101 A.D.3d 1442, 956 N.Y.S.2d 666, 2012 N.Y. App. Div. LEXIS 8774 (N.Y. App. Div. 3d Dep't 2012)*.

Where a complainant was subjected to a hostile work environment due to sexual harassment, the administrative law judge's award to her of damages for lost wages was reasonably related to the discriminatory conduct, and petitioners failed to meet their burden to prove that she did not exercise diligent efforts to mitigate her damages. *Matter of Amg Managing Partners, LLC v New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764, 2017 N.Y. App. Div. LEXIS 2515 (N.Y. App. Div. 4th Dep't 2017)*.

This section which provides that the Commission may, among other things, order the payment of compensatory damages to the person aggrieved by a discriminatory practice is itself discriminatory in awarding damages only to a complainant and not to a landlord, and such procedure invalidates the provision for damages. *Weynberg v New York Com. on Human Rights, 56 Misc. 2d 1, 287 N.Y.S.2d 1002, 1968 N.Y. Misc. LEXIS 1720 (N.Y. Sup. Ct. 1968)*.

In an action to punish a landlord for contempt of court for wilful failure to obey the provisions of a court order enforcing an order of the Civil Rights Commission, it was held that an intervenor was relegated to a plenary action pursuant to *Executive Law § 297(9)* and that any award for compensatory or punitive damages would have to be made by the court having jurisdiction of that action. *State Com. for Human Rights v Kennelly, 59 Misc. 2d 278, 299 N.Y.S.2d 342, 1969 N.Y. Misc. LEXIS 1651 (N.Y. Sup. Ct. 1969)*.

Actress would be awarded $60,000 in compensatory damages where her employer utilized his employment relationship with her to coerce her into participating in sexual activity with his business associates to advance his own business interests, and compelled her to continue one such relationship, which he helped choreograph, for period of 18 months. *Thoreson v Penthouse Int'l, 149 Misc. 2d 150, 563 N.Y.S.2d 968, 1990 N.Y. Misc. LEXIS 609 (N.Y. Sup. Ct. 1990)*, modified, *179 A.D.2d 29, 583 N.Y.S.2d 213, 1992 N.Y. App. Div. LEXIS 5427 (N.Y. App. Div. 1st Dep't 1992)*.

Although Article 78 proceeding cannot preclude later federal court § 1983 suit for damages, because, since damages are largely unavailable in Article 78 proceedings, court in initial action did not have power to award full measure of relief sought in second action, this rationale would not appear to apply in case where initial forum did have power to grant compensatory damages, such as New York State Division of Human Rights in hearing discrimination complaint. *Kirkland v Peekskill, 651 F. Supp. 1225, 1987 U.S. Dist. LEXIS 227 (S.D.N.Y.)*, aff'd, *828 F.2d 104, 1987 U.S. App. LEXIS 12318 (2d Cir. N.Y. 1987)*.

In action under Human Rights law, finding that stress arising from employer’s age discrimination against employee aggravated or accelerated progression of employee’s Parkinson’s symptoms, was not clearly erroneous. *Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996)*.

In action under Human Rights law, record supported finding that stress arising from employer’s age discrimination exacerbated employee’s heart condition, where employee presented competent expert evidence of causal link between discrimination and onset of angina attacks. *Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996)*.

In action predicated on age discrimination in employment, jury’s award of $250,000 for pain and suffering would be reduced to $175,000 where (1) record established that employee suffered physically due to aggravation of his Parkinson’s disease and heart condition, but did not establish how rapidly his condition would have deteriorated absent employer’s conduct, and (2) employee failed to seek psychiatric help for his emotional distress. *Shea v Icelandair, 925 F. Supp. 1014, 1996 U.S. Dist. LEXIS 5530 (S.D.N.Y. 1996)*.

$200,000 compensatory damage award under Human Rights Law deviated materially from what would be reasonable compensation, and new trial would be held on issue of compensatory damages unless age discrimination plaintiff accepted remittitur of $170,000, thereby reducing award to $30,000, where there was no showing of duration or magnitude of plaintiff's emotional injuries, nor any evidence of medical or psychological treatment. *Tanzini v Marine Midland Bank, N.A., 978 F. Supp. 70, 1997 U.S. Dist. LEXIS 11793 (N.D.N.Y. 1997)*.

52. — —Mental anguish

The Commissioner of the State Human Rights Division reasonably concluded that an employer engaged in an unlawful discriminatory practice and compelled an employee to quit her job, where the evidence indicated that the employer had made blatantly obscene anti-Semitic remarks to her in the presence of other employees and had refused to apologize, notwithstanding the fact that the employer did not directly fire the employee and in fact had urged her to return to work. In exercising his broad powers to adopt measures reasonably deemed necessary to redress the injury to the employee, the commissioner properly directed that the employer apologize in writing, offer to reinstate the woman with back pay, together with $500 in damages for the shock, humiliation and outrage she experienced. *Imperial Diner, Inc. v State Human Rights Appeal Bd., 52 N.Y.2d 72, 436 N.Y.S.2d 231, 417 N.E.2d 525, 1980 N.Y. LEXIS 2830 (N.Y. 1980)*.

Executive Law § 297 gives individuals a choice. They can either elect to sue in court and recover in damages which they can establish, including mental anguish, or they can elect to seek administrative relief under the Human Rights Law. Whether they elect to seek this latter relief, complainants may obtain directives and orders which will benefit both themselves and others in their position but they limit their recovery for damages to actual out-of-pocket expenses. *State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970)*, aff'd, *29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971)*.

The Commissioner of State Division of Human Rights has no power to award either attorney's fees to complainants or monetary damages for mental anguish or pain and suffering. *State Div. of Human Rights v Luppino, 35 A.D.2d 107, 313 N.Y.S.2d 28, 1970 N.Y. App. Div. LEXIS 3948 (N.Y. App. Div. 2d Dep't 1970)*, aff'd, *29 N.Y.2d 558, 324 N.Y.S.2d 298, 272 N.E.2d 885, 1971 N.Y. LEXIS 1169 (N.Y. 1971)*.

In a proceeding pursuant to *Exec Law § 298* to review a determination that a prospective employee was refused consideration on the basis of his arrest record, the determination that awarded compensatory damages for mental anguish and humiliation was properly confirmed where the job in question was as a mechanic at a state correctional facility, and where the human rights commissioner's broad power to order affirmative action included the power to award such compensatory damages to the aggrieved employee. *State, Dep't of Correctional Services v New York State Div. of Human Rights, 88 A.D.2d 1061, 452 N.Y.S.2d 746, 1982 N.Y. App. Div. LEXIS 17482 (N.Y. App. Div. 3d Dep't 1982)*.

Compensatory damages are available under the Human Rights Law where a complainant has suffered mental anguish, humiliation, and emotional trauma as the direct result of a discriminatory act. *Totem Taxi, Inc. v New York State Human Rights Appeal Bd., 98 A.D.2d 923, 471 N.Y.S.2d 358, 1983 N.Y. App. Div. LEXIS 21244 (N.Y. App. Div. 3d Dep't 1983)*, rev'd, *65 N.Y.2d 300, 491 N.Y.S.2d 293, 480 N.E.2d 1075, 1985 N.Y. LEXIS 15079 (N.Y. 1985)*.

The Commissioner of New York State Division of Human Rights did not err in not to awarding compensatory damages for emotional distress and humiliation, suffered by a woman when her supervisor told her to "stop acting like a bitch," where, although damage awards could be appropriate, the Commissioner had broad powers to adopt measures which he reasonably deemed necessary to redress the injury, and had ordered the Department of Social Services, petitioner's employer, to take affirmative action in advising its personnel about and implementing the State's policy of nondiscrimination due to sex, and where the Commissioner found that the sexually discriminatory utterance had been prompted by petitioner's refusal to comply with her superior's directive. *Davey v Commissioner of New York State Dep't of Civil Service, 108 A.D.2d 1074, 485 N.Y.S.2d 641, 1985 N.Y. App. Div. LEXIS 43381 (N.Y. App. Div. 3d Dep't 1985)*.

In Human Rights Law proceeding brought by white female deputy sheriff who alleged sex and race discrimination, award of $30,000 compensatory damages for mental anguish was grossly excessive where deputy testified only that she was upset,

depressed, felt demeaned and insecure, and continued to experience nightmares, and there was no indication of length of time these consequences were suffered, frequency of nightmares, or whether she sought medical or psychological attention or took any medication; thus, award of damages for mental anguish would be reduced to $15,000. *State Div. of Human Rights ex rel. Cottongim v County of Onondaga Sheriff's Dep't, 127 A.D.2d 986, 513 N.Y.S.2d 68, 1987 N.Y. App. Div. LEXIS 43480 (N.Y. App. Div. 4th Dep't 1987)*, aff'd, *71 N.Y.2d 623, 528 N.Y.S.2d 802, 524 N.E.2d 123, 1988 N.Y. LEXIS 603 (N.Y. 1988)*.

College employee's testimony regarding persistent daily sexual harassment during her employment at college, and significant physical manifestations that resulted from her emotional distress, so affecting her that she was unable to attend college during following semester, was clearly sufficient to establish mental anguish and humiliation, but award of $150,000 in compensatory damages for mental anguish was excessive and would be reduced to $100,000. *SUNY College of Environmental Science & Forestry v State Div. of Human Rights, 144 A.D.2d 962, 534 N.Y.S.2d 270, 1988 N.Y. App. Div. LEXIS 14449 (N.Y. App. Div. 4th Dep't 1988)*.

Division of Human Rights properly ordered employer to reinstate employee who established "constant and blatant" racial discrimination against her and suffered mental anguish therefrom. *Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989)*.

Award of $15,000 to dentist for mental anguish suffered when sublessor terminated dentist's sublease on ground that dentist treated persons who were ill with AIDS was grossly excessive, and would be reduced to $5,000. *Barton v New York City Com. on Human Rights, 151 A.D.2d 258, 542 N.Y.S.2d 176, 1989 N.Y. App. Div. LEXIS 7353 (N.Y. App. Div. 1st Dep't 1989)*.

Commissioner of Human Rights is authorized to include, as compensatory damages for violation of Human Rights Law, award for mental anguish and humiliation suffered by complainant, which may be established by testimony of claimant alone. *Moore v State Div. of Human Rights, 154 A.D.2d 823, 546 N.Y.S.2d 487, 1989 N.Y. App. Div. LEXIS 12709 (N.Y. App. Div. 3d Dep't 1989)*.

Court would annul award of $10,000 for hurt, humiliation and mental anguish allegedly suffered when police department unlawfully discriminated against complainant by disqualifying him for position of police officer on basis of physical disability which did not prevent him from performing duties of that position in reasonable manner where, despite complainant's testimony that he was angry as result of his disqualification, there was no substantiation of his claim of hurt, humiliation and mental anguish, and especially since there was some basis for department's conclusion that complainant should be disqualified. *New York v State Div. of Human Rights, 154 A.D.2d 56, 551 N.Y.S.2d 514, 1990 N.Y. App. Div. LEXIS 1888 (N.Y. App. Div. 1st Dep't)*, app. denied, *76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888, 1990 N.Y. LEXIS 3001 (N.Y. 1990)*.

Employee who was denied promotion in retaliation for opposing discriminatory employer practices was properly awarded provisional appointment to desired position with back pay; however, award of $10,000 for mental anguish was not authorized under CLS *Exec § 297* in absence of proof that employee suffered any ill effects from discrimination. *New York State Office of Mental Retardation & Developmental Disabilities v New York State Div. of Human Rights, 164 A.D.2d 208, 563 N.Y.S.2d 286, 1990 N.Y. App. Div. LEXIS 13984 (N.Y. App. Div. 3d Dep't 1990)*.

In proceeding under Human Rights Law against nursing home that unlawfully discriminated against complainant by placing him in strict isolation because he tested HIV-seropositive, compensatory award of $150,000 was excessive, even though complainant presented evidence that he was lonely, depressed, agitated and generally tearful as result of his isolation, which endured for 9 ½ months, where there was no evidence as to severity or consequences of his condition, or that he sought medical treatment for it; in light of similar cases, award should not exceed $75,000. *Marcus Garvey Nursing Home v New York State Div. of Human Rights, 209 A.D.2d 619, 619 N.Y.S.2d 106, 1994 N.Y. App. Div. LEXIS 11465 (N.Y. App. Div. 2d Dep't 1994)*.

Award of $25,000 in compensatory damages for emotional distress and humiliation as result of unlawful racial discrimination was excessive where sole evidence of such damages was complainant's testimony that employer's unlawful conduct made him feel "victimized, ambushed and abandoned" and caused him to withdraw from relationships with his friends and family, that he was unable to pay court-ordered child support or to provide entertain-ment for his 3 children, and that he could not complete purchase of items he had ordered prior to his termination and forfeited $1,000 deposit on automobile; appropriate award in such

case was $15,000. *New York State Dep't of Correctional Servs. v State Div. of Human Rights, 215 A.D.2d 908, 626 N.Y.S.2d 588, 1995 N.Y. App. Div. LEXIS 5326 (N.Y. App. Div. 3d Dep't 1995)*.

In order to sustain award for mental anguish, there must be evidence that mental anguish was caused by discriminatory practice, and there must be some evidence of magnitude of injury. *Van Cleef Realty v New York State Div. of Human Rights, 216 A.D.2d 306, 627 N.Y.S.2d 744, 1995 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 2d Dep't 1995)*.

Damage award of $30,000 for mental anguish suffered by couple who experienced racial steering in rental of housing was excessive where couple was not subjected to prolonged discrimination, their contact with realtor was limited to one-time encounter, realtor's conduct did not affect their ability to find housing, they were not subjected to rude or egregious racial epithets, they adduced no evidence as to duration or magnitude of their mental anguish, and their testimony was limited to single assertion each of distress they felt; proper award would not exceed $5,000. *Van Cleef Realty v New York State Div. of Human Rights, 216 A.D.2d 306, 627 N.Y.S.2d 744, 1995 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 2d Dep't 1995)*.

Employee, who was wrongfully terminated due to his age, was entitled to award in amount of $10,000 for mental anguish based on his testimony that he was "frightened to death" not to have job at age 63, and that he suffered loss of sleep and appetite. *Laverack & Haines, Inc. v New York State Div. of Human Rights, 217 A.D.2d 955, 629 N.Y.S.2d 595, 1995 N.Y. App. Div. LEXIS 8381 (N.Y. App. Div. 4th Dep't 1995)*, rev'd, *88 N.Y.2d 734, 650 N.Y.S.2d 76, 673 N.E.2d 586, 1996 N.Y. LEXIS 3057 (N.Y. 1996)*.

Award of $25,000 to complainant who had been discriminated against on basis of her pregnancy was excessive where discriminatory conduct was limited to single encounter at which complainant's co-workers were not present, complainant was not subjected to rude or egregious treatment that might have aggravated her mental anguish, and complainant adduced no evidence of duration or magnitude of her mental anguish; matter would be remitted to Division of Human Rights for imposition of new award not to exceed $5,000. *A.S.A.P. Personnel Servs. v Rosa, 219 A.D.2d 648, 631 N.Y.S.2d 396, 1995 N.Y. App. Div. LEXIS 9285 (N.Y. App. Div. 2d Dep't 1995)*.

In order to sustain award of damages for mental anguish resulting from discrimination, there must be evidence that mental anguish was caused by discriminatory practice, and there must be some evidence of magnitude of injury. *A.S.A.P. Personnel Servs. v Rosa, 219 A.D.2d 648, 631 N.Y.S.2d 396, 1995 N.Y. App. Div. LEXIS 9285 (N.Y. App. Div. 2d Dep't 1995)*.

Award of $200,000 for mental anguish as result of sexual employment discrimination was excessive and should not have exceeded $5,000 where complainant's discussion of her mental anguish was brief, and there was no evidence as to duration of her condition, its severity or consequences, or evidence of treatment. *Port Wash. Police Dist. v State Div. of Human Rights, 221 A.D.2d 639, 634 N.Y.S.2d 195, 1995 N.Y. App. Div. LEXIS 12381 (N.Y. App. Div. 2d Dep't 1995)*, app. denied, *88 N.Y.2d 807, 647 N.Y.S.2d 165, 670 N.E.2d 449, 1996 N.Y. LEXIS 1624 (N.Y. 1996)*.

Compensatory damages for mental anguish in amount of $50,000 for loss of employment opportunity was excessive where respondent never sought medical treatment as result of petitioners' discriminating conduct in disqualifying him for position of firefighter on basis of physical disability; award of $10,000 was appropriate under circumstances. *City of Fulton v New York State Div. of Human Rights, 221 A.D.2d 971, 633 N.Y.S.2d 914, 1995 N.Y. App. Div. LEXIS 13462 (N.Y. App. Div. 4th Dep't 1995)*.

Evidence supported awards of $60,000 in compensatory damages to each of 3 complainants for mental anguish and humiliation arising from acts of sexual harassment committed by corporate employer's executive director, despite absence of psychiatric or other medical evidence, considering duration, severity, consequences and physical manifestations of mental anguish. *Father Belle Community Ctr. v New York State Div. of Human Rights, 221 A.D.2d 44, 642 N.Y.S.2d 739, 1996 N.Y. App. Div. LEXIS 5508 (N.Y. App. Div. 4th Dep't)*, reh'g denied, *647 N.Y.S.2d 652, 1996 N.Y. App. Div. LEXIS 10989 (N.Y. App. Div. 4th Dep't 1996)*, app. denied, *89 N.Y.2d 809, 655 N.Y.S.2d 889, 678 N.E.2d 502, 1997 N.Y. LEXIS 214 (N.Y. 1997)*.

Damage award of $50,000 for mental anguish arising from racial discrimination in employment was excessive and would be reduced to $5,000. *American Int'l Group v Rosa, 224 A.D.2d 179, 637 N.Y.S.2d 121, 1996 N.Y. App. Div. LEXIS 773 (N.Y. App. Div. 1st Dep't)*, app. denied, *87 N.Y.2d 807, 641 N.Y.S.2d 829, 664 N.E.2d 895, 1996 N.Y. LEXIS 167 (N.Y. 1996)*.

Award of $300,000 for mental anguish and compensatory damages was appropriate in light of petitioner's employees' constant, egregious, and blatant discriminatory conduct. *Tiffany & Co. v Smith, 224 A.D.2d 332, 638 N.Y.S.2d 454, 1996 N.Y. App. Div. LEXIS 1456 (N.Y. App. Div. 1st Dep't)*, app. denied, *88 N.Y.2d 806, 646 N.Y.S.2d 985, 670 N.E.2d 226, 1996 N.Y. LEXIS 1723 (N.Y. 1996)*.

Administrative Law Judge abused his discretion in refusing employer's request to have complainant examined by its psychiatrist where complainant had alleged serious psychiatric injuries as result of discrimination; any alleged difficulties complainant might experience with examination could be mitigated by imposition of reasonable conditions. *Carrier Corp. v New York State Div. of Human Rights, 224 A.D.2d 936, 637 N.Y.S.2d 877, 1996 N.Y. App. Div. LEXIS 1572 (N.Y. App. Div. 4th Dep't 1996)*.

It was not excessive to award $10,000 as compensatory damages for mental anguish due to unlawful discriminatory practice of terminating complainant from employment because of her gender and gender-specific disability (pregnancy). *Heidie Tuxedos & Formals v New York State Div. of Human Rights, 224 A.D.2d 1022, 638 N.Y.S.2d 376, 1996 N.Y. App. Div. LEXIS 1700 (N.Y. App. Div. 4th Dep't 1996)*.

Award of $25,000 against Manhattan and Bronx Surface Transit Operating Authority, representing compensatory damages for mental anguish and humiliation for employment discrimination based on petitioner's disability, was excessive where employee testified that, as result of discriminatory acts, he felt "very upset" and "very angry," and he was reluctant to wear his hearing aids during other interviews; such testimony only supported award of up to $7,500. *Manhattan & Bronx Surface Transit Operating Auth. v New York State Div. of Human Rights, 225 A.D.2d 553, 638 N.Y.S.2d 761, 1996 N.Y. App. Div. LEXIS 1938 (N.Y. App. Div. 2d Dep't 1996)*.

African-American correctional officer established entitlement to award for mental anguish and humiliation for racial discrimination suffered at hands of his supervisor over 2-year period where supervisor had negative attitude toward minorities, he consistently exhibited such attitude to his subordinates in work place, he repeatedly verbally harassed and humiliated officer in front of other officers, civilian bus drivers and prisoners, he pressured him to violate regulations, and he ordered officer to sit with prisoners during transportation assignments for periods of 12 to 15 hours in defiance of regulations requiring officer rotation every 30 minutes; however, award of $100,000 was excessive and would be reduced to $35,000 given lack of proof of severity, consequences and duration of effects which supervisor's negative conduct had on officer. *New York State Dep't of Correctional Servs. v New York State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827, 1996 N.Y. App. Div. LEXIS 2063 (N.Y. App. Div. 3d Dep't 1996)*.

Award of $150,000 for mental anguish and humiliation as result of unlawful age discrimination was excessive and would be reduced to $100,000. *Boutique Indus. v New York State Div. of Human Rights, 228 A.D.2d 171, 643 N.Y.S.2d 986, 1996 N.Y. App. Div. LEXIS 6283 (N.Y. App. Div. 1st Dep't 1996)*.

Complainant's testimony as to her feelings of embarrassment, humiliation and inadequacy, together with her testimony as to adverse physical effects of weight loss and inability to find comparable employment for almost 2 years as result of hostile work environment and discriminatory discharge, supported claim for mental anguish. *Bronx County Medical Group, P.C. v Lassen, 233 A.D.2d 234, 650 N.Y.S.2d 113, 1996 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 1st Dep't 1996)*, app. denied, *89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617, 1997 N.Y. LEXIS 474 (N.Y. 1997)*.

Award of $250,000 for mental anguish as result of hostile work environment and discriminatory discharge was excessive and would be reduced to $25,000. *Bronx County Medical Group, P.C. v Lassen, 233 A.D.2d 234, 650 N.Y.S.2d 113, 1996 N.Y. App. Div. LEXIS 11988 (N.Y. App. Div. 1st Dep't 1996)*, app. denied, *89 N.Y.2d 813, 658 N.Y.S.2d 243, 680 N.E.2d 617, 1997 N.Y. LEXIS 474 (N.Y. 1997)*.

Award of $75,000 would be reduced to $15,000 in proceeding against Department of Correctional Services for unlawful discriminatory practice based on race where claimant's testimony did not detail much in way of severity, consequence or duration of his mental anguish, and he admitted that his anxiety and stress were intermittent only. *New York State Dep't of Correctional Servs. v State Div. of Human Rights, 241 A.D.2d 811, 661 N.Y.S.2d 85, 1997 N.Y. App. Div. LEXIS 7816 (N.Y. App. Div. 3d Dep't 1997)*, app. denied, *92 N.Y.2d 807, 678 N.Y.S.2d 593, 700 N.E.2d 1229, 1998 N.Y. LEXIS 2800 (N.Y. 1998)*.

In discrimination cases, awards for emotional distress are not dependent on psychiatric or other medical evidence. *Young Fu Hsu v New York State Div. of Human Rights, 241 A.D.2d 913, 661 N.Y.S.2d 400, 1997 N.Y. App. Div. LEXIS 7842 (N.Y. App. Div. 4th Dep't 1997)*.

Award of $20,000 for mental anguish was excessive where complainant testified that, as a result of petitioner's racially discriminatory conduct in handling her employment application, she "felt hurt" and was generally irritable, remained in bed, and suffered from headaches and stomach distress for which she took Tylenol and Alka Seltzer, she testified that her fear of rejection made her postpone job-seeking activities for 2 months, and she did not seek medical treatment; award of $10,000 was appropriate. *Buffalo Ath. Club v New York State Div. of Human Rights, 249 A.D.2d 986, 672 N.Y.S.2d 210, 1998 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 4th Dep't 1998)*.

$20,000 in compensatory damages for mental anguish, awarded to respondent who was wrongfully disqualified from civil service eligibility list in violation of Human Rights Law, was unsupported by evidence and would be reduced to $10,000 where respondent stated only that he was "hurt," "angry," and "emotional" at being denied employment he believed would offer job security for him and his family. *City of New York v New York State Div. of Human Rights, 250 A.D.2d 273, 682 N.Y.S.2d 387, 1998 N.Y. App. Div. LEXIS 13953 (N.Y. App. Div. 1st Dep't 1998)*, modified, *93 N.Y.2d 768, 698 N.Y.S.2d 594, 720 N.E.2d 870, 1999 N.Y. LEXIS 3434 (N.Y. 1999)*.

In action against Niagara Frontier Transportation Authority for unlawful racial discrimination in failing to hire complainant for 2 positions for which she applied, award of damages for mental anguish and humiliation would be vacated, and case would be remitted for recalculation of such damages, where she proved discrimination as to only one position, and record did not specify any relation between award and any particular position. *Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000)*.

In action against Niagara Frontier Transportation Authority for unlawful racial discrimination in failing to hire complainant for 2 positions for which she applied, case would be remitted for recalculation of back pay award where she proved discrimination as to only one position, and thus back pay had to calculated using date and salary for that position rather than other position. *Niagara Frontier Transp. Auth. v New York State Div. of Human Rights, 275 A.D.2d 922, 713 N.Y.S.2d 631, 2000 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 4th Dep't 2000)*.

Claimant's testimony as to severity and duration of her mental anguish, even unsubstantiated by medical or other objective evidence, supported award of $50,000 for emotional distress, where employer's acts of unlawful discrimination included sexual harassment by claimant's immediate supervisor over 4-month period, failure to act on her formal complaints to her superiors, including employer's equal opportunity office, and retaliation for such complaints by disciplining her twice and ultimately terminating her. *City of New York v N.Y. State Div. of Human Rights, 283 A.D.2d 215, 728 N.Y.S.2d 367, 2001 N.Y. App. Div. LEXIS 4809 (N.Y. App. Div. 1st Dep't 2001)*.

Sexual harassment damage award of $50,000 for mental anguish and humiliation was excessive where there was no proof of severity and consequences of complainant's condition; thus, award of $20,000 was appropriate. *State v N.Y. State Div. of Human Rights, 284 A.D.2d 882, 727 N.Y.S.2d 499, 2001 N.Y. App. Div. LEXIS 6888 (N.Y. App. Div. 3d Dep't 2001)*.

Award of $15,000 for mental anguish and humiliation for employment discrimination was excessive because the employee sought no medical treatment and her testimony in support of that award was sparse; an award of $5,000 was the maximum award supported by the evidence. *Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't)*, app. denied, *13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009)*.

There was no basis upon which to disturb the compensatory damages award the State Division of Human Rights assessed because a couple was discriminated against based on their sexual orientation, and the record reflected the hurt, humiliation and mental anguish that they suffered as a result of farm owners' conduct; the awards were well in accord with those sustained in similar cases. *Matter of Gifford v Mccarthy, 137 A.D.3d 30, 23 N.Y.S.3d 422, 2016 N.Y. App. Div. LEXIS 238 (N.Y. App. Div. 3d Dep't 2016)*.

Where a complainant was subjected to a hostile work environment due to sexual harassment, although the administrative law judge's award to her of damages for mental anguish and humiliation was reasonably related to the wrongdoing, the amount of the award was inappropriate when compared to other awards for similar injuries; accordingly, the court reduced the award from $ 65,000 to $ 25,000. *Matter of Amg Managing Partners, LLC v New York State Div. of Human Rights, 148 A.D.3d 1765, 51 N.Y.S.3d 764, 2017 N.Y. App. Div. LEXIS 2515 (N.Y. App. Div. 4th Dep't 2017)*.

Jury award of $18,000 for emotional distress suffered by worker who was fired due to his age was extremely modest, and thus was neither conscience-shocking nor substantially deviant from reasonable compensation, where worker testified that losing his job was “like a divorce, your wife died or state of shock.” *Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.)*, cert. denied, *506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992)*.

In action by employee who was discharged in retaliation for his complaints of race discrimination, award of $219,428 in compensatory damages for pain, suffering and humiliation was excessive where sole evidence as to magnitude and duration of employee’s emotional injury or mental distress was his own testimony that he felt “humiliated,” “angry,” “shocked,” “like dirt,” and “terrible” during certain incidents at work, that he stayed home sick from work for several days and saw doctor once due to ailments related to nervous tension, and that he was “devastated” when he was discharged; new trial would be ordered unless employee agreed to reduced award of $20,000. *McIntosh v Irving Trust Co., 887 F. Supp. 662, 1995 U.S. Dist. LEXIS 7700 (S.D.N.Y. 1995)*.

Terminated advertising salesman’s claim for emotional distress in ad damnum clause of complaint is not time-barred, where he is not making separate claim for intentional infliction of emotional distress, because salesman, asserting age discrimination, is making proper and timely request for emotional distress damages as aspect of request for compensatory damages authorized under *Exec § 297*. *Gagliardi v Universal Outdoor Holdings, Inc., 137 F. Supp. 2d 374, 2001 U.S. Dist. LEXIS 3936 (S.D.N.Y. 2001)*.

It was appropriate to award complainant $500 for mental anguish she suffered as a result of unlawful discriminatory demotion based on national origin. 2000 Order Comm HR No. 9D-E-O-89-136156E.

53. — —Loss of consortium

In action for discriminatory termination of employment, damages for loss of consortium were not recoverable since alleged wrongful conduct preceded marriage of employee, notwithstanding fact that actual effective date of discharge was subsequent to marriage, since underlying allegations were based in part on notification of discharge one day before wedding. *Mehtani v New York Life Ins. Co., 145 A.D.2d 90, 537 N.Y.S.2d 800, 1989 N.Y. App. Div. LEXIS 1552 (N.Y. App. Div. 1st Dep't)*, app. denied, app. dismissed, *74 N.Y.2d 835, 546 N.Y.S.2d 341, 545 N.E.2d 631, 1989 N.Y. LEXIS 2897 (N.Y. 1989)*, app. denied, *85 N.Y.2d 806, 627 N.Y.S.2d 323, 650 N.E.2d 1325, 1995 N.Y. LEXIS 1227 (N.Y. 1995)*.

54. —Punitive damages

Person aggrieved by discriminatory practice in violation of Human Rights Law may not recover punitive damages in court action brought under CLS *Exec § 297(9)* since such relief is expressly excluded in proceeding before Division of Human Rights and, should such damages be permitted, aggrieved person would be encouraged to avoid administrative channel before division and bring their complaints in court proceedings. *Thoreson v Penthouse Int'l, 80 N.Y.2d 490, 591 N.Y.S.2d 978, 606 N.E.2d 1369, 1992 N.Y. LEXIS 4231 (N.Y. 1992)*.

Where sole evidence of mental anguish was complainant’s own testimony that she was “[e]motionally and physically screwed up”, award of $35,000 for mental anguish is grossly excessive and new award should not exceed $5,000–award of back pay from complainant’s discharge in February 1985 until her reinstatement by petitioner constitutes punitive assessment against petitioner rather than compensation; complainant obtained new employment at same pay in July 1985; Division of Human Rights may not award what would amount to punitive damages solely on finding that unlawful discrimination occurred; award of back pay must be reduced to cover only period that complainant was out of work as result of her unlawful discharge;

however, Division did not abuse its discretion in ordering petitioner to reinstate complainant–three-year period between filing of complaint and issuance of Division's determination did not operate to divest Division of jurisdiction; absent showing of substantial prejudice, time limitations enunciated in *Executive Law § 297* are directory and not mandatory. *Cosmos Forms, Ltd. v State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50, 1989 N.Y. App. Div. LEXIS 6521 (N.Y. App. Div. 2d Dep't 1989)*.

It was proper to award $2,500 in punitive damages each to complainant and to realtor who represented her, who was also black, for petitioner's unlawful discriminatory practice of refusing to sell piece of real property to complainant because of her race; however, it was error to make same award to second black realtor where her testimony showed only that she was complainant's realtor's employer, and that he recounted to her his dealings with petitioner. *Feggoudakis v New York State Div. of Human Rights, 230 A.D.2d 739, 646 N.Y.S.2d 175, 1996 N.Y. App. Div. LEXIS 8219 (N.Y. App. Div. 2d Dep't 1996)*.

Retroactive application of 1991 amendment to CLS *Exec § 297(4)(c)(iv)* was appropriate with respect to punitive damages awarded in case filed in January 1991, although amendment was enacted in July 1991 and declared to be effective "immediately," since remedial statutes constitute exception to general rule against retroactive application. *New York State Div. of Human Rights v Gruzdaitis, 265 A.D.2d 904, 696 N.Y.S.2d 330, 1999 N.Y. App. Div. LEXIS 10026 (N.Y. App. Div. 4th Dep't 1999)*.

While the cooperative owners failed to state claims for breach of a tenant corporation's fiduciary duties or against its directors individually, they stated causes of action for housing discrimination under *N.Y. Exec. Law § 296(5)(a)(2)* and *42* U.S.C.S. § 3601 et seq., and for punitive damages, which were limited to $10,000 by *N.Y. Exec. Law § 297(4)(c)(iv)*, (9). *Stalker v Stewart Tenants Corp., 93 A.D.3d 550, 940 N.Y.S.2d 600, 2012 N.Y. App. Div. LEXIS 2110 (N.Y. App. Div. 1st Dep't 2012)*.

This section which provides that the Commission may, among other things, order the payment of compensatory damages to the person aggrieved by a discriminatory practice is itself discriminatory in awarding damages only to a complainant and not to a landlord, and such procedure invalidates the provision for damages. *Weynberg v New York Com. on Human Rights, 56 Misc. 2d 1, 287 N.Y.S.2d 1002, 1968 N.Y. Misc. LEXIS 1720 (N.Y. Sup. Ct. 1968)*.

Punitive damages, although not available in proceedings brought before the Human Rights Commission for a violation of the Human Rights Law, are available under appropriate circumstances to litigants who opt for a judicial forum rather than an administrative one since the Human Rights Law, by providing that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages and such other remedies as may be appropriate" (*Executive Law § 297 [9]*), does not limit "damages" to compensatory "damages" only. In addition, although punitive damages may not be alleged as a separate cause of action, plaintiffs, two physicians who were denied the opportunity to purchase a cooperative apartment allegedly because defendant sponsor refused to take the necessary steps to facilitate the changeover of the apartment from a residence to a medical office when it learned that plaintiffs would be treating patients with Acquired Immune Deficiency Syndrome, sufficiently alleged punitive damages for defendant's alleged willful and malicious conduct in violation of the Human Rights Law. *Seitzman v Hudson River Assoc., 143 Misc. 2d 1068, 542 N.Y.S.2d 104, 1989 N.Y. Misc. LEXIS 323 (N.Y. Sup. Ct. 1989)*.

Punitive damages are not recoverable for violation of Human Rights Law since law was designed to provide private right of action, legislature failed in attempt to pass legislation which would explicitly provide for such damages, and such damages are not available under equivalent federal statutes. *Tyler v Bethlehem Steel Corp., 958 F.2d 1176, 1992 U.S. App. LEXIS 4161 (2d Cir. N.Y.)*, cert. denied, *506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46, 1992 U.S. LEXIS 5704 (U.S. 1992)*.

Action for employment discrimination in violation of Human Rights Law, except for claim for punitive damages, survives employee's death. *Estwick v U.S.Air Shuttle, 950 F. Supp. 493, 1996 U.S. Dist. LEXIS 20104 (E.D.N.Y. 1996)*.

Under *Exec § 297*, punitive damages are not recoverable against municipality for human rights violations. *Dean v Westchester County DA's Office, 119 F. Supp. 2d 424, 2000 U.S. Dist. LEXIS 16746 (S.D.N.Y. 2000)*.

Where a jury found that an employer discriminated and retaliated against an employee on the basis of gender in violation of Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e*, the New York State Human Rights Law, *N.Y. Exec.*

Law §§ 296-*301*, and *New York City, N.Y., Admin. Code §§ 8-107*-8-131, a comparison of the punitive damage awards in comparable cases indicated that reducing the jury's $2,500,000 punitive damages award to $600,000 was appropriate because (1) *42 U.S.C.S. § 1981a(b)(3)(d)* limited the maximum damages award in a Title VII case to $300,000, (2) *N.Y. Exec. Law § 297(9)* prohibited the imposition of punitive damages in an employment discrimination case, (3) punitive damages under *New York City, N.Y., Admin. Code § 8-502(a)* had a remedial purpose, and (4) the employee was awarded approximately $1.5 million in compensatory damages. *Zakre v Norddeutsche Landesbank Girozentrale, 541 F. Supp. 2d 555, 2008 U.S. Dist. LEXIS 9460 (S.D.N.Y. 2008)*, aff'd, *344 Fed. Appx. 628, 2009 U.S. App. LEXIS 12188 (2d Cir. N.Y. 2009)*.

55. —Post-judgment interest

Complainant, who was awarded payment of back pay by Commissioner of Human Rights after finding that complainant had been discriminated against because of his race, was entitled to 6% interest on such award after payroll deductions from date of Commissioner's order rather than date compensation accrued where State Division of Human Rights, and not employer, was responsible for four-year delay from date compensation accrued. *State Div. of Human Rights ex rel. Falleder v Massive Economic Neighborhood Development, Inc., 47 A.D.2d 187, 366 N.Y.S.2d 23, 1975 N.Y. App. Div. LEXIS 9136 (N.Y. App. Div. 1st Dep't 1975)*.

So that petitioner not be rewarded for its deliberate default by retaining use of ultimate damage award from date of order by State Division of Human Rights (SDHR) rendered on petitioner's default until SDHR issued new order after hearing on damages, final damage award would bear interest from date of SDHR's original order entered on default. *Interboro Management Co. v State Div. of Human Rights, 139 A.D.2d 697, 527 N.Y.S.2d 453, 1988 N.Y. App. Div. LEXIS 4415 (N.Y. App. Div. 2d Dep't 1988)*.

Commissioner erred in requiring an employer to pay predetermination interest in employment discrimination claim relating to that portion of the "unreasonable delay" in determining the complaint that was attributable solely to the New York State Division of Human Rights. *Matter of Rite Aid of N.Y., Inc. v New York State Div. of Human Rights, 60 A.D.3d 1428, 875 N.Y.S.2d 708, 2009 N.Y. App. Div. LEXIS 2020 (N.Y. App. Div. 4th Dep't)*, app. denied, *13 N.Y.3d 702, 886 N.Y.S.2d 94, 914 N.E.2d 1012, 2009 N.Y. LEXIS 3443 (N.Y. 2009)*.

Notes to Unpublished Decisions

I. Remedies

1. Election of remedies

2. —Election between administrative and judicial remedies

Unpublished decision: District court properly dismissed an employee's discrimination claims where he previously filed a complaint with the New York City Commission on Human Rights asserting identical claims, the Commission had dismissed

the claims for lack of probable cause, and thus the claims were precluded by the election of remedies doctrine. *DuBois v Macy's Retail Holdings, Inc., 533 Fed. Appx. 40, 2013 U.S. App. LEXIS 20301 (2d Cir. N.Y. 2013)*.

Unpublished decision: Bus driver's discrimination claim was properly dismissed because driver had already pursued that claim with New York State Division of Human Rights, which dismissed claim for lack of probable cause. *Carris v First Student, Inc., 682 Fed. Appx. 30, 2017 U.S. App. LEXIS 4056 (2d Cir. N.Y. 2017)*.

II. Other Procedural Matters

3. Summary Judgment

Unpublished decision: Terminated employee's race discrimination and retaliation claims failed because the employee did not show a genuine dispute of fact regarding alleged discrimination in the employer's overtime distribution since the differences in overtime hours were minimal and were easily explained by the higher rate at which African-American employees declined overtime opportunities, and the employee did not present sufficient evidence to create a genuine dispute of fact regarding whether the employee's purportedly "similarly situated" comparators were, in fact, similarly situated. *Finn v N.Y. State Office of Mental Health-Rockland Psychiatric Ctr., 489 Fed. Appx. 513, 2012 U.S. App. LEXIS 25168 (2d Cir. N.Y. 2012)*.

Opinion Notes

Agency Opinions

I. Generally

1. In general

The Arab Boycott Law applies to banking transactions. *1976 N.Y. Op. Att'y Gen. No. 69, 1976 N.Y. AG LEXIS 37*.

2. Preemption of local laws by state laws

Legislation prohibiting discrimination in housing practices has not been pre-empted by the State. Local laws may be enacted provided they do not make illegal that which the State allows. The validity of the local laws is not affected by the fact that greater penalties are thereby imposed. 1968 NY Ops Atty Gen Aug 1.

Local legislation prohibiting discrimination in housing, employment and places of public accommodation on the basis of sexual preference has not been pre-empted by the State. 1978 NY Ops Atty Gen March 6 (Informal).

3. "Employer"

The State is an employer subject to the Human Rights Law. The Commissioner of Human Rights may award compensatory damages in cases of discrimination by the State as employer. A person awarded damages does not have to sue in the Court of Claims in order to enforce the award. 1980 NY Ops Atty Gen Feb 28 (formal).

II. Review and Enforcement

4. Validity of administrative orders

5. —Orders re licenses

State Liquor Authority may not ask applicants for a license whether or not they have ever been arrested but may ask only about pending arrests or arrests which have not been followed by a termination in favor of the applicant. *1977 N.Y. Op. Att'y Gen. No. 26, 1977 N.Y. AG LEXIS 117*.

The Board of Commissioners of Pilots may decline to renew the license of a Long Island Sound-Block Island Sound pilot, who had not reached his sixtieth birthday on January 1, 1972, solely on the ground that he has now reached the age of sixty-five. *1980 N.Y. Op. Att'y Gen. No. 55, 1980 N.Y. AG LEXIS 53*.

Research References & Practice Aids

Cross References:

This section referred to in §§ 296, 296-a, 298, 298-a.

Form of complaint in action for racial discrimination in publicly assisted housing, see CLS Civ R § 18-c.

Undertaking by the state, municipal corporation or public officer, CLS *CPLR 2512*.

Codes, Rules and Regulations:

Rules of Practice, Division of Human Rights. *9 NYCRR §§ 465.1*–465.20 (CLS Exec Appx, Human R Rules §§ 465.1–465.20).

General Regulations, Division of Human Rights. *9 NYCRR §§ 466.1*–466.10 (CLS Exec Appx, Human R Rules §§ 466.1–466.10).

Public access to records. *9 NYCRR § 466.7*.

Election of arbitration. 9 NYCRR §§ 467.1 et seq.

Jurisprudences:

1 NY Jur 2d Actions § 18.

18 NY Jur 2d Civil Rights § 42.

18A NY Jur 2d Civil Rights §§ 140, 142–144, 147–149, 156, 158, 161–163, 165–170, 172–174, 176–179, 181, 182, 184–187, 189, 192–197, 203, 204, 214, 216.

67A NY Jur 2d Injunctions §§ 53, 57.

84 NY Jur 2d Pleading § 111.

7 Medina's Bostwick Practice Manual (Matthew Bender), Forms HR 101 et seq. (actions and proceedings relating to the Human Rights Law).

15 Am Jur 2d, Civil Rights § 261.

5A Am Jur Pl & Pr Forms, Civil Rights, Forms 1, 21–52, 71–117, 141, 152.

2 Am Jur Proof of Facts 2d 187, Racial Discrimination in Employment (In general; Use of Statistics).

2 Am Jur Proof of Facts 2d 237, Racial Discrimination in Employment—Testing and Educational Requirements.

3 Am Jur Proof of Facts 2d 221, Racial Discrimination in Employment–Recruiting and Hiring.

22 Am Jur Proof of Facts 650, Dismissal of Teachers for Cause.

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts.

28 Am Jur Trials 1, Housing Discrimination Litigation.

Law Reviews:

Preclusive effect of state judgments on subsequent 1983 actions. 78 Colum. L. Rev. 610.

Hermann, Financing public interest litigation in state court: a proposal for legislative action. 63 Cornell L. Rev. 173.

Res judicata held inapplicable to section 1983 action where issues of procedural due process were not raised in prior state litigation. 43 Fordham L. Rev. 459.

Waiver of sovereign immunity by a state does not give a federal cause of action for damages under sections 1983 and 1988 of the civil rights act. 2 Fordham Urb. L.J. 109.

Benetar, One man-one veto. (practice at Joint Task Force on Practices and Procedures of N.Y. State Division of Human Rights). 53 NYSB J 497.

Annotations:

Right to assistance by counsel in administrative proceedings. 33 ALR3d 229.

Hearsay evidence in proceedings before state administrative agencies. 36 ALR3d 12.

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

Recovery of damages for emotional distress resulting from racial, ethnic, or religious abuse or discrimination. 40 ALR3d 1290.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status. 61 ALR3d 944.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 ALR3d 351.

Requiring apology as“affirmative action”or other form of redress under state civil rights act. 85 ALR3d 402.

Sufficiency of state remedy under *42 USCS § 2000e-5(c)* to require 60-day deferral by Equal Employment Opportunity Commission to allow state time to act. 45 ALR Fed 347.

Disclosure of information by Equal Employment Opportunity Commission or other agency as affected by *42 USCS § 2000e-8(e)*, making it unlawful for officer or employee of Commission to make public information obtained by Commission prior to institution of proceeding involving such information. 47 ALR Fed 471.

Time limitations of § 706 of Civil Rights Act of 1964, as amended (*42 USCS § 2000e-5(f)(1)*) for bringing civil action by person aggrieved as subject to tolling because of equitable considerations. 54 ALR Fed 335.

When will Federal Government employee be excused from 30-day limitation period, established by Equal Employment Opportunity Commission regulation (29 CFR § 1613.214(a)(1)(i)), for bringing matters relating to employment discrimination to attention of Equal Employment Opportunity Counselor. 57 ALR Fed 116.

Effect on employment discrimination action of failure of Equal Employment Opportunity Commission to timely serve defendant with notice of charges as required by § 706(b) and (e) of Civil Rights Act of 1964 (*42 USCS § 2000e-5(b)* and (e)). 57 ALR Fed 565.

What constitutes impairment of proposed intervenor’s interest to support intervention as matter of right under *Rule 24(a)(2) of Federal Rules of Civil Procedure* in employment discrimination actions. 74 ALR Fed 895.

Texts:

Liddle & Marino, Labor and Employment in New York (Michie) pp 13-54.

New York Employee Discrimination Handbook (1998 ed, Matthew Bender).

Hierarchy Notes:

NY CLS Exec, Art. 15

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