

## STATE OF MAINE

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## Inter-Departmental Memorandum

Date January 27, 1992

To Commissioners Dept. Maine Human Rights Commission  
 From John E. Carnes, Commission Counsel Dept. " " " "  
 Subject Standards of Review Applied To Cases Brought Before The Commissioners

During the January Commission Meeting it was suggested that it might be good for us to review the various factors which Commissioners ought to consider when arriving at determinations relating to cases brought before them. I am happy to provide the following for your consideration and discussion.

There are two basic decisions Commissioners make relating to individual cases. The first is whether or not there are "reasonable grounds" to believe that unlawful discrimination has occurred. The second decision is whether, having found reasonable grounds, a particular case ought to be litigated in the courts by the Maine Human Rights Commission.

#### I. Reasonable Grounds Determinations

The standard I use when I review draft Investigator's Reports and the standard used by the federal Equal Employment Opportunity Commission ("EEOC") is labeled "Litigation Worthy." Is there enough admissible evidence (or is there reason to believe that formal litigation discovery will likely find enough admissible evidence) so that there is at least an even chance that plaintiff will be able to prove in court "by a preponderance of the evidence" that the discrimination occurred? The reason for the adoption of this standard with its reference to "admissible" evidence is that it does not advance the cause of civil rights to bring to court weak cases in which the alleged violator is likely to prevail. The "litigation worthy" standard refers to "admissible" evidence even though the Commission's consideration of information is not limited by the court's Rules of Evidence. Applying this standard means, for example, that while the Commissioners can consider hearsay evidence, they should give it little if any weight since the Superior Court will not be able to consider it at all unless the item of information falls under one of the exceptions to the Hearsay Rule. This does not mean, however, that the Commissioners cannot look at a piece of inadmissible evidence and decide that further investigation by counsel during litigation will likely lead to admissible evidence.

II. Will the Maine Human Rights Commission File  
A Lawsuit?

If the Commissioners find "reasonable grounds" in a case and conciliation efforts fail, and if the Complainant has not obtained private legal representation, the case returns to the Commissioners for review for possible litigation in the name of the Commission for the use of the Complainant. Below are ten (10) factors/questions which I believe may be considered prior to making a litigation decision. I have given them my own ranking of importance. Your ranking may be different and you may think of additional considerations.

1. Has additional information been gathered by the Compliance Officer or Counsel since the reasonable grounds finding?
2. How many lawsuits can the Commission's litigation resources carry at the time in question? Is there a "slot" open? If not, when will one become available?
3. What was the degree of harm to the Complainant? Was there gross sexual harassment and loss of a job? Or was Complainant "merely" laid off several hours before all other employees were laid off?
4. How strong is the case in terms of admissible evidence? Presumably it is "litigation worthy" because of application of the standard described in Part I, above. But is the chance of prevailing in court 50/50, or 80/20, or 100%.
5. What is the legal issue? Will resolution by the court help many people or just the individual Complainant? Is it a new legal issue which the Commission needs to have clarified by court decision in order to provide guidance in future cases, or is it a common issue which has been litigated many times before? How many cases involving this issue does the Commission already have in court at the time?
6. What monetary damages have been lost? \$70,000? \$70?
7. Has the Complainant turned down an offer which the Commission believes was reasonable?
8. How difficult is the litigation? How long will it take to complete? Will it likely be appealed to the Supreme Court? If so, add two years. How complex are the legal issues? The more complex they are, the more hours will be required for research and brief writing. How expensive will

litigation be? Is it a difficult physical disability case in which expert witnesses may cost the Commission \$2,000 - \$10,000 for that one case alone? Will that expense have any impact on the Commission's ability to file suits for other Complainants?

9. How many other Complainants are waiting for a litigation decision by the Commissioners? When do the statutes of limitations run in those cases? Are any of those cases particularly compelling?
10. What financial resources are available to the Complainant? I believe this question is relevant only when the Commission is faced with two cases of equal merit but has the resources to litigate *only* one. If one Complainant can afford private representation but prefers to avoid the expense, while the other is without funds, which case should the Commission champion, all other factors being equal?

I would be pleased to discuss this subject at your convenience.

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