

# **Annual Report 2010-2011**

## **Message from the New York State Division of Human Rights**

The New York State Division of Human Rights (“NYSDHR”) is pleased to present to the Governor, the Legislature and the public our 2010-2011 Annual Report.

During the last fiscal year the NYSDHR worked diligently to advance the civil rights of all New Yorkers. To that end, our law was amended to offer domestic workers protection from sexual harassment, as well as harassment on the basis of gender, race, religion, or national origin. Working in partnership with the New York State Department of Labor and the advocacy community we believe this new amendment will foster a safe and respectful working environment for a segment of the labor force which plays a crucial role in our society but is often overlooked.

New York State has long been a leader in the fight to end discrimination. Under Governor Andrew M. Cuomo we will continue to fulfill our legislative mandate through effective enforcement of the Human Rights Law. The NYSDHR will continue to develop policies and legislation that further our mission and educate all members of the public about their rights. Further, we will work with communities afflicted by hate crimes so that opposition to bigotry and hate is forcefully expressed.

Finally, our state is in the midst of the worst economic crisis in decades. This means graduates face grim employment prospects, older workers are putting off retirement, and those who are employed or seeking employment may find themselves in increasingly hostile environments. Our agency will work even more aggressively to ensure every New Yorker participates fully in the economic, cultural and intellectual life of our state, as outlined in our great law.

We are honored to lead this effort and to serve the people of the Empire State.

## Agency Overview

In 1945 the New York State Legislature passed the first state civil rights law in the nation, prohibiting employment discrimination on the basis of race/color, creed, or national origin. With the law, also came the founding of a new state agency called the State Commission against Discrimination, created to deal with individual complaints, investigate patterns of discrimination, and conduct education and outreach among constituents.

In subsequent years, the law was amended to extend protections and prohibit discrimination in additional areas. The first amendment to the law came in 1952 to prohibit discrimination in places of public accommodation. Subsequent amendments came in 1955 and 1956 to prohibit discrimination in housing. The State Commission against Discrimination was renamed the State Commission for Human Rights in 1962, and in 1968 the Commission was re-organized under a single commissioner and its current designation: New York State Division of Human Rights. The 1968 statute also established the system for trying discrimination complaints before hearing examiners, which still exists today.

In the late sixties and early seventies, a number of amendments prohibited sex discrimination in employment, housing, and public accommodation and discrimination in credit was prohibited in 1974. From 1974-1980 various amendments to the law extended protection against discrimination on the basis of physical disability, making protections provided under New York State Law more comprehensive than federal law. And, in 1996, New York became the first state to ban discrimination against persons with a predisposing genetic characteristic determined as a result of genetic testing.

Sexual orientation and military status were added as protected classes in all areas of jurisdiction in 2003. In 2009 the Human Rights Law was amended to provide protection from employment discrimination for victims of domestic violence. Protection from harassment for Domestic Workers was added in 2010. Today, our law remains one of the broadest and most expansive in the country.

The following are notable agency highlights for FY 2010-2011:

- **Stimulus/State Contracts Civil Rights Compliance**: The Division and CIO/OFT completed the initial design of a data collection and reporting instrument for a state-wide system for compliance information about workers on stimulus projects (which were the result of the American Recovery and Reinvestment Act of 2009) and other state contracts as part of the Division's participation on the Stimulus Oversight Panel and working group with New York State's: Inspector General, Office of Medicaid Inspector General and Metropolitan Transportation Authority Inspector General. The template was designed to be used by contractors, subcontractors and state agencies distributing and receiving stimulus funds. This tool will report, for specific projects and contracts, information about employees in classes protected from discrimination and prevailing wages paid to these workers. The reporting process, which mirrors information government contractors must keep and make available for other

purposes, has been designed for minimal difficulty or burden on operations. Developing this program as efficiently as possible, this work is all being done inhouse by the agencies without additional expenditures.

Data reported for all ARRA or other state contracts that result in employment can be aggregated electronically for projects and contracts and used by both the funding agency and the Division to monitor compliance with the civil rights laws that apply both to stimulus projects and to state contracts generally. This will be done not only by comparing employment of workers in protected classes with goals applicable under specific funding grants, but also by comparing workforce information to availability in the geographic area or other appropriate labor pools. Variances identified by these comparisons will be investigated for possible discrimination or non-compliance with civil rights laws. The Division designed this system originally for stimulus-funded projects and contracts, but also so that it can be used by all state agencies that contract or fund projects resulting in employment. Additionally, it will permit agencies to map data about contracts, grants and employment to help them determine whether communities are receiving the benefits of public expenditures on a non-discriminatory basis. By the end of FY 2010-2011 the program was tested using data being provided to CIO/OFT from DOT Civil Rights for stimulus projects funded by DOT.

- **Case Processing:** During the last quarter of FY 2010-2011 the Division developed, and in April 2011, implemented a more effective case processing/management strategy to address aging cases, while also addressing median processing times and average processing times to improve accountability, efficiency, and customer service. The shift and even further development of the strategy was, and continues to be, consistent with the Governor's directive to reinvent government and employ the four basic principles: performance; results; putting the people first; and integrity.
- **Division Initiated Investigations:**
  - **Jackson Hewitt Tax Service:** The Division brought a complaint against Jackson Hewitt's marketing of tax refund anticipation loans in a discriminatory manner and with discriminatory effect against communities of color; after Jackson Hewitt sued, the Division won a motion to dismiss. *Jackson Hewitt Tax Service Inc. v. Kirkland*, 735 Supp. 2d 91 (S.D.N.Y. 2010). Although H&R Block did not offer Refund Anticipation Loans (RALs) this tax season, Jackson Hewitt and Liberty Tax offered some RALs under funding from the only remaining supplier of RALs, Republic Bank of Kentucky. The future of these loans is in doubt because federal regulators have scheduled a proceeding to determine whether Republic should continue to fund RALs, meanwhile other banks have either been ordered to stop funding RALS or have withdrawn from the practice. By the end of FY 2010-2011 the Division Initiated Investigation unit began working on a brief on Jackson Hewitt's appeal of the federal district court's decision to dismiss its case to enjoin Division proceedings.

- **Oyster Bay**: The Housing Investigations unit is investigating the Division Initiated Complaint (DIC) against Oyster Bay and developers. The complaint against the Town of Oyster Bay and developers alleges the Town's Next Generation and Golden Age housing program's residency preferences (for residents and children of residents of Oyster Bay and its school districts, who are overwhelmingly white) discriminate on the basis of race and national origin and perpetuate residential segregation: they prevent persons of color from having any real opportunity to obtain such affordable housing and lock in the present racial composition of the Town. As complainant, the Division has reviewed extensive information provided by respondents Long Island Housing Partnership and developers, and has submitted information and rebuttal to the investigator.
  
- **Collegiate Village/Western New York**: In December 2007 DHR took action against a large Buffalo-area real estate company and other involved entities, regarding the planned conversion of a large residential complex into an exclusive, gated student community in Buffalo. The complaint alleged violations of the New York State Human Rights Law (NYSHRL) by promoting segregation and discrimination in housing based on familial status, race, ethnicity, and/or age. In April 2008 the developers agreed to a settlement. The developers did not comply because (a) they didn't get the original financing for construction and (b) even though they have applied for and probably could get other financing, they wanted to build a fence between the affordable and student housing sections (which the agreement prohibits). After the developer broke off negotiations regarding failure to comply with the Division settlement agreement, it sued the Division in Erie County Supreme Court, seeking a judgment that the settlement agreement was void and unenforceable. The Division moved to dismiss; the court denied the motion; the Division answered the complaint; and the developer has noticed certain discovery. The Division, represented by the Attorney General, will continue to litigate the matter.

Note: The DII Unit is continuing with and proceeding to open a total of nine confidential investigations.

- **Professional Education Programs**: The Division held a number of professional education programs on various segments of the Human Rights Law. In April 2010 we co-hosted with HUD a conference on housing rights at the Bronx Zoo which was attended by more than 140 people. In September 2010 we recognized the 65<sup>th</sup> Anniversary of the Human Rights Law at a Symposium at John Jay College that included expert panel discussions on Disability Rights; Lesbian, Gay, Bisexual, and Transsexual (“LGBT”) discrimination; and employment rights related to people with prior arrest and conviction records. In October 2010 we hosted a symposium at New York Law School on domestic violence in the LGBT community.
  
- **Community Programs**: The Division participated in numerous community events related to the Human Rights Law and protected classes. In July 2010 the Division

participated in special surf camps at Long Beach for visually handicapped athletes, “Wounded Warriors” from the Iraq and Afghanistan conflicts, and teenagers with autism. In September 2010, the Division was represented at a volleyball tournament in Brentwood between local police and immigrant day laborers as part of the ongoing efforts following the Lucero murder; in October 2010 the Division hosted a special art exhibit featuring drawings from an international program called “Others Are Us” that partnered intermediate school students in the Bronx with peers in Nicaragua; and, in December 2010 the Division participated in an ice hockey exhibition at the Nassau Veteran’s Memorial Coliseum of the Long Island Blues, a team of young adults on the autism spectrum.

## **1. Budget and Finances**

The State of New York operates on a fiscal year commencing each April 1, and ending the following March 31. The Governor submitted the SFY 2010-2011 Executive Budget in January 2010 for consideration by the Legislature. This year’s budget was enacted by the Legislature in August 2010.

The Division’s enacted budget for the current fiscal year provides for an all funds appropriation of \$ 23,029,000, consisting of \$ 14,788,000 in General Fund (State tax-levy) appropriations and \$ 8,241,000 in Special Revenue Funds, which are monies provided by the Federal government for the Division’s program contracts with the U.S. Department of Housing and Urban Development (HUD) and the Equal Employment Opportunity Commission (EEOC).

The adopted budget provides for a Division staffing level of 206 full-time equivalent (FTE) personnel; state funding supports 152 of these FTE positions while the balance (54) FTE are supported through funds provided by Federal contracts. In the last few years, Federal funds accounted for a larger proportion of the Division’s total budget, in recognition of the Division’s increased caseload.

Subsequent to the enactment of the SFY 2010-2011 budget, the Division was required to make further reductions to the state-funded side of its budget as a result of the State Workforce Reduction Program during the fall of 2010. Consequently, the Division’s all-funds headcount declined to 195 FTE by January 2011, with a corresponding reduction in the Division’s budget allotment.

The Division continues to recognize the current economic and financial challenges facing New York State. In spite of these hurdles the Division has and will continue to take steps to ensure the historic mission of the agency continues to be fulfilled.

## **2. Amendments to the Law**

The mission of the Division is to ensure, "every individual . . . has an equal opportunity to participate fully in the economic, cultural and intellectual life of the State." This pursuit continues to mean the evolution of the law. As such, the past year has brought amendments that include expansion and the addition of a new, protected class.

- **Disabled - Chapter 196 of the Laws of 2010**

This Chapter amends the Human Rights Law relating to disability in connection with housing, boycotting/blacklisting jurisdiction, and the declaration of civil rights. The legislation, passed unanimously by both the Assembly and the Senate, was a Division departmental bill. It became effective July 15, 2010, and amends the following areas of the Human Rights Law:

### **Housing**

For both public and private housing, the reasonable accommodation provisions have been amended by adding the language in bold:

It shall be an unlawful discriminatory practice for [a housing provider] ... [t]o refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling, including reasonable modification to common use portions of the dwelling.

This provision requires landlords and other housing providers to make reasonable modifications, at their own expense, to common areas of dwellings to enable tenants with disabilities to use and enjoy the dwelling.

Human Rights Law § 296.2-a(d)(2) and § 296.18(2).

### **Boycott/blacklist/refuse to trade with**

Disability has been added as a protected basis to the provisions of Human Rights Law § 296.13, which now read as follows:

It shall be an unlawful discriminatory practice (i) for any person to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action.

Human Rights Law § 296.13, emphasis added.

### **Civil Rights**

The amendment also adds the disabled to Human Rights Law § 291, subdivisions 1 and 2, and declares it is a civil right to have the opportunity to obtain employment, education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without unlawful discrimination. These additions do

not directly affect the Division's enforcement of the Human Rights Law, but serve to make the law consistent with the rights of persons with disabilities.

- **Domestic Workers - Chapter 481 of the Laws of 2010**

This Chapter amends the Labor Law to provide certain new protections for domestic workers, and amends the Human Rights Law to provide protection against harassment for domestic workers. It was signed August 31, 2010 and became effective November 29, 2010. The amendment adds a new section to the Human Rights Law, as follows:

***New Section Added as 296-b***

§ 296-b Unlawful discriminatory practices relating to domestic workers.

1. For the purposes of this section: "Domestic workers" shall have the meaning set forth in section two of the labor law.
2. It shall be an unlawful discriminatory practice for an employer to:
  - (a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.
  - (b) Subject a domestic worker to unwelcome harassment based on gender, race, religion or national origin, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

Under this new provision, domestic workers may file complaints of sexual harassment, and for harassment on the basis of gender, race, religion or national origin. Hiring, firing, and other terms, conditions and privileges of employment are not covered. In a departure from the usual definition of employer, in which employers must have four or more employees to come under the provisions of the Human Rights Law, households who employ even one domestic worker will be subject to the new provisions of the HRL.

**Amendment to Definitions of "Employee" and "Employer"**

Domestic workers employed directly by the household where the work was performed were previously excluded from *any* coverage under the Human Rights Law. The prior definition of "employee" excluded "any individual ... in the domestic service of any person". Human Rights Law § 292.6. Furthermore, the prior definition of "employer" excluded employers with fewer than four employees, thus

excluding most persons employed directly by a private household. Human Rights Law § 292.5.

Domestic workers continue to be excluded from the general employment discrimination provisions of § 296.1, but the definitions of “employee” and “employer” have been amended to reflect that § 296-b is an exception to the domestic services and numerosity limitations.

### **Definition of “Domestic Worker”**

The new § 296-b cross-references Labor Law § 2.16 for the definition of “domestic worker”, as follows:

“Domestic worker” shall mean a person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose. “Domestic worker” does not include any individual (a) working on a casual basis, (b) who is engaged in providing companionship services, as defined in paragraph fifteen of subdivision (a) of section 213 of the fair labor standards act of 1938, and who is employed by an employer or agency other than the family or household using his or her services, or (c) who is a relative through blood, marriage or adoption of: (1) the employer; or (2) the person for whom the worker is delivering services under a program funded or administered by federal, state or local government.

The Division supported and has promoted the goals of this legislation, noting in its comment to the Governor’s Counsel’s office as follows:

The Division supports the goals of the bill, which is intended to protect the rights of vulnerable workers who have seen little legal protection in the past. The sections pertaining to the Human Rights Law are sufficiently narrowly tailored so as to avoid government intrusion into the very personal choice of choosing whom to employ in the home. The protections of the Human Rights Law will come into effect after the hiring decision is made: once an individual is hired, it is insupportable that she or he would be without redress against the kind of harassment set out in the proposed legislation.

### **3. Commissioner’s Orders**

Jamie L. Colgrove and Natalie J. Thibeault v. West Taghkanic Diner II, Inc.; L'houssine Siba, Case Nos. 10127568 and 10127569 (*it is noted an Appeal of this Order is pending*)

Respondents, a diner and its owner, sexually harassed Complainants, who were waitresses, then fired them in retaliation for their complaints about the harassment. The Commissioner awarded Complainants \$1,619.40 and \$1,800 in lost wages, respectively and \$20,000 each for the mental anguish suffered.

Mark J. Sullivan v. Animal Fair Media, Inc., Wendy Diamond, Individually, Case No. 10122835

Respondents, a media company and its owner, violated the Human Rights Law's prohibition against age discrimination in advertising, when they published a job vacancy listing with the limiting language "younger applicants." Complainant, who read the advertisement, felt discouraged from applying because of his age. Accordingly, the Commissioner awarded Complainant \$1,500 for the mental anguish he suffered.

Housing Opportunities Made Equal, Inc. and Stephanie M. Gilliam v. William B. Johnston Case Nos. 10132105 and 10132112 (it is noted that an appeal of this Order is pending)

Respondent, the owner of rental housing, violated the Human Rights Law when it published advertising for its rental property discouraging young families and children from applying. Respondent discriminated against Complainant Gilliam, a mother of two, who read Respondent's advertisements when she was seeking housing for herself and her family, when Respondent published the advertisements. The Commissioner awarded Complainant Gilliam \$2,500 for the mental anguish she suffered. Complainant HOME was awarded \$4,281 for the resources it diverted investigating Respondent's violation and \$8,000 in punitive damages. Further, the Commissioner assessed a civil fine and penalty in the amount of \$15,000.

Larosa Carson v. Robert Embow, Individually, Grove Roofing Services, Inc., Case No.10120123 (it is noted that an appeal of this Order is pending)

The Commissioner awarded Complainant \$50,000 for the mental anguish she suffered when Respondent Grove Roofing Services, Inc., a roofing contractor, discriminated against Complainant, a roofer apprentice, by subjecting her to a hostile work environment because of her race.

Thomas Belle v. Milan Maintenance, Inc., DaVinci Cleaners Corp., Christopher Martirano, Individually, Dennis Helliwell, Individually, Case No. 10121725

Respondents, who provide janitorial and cleaning services, discriminated against Complainant in violation of the Human Rights Law when they terminated his employment based on his prior criminal conviction record. The Commissioner awarded Complainant \$10,000 for the mental anguish he suffered.

Kevan H. Arya v. City of Niagra Falls, Case No. 10119211 (it is noted an appeal of this Order is pending)

The Commissioner found Respondent, a city in upstate New York, discriminated against Complainant in violation of the Human Rights Law when it denied him a master electrician license because of his national origin. Complainant was awarded \$8,000 for the mental anguish.

Norman Parnass v. Ben Rottenstein Associates, Inc., Jack Jaffa, Case No. 10112745 (it is noted an appeal of this Order is pending)

The Commissioner found Respondents, a company in the real estate business and its owner, harassed, fired and retaliated against Complainant, an 86 year old employee, based on Complainant's age. The Commissioner ordered Respondent pay Complainant \$15,000 to compensate him for the mental anguish he suffered, \$188,750 for lost wages, \$26,192.40 for lost vacation and sick days and \$7,067.50 for his lost share of profits.

Mackenzie Valentine v. New York State Thruway Authority; and New York State, Office of the Comptroller, New York State Department of Civil Service, Case No. 10116524

The Commissioner found Respondent New York State Thruway Authority, which employed Complainant as a radio dispatcher, discriminated against Complainant based on her sex and disability when it terminated her employment because she suffered gender identity disorder. The Commissioner awarded Complainant \$20,000 for the mental anguish she suffered and \$5,177 in lost wages.

#### **4. Court Decisions**

All final orders of the Division are appealable to court, pursuant to Section 298 of the Human Rights Law, and the Division's Office of General Counsel represents the Division in many such court actions each year. Appeals from Commissioner's Orders after Hearing are decided in the Appellate Divisions of the NYS Supreme Court. Following are some of the decisions from New York's four Appellate Divisions for the last fiscal year.

##### **Appellate Division, First Dept.**

Bush v. N.Y. State Div. of Human Rights, 78 A.D.3d 505, 910 N.Y.S.2d 645 (1st Dept. 2010), lv. denied --- N.Y.3d ---, 2011 WL 2566517 (2011)

The Division conducted an appropriate and fair investigation, and that it had a rational basis for finding no probable cause to believe petitioner's housing application was rejected because of her race, sex, marital status, religion, or disability.

Ferrer v. N.Y. State Div. of Human Rights, 82 A.D.3d 431, 918 N.Y.S.2d 405 (1st Dept. 2011)

Complainant (who filed a complaint with the Division alleging failure to accommodate and disability discrimination) challenged the no probable cause finding on the basis that sexual harassment had not been investigated. However, this claim was not reasonably discernable from the complaint, and may not be raised for the first time in a court proceeding to review the determination. Moreover, the specific conduct alleged, is legally insufficiently severe and pervasive to constitute sexual harassment. There was no evidence in the record which established that the specific incidents described in the petition were anything more than isolated, occasional or benign.

Oursler v. KT's Junction, Inc., 74 A.D.3d 1910, 903 N.Y.S.2d 645 (4th Dept. 2010)  
Commissioner's finding of pregnancy discrimination is supported by substantial evidence. The substitution of the ALJ during the proceeding does not require reversal. Judiciary Law § 21 has never been applied to administrative proceedings, and the substitution of ALJs during the course of a hearing is generally permissible and will not, standing alone, warrant a finding of prejudice. The fact that the second ALJ did not hear or observe any witnesses does not constitute prejudice and, indeed, petitioner failed to demonstrate any actual prejudice. Award for mental pain and suffering reduced from \$10,000 to \$5,000, in light of short duration and non-specific nature of complainant's suffering.

Monsay v. N.Y. State Div. of Human Rights, 77 A.D.3d 1378, 907 N.Y.S.2d 909 (4th Dept. 2010)

The determination that respondent did not unlawfully discriminate against complainant on the basis of gender or age is supported by substantial evidence. Even assuming that complainant established a prima facie case of gender or age discrimination, the College rebutted the presumption of discrimination created by petitioner by presenting the requisite legitimate, independent, and nondiscriminatory reasons to support its employment decisions.

Bowler v. N.Y. State Div. of Human Rights, 77 A.D.3d 1380, 908 N.Y.S.2d 508 (4th Dept. 2010), lv. denied 16 N.Y.3d 709 (2011)

Order After Hearing dismissing complaint confirmed. Substantial evidence supported agency's determination petitioner was not subjected to sexual discrimination based on a hostile work environment. The two inappropriate comments found by the ALJ to be attributable to petitioner's immediate supervisor were neither sufficiently severe nor pervasive to alter the conditions of petitioner's employment, and we will not disturb the credibility determinations of the ALJ with respect to any remaining allegations. The court will not weigh the evidence. Further, substantial evidence supported the finding of no retaliation, as complainant failed to allege any adverse action was taken based on having engaged in protected activity.

N.Y. State Div. of Human Rights (Scardino) v. Independent Auto Appraisers, Inc., 78 A.D.3d 1541, 910 N.Y.S.2d 787 (4th Dept. 2010)

The Commissioner's determination that Scardino was the victim of age discrimination is supported by substantial evidence. The award of damages for lost wages is reasonably related to the discriminatory conduct. However, the record does not support an award of damages for mental anguish and humiliation. The determination after the compliance hearing that respondents failed to comply with the prior order is supported by substantial evidence. Respondents directed to pay \$36,607 for lost wages, with interest at the rate of 9% per annum, commencing September 1, 1989.

County of Onondaga v. Mayock, 78 A.D.3d 1632, 910 N.Y.S.2d 628 (4th Dept. 2010)  
Division's order after hearing, finding that complainant was discriminated against on the basis of his sexual orientation is confirmed. The award of \$25,000 for mental anguish should not be disturbed.

Jackson v. Buffalo Municipal Housing Authority, 81 A.D.3d 1271, 916 N.Y.S.2d 437 (4th Dept. 2011)

Substantial evidence supports Division's determination that petitioners failed to establish a prima facie case of unlawful employment discrimination based on race. The education, qualifications, duties and employment status of the Caucasian nurse, who was retained when complainants were laid off, bore little resemblance to those of the two complainants.

### **Appellate Division, Second Dept.**

Simmons v. Suffolk County Community College, 75 A.D.3d 513, 904 N.Y.S.2d 753 (2d Dept. 2010), lv. denied 16 N.Y.3d 705 (2011)

Appellate Division, in 2009, annulled the Division order finding discrimination; this annulment was reversed by the Court of Appeals. On remand, the Appellate Division finds \$50,000 for mental pain and suffering to be excessive and remands for a new award not to exceed \$5,000, stating "complainant failed to demonstrate the duration, severity, or consequences of any mental anguish he suffered as a result of any incidents evidencing racially discriminatory practices ... To the contrary, the complainant's claims of mental anguish and post traumatic stress are not connected to incidents of racial discrimination but, rather, are connected to an accident ... as well as to a Workers' Compensation proceeding related to that accident."

Medical Express Ambulance Corp. v. Kirkland, 79 A.D.3d 886, 913 N.Y.S.2d 296 (2d Dept. 2010)

(MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS PENDING)

Division's Order After Hearing vacated. Although there is evidence in the record that the complainant was subjected to unwelcome sexual advances by her supervisor that altered the condition of the workplace, the employer should not have been held liable because they did not become a party to it by encouraging, condoning, or approving it. Respondent's action subsequent to the filing of the complaint could not form the basis of liability. The fact that the employer did not have an anti-harassment policy is irrelevant. "No authority suggests that merely failing to have a sexual harassment policy is substantial evidence to support a finding that the employer condoned the sexual harassment."

New York State, Division of Human Rights v Town of Oyster Bay, 81 A.D.3d 812, 917 N.Y.S.2d 236 (2d Dept. 2011)

(MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS PENDING)

Town brought action against the Division, seeking to enjoin complaint regarding town's housing program that is alleged to have a discriminatory impact. The Division acted within its authority in initiating the administrative complaint on its own; statutory provisions authorizing this action are not unconstitutional. Town was required to exhaust administrative remedies before seeking court review. The exceptions to the exhaustion doctrine are where the agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or where resort to administrative remedies would be futile or would cause irreparable injury. The combined functions of the Division, to initiate, investigate, and adjudicate a complaint, are not a violation of due process.

New York State Div. of Human Rights (Miller) v. Caprarella, 82 A.D.3d 773, 917 N.Y.S.2d 704 (2d Dept. 2011)

An enforcement proceeding initiated by the Division raises the issue of whether the determination was supported by sufficient evidence in the record as a whole; the Division's finding are accorded considerable deference due to its expertise, and will be confirmed if based on substantial evidence. Landlord's proffered legitimate, non-discriminatory reason for refusing to rent apartment to complainant was not credible. Disbelief of the reasons offered, together with the elements of the prima facie case, suffice to show intentional discrimination. Complainant and black tester were told apartment had been rented, while white tester was told it was still available, and was eventually rented to white couple. Awards confirmed as follows: \$7,500 for mental anguish; \$3,000 for out-of pocket expenses; \$10,000 in punitive damages; \$28,932 for attorneys fees.

### **Appellate Division, Third Department**

N.Y. State Off. of Mental Health v. N.Y. State Div. of Human Rights (Asimolowo), 75 A.D.3d 1023, 906 N.Y.S.2d 181 (3d Dept. 2010)

Employer's stated reason for termination was a pretext for disability discrimination. Plaintiff's civil service status was "dubious" and a genuine cause for concern, but he was terminated only after a medical leave for cancer treatment followed by another leave request for temporary disability due to a knee and ankle injury. Mental pain and suffering award was properly based solely on Plaintiff's testimony, even in the absence of medical or psychiatric treatment. Award of \$30,000 confirmed. Complainant was still suffering four years later, and was deeply hurt that his children had lost respect for him.

Tosha Restaurants, LLC v. N.Y. State Div. of Human Rights (Fuller), 79 A.D.3d 1337, 911 N.Y.S.2d 734 (3d Dept. 2010)

Division found that complainant was terminated from his position as dishwasher due to psoriasis and cellulitis condition on the back of his head. This determination is entitled to considerable deference, and review is limited to whether there is substantial evidence. Employer offered: (1) customers and coworkers complained, (2) it was a "violation of health code", and (3) because of his other job, scheduling was "becoming a problem." However, there was no evidence complainant was unable to perform his job due to the condition, which he had documented with a doctor's note. The employer admitted in testimony the disability was the reason for his termination. Awards of \$4,776 back pay and \$10,000 mental pain and suffering confirmed.

### **Federal District Court**

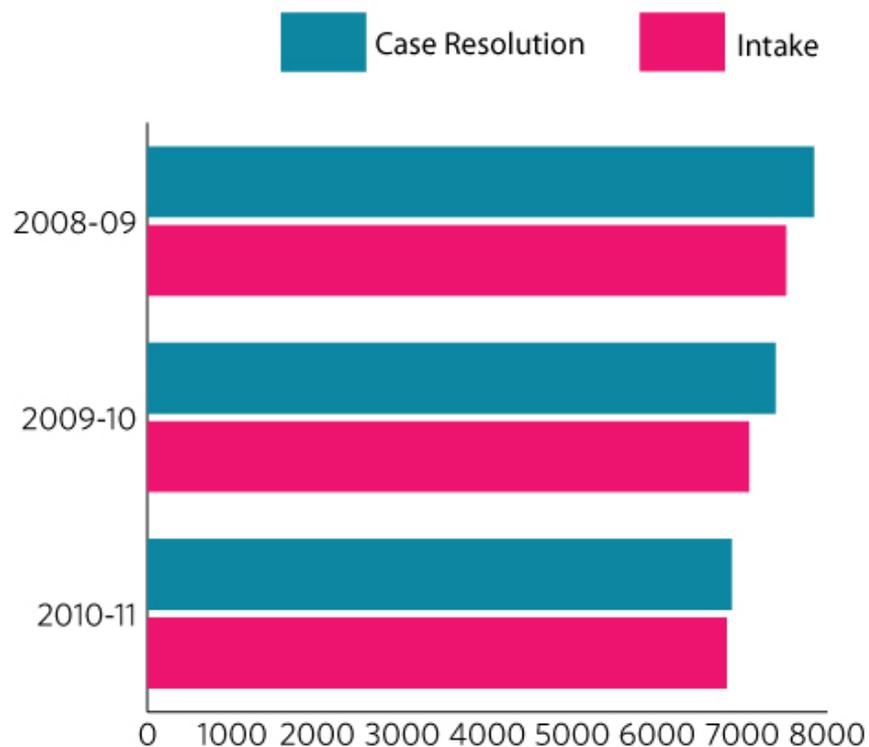
Jackson Hewitt Tax Service Inc. v. Kirkland, 735 F.Supp.2d 91 (S.D.N.Y. 2010)

Human Rights Law is not preempted by the National Bank Act, with respect to Division's administrative proceeding against provider regarding its marketing of tax refund anticipation loans (RALs). Division allowed to proceed with investigation of allegations that tax preparation firms targeted "low-income individuals, primarily in communities of color, and military families for" the RALs.

## 5. Division Operating Statistics

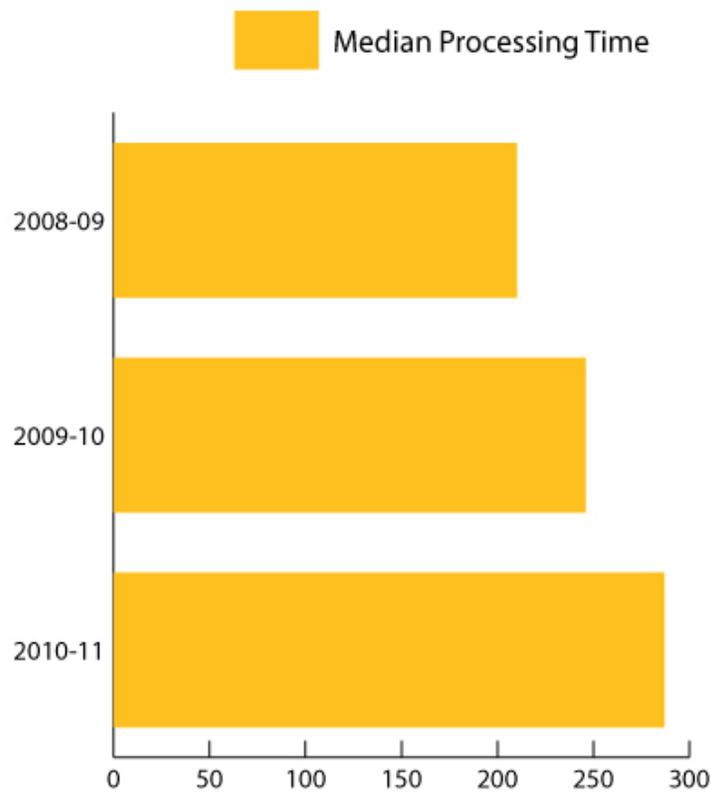
There were 7394 complaints filed with the Division in FY09-10, a decrease of just under six percent from FY08-09. During this same time period, the Division resolved 7080 complaints. In FY10-11, there were 6875 complaints filed with the Division, a decrease of just over seven percent. During this time period, the Division resolved 6815 complaints (See Table 1A).

TABLE 1-A Intake v. Case Resolutions  
(as of March 31)



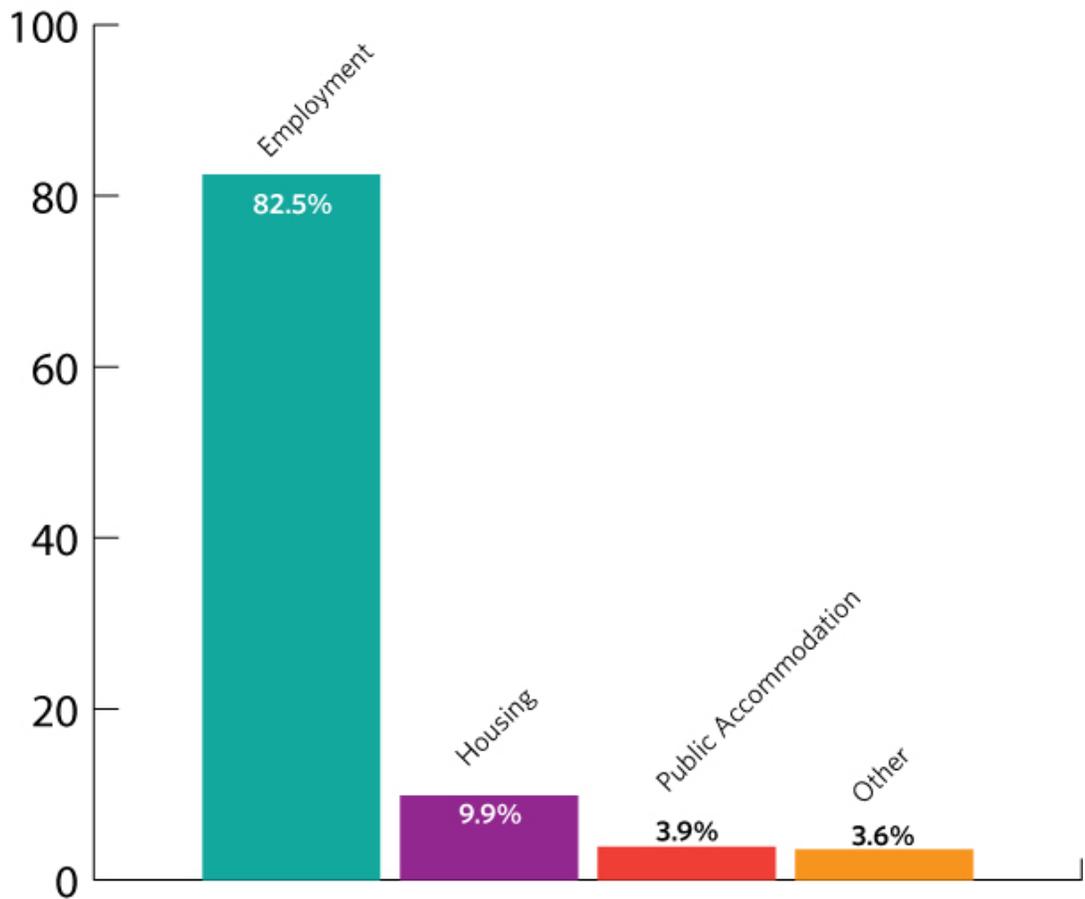
The median processing time increased slightly from 246 days in FY09-10 to 287 days in FY10-11. This means 50% of the Division's cases were resolved in less than 287 days, The change in resolution reflects a policy decision to prioritize the oldest cases in the Division's backlog (see Table 1B).

**TABLE 1-B Median Processing Time in Days  
(as of March 31)**



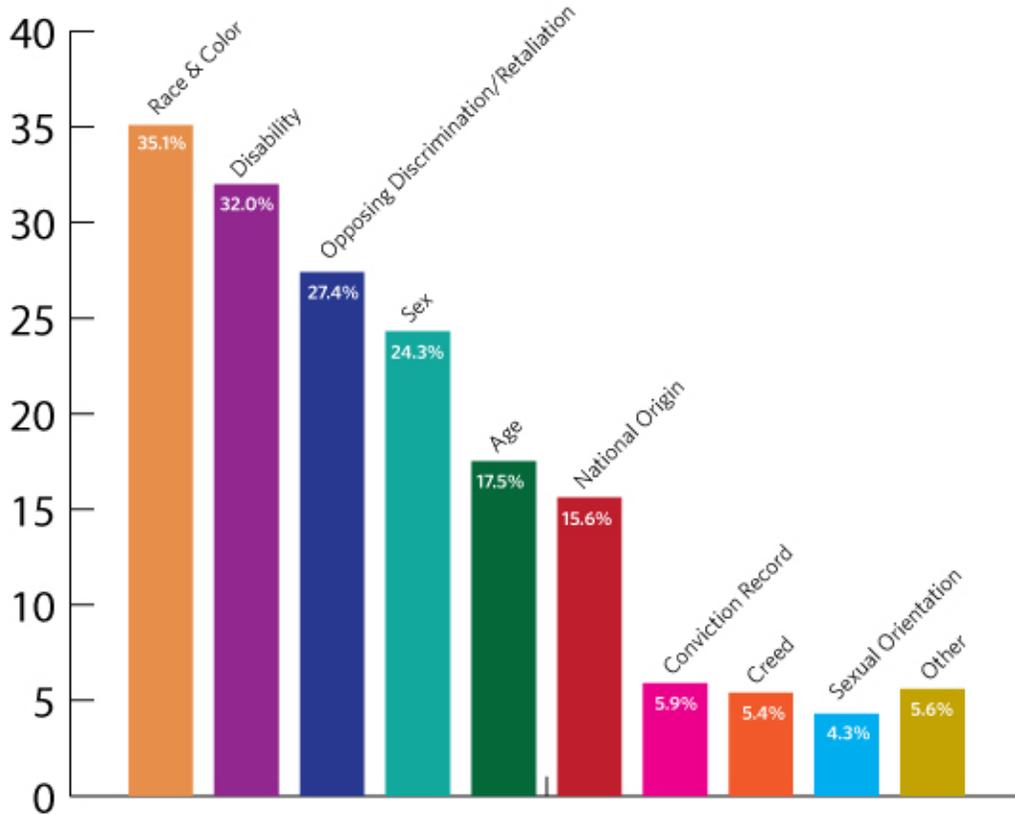
In FY10-11, the majority of complaints filed were in the area of Employment (approximately 82%), followed by Housing (approximately 10%), Public Accommodation (approximately 4%), with the sum of all other areas comprising approximately 4% of all cases filed. (see Figure 1).

**Figure 1 Jurisdiction of Cases Filed  
FY 2010-11**



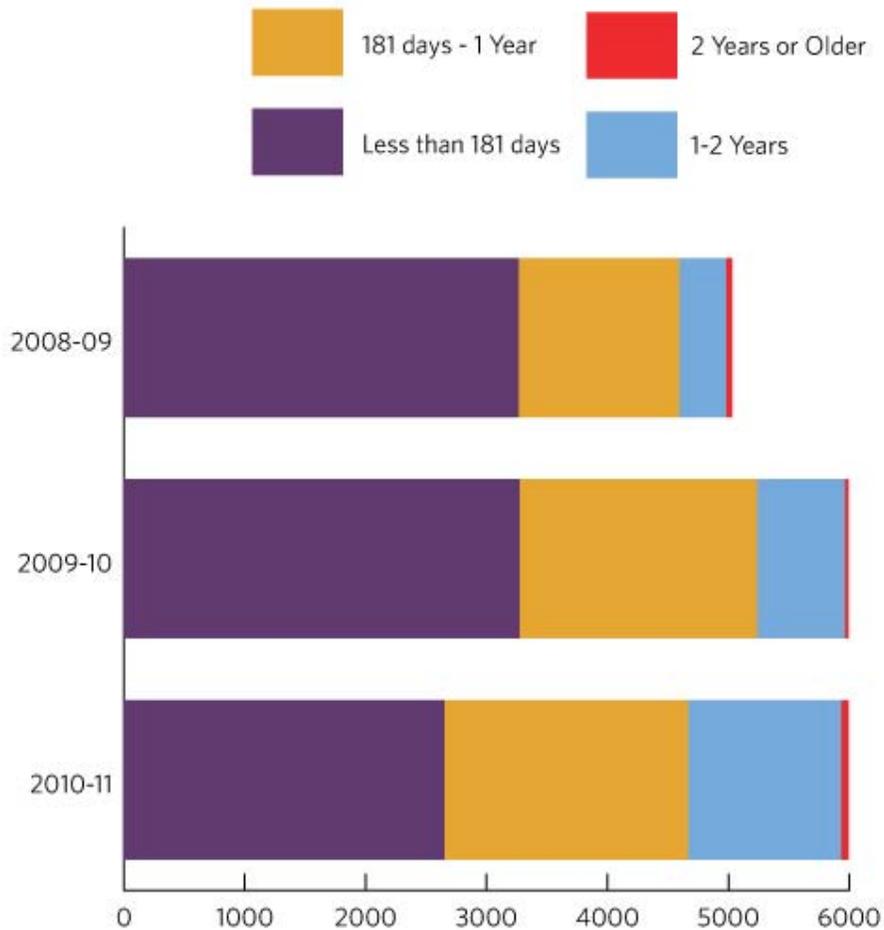
The most frequently cited basis of complaints filed in FY10-11 was Race/Color (35.1%), followed by Disability (32%) and Opposed discrimination/Retaliation (27.4%). It is important to note some complaints allege more than one basis; therefore, the total percentage of bases cited will be more than 100%. (see Figure 2).

Figure 2 Bases of Cases Filed  
FY 2010-11



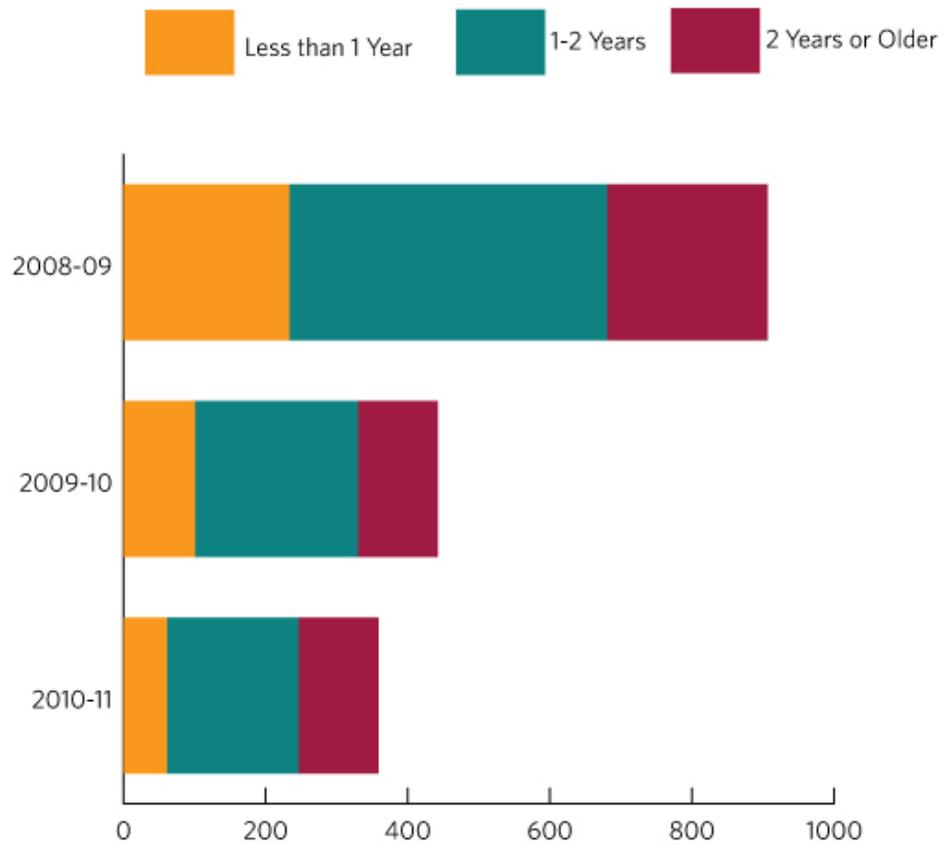
As of the end of FY09-10, 54% of cases under investigation were less than 181 days old, 33% were between 181 days and one year old; 12% were between one and two years old, and less than 1% were over two years old. At the end of FY10-11, 44% of cases under investigation were less than 181 days old, 34% were between 181 days and one year old; 21% were between one and two years old, and less than 1% were over two years old. (See Table 2A).

**TABLE 2-A Age of Investigations Caseload  
(as of March 31)**



Of the cases in the Hearing Process that received investigative determinations of Probable Cause, 23% were less than one year old, 47% were between one and two years old, and 21% were two years old or older at the end of FY09-10. At the end of FY10-11, 17% were less one year old, 52% were between one and two years old, and 31% were two years old or older. (See Table 2B).

**TABLE 2-B Age of Hearings Caseload  
(as of March 31)**



During FY09-10, the Division issued 6666 investigative determinations (see Figure 3B). Of these, 60% were No Probable Cause, 16% were Dismissals and 15% were settlements; nine percent were Probable Cause determinations, which resulted in those cases advancing to the hearing process. In FY10-11, the Division issued 6772 investigative determinations (see Figure 3C). Of these 61% were No Probable Cause, 17% were Dismissals, and 14% were settlements. 8% were Probable Cause determinations, which resulted in those cases advancing to the hearing process.

Figure 3A Investigation Outcomes  
FY 2009-10

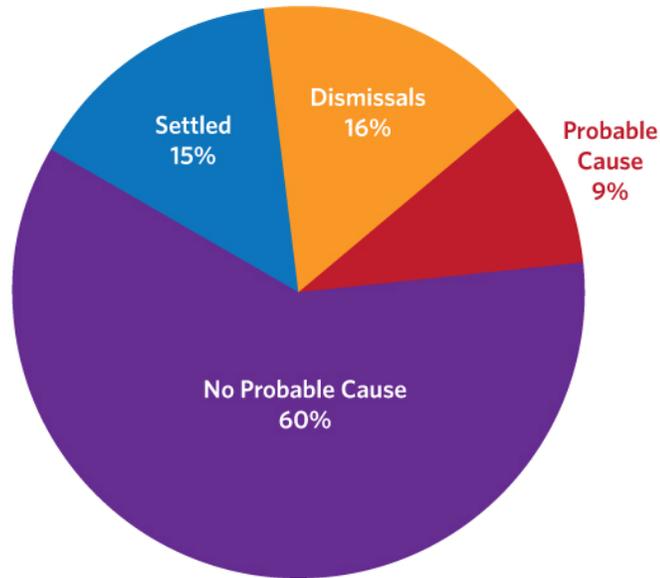
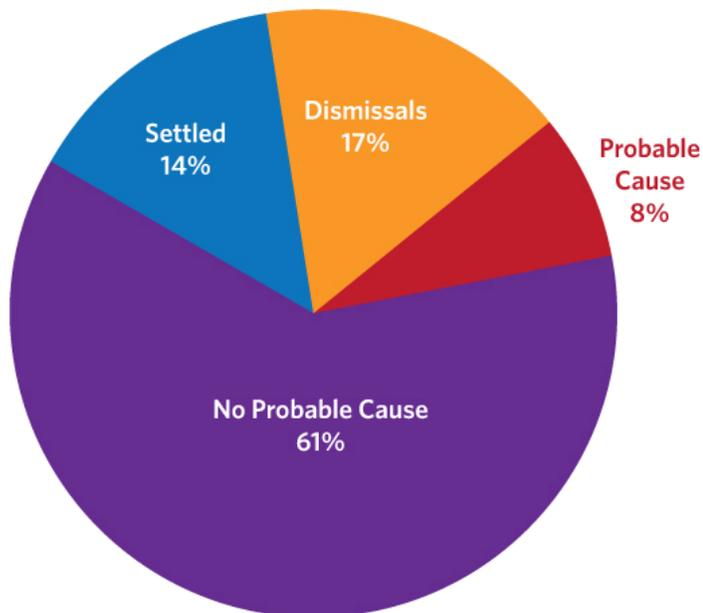


Figure 3B Investigation Outcomes  
FY 2010-11



In FY09-10, the Commissioner issued 1032 Commissioner's Orders (see Figure 4B). Sixty two percent of these were settlements, 13% were dismissals prior to the completion of the Hearing process, 21% of Commissioner's Orders during this period were dismissed after hearing, while five percent were sustained after hearing. During FY10-11, the Commissioner issued 567 Commissioner's Orders (see Figure 4C), 70% were settlements, 10% were dismissals prior to the completion of the Hearing process, 15% were dismissed after hearing, while 4% were sustained after hearing.

Figure 4A Hearing Outcomes  
FY 2009-10

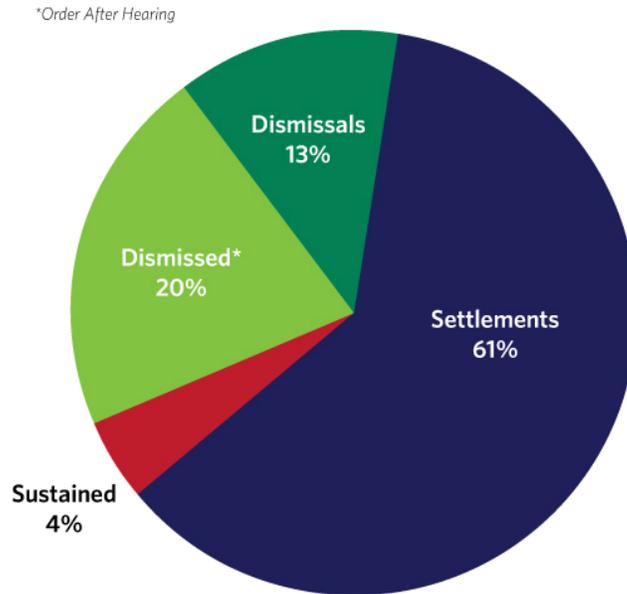


Figure 4B Hearing Outcomes  
FY 2010-11

