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VOLUME II

STUDY OF LAWS AND COURT DECISIONS

HISTORICAL RECORD OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN PUBLIC AND PRIVATE CONTRACTING IN NEW JERSEY

A Report Submitted to
NJ TRANSIT
and the
Governor's Study Commission on Discrimination in
Public Works Procurement and Construction Contracts

by
The Afro-American Studies Program
University of Maryland at College Park

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Primary responsibility for drafting this report rests with Roberta Y. Wright. At various stages the effort was assisted by able research assistance from Mary Pat Gallagher, Ralph Cestaro, Donna Gayle, David Liston, Lorri Wright, Tasa Hardaway, Cynthia Ponder and La'Tonya Rease. The editorial assistance of Tish Crawford and Tommie Nell Taylor was invaluable.



EXECUTIVE SUMMARY

This report contains the conclusions reached in a study of the impact of New Jersey legal policies concerning civil rights on minority and women business enterprises. It fulfills the requirements of Task 2 of Request for Proposal 1323, "Historical Record of Minority and Women Business Enterprises in Public and Private Contracting in New Jersey."

This work sets the historical and legal backdrop for the entire study. In Part I, the first section depicts New Jersey today through the eyes of a fictional business person appraising its geography, population, ethnic and gender composition, business and workforce composition. Next, the history of slavery and of the similarity of treatment accorded to women are presented in an effort to explain the legacy of disparate treatment in the present day.

Part II traces from early colonial times to contemporary times the historical development of what is widely regarded as an elaborate statutory scheme of antidiscrimination laws: An assessment of New Jersey's implementation of those laws forms the theoretical underpinnings for the vast divergence between the promise of equality for all ethnic groups in New Jersey and the reality of that promise with respect to state contracting.

According to census data, New Jersey is one of the most ethnically diverse states in the United States of America. However, the differing groups reside in residential isolation from one another. Although there have been waves of migration for each ethnic group, because African-Americans and women have had a consistent presence in the



state, in the main we look to the history of this group to identify barriers created by discrimination.

That history reveals the occurrence of major race riots in New Jersey which were directly attributable to the great disparities between the socio-economic conditions of blacks as opposed to whites. Despite these clear inequities, at least one attitudinal survey established that "Negroes" were reluctant to come forward to press complaints of discrimination.¹ In the more than twenty-five years since those studies, there has been a steady stream of complaints.² Consistently, the most frequent basis of the complaints received by the Division has been that of race. Between 1971 and 1991, over 12,500 citizens filed complaints of discrimination because of race with the Civil Rights Division; over 6,000 complaints of sex discrimination were filed over the same period.³ Yet, despite the fact that the New Jersey Division on Civil Rights has handled the enforcement of these individual complaints of discrimination, there are still a significant number of minorities and women who, like 17% of Negroes surveyed in 1964,

...condemn the police; who do not believe that judges, lawyers of the Civil Rights Division would be helpful to them, who do not believe that the major

¹ Blumrosen, Alfred B., and Zeitz, Leonard, "Securing Equality: The Operation of the Laws of New Jersey Concerning Racial Discrimination, Report to the New Jersey Commission on Civil Rights, (1964).

² See, Table I, Chapter II, "Study of Laws and Court Decisions", which sets forth in chart form the complaints received per basis of discrimination per year from 1971 to March 1992. This information was obtained from Roberto Rodriguez, Supervisor for Research and Statistics Management Information Systems, Division of Civil Rights, April 1992.

³ There were nearly 35,000 individual complaints of discrimination for the period 1971 to 1991.



political institutions can give them protection.⁴

Ironically, white male business owners only see themselves as "losing" at the expense of racial minorities.⁵

These incredible discrepancies in perception, in terms of how differing ethnic groups assess their chances of competing for state contracts, coupled with the fact of unremedied discrimination in most areas of economic life in the state leads to the conclusion that the law has not been effectively implemented to effect legislative policy.

⁴ Blumrosen, Id., page 13.

⁵ "Technical Report: SURVEY COMPARING MINORITY/WOMEN-OWNED BUSINESS ENTERPRISES TO NON-MINORITY OWNED BUSINESSES", A Report Submitted to NJ Transit and the Governor's Study Commission on Discrimination in Public Works Procurement and Contracts, March 9, 1992, page iv.



PART I

A. New Jersey Through the Eyes of a Stranger

Imagine if you will that you are an alien who has recently landed in a place called New Jersey. You have come to start a business. You know how to manufacture a material called "superconductor". It is June, 1991. You begin your marketing survey. You buy a newspaper. You read the following items:⁶

...Students are meeting at Camp Dark Waters in Medford, Burlington County, to learn the reality of underground railroad and of slavery. They report being woefully afraid.

An examination of the accompanying pictures reveals that the people involved all have dark skin.

...a conference at a local church is celebrating the first black episcopal priest in New Jersey, Absalom Jones. In the 1700s, Jones led black church members in a walk-out from their church, whose leadership had recently decided to segregate blacks into an upstairs gallery.

...and, at the coastal town of Atlantic City, a corruption trial focuses on whether black city officials received bribes from successful project bidders. One successful contractor testified that he merely wanted to improve services to inner-city residents because casino gambling had failed to improve life outside the boardwalk.

The implication is clear: There is some kind of conflict going on. You continue to read.

... NAACP president Keith Jones says that the state chapter of the NAACP receives nearly 400 serious complaints annually about police brutality.

⁶ All references to newspaper items are from actual news articles appearing in The Trenton Times, the Newark Star Ledger, The Princeton Times, or The New York Times (New Jersey Edition) from February 1991 to January 1992. The news clippings were collected by the Governor's Study Commission on Discrimination in Public Works Procurement and Contracts and provided to the University of Maryland Afro-American Studies Program as background for the historical survey.



Attorney General Del Tufo says that incidents of police brutality in New Jersey are an "aberration".

You wonder: what is the NAACP? Turning the page, you study this article.

... New Jersey ranks among the nation's top five states for strengthening their economies with sound investments designed to generate job and income growth. According to the Corporation for Enterprise Development, New Jersey has the following characteristics: Job quality higher than most states; vigorous business vitality in trading; healthy industrial diversity (although average when it comes to entrepreneurship); a strong pool of highly trained workers; strength in financial and technology resources; and an excellent network of roads, bridges and other physical resources that benefit commerce. Although it is a leader in fostering technology, it lags in financial help for business ventures and in the area of international marketing policies and tax and fiscal system. New Jersey has managed to produce good-paying jobs and has strength in areas related to the information-age economy and in pharmaceuticals. The state has a high level of educational attainment but there are many who are failing to graduate high school and who may not be prepared for the new jobs being created.

You are becoming interested in this place called New Jersey. You note that it is a corridor state; it is on the way to everywhere. It is a great place to raise a family. An educator at a great institution called Princeton agrees with you.

... a Princeton study conducted by David Zimmerman challenges traditional notions of welfare dependency and posits the theory of intergenerational transmission of poverty as opposed to the welfare trap. He documents the direct relationship between the earning capacity of fathers and sons. Even his antagonist states that entrepreneurial spirit is a powerful tool to move up in the state of New Jersey. He cites examples of other immigrants arriving penniless and moving up the ladder.

You think, "If my business succeeds, my son could be rich!" And just then another newspaper item catches your eye. It provides an example of this intergenerational transfer of wealth.

...In May 1990, Joseph Courter of Essex Falls gave his alma mater, New

Jersey Institute of Technology, a million dollar endowment for engineering students. He graduated from NJIT in 1936 at 30 years of age. He left a job as a professional engineer to become a contractor. He invested \$5,000 in 1937 to start the business. His firm became very successful. It eventually employed over 2,000 people. The firm became noted for contributions to the industrial power piping and energy conservation fields. Courter became president of the Mechanical Contractors Association of New Jersey and executive vice president of the Board of American Museum of Immigration at the Statute of Liberty. His son became a powerful lawyer and the representative of New Jersey's 12th District to its legislature. [The son] was also Republican candidate for governor in 1989.

Meanwhile, in Elizabeth, those people with dark skin are pushing for a slave memorial. Apparently, they believe that an African holocaust memorial may motivate others to confront what the leader of the country has called the "new world order".

...[the new world order] is the same as "manifest destiny": [a theory which posits] that [whites] have a moral right to take control of the continent and subordinate its indigenous population. Phillip Pannell, Sr., whose son was shot and killed by a Teaneck police officer in April of 1990, and who spoke at the rally for the memorial, stated, "In the white man's eyes we are still slaves."

For the first time you look at yourself. Your skin is dark. Dark green! Is it color, you ask, that determines capacity and ability to succeed in business? You recall that Courter and his son have no color in their skin. But you reject this hypothesis. Apparently, the females of this species with white skin have similar problems to people of color. Unlike on your planet, they are not of equal status to the males. In the business world here, they reach what is called a "glass ceiling", beyond which they cannot pass. Surely, New Jersey law would prohibit exclusion from the economic life of the state on the basis of color or gender. You make a mental note: "Get a good lawyer to check this out." From the newspaper you know that the highest court in the state, the New Jersey Supreme Court, is headed by Robert Wilentz, whose court is known for its efficiency,



case management and lack of corruption. Chief Justice Wilentz has just delivered the commencement address at Rutgers-Newark Law School. You read:

The public school enrollment of our biggest cities is more than 90 percent minority. ...How can a state be great when its cities are in effect segregated, when its schools are in effect segregated, when its society is segregated?

From the article you learn that the Chief Justice of New Jersey sees society afflicted with a malady that saps the quality of lives, a condition that makes a society that is less than healthy, less than happy. He goes on to speak of the separation of the races, "the physical, cultural and emotional separation and isolation of the races." Wilentz says he is frightened by this vision of New Jersey as "a collection of islands, white islands and black islands, not happy with each other at all, each potentially hostile."

But you are still confident. If the newspaper is to be believed, New Jersey has long had this dichotomy. More importantly, you believe what the Chief Justice said, "When you see [discrimination] long enough and often enough, you stop seeing how horrible it is."

Thus, armed with your technical expertise in the manufacture of "superconductors", your entrepreneurial spirit, your ignorance of the implications of prejudice and your complete faith that your business can revolutionize life on earth in much the same way as Lewis Latimer's invention of the carbon filament for light bulbs brought light to the world, you decide that you will become an entrepreneur in New Jersey.

With great introspection, you marshal the relevant facts. Your image is different from that of the traditional business person in New Jersey. Other than your intellectual property and a prototype of "superconductor," you have no start-up capital. You do not

own a home. Although you are regarded as brilliant in your former world, you have no formal earth education. Your previous employment history does not include being an entrepreneur. You don't have a "green card";⁷ but you don't believe you need one to start a business. More significantly, you don't have a "job card,"⁸ connoting union membership. And until your flying carpet is manufactured with "superconductor" you must rely on public transportation to travel. You buy another newspaper. You read:

...corruption in local government and on school boards is a "continuing problem" in New Jersey despite efforts to combat it, Attorney General Robert Del Tufo reports to the State Commission of Investigation. In a special two-day hearing that began on January 7, 1992, testimony reveals that official corruption is sophisticated in New Jersey. There are subtle quid pro quos in which winks and nods and accepted customs can be responsible for transactions in which both parties gain to the tune of tens and hundreds of thousands of dollars. One convict testified that he used false identities of students and non-existent bus routes to pad contracts of bus operators who paid him and two school board members to steer contracts their way.

On the other hand, you learn:

...in the 1992 budget of the Governor, the only area spared the budget axe is the State Commission on Science and Technology. They are accorded a \$20.6 million dollar allotment.

The article further indicates that business development is an important role for this Commission. It has venture programs like entrepreneur forums and venture capital matching. It funds four business incubators to provide incentive to small high-tech enterprises. In another article, you discover that New Jersey's Mercer County has a

⁷ The designation of permanent resident status by the United States Immigration and Naturalization Service is connoted by the possession of a "green card."

⁸ This slang expression refers to certification of having completed an apprenticeship training program and being a member in good standing with the union.



reputation as a hot-bed of high-technology. The County announces that 22 area firms have won 33 Small Business Innovation Research grants worth about \$4 million to develop new technologies. Perhaps you should locate your business there.

To satisfy your workforce needs you decide to participate in the federal Target Jobs Tax Credit Program to hire people who would not normally have employment opportunities. Thinking of taxes, you read to find:

...New Jersey recently increased its income tax and imposed a surcharge on its business tax. Although New Jersey had traditionally relied most heavily on property tax, the increase would bring the state more into line with neighboring states like New York.

You wonder if New Jersey by this increase would not encourage a company in New York thinking of moving to New Jersey for lower taxes to simply relocate to another region.

The newspaper describes New Jersey's labor market as "severely depressed." Industrial expansion has faltered to a new low of 547,800, a level not seen since 1939. Construction has been less affected than manufacturing due to a big increase in contracts for highway construction and other infrastructure projects.

A kernel of understanding begins to form in your mind. State participation in the economic life of the state makes a positive contribution to the success of individual businesses through its public works and procurement contracts. You are convinced that the state of New Jersey will want to help you manufacture "superconductor".

The New Jersey Department of Commerce, you discover, is responsible for the support and development of business and industry. It even has a Division of Small Businesses and Women and Minority Businesses that particularly addresses your concerns. Although in its lay-off plan the Department of Commerce released the director



of this division,⁹ the department's stated position is that they will continue to work with the New Jersey legislature to develop more innovative ways to provide these services.

You agree with this in principle but you are not sure that you really believe in a program targeted to help you just because you are dark green. The New Jersey Economic Development Authority (hereinafter "EDA") is where you will go to get information and assistance in beginning your business. Its major responsibilities include providing low cost loans to labor-intensive New Jersey companies in need of working capital for financing operations; assisting companies in relocation to the state; offering consulting services in planning, marketing, finance and business functions to manufacturers; even providing loan processing services to selected state and federal programs. It is the state's principal source of long-term, low-interest financing for economic development activities undertaken by private companies.¹⁰ If the EDA cannot help you, you will then explore other state business assistance programs. There is, for example, the New Jersey Local Development Financing Fund,¹¹ which provides direct state financial assistance to local commercial and industrial projects, including but not limited to, loans, loan guarantees, grants, secondary mortgages and equity participation. Yes, you muse, New Jersey is definitely where I will locate my new business. But where in New Jersey? You have concerns having to do with more than just the business

⁹ 4/23/91 Trenton Times

¹⁰ See N.J.S.A. 52:27 H-1 et seq.

¹¹ N.J.S.A. 34:1B-36 et seq. with regulations set forth at N.J.A.C. 19:30-1.1 et seq.



aspects.

Your husband will be joining you shortly. He is dark purple. Your children, with their mixed green and purple genes, look black, like the dark people in the news articles. You must think about schools, housing and transportation. Again, the newspaper is very instructive.

...According to Dr. James W. Hughes, professor at the Graduate School of Urban Planning and Policy at Rutgers-New Brunswick, the 1980s was the strongest decade of economic growth in New Jersey but also the greatest wave of economic decentralization in its history. The countryside now has weekend traffic jams on rural roads headed to shopping malls. Following the major highways that crisscross the state and responding to the lure of affordable land and lower property taxes, businesses that grew during the boom years of the last decade often directed that growth into less expensive rural environs.

...The 1990 Census of Population and Housing indicates a clear shifting of the population from densely populated counties in northeastern New Bergen, Hudson and Essex counties. Population density declined by nearly 100,000 residents over the last 10 years. At least half that number is accounted for by a 16.4 percent decline in Newark.

...According to Marilyn Morheuser, activist education lawyer in the Abbott v. Burke¹² case which ruled the T & E Act¹³ was unconstitutional because it resulted in huge disparities in spending between rich and poor school districts, the new Quality Education Act¹⁴ does the same.

...Trenton schools lost \$51 thousand in state funding which was then allocated to Passaic, the state's poorest district.

¹² 119 N.J. 287, 575 A. 2d 359 (1990)

¹³ The old school aid law was referred to as the "T & E" Act. In reality, there have been four statutes dealing with the funding of public education since 1970: The State School Aid Law of 1954, as amended [L. 1954, c. 85, as amended; N.J.S.A. 18A:58-1 et seq.]; the State School Incentive Equalization Aid Law [L. 1970, c 234]; the Public School Education Act of 1975 [L. 1975, c. 212; N.J.S.A. 18A:7a-1 to 52]; and the Quality Education Act of 1990 [L. 1990, c. 52 (QEAI)], as amended in Senate Bill 3230 [L. 1991, C. 62 (QEAI)].

¹⁴ L. 1991, c. 62 (EA II)



Choices! Choices! Do you sacrifice the convenience of city living for the sake of educating your children? Can you cope with daily commuting in rush-hour traffic and handle traffic on Saturday, too? How can you be sure that your children receive a quality education if you cannot be sure what the funding mechanism is going to be? And, what of housing? Although affordable housing for workers is consistently cited by New Jersey companies as a major factor in business location and relocation analysis, you discover:

...Governor Kean's Advisory Commission on Removing Barriers to Affordable Housing found after an eighteen-month investigation that local zoning codes, environmental regulations and building ordinances are formidable barriers to affordable housing and raise costs 20 to 35 percent in some communities.

(You certainly want to know which communities these are.) The ordinances themselves do not seem sinister on their face. They appear to be race-neutral. Perhaps such an increase in housing costs is an appropriate price to pay for protecting the environment?

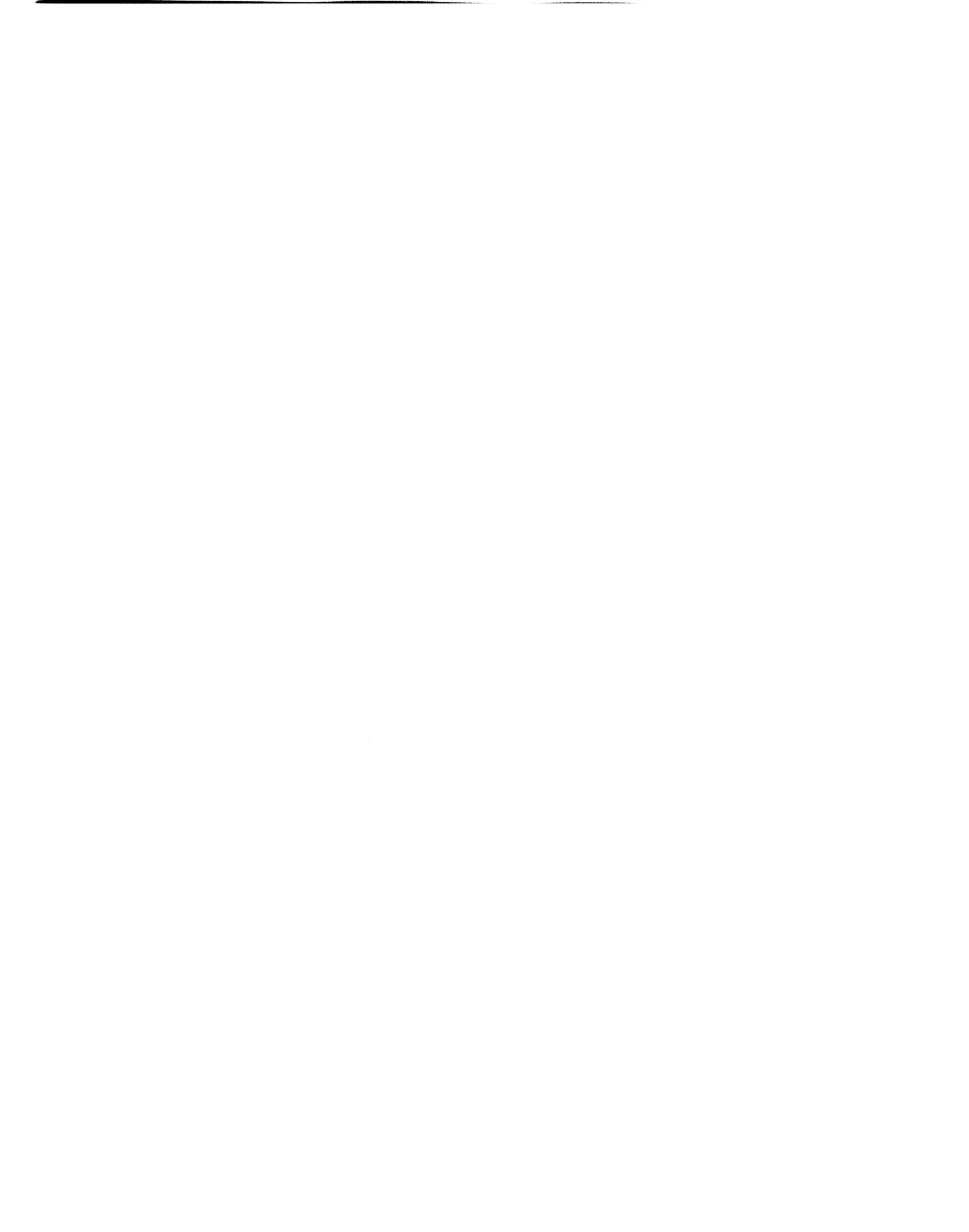
So why do the dark people claim these ordinances affect them disproportionately? And what is a 'Mount Laurel' obligation?¹⁵

...the Non-Profit Housing Network challenged a new state policy that gives towns credit toward their Mount Laurel obligation (to provide their fair share of affordable housing) for homes built between 1980 and 1986 that were occupied by low and moderate income families. The network maintains that the people living in those houses can't actually afford them. Already Brick Township in Ocean County was the first to seek to reduce its Mount Laurel obligation under the new policy.

You are certainly happy to see that:

advocates of a \$135 million housing bond issue were negotiating with tax revolt activists who were instrumental in defeating the housing plan which

¹⁵ Under the Mount Laurel II case, municipalities must provide their fair share of affordable housing.



included loans for middle class families buying their first homes.

You dream of owning your own home. You pray that the referendum passes next election and that you can take advantage of it.

After all, this is why you have come to New Jersey: to participate in the economic growth and diversity which it has consistently espoused in expressions of state policy. Let us take a closer look at the laws and court decisions that have either a) affected minority and women-owned business enterprises having become entrepreneurs or b) adversely affected these groups, which would impact the establishment of your new business venture.



B. Intentional Discrimination: The Legacy of Slavery.¹⁶

The history of legal racism and discrimination against racial minorities and women in New Jersey goes back to the earliest history of New Jersey as a colony. As in each of the other original colonies, slavery existed in New Jersey.¹⁷ By 1745 an incomplete census of colonial New Jersey found 4606 black slaves¹⁸ and there was also evidence of contempt for them by their owners.¹⁹ Unwritten practices of contempt affected not only the work and effort of the slaves, and subsequently of "free" blacks, in the growth of the state but also set the tone for how the law was enforced and experienced by women and other racial minorities.²⁰

¹⁶ The information on the early history of blacks and women in New Jersey which appears in this section entitled, is extracted from research conducted by Jerome Culp and submitted to the University of Maryland. For an examination of the patterns of population characteristics and industrial growth and the development of corporations, which were the outgrowth of this historical legacy, please refer to the report of Dr. Samuel L. Myers, Jr., entitled "Demographic Trends: Historical Record of Minority and Women-Owned Business Enterprises in Public and Private Contracting in New Jersey". In that report the researcher summarizes the body of historical evidence regarding ongoing effects of past and present race and gender discrimination upon African Americans, Hispanic Americans, Asian Americans, members of other racial groups and women in New Jersey's marketplace. Detailed are racial and non-racial factors affecting the formation, development, availability and participation of minority/women business enterprises in New Jersey.

¹⁷ As early as 1685, Colonel Lewis Morris employed sixty or seventy Negroes on his plantation and iron mill in Shrewsbury, New Jersey. Zilversmidt, Arthur, The First Emancipation: The Abolition of Slavery in the North, Chicago (1967), page 6.

¹⁸ Zilversmidt, ibid., p. 7.

¹⁹ According to John Hepburn in "The American Defence of the Christian Golden Rule, or an Essay to Prove the Unlawfulness of Making Slaves of Men" (1715), cited in Zilversmit, supra., New Jersey masters dressed their slaves in rags and forced them to go barefoot in the cold of winter. They showed their contempt for their Negroes by naming them Toby, Mando, Mingo--- names ordinarily reserved for dogs and horses.

²⁰ Accord, McMillen, Neil R., Dark Journey: Black Mississippians in the Age of Jim Crow (1989)



New Jersey law permitted slavery. When slavery was introduced in the British colonies in the 1600s, there was a common law tradition that one could not enslave a Christian.²¹ This tradition, specifically that of becoming a member of the community through conversion thus conferring equal rights, was gradually eliminated from the law of the American colonies.²² New Jersey was no exception. The acts passed by the second Assembly of New Jersey, 1704,²³ removed substantial rights from the slaves and left the bearers of that status with little legal support. The horrors of the separation of slave families, so prevalent in the Southern states, for example, was known to exist as well in New Jersey.²⁴

In addition, the control of the most intimate details of the lives of slaves was left up to their master. They could be and were required to have sex for breeding purposes and for the master's pleasure.²⁵ The comprehensive Slave Code of 1714 required the disciplining by whipping of any slave found more than five miles from home.²⁶ Because

²¹ Wood, Forrest G., The Arrogance of Faith: Christianity and Race in America From the Colonial Era to the Twentieth Century, Knopf Publishing, (1990), Page 116.

²² The tradition was explicitly eliminated in South Carolina and Maryland; [It is interesting to note that parts of New Jersey lie south of Baltimore. See Wright, Giles R., Afro-Americans in New Jersey: A Short History, New Jersey Historical Commission (1988), p.15] and in New Jersey was found to be a groundless opinion by the New Jersey colonial legislature.

²³ Anno Regni Reginae Annae 1...Tertio (December 1704)

²⁴ On a visit to Perth Amboy, New Jersey, in 1797, Willima Dunlap observed a slave woman whose master had separated her from her beloved child: "The Mother by her cries has made the town re-echo and has continued her exclamations for two hours incessantly and still continues them." Zilversmidt, Arthur, Op. Cit., p. 10.

²⁵ Id. at page 11.

²⁶ Id., at page 13.



of fear of theft and of the associational influence of freedom, New Jersey passed laws that prevented free blacks from trading with slaves. Indeed, New Jersey had one of the most severe set of black codes of the northern colonies.²⁷ Any slave engaged in a trade was presumed to be a thief.²⁸ And there were severe restrictions on the manumission of slaves: A slave master had to pay twenty pounds for each freed slave, a practice which continued until 1769. The freed slave was also prohibited from becoming a landowner.²⁹

The New Jersey slave code, enacted as a direct result of the New York Negro revolt of 1712, also established special courts for slaves. These slave courts lasted until 1768 when they were disbanded. Yet it was not until 1803 that gradual abolition of slavery was finally adopted. This statute³⁰ freed all slaves born after July 4, 1803 upon attaining the age of 21 in the case of females and 25 in the case of males. Initially, the bill also included a provision that provided for abandoned ex-slaves at the expense of the state. Indeed, it can be argued that the impetus for opposition to gradual abolition diminished not because New Jersey was at the forefront of the abolition movement but rather **because** the state absorbed the former masters' responsibility for the necessities of slaves. However, the cost to the state amounted to 40% of its budget (excluding prisons and militia) so the program was abandoned after a short time. Thus, by 1810

²⁷ Zilversmidt, Arthur, Id., at page 13.

²⁸ Zilversmidt, Arthur, Id. at page 23.

²⁹ Zilversmidt, Id. at pages 23 - 24.

³⁰ See Zilversmidt, Id. at pages 213 - 215.



New Jersey remained the only state in the North to have more slaves than freed Negroes.³¹

The 1844 New Jersey Constitution did not mention slavery.³² In 1845 the New Jersey Supreme Court refused to find that the continued existence of slavery was a violation of the Constitution of the United States or that of New Jersey.³³ Finally in 1846, due to the ineffectiveness of the slow abolition statute, the legislature passed an Act to Abolish Slavery.³⁴ However, while the act freed slaves, it limited their freedom and changed slavery into a form of bond apprenticeship and prohibited the export of these "apprentices" out of the state. By this time, there were less than 700 slaves in the state and most were aged; but there was still no outright abolition. It is said that lawmakers feared that abolishing slavery outright would eliminate the hope of support from their former masters.³⁵ Thus, the 18 slaves listed in the 1860 census were really not freed until the Thirteenth Amendment to the United States Constitution was passed after the Civil War.

Geographically, New Jersey is a corridor state. This accessibility made it a destination for black migrants from the South. In all periods³⁶ the state could be

³¹ Zilversmidt, Id. at pages 210 - 216.

³² Proceedings of the New Jersey State Constitutional Convention of 1844.

³³ State v. Post, 20 N.J. Law Rep 368 (1845).

³⁴ Statutes of the State of New Jersey. Revised (1847)

³⁵ Zilversmidt, Id., at pages 220 - 221.

³⁶ There were five southern black movements to New Jersey after the colonial period. Before the Civil War the migrants were free blacks and runaway slaves. Wright, Giles R., Op. Cit., page 18.



reached easily by the common modes of transportation. Also, occupying a strategic location between New York City and Philadelphia, huge metropolitan centers that attracted many migrants, the state was in the path of a major stream of black migration. Most of New Jersey's larger municipalities were near one of these cities and received some of their spillover. Thus, because the people of New Jersey were not on feudal estates, the laws of other states (particularly, New York to the north and Pennsylvania to the southwest) influenced the opportunities of blacks. For example, in the history of the Quakers, one sees that the Philadelphia Society of Friends included people from New Jersey, Pennsylvania, Maryland and Delaware.³⁷ So the restriction of access of blacks to certain occupations in Pennsylvania impacted the jobs that blacks were able to take in New Jersey. On the other hand, New Jersey's early history of anti-slavery was contrary to that of Pennsylvania; rather, New Jersey was akin to its southern neighboring states.³⁸

C. The Early History of Women

The status of women in the colonial history of New Jersey stems from their status under English common law. In English common law, women were *erunt animae duae in carne una*; that is, two souls but one flesh. This unity of person gave fathers or husbands virtually unlimited control over the property and person of their daughters or wives. Women were unable to contract in their own right under English common law. This

³⁷ Soderlund, Jean R., *Quakers and Slavery: A Divided Spirit*, (Princeton University Press 1985). The history of the slow elimination of slave holdings by the Philadelphia Meeting and the development of stronger and stronger anti-slavery feelings in general is detailed.

³⁸ Soderlund, ibid., page 22.



meant that contracts made by women were void and could not be enforced against either their husbands or themselves.³⁹ There were other degradations of women in the law: Women could not sue or be sued without their husbands and they could not own property without their husbands. The personal property of a woman became that of her husband when she married. Though she retained some rights in her real property subsequent to marriage, her husband was entitled to control the profits and to dispose of that property with little control.⁴⁰ She was subject to the discipline of her husband.⁴¹ Indeed, if a wife killed her husband her crime was not just murder but treason.⁴²

To be sure, this harsh legal status was ameliorated somewhat in English common law by equity rules, but the minor amelioration available through courts of equity was only available to landed women. Women of the lower classes lacked the wherewithal to seek any protections.⁴³ English law never changed the legal fiction of the duality of women until the 20th century. These severe restrictions on the position of women left them in a legal status similar to slavery.

New Jersey enacted laws in 1877 that permitted women to retain personal property outside of marriage and to have separate estates. This statute also absolved husbands

³⁹ Baker, J. H., An Introduction to English Legal History, (3rd ed. Butterworths 1990) at page 550 - 557.

⁴⁰ Baker, Id. at pages 551 -552.

⁴¹ Even in the 18th century, the law allowed a husband to chastise his wife. [A judge] earned the nickname "Judge Thumb" by laying down the restriction that the stick should not be thicker than the thumb. Baker, Id., n 25 at page 551.

⁴² Baker, Id., at page 551.

⁴³ Baker, Id., at page 554.



of obligations for debts contracted before marriage. In 1912, women were given the right to sue and be sued without their husbands as parties to the law suit.⁴⁴ The Nineteenth Amendment to the U.S. Constitution was adopted by New Jersey in 1920, whereby women acquired the right to vote. By 1929, wives became responsible for their own tort liability. In *Sillery v. Fagan*, 120 N.J. Super. 416, 294 A. 2d 624 (1972), the court took judicial notice of "the efforts of the Women's Liberation movement to end all inequity between the sexes." This judicial recognition of the status of women and the need for change reflects the continued need of women to fight legal and social oppression.

D. Implications of gender-based and race-based discrimination (1860 - 1900).

It is important to understand the distinction between gender-based and race-based discrimination. The former was meant to provide protections against the exploitation of the status of women in the world. This paternalism, while limiting the status of women by virtue of the then prevalent belief in their lesser abilities, was grounded in concerns of providing for women and children who were born of marriages with men. In this sense, the discrimination against women is connected to the discrimination against black people as slaves because they were both seen as not possessing the independence or capabilities to participate completely in the economic and social conditions of the state of New Jersey. However, race-based discrimination against slaves was based on economic considerations. Such slaves were chattel to be bought and sold. For the most part, concerns about protecting slaves arose out of concern for the preservation of wealth rather than considerations of marriage or creation of children and an estate.

⁴⁴ *Sillery v. Fagan*, 120 N.J. Super. 416, 294 A. 2d 624 (1972).



The adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution⁴⁵ should have destroyed this legacy of powerlessness for

⁴⁵ The Thirteenth Amendment provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Section 1 of the Civil Rights Act of 1866 provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power,... are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude,... shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence to inherit, purchase, lease, and sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The Fourteenth Amendment enacted by Congress in June 1866 (and finally ratified in 1868) was designed to end doubt about the constitutionality of the Civil Rights Act of 1866. Primary responsibility for the protection of black rights, however, was left to the states. All persons born in the United States were made citizens, but deprivations of citizenship rights were negatively stated rather than in positive form as in the Civil Rights Act of 1866.

Section 1 of the Fourteenth Amendment provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Adopted in 1870, the Fifteenth Amendment prohibited the denial of the right to vote to United States citizens because of "race, color, or previous condition of servitude." Congress was empowered to enforce the provision "by appropriate legislation."



black men. The Thirteenth Amendment put into the Constitution the practical implications for the Emancipation Proclamation. The Supreme Court made clear that the Thirteenth Amendment was passed to remove the "badges and incidents of slavery."⁴⁶ The Fourteenth Amendment was meant to reverse the implications of *Dred Scot v. Sandford*.⁴⁷ In *Dred Scot*, Chief Justice Taney opined that black men have no rights that white men need respect because black slaves were not and were never intended to be citizens of the United States. Chief Justice Taney concluded that there was no federal citizenship. The Fourteenth Amendment would explicitly reverse that decision by extending a national citizenship and corresponding rights to all. The Fifteenth Amendment extended the right to vote to black men. These amendments did not eliminate discrimination primarily because the Supreme Court in the civil rights cases invalidated the Reconstruction era legislation which protected the civil rights of black and other citizens and left that protection to the states.⁴⁸ Thus, it was at the state level that the rights of citizens were secured and at the state level where black and women citizens who had been aggrieved had to look for protection and legal status. Let us examine the

⁴⁶ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) at page 439.

⁴⁷ 60 U.S. (19 How.) 393 (1857).

⁴⁸ Justice Bradley's opinion in the Civil Rights cases, 109 U.S. 3 (1883) concluded that the civil rights acts cannot extend to the private activities of citizens, helping to ensure that there would be no governmental protection for black civil rights until the second half of the 20th. Justice Bradley argued that:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitant of that state, there must be some stage in the process of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected....



application of some of these protections in New Jersey during the period.

There was a very strong tradition in English common law bequeathed to America and carried over into our early American legal history. Innkeepers and others with monopoly power, or who operated public accommodations, were required to open their establishments to the public unless the person seeking access was disqualified.⁴⁹ New Jersey apparently acceded to the modern unsavory development of the rule that anyone can be excluded unless it is a violation of an explicit civil rights statute, instead of the earlier common law rule that held that only the unsavory were excludable.

The denial of freedom of reasonable access in some states following passage of the Fourteenth Amendment, and the creation of a common law freedom to arbitrarily exclude following invalidation of segregation statutes, suggest that the current majority rule may have had less than dignified origins.⁵⁰

The impact of lack of protection in employment until very recent times left the black citizens of New Jersey with little practical protection against the adverse power and concerns of the majority population. For example, black people in New Jersey, much like their counterparts in Pennsylvania, were subject to exclusion from professions and occupations after the Civil War and continuing to 1900.⁵¹ Emancipation did not produce equality not only because of blacks' lack of capital and fear of re-enslavement, but also because of preconceived notions held by whites of what constituted appropriate

⁴⁹ See, for example, Uston v. Resorts International Hotel, Inc., 89 N.J. 163, 445 A. 2d 370 (1982) at pages 373 - 375.

⁵⁰ Id., at page 374, n. 4.

⁵¹ Lane, Roger, Roots of Violence in Black Philadelphia 1860 - 1900 (1986), pp., 16 - 44.

employment for blacks.⁵² Racial violence was used to enforce these exclusions.

One generally provocative trigger for these brawls was a uniform, any uniform, which suggested power or authority. It was murderously dangerous for a black man to wear a watchman's cap, unthinkable for one to serve as conductor on a streetcar, with the right to admit or throw out passengers. Above all, in the early 1860s, the prospect of black men in blue uniforms, under arms, was more than many whites could bear.⁵³

Thus, blacks were effectively excluded from a number of occupations and the number of blacks who were professionals in the broadest sense remained small throughout the 1900s. This failure to gain numbers in employment occurred despite an increase in education and other skills. In addition, as other immigrant groups came to New Jersey, they were permitted to displace black workers.⁵⁴

The implications, then, of slavery and status and subsequently of race and gender-based discrimination arising from the early history of New Jersey are these: Blacks and women were bereft of legal protection until later history; the lack of protection left blacks and women unable to fully participate in the activities of the state during this period. This is historical evidence of direct exclusion and discrimination.

⁵² Nash, Gary B., and Soderlund, Jean R., Freedom By Degrees: Emancipation in Pennsylvania and Its Aftermath, Oxford University Press, (1991), p. 204.

⁵³ Lane, Op. Cit., page 19, n 34.

⁵⁴ Lane, Id. pages 37 - 44.



PART II

NEW JERSEY LEGAL POLICIES CONCERNING CIVIL RIGHTS AND EQUAL OPPORTUNITY FOR MINORITIES AND WOMEN

Introduction

An examination of the impact of New Jersey legal policies on the creation and operation of M/WBE's must necessarily begin with its Civil Rights and Equal Opportunity policies for minorities and women. For the past forty years, New Jersey has been a pioneer in developing anti-discrimination legislation for the protection of minorities and women. The resulting Law Against Discrimination (hereinafter called the "LAD"), N.J.S.A. 10:5-1 et seq., prohibits discrimination by the state, including any of its subdivisions, and private and regulated industries on the basis of race and sex.¹ The Supreme Court of New Jersey has continually reaffirmed that the "eradication of 'the cancer of discrimination' has long been one of our State's highest priorities." Frank v. Ivy, 120 N.J. 73 (1990) at 110, Dixon v. Rutgers, The State University of N.J., 110 N.J. 432, 451 (1988), Fuchilla v. Layman, 109 N.J. 319, 334 (1988) and Peper v. Trustees of Princeton University, 77 N.J. 55, 80 (1978). Indeed the Legislature, in enacting the LAD, has declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions of a free democratic state." N.J.S.A. 10:5-3.

¹ There are other bases of discrimination which are prohibited: age, ancestry, color, creed, handicapped, marital status, medicaid, military service, national origin, and families with children under 18 are examples. For the purpose of this study, we have primarily concerned ourselves with discrimination based on race and sex.



Nevertheless, as we have seen in the previous section,² grave dissatisfaction with perceived and actual inequities have persisted from the early history of New Jersey to the present day. This report examines whether these inequities may be attributable to the failure to effectively implement New Jersey's far-reaching antidiscrimination laws.

In a 1964 report to the New Jersey Commission on Civil Rights,³ the authors advised that "the strength of the law lies not alone in its preachments but also in its power to affect the direction of everyday life."⁴ The report had posed the question: "Has the law which promises equal opportunity been effectively enforced so as to provide that opportunity?" The underlying hypothesis was that if the laws had been enforced, then the explanation for the wide socio-economic disparity between traditionally underrepresented groups (for example, African-Americans, Hispanics and women, etc.) and white males would lie outside of a consideration of effective enforcement of the laws. If the laws had not been enforced, then the law may yet be an effective force in channelling social change.

It was an optimistic view. (New Jersey had just experienced major race riots. The Kerner Commission⁵ had traced the cause of the riots to the great disparities in the

² Quantitative evidence of disparities based on race and sex in other areas of economic and social life in New Jersey is described in other chapters of this report. See, in particular, the chapters on education, employment, public accommodations and labor unions.

³ Blumrosen, Alfred W., and Zeitz, Leonard, et. al., Securing Equality: The Operation of the Laws of New Jersey Concerning Racial Discrimination, Report to the New Jersey Commission on Civil Rights (1964).

⁴ Blumrosen, et. al., ibid., page 57.

⁵ Report of the New Jersey Governor's Select Commission on Civil Disorder, NJ 974.932N462 (1968).



socio-economic conditions between blacks and whites. The reluctance of "Negroes" to come forward to press complaints of discrimination⁶ had been documented in an attitudinal survey accompanying the report to the Commission. The transfer in 1963 of enforcement power from the Department of Education to the Department of Law and Public Safety, Division of Civil Rights (hereinafter referred to as "the CRD"), whose purpose was to "introduce a greater emphasis on the enforcement of rights given by the statute",⁷ lay ample groundwork for the propriety of agency investigative initiative, the broadest reasonable construction of its enforcement powers, and pursuit of effective remedies.) Thus, the identification of weaknesses in the implementation of the broad powers under state anti-discrimination laws would encourage systemic approaches to the reduction of vast disparities in the relative situations of the various ethnic groups and trigger implementation of the civil rights laws.

Education as to New Jersey's strong constitutional and legislative reverence for the dignitary interests of its citizenry and of its progressive body of laws in support of those interests, it was believed, would alter the perception of potential claimants that the law could not help them. And the best education as to the existence of those rights was asserted to be effective enforcement of existing anti-discrimination laws.⁸

However, in the years which ensued after Blumrosen study, the concept of "affirmative action" tested the political will of the government or enforcement agencies.

⁶ Blumrosen, et. al., Id., Pages 12 - 14.

⁷ Blumrosen, et. al., Id., pages 17-17a. The statute referenced is the New Jersey Law Against Discrimination, N.J.S.A. 10:5 et seq.

⁸ Blumrosen, et. al., pages 57 -58.

Resentment and perceptions of unfairness among whites in response to attempts to correct for their prior advantages hardened into organized opposition.⁹ Thus, in the last twenty years, despite a steady stream of individual complaints of discrimination,¹⁰ all of which are vigorously pursued by the CRD,¹¹ there is still a reluctance to initiate investigations,¹² to use its full range of powers under enabling legislation, or to fashion effective remedies for persistent problems.¹³

Consistently, the most frequent basis of the complaints received by the Division has been that of race. Between 1971 and 1991, of a total of approximately 35,000 complaints of discrimination filed with the Civil Rights Division, over 12,500 of these were

⁹ See, Myers, Samuel, "Technical Report: Survey Comparing Minority/Women-Owned Business Enterprises to Non-Minority Owned Businesses," A Report to the New Jersey Transit Authority and the Governor's Study Commission on Discrimination in public Works Procurement and Contracts. (1992) The report indicates that white male business owners see themselves as "losing" at the expense of racial minorities.

¹⁰ See, Table I, Statistical Summary of Complaints Received per Basis of Discrimination, Source: Report of the Management Information System, Department of Law and Public Safety, Division on Civil Rights, Management Information System (1991), Appendix A.

¹¹ Interview with Rolando Torres, Assistant Director for Enforcement, Division of Civil Rights

¹² Interviews with Roberto Rodriguez, Supervisor for Research and Statistics Management Information Systems, Division of Civil Rights, and with Lynn B. Norcia, Deputy Attorney General, Department of Law and Public Safety, Division of Law. The statistical report of activities provided by Mr. Rodriguez showed no documentation of investigations undertaken, although the data from 1974 indicates that surveys were undertaken. Efforts to find out the use to which survey data was put were unavailing. Ms. Norcia stated that she had no recollection of investigations being undertaken during her seven year tenure though she was currently considering a group of housing cases for systemic action.

¹³ Id., Interview with Torres. He indicated that budgetary constraints impeded the use of systemic approaches to these problems. With regard to disparities in the utilization of M/WBE's, he pointed to the need for education among potential claimants that discrimination in contracting is a cognizable claim under the New Jersey Law Against Discrimination. In the meantime, individual claims of such discrimination, if filed, are vigorously pursued as are claims of discrimination on other statutory bases.

based on race. Over 6,000 complaints of sex discrimination were filed over the same period. (See, Table I at Appendix A.) Despite the fact that the New Jersey Division on Civil Rights has handled the enforcement of these individual complaints of discrimination, there are still a significant number of minorities and women who, like 17% of the [Negroes] surveyed in 1964, who:

...condemn the police; who do not believe that judges, lawyers of the Civil Rights Division would be helpful to them, who do not believe that the major political institutions can give them protection.¹⁴

The incredible discrepancies in perception of how differing racial groups assess their chances of competing for state business, coupled with the fact of unremedied discrimination in most areas of economic life in the state,¹⁵ leads not toward the conclusion that the law should be used as a tool for social change but that the law is useless and that claims for decent treatment must be pressed in other forums than those provided by law.¹⁶

The prevention of public rebellion, then, is a legitimate goal of the state. It is based on the assumption that the economic, political, and social health of any society depends heavily on access to the sources of economic and political power by all major

¹⁴ Blumrosen, Op. Cit., page 15.

¹⁵ See "Final Report: Summary of Conclusions", Historical Record of Minority and Women Business Enterprises in Public and Private Contracting in New Jersey, May 6, 1992.

¹⁶ Certainly the recent occurrences in the aftermath of the Rodney King verdict corroborate the popularity of this cynical view.



racial, gender, and ethnic groups.¹⁷ Public perception of fairness is also critical.¹⁸ In today's competitive global economy, New Jersey cannot remain competitive if it denies opportunity to those who can become self-supporting. A majority of the workforce in the year 2000 will be ethnic minorities and most jobs will require high technical skills. As long as women and minorities are denied access to business opportunities, the consequences for society are grave indeed.

History of Anti-Discrimination Laws

The 1968 Kerner Commission Report¹⁹ documented the fact that New Jersey's failure to fully implement its extremely broad governmental powers to remedy discrimination against racial minorities was, among others, a source of dissatisfaction among racial minorities. Previous studies have documented this lack of implementation.²⁰ To understand the standard by which effective enforcement is

¹⁷ Accord, Brimmer, Andrew F. and Marshall, Ray, "Minority and Female Business Development Programs: Assessment and Options," Public Policy and Promotion of Minority Economic Development, Report to the City of Atlanta, June 29, 1990, page 1 ff.

¹⁸ It is especially important that the public believe that minority business development programs are in the public interest and are fair. As Justice Powell noted in his concurrence in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) which upheld the federal minority set-aside program, "Respect for the law, especially in an area as sensitive as this, depends in large measure on the public's perception of fairness. It is therefore important that the legislative record supporting race conscious remedies contain evidence that satisfies fair minded people that [governmental] action is just." *Id.*, p. 507 n. 8. In order to establish a public perception of fairness, it is clear that local/state governments must show specific evidence of discrimination in its "own bailiwicks," to justify the establishment of set aside legislation. The set aside plan must be "narrowly tailored to remedy prior discrimination." *City of Richmond vs. J. A. Croson Company*, 109 S.Ct. 706.

¹⁹ Report of the New Jersey Governor's Select Commission on Civil Disorder, Op. Cit.

²⁰ Blumrosen, et. al., Op. Cit. There was also a study presented to the Civil Rights Commission during the 1970s. Professor Blumrosen has written extensively on implementation issues in New Jersey.



measured, let us examine the enforcement powers under the current constitutional and statutory schemes.

A. The New Jersey Constitution of 1947

The 1947 Constitution of the State of New Jersey may be said to be one of the most forward-looking documents of its kind in the United States. It extends similar provisions in earlier Constitutions,²¹ which prohibited discrimination in civil rights on account of religious principles, to "all persons" and made the provision broader and more specific. It provides:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

This unalienable rights provision, while comparable to the 14th amendment of the U. S. Constitution, is broader because it reaches private action and does not require intentional discrimination. *Greenberg v. Kimmelman*, 99 N.J. 552 (1985) In the context of racial discrimination, the elements of a claim under Article 1, Section 1, are analogous to the equal protection clause under the U. S. Constitution. *Peper v. Princeton University Board of Trustees*, 77 N.J. 55 (1978). A claim under this provision requires the plaintiff to show that he or she was treated less favorably than a similarly situated person, and that the reason for this disparate treatment was his or her race. In employment discrimination cases brought under the state constitution, the New Jersey Supreme Court has approved of the use of the proof framework set out in *McDonnell Douglas Corp. V. Green*, 411 U.S.

²¹ The 1776 Constitution protected religious freedom for office holders. The 1844 Constitution also provided that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles."



792 (1973); *Peper v. Princeton University Board of Trustees*, supra.

Under New Jersey Constitution, Article 1, Section 5, there is an explicit prohibition against discrimination and segregation. This section provides:

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

Although this provision has been interpreted as being analogous to the federal equal protection clause and requires essentially the same analysis as that of Article 1, Section 1. *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297 (Ch 1970), it is not necessary to bring an action under this section of the Constitution for the redress of injury to one's dignitary interest, as we shall see, infra.

One significant distinction between the federal and state constitutional provisions is that, while the Fourteenth Amendment of the U.S. Constitution requires state action in every case, the New Jersey State Constitution reaches some forms of private conduct.²² Thus, claims under the state constitution need not be analyzed rigidly under the *McDonnell Douglas* formula. Indeed, the New Jersey Supreme Court approved of an analysis which merely inquired whether the alleged disparate treatment was the product of a legitimate business consideration rather than proscribed discrimination. *Peper*, supra.

The presence of this constitutional mandate against discrimination makes New

²² *State v. Schmid*, 84 N.J. 535 (1980), holding that state constitutional provisions regarding free speech are applicable to private property where property is open to the public; *Utson v. Resorts International Hotel, Inc.*, 89 N.J. 163 (1982), holding that when property owners open their premises to the general public they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises.



Jersey unique in this way: In the absence of implementing legislation, New Jersey courts have the power to enforce rights conferred by the Constitution which would prohibit discrimination and segregation. *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189 (1961). Moreover, pursuant to generally accepted principles of statutory construction, interpretations of other legislative enactments also designed to prohibit discrimination should be liberally interpreted. *Levitt & Sons, Inc. v. Division Against Discrimination in State Department of Education*, 31 N.J. 514 (1960), appeal dismissed, 363 U.S. 418 (1961). The New Jersey Law Against Discrimination,²³ thus, is a separate source for the implementation of these constitutional protections and should be vigorously enforced. Let us now examine the historical development of this law.

B. Statutory History of The New Jersey Law Against Discrimination

This statute prohibits discrimination because of race or sex not only in public and private contracting with the State of New Jersey but also in other areas affecting the economic life of citizens in the state. To illustrate its broad scope, we detail a brief history of the development of New Jersey's anti-discrimination policies below:

In 1884, the first Civil Rights Bill was introduced to the New Jersey legislature.²⁴ This was the beginning of the struggle by the State of New Jersey to eliminate discrimination. Toward the end of World War I, we see state recognition of the wrong to the "municipality" as opposed to the person by an offender of the civil rights law.²⁵

By 1921, the aggrieved party had acquired the right to sue in the name of the

²³ N.J.S.A. 10:5 et. seq.

²⁴ Laws 1884 Chapter 219

²⁵ Laws 1917, Chapter 106, Assembly 103 (1917)



State of New Jersey.²⁶ In that same year, New Jersey extended to women electors equal privilege in holding all offices or employment in the State.²⁷

By 1933, the first prohibition against discrimination on account of race, creed or color in employment on public works is passed.²⁸ Later, a provision for allowing attorney fees as part of costs in is added to the 1884 Civil Rights Laws and a fee schedule is fixed.²⁹

In 1938, state, counties and municipalities are forbidden to discriminate against applicants for employment by reason of age.³⁰ That same year saw the establishment of the Good Will Commission, predecessor to the Division against Discrimination of 1945.³¹

The 1940s were years of great activity insofar as continued violation of civil liberties of the "colored persons in New Jersey" and of state recognition of its interest in remedying such violations were concerned.³² For the first time, money

²⁶ Laws 1921, Chapter 174, A89

²⁷ Laws 1921, Chapter 299 - A212

²⁸ Laws 1933, Chapter 277 - A 478

²⁹ Laws 1935, Chapter 247 - A325

³⁰ Laws 1938, Chapter 295 - A445

³¹ Laws 1938, Chapter 295 (AJR14)

³² Laws 1941, Chapter 247 - A214 - permits citizens to hold office or employment regardless of sex or marital status; forbids discrimination in compensation, promotion or dismissal based on sex or marital status.

Laws 1942, Chapter 114 - A194 - forbids discrimination by reason of race, color or creed in employment on public works or defense contracts.

Laws 1945. Chapters 168 to 174 - creates the Division Against Discrimination and broadened all civil rights laws to include "creed, national origin, or ancestry;" abolishes the Good Will Commission; forbids discrimination in public places (168 - A184), employment (169 - A321), public contracts (171 - A371), schools (172 -A372), hospitals (173 -A373), war industries (174 - A374).

Laws 1949, Chapter 11, Assembly 65 - combines into one law the substantive provisions of civil rights law and existing Law Against Discrimination. This law was the result of several attempts at passage and any number of commission reports documenting the need for a civil rights law for New Jersey.



is appropriated. A commission is also created to recommend measures to improve the economic, cultural, health and living conditions of the "urban colored population."³³ By the end of the decade, there is finally one comprehensive law governing discrimination in employment, public works or defense contracts, schools, hospitals, etc. The enforcement of this law is assigned to a newly created Division Against Discrimination.³⁴ But this division is located in the Department of Education.³⁵

Discrimination in public housing, publicly assisted housing accommodation and mortgage lending is added to the list of prohibitions covered by the law during the 1950s.³⁶ An attempt to ameliorate the exclusion of blacks from unions surfaces for the first time, perhaps in response to the inclusion of blacks in military service during World War II.³⁷

³³ Laws 1941, Chapter 192 - A184 - creates commission to recommend measure to improve economic, cultural, health and living conditions of urban colored population; appropriates \$16,000. This Commission issued several reports of violations of civil liberties of colored persons in New Jersey.

³⁴ Laws 1945, Chapter 168 - 174

³⁵ Arguably, this weakened the implementation of the act's enforcement powers of the law. See, Blumrosen, Alfred W. and Zeitz, Leonard, and the students in the course on Social Legislation, Rutgers School of Law 1963-1964, "SECURING EQUALITY: The Operation of the Laws of New Jersey Concerning Racial Discrimination," Report to the New Jersey Commission on Civil Rights. (1964), p. 17. "The Division on Civil Rights was, for more than 15 years, located in the Department of Education. During a large part of that period, it was not viewed as engaged primarily in the processing of cases involving discrimination. Rather, its staff engaged in extensive activities outside the area of law enforcement."

³⁶ Laws 1950, Chapters 105 to 112 - prohibits discrimination by reason of race, creed color, national origin, or ancestry in housing built with public funds or public assistance; parallels similar language of the Veteran's Housing Act. (P.L. 1946)

Laws 1955, Chapter 106 and 107, A424, 425 - prohibit discrimination in granting mortgage loans.

Laws 1951, Chapter 64 - prohibits discrimination by employers of labor organizations against members of the National Guard, Naval Militia and Reserve and those subject to draft.

Laws 1957, Chapter 66, Assembly 8 - prohibits discrimination in obtaining the accommodations, advantages, facilities and privileges in any publicly assisted housing accommodation because of race, creed, color, national origin or ancestry; defines publicly assisted housing accommodation.

³⁷ Laws 1951, Chapter 64 - prohibits discrimination by employers of labor organizations against members of the National Guard, Naval Militia and Reserve and those subject to draft.

For a while it seemed as if New Jersey had wrought a "peaceful social revolution"³⁸ through its antidiscrimination policies. The Civil Rights Division is created in 1960.³⁹ Added to the list of prohibitions are discrimination in housing generally;⁴⁰ discrimination by employers against applicants for training or apprenticeship programs;⁴¹ and discrimination by any contractor or supplier doing any construction, alteration or repair of any public building or public work;⁴² discrimination in the selling or leasing of real property except the rental of an apartment in a 2-family dwelling where the other apartment is maintained by the owner as the household of his family and the rental of rooms by the owner or occupant of a 1-family accommodation.⁴³ This last statutory provision changed the definition of "a place of public accommodation."

Enforcement powers are given to the Civil Rights Division. Laws 1963, Chapter 40 - S78 transfer the Division on Civil Rights from Department of Education to Department of Law and Public Safety. Laws 1966, Chapter 254 - A474 include an employer with fewer than 6 persons in his employ in the law against discrimination. Laws 1966, Chapter 165 - A564 provide that complaints of violation of the statutes governing civil rights shall be made to the Attorney General instead of the Commissioner of Labor.⁴⁴ The purpose of the transfer of this power to the Department on Law and Public Safety, Division on Civil Rights, was to "introduce a greater emphasis on the enforcement of rights given by the statute."⁴⁵

C. The Current Law Against Discrimination Statute

The Law Against Discrimination, N.J.S.A. 10:5 et. seq. (hereinafter referred to as "LAD") prohibits discrimination on the basis of race, sex, age, handicap, national origin,

³⁸ A term coined by Professor Alfred Blumrosen. See William A. Darity, Jr., Current Historical Trends, Vol. IV, Report to the New Jersey Transit Authority. (1992)

³⁹ Laws 1960, Chapter 59 - A474

⁴⁰ Laws 1961, Chapter 106 - A12

⁴¹ Laws 1962, Chapter 175 - A515

⁴² Laws 1962, Chapter 213 - A366

⁴³ Laws 1966, Chapter 17 - A 164

⁴⁴ In 1968, laws relating to discrimination were reallocated to Chapter 5 of Title 10, thus, the citation NJSA 10:5.1 et seq.

⁴⁵ Blumrosen, Id., page 17-17a.



etc. in the areas indicated above.⁴⁶ Under LAD, the Attorney General has broad power to organize a section of the Division on Civil Rights to "receive, investigate, and act upon complaints alleging discrimination."⁴⁷ The Attorney General is also given the power to "conduct investigations, receive complaints and conduct hearings thereon other than those complaints received and hearings held pursuant to the provisions of this act."⁴⁸(*emphasis added.*)

Prior to 1963, this section read "receive, investigate, and pass upon complaints alleging acts in violation of the provisions of this act." This earlier language may have contemplated a narrow role for the Attorney General, which would involve complaints. As amended, however, the statute appears to contemplate the authority of the Attorney General's office to initiate investigations and complaints.

Section 10:5-13, which deals with remedies, filing of complaints, and prosecution in the superior court, provides that "the Commissioner of Labor, the Attorney General, or the Commissioner of Education may, in like manner, make, sign and file such complaint." In *Jackson v. Concord Company*, 54 N.J. 113, 253 A.2d 793 (1969) the court held that the authority granted under these sections "is utilizable not only where a wronged individual declines to complain but also in situations where the alleged unlawful conduct is more general." *Id.* 253 A.2d at 798-99. In addition, the court noted that in conjunction with section 10:5-14.1, once a complaint is filed the Attorney General is authorized to

⁴⁶ Discrimination in other paths to entrepreneurship, such as Housing and Education, are examined separately in other chapters of this study.

⁴⁷ N.J.S.A. 10:5-5(c)

⁴⁸ N.J.S.A. 10:5-8(h)



"proceed against any person in a summary manner in the Superior Court to compel compliance, to prevent violations, attempts thereat or attempts to interfere with or impede enforcement of or the exercise or performance of any power or duty under the Act." *Id.* at 799. Section 10:5-6 states that the Division on Civil Rights is given the power to prevent and eliminate discrimination, and is further given "general jurisdiction and authority for such purposes."

Section 10:5-9.1 specifically empowers the Division on Civil Rights to "enforce the laws of this State against discrimination in housing built with public funds or public assistance." The annotations to this section indicate that investigations by the Director are authorized by N.J.A.C. 13:4-2.1, 13:4-2.2. This was affirmed in *Hinfey v. Matawan Regional Board of Education*, 77 N.J. 514, 391 A. 2d 899 (1978). There, the court held that the Division of Civil Rights had broad discretionary powers, and that the Division was vested with a wide range of regulatory tools encompassing investigative, educative, prosecutorial, adjudicative and rule-making powers. The Division on Civil Rights, for example, has the authority to bring an action for injunctive relief to restrain a landlord from renting an apartment to others while a discrimination complaint is unresolved. *Poff v. Caro*, 228 N.J.Super. 370, 549 A.2d.900 (L. 1987).

Implementation Analysis

The extent of the Attorney General's enforcement powers is important. An implementation policy which is exclusively complaint-driven, such as has been the case during the period under consideration, while consistent with American legal tradition, may fail to prevent discrimination. Let us examine a few of the areas.



State Contracting. Because of the secrecy surrounding the bidding process, members of the available pool of bidders may not know they have been discriminated against when they have been denied a contract. No individual could be expected to fathom the operation of State Contracting procedures sufficiently to understand at what point, if ever, she has been the victim of racial discrimination. For example, at a seminar conducted by New Jersey Transit Authority regarding its bidding procedures, many of the minority participants stated that they were not only unfamiliar with the process by which bid information was obtained and prepared, but they were totally unaware that the LAD prohibited discrimination in state contracting.⁴⁹ Thus, it would appear that agency-initiated investigations would be the only effective protection victims of discrimination would have in the area of state contracting. Because the utilization of minority contractors is peculiarly within the purview of the agency, the failure to require maintenance and reporting of the percentage of M/WBE's competing and receiving contracts during the period studied, can also be regarded as lack of implementation of the LAD.⁵⁰

A fundamental problem with complaint-driven enforcement generally in the area of state contracting is a lack of knowledge that it is prohibited by LAD. Because it has been so infrequently raised, even judges have dismissed claims brought under its provisions. In *Watkins v. Resorts International Hotel and Casino, Inc.*, 124 NJ 398,

⁴⁹ Transcript of Proceedings, In Re: New Jersey Transit's Minority Advisory Committee D. B. E. Sub-Committee Business Forum, Saturday, May 7, 1988.

⁵⁰ A major contracting entity with the state of New Jersey is the Department of Treasury. However, while this agency kept summaries of construction contracting activity, it did not have accurate information as to total construction contracts and dollars awarded to M/WBE's as at January 7, 1992. (Interview with Lana Sims, Director of the State Treasury.) A utilization study was undertaken contemporaneously with this project which will provide accurate information.



(1991) it was ruled that Watkins had no jurisdiction to hear the claim of minority bus drivers who alleged that they had been illegally excluded from contracts to transport gamblers to Atlantic City casinos. The Casino Reinvestment Development Authority provides financial assistance to businesses. Under NJSA 5:12-181 proceeds received by the Casino Reinvestment Development Authority are set aside for investment in M/WBE's.

Again, in Douglas v Bally's Grand Hotel Casino et. al., Superior Court of New Jersey, Law Division: Atlantic County, Docket No. ATL-L-005353-L, when a black decorated Vietnam service veteran and owner/operator of a certified minority small business limousine service sued a dozen owner/operators of hotel/casinos for refusal to contract with him, the Court ruled that neither LAD⁵¹ nor the Casino Control Act⁵² were applicable to his claim for relief. His stated reasons⁵³ illustrate the popular belief that claims of discrimination do not arise in the context of contracting with the state or its agencies.⁵⁴ The Attorney General moved to participate as Amicus Curiae in the case.

⁵¹ The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1

⁵² N.J.S.A. 5:12-84 and 5:12-134

⁵³ Douglas v. Bally's Grand Hotel, Docket No. ATL-L-005353-91, attached at Appendix D.

⁵⁴ Perhaps this view is best explained by Brimmer and Marshall in their report on discrimination in the City of Atlanta. Brimmer, Andrew F. and Marshall, Ray, "Minority and Female Business Development Programs: Assessment and Options," Public Policy and Promotion of Minority Economic Development, Report to the City of Atlanta, June 29, 1990 at page 2. "There seems to be wide acceptance of the need to afford broad access to education and jobs, but less attention to the need for broad access to business opportunities...[Those who feel that special programs to help M/WBE's succeed in business constitute unjust enrichment do not understand that] it is in the interest of every community to eliminate the discriminatory barriers to business formation [because] the distribution of wealth, income, and power will continue to be unfair and even to polarize, with grave consequences for the economy, polity and society.



The state's brief, attached,⁵⁵ arguing that the enabling language of the statute could not have clearer, is an example of vigorous pursuit of matters which come to the attention of the CRD. But it is to be noted that this complaint was brought by an aggrieved individual through a private attorney and that the amicus brief takes no position on the merits of the claim.

Housing. Because of the complexity of social, economic and governmental structure through which discrimination is practiced, it is frequently impossible to prove or to know is happening on an individual basis. The critical link between private discrimination and state responsibility for exclusion of M/WBE's from participation in the economic life of the state is shown here. For example, the Multiple Dwelling Reporting Rule was developed in 1974⁵⁶ not only to enable the CRD to pinpoint problem areas in housing discrimination by identifying landlords with the most frequent discriminatory practices but also to compare the percentage of ethnic minorities living in the county with the percentage of these same groups residing in the units required to report. For eighteen years, although the data was collected the CRD did not use it in any significant way.⁵⁷ Only through a grant from HUD in 1991 has the entry of the data been put in

⁵⁵ See, Susan Maczik v. Gilford Park Yacht Club, OAL DKT No. CRT 6415-89, DCR DKT NO.1 PQ075-01970, Appendix D. The Director has issued a strong opinion regarding the elimination of discrimination on the basis of sex in this area of the law.

⁵⁶ Sometimes called the Landlord Tenant Reporting Rule, dwellings with 25 or more units are required to report such information as the number of units, type of unit, whether the minimum or maximum rent is charged, applications by race, turnovers, use of advertising, etc. The theory of the reporting requirement is that by requiring this annual report from landlords, it is a reminder, much akin to the annual filing of Form 1040 with the IRS, of the requirements of the law.

⁵⁷ Interview with James Sincaglia, Department of Law and Public Safety, Division of Civil Rights. Mr. Sincaglia stated that the data was not collected in a way that facilitated enforcement



a database where the characteristics of dwellers in housing containing 25 or more units can be compared with the demographics of the county.

As we have seen, lack of capital is found to be a major factor in preventing MWBE formation or success and home ownership forms the capital base of most small businesses. From an analysis of housing complaints filed from 1971 to 1991,⁵⁸ we know that on the average nearly 400 annual complaints from individuals were filed.⁵⁹ We infer state knowledge of the existence of numerous complaints of discrimination in the housing area. Unlike in state contracting, here the inadequacy of reporting has resulted in precluding the taking of a more systemic approach to the problem of housing discrimination.

Finance. Banks in New Jersey have not been required to report their mortgage activity under LAD. We now know from the 1990 Report of Federal Regulators issued pursuant to the Home Mortgage Lending Act that there is wide disparity in rejection rates for whites as opposed to blacks and Hispanics. E. Robert Levy, executive director of the Mortgage Bankers Association in New Jersey found the data very troubling. He stated, "On the surface, it would indicate there could be a problem with respect to minority

policy. In October 1990, he produced a report to the Department of Housing and Urban Development called "A Proactive Approach to Decrease Housing Discrimination", Report of the New Jersey Department of Law and Public Safety, Division on Civil Rights. In 1991, the CRD received a grant from HUD which has enabled them to develop an appropriate database from the information that has been collected for the past 18 years.

⁵⁸ See Table I. Discrimination Case Loads: Cases Received by New Jersey Agencies, attached at Appendix.

⁵⁹ Source: Statistical Reports from the Management Information System of the Department of Law and Public Safety Division on Civil Rights for fiscal years 1971 to 1991.



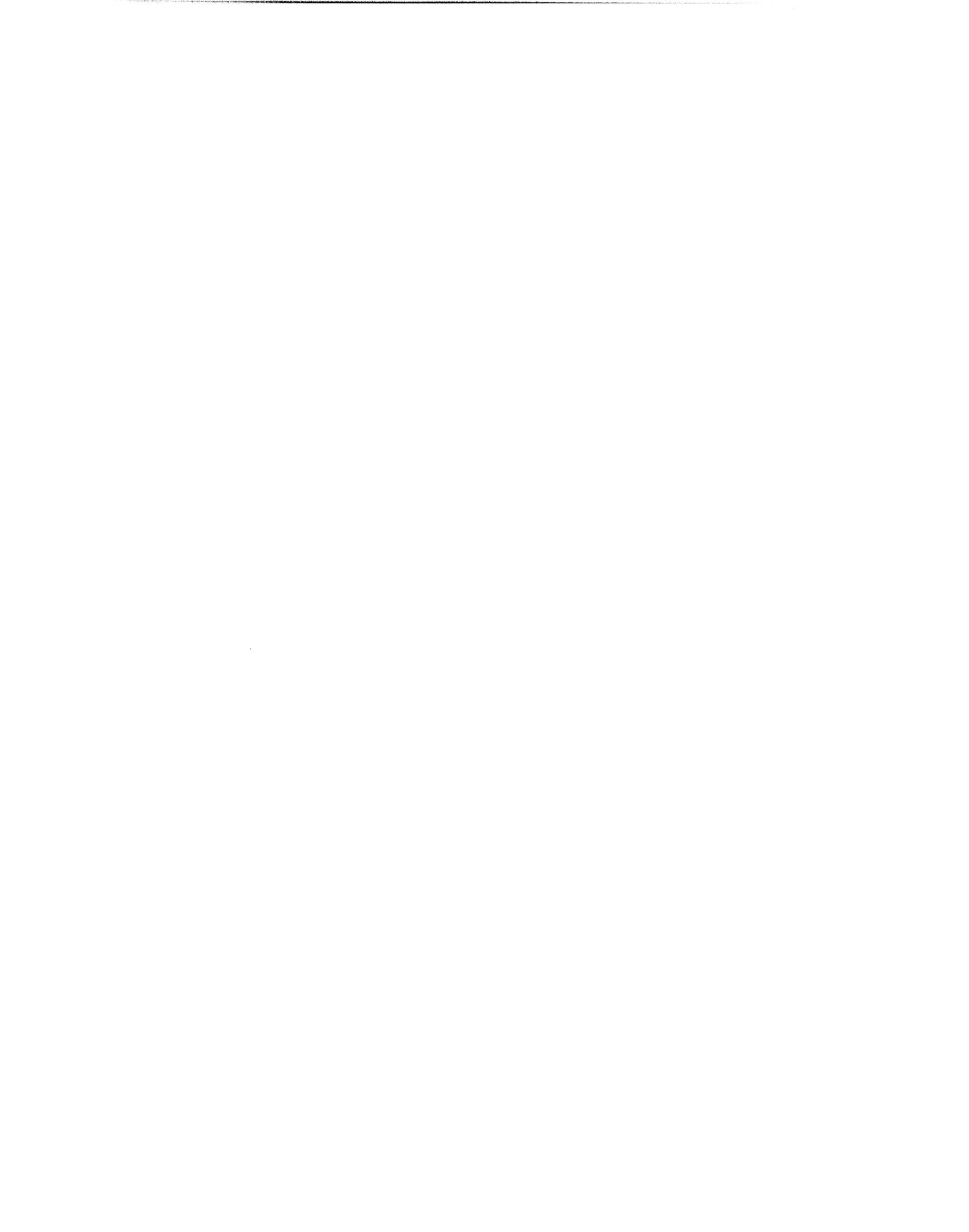
lending...I am totally unaware of any purposeful redlining or discrimination or any kind of effort or motivation by any lenders in our organization to discriminate on the basis of race."⁶⁰ The point with respect to enforcement of LAD is this: If state law prohibits discrimination against minorities and women in financial institutions, what inference is to be drawn from the failure of the Bankers Association or of the state banking commission to even keep records of rejection rates so that its representatives would not be "totally unaware"? No individual can be expected to fathom banking industry practices to understand at what point, if ever, she has been the victim of discrimination. Her only protection against a system with which she cannot cope must come from agency initiated investigations, or minimally, a reporting requirement to the designated statutory authority.

There is a similar unfamiliarity with the requirements of LAD. Upon information and belief, when minority appraisers filed complaints with the Banking Commission for the failure of banks to use their services, they were told that there was nothing the Commission could do.⁶¹

Public Accommodations. Access to contracting or business assistance information is another problem with effective implementation. The traditional means by which Blacks, for example, obtain informal information (churches, social groups, NAACP) is not hooked into the network of those trade associations and social organizations which provide information on contracting opportunities. In this era of technology, one would think that a telephone information hotline by which information regarding bid solicitations

⁶⁰ Newark Star Ledger, October 27, 1991.

⁶¹ A letter to this effect is said to exist.



and deadlines or even technical assistance could remedy this problem. However, New Jersey Transit has such a telephone hotline. Nevertheless, many M/WBE's did not know of its existence.⁶² Thus, it can be said that impediments to providing information to the public still exist.

Business Assistance. New Jersey has long undertaken business assistance programs to assist businesses located within the state or who would like to re-locate to the state. In testimony before the Senate Appropriations Committee, the Commissioner of the Department of Commerce and Economic Development⁶³ confirmed the dissatisfaction of M/WBE's with their services. A Newsletter that is intended to break through the procurement maze of state government and corporations was published in 1991 but the Commissioner admitted that the services to the small business community and the M/WBE community lagged behind their other work.

Policy of Complaint-Driven Enforcement. As we have seen the CRD has the authority to initiate proceedings. However, during the period examined, this power was rarely exercised.⁶⁴ Rather we see from the data that the CRD handles, and has handled since the early 1970s over 1500 individual case filings per year.⁶⁵ Effective

⁶² Transcript of Proceedings, NJ Transit, Op. Cit., page 65.

⁶³ Testimony of George Zeffinger, New Jersey Senate Appropriations Hearings, April 16, 1991.

⁶⁴ See, for example, the Statistical Report (1991), Department of Law and Public Safety Division on Civil Rights Management Information System, attached at Appendix B.

⁶⁵ The charts contained in Appendix A provide a graphic illustration of just how busy the CRD has been over the years.



implementation of the LAD, however, requires planned enforcement.⁶⁶ Complex problems require a planned series of investigations on an industry by industry basis to enable the CRD to exercise its full powers. Our research indicates, with one exception, for the last twenty years that plan has been simply to handle the large numbers of individual complaints. That exception was the housing report to which we referred, supra. Interestingly enough, the one area where a systemic approach is being considered is housing.⁶⁷

Financial support for the CRD has remained roughly the same over the period studied,⁶⁸ according to enforcement officials. Yet cases have continued to be filed at the rate of over 1500 per year on the average. In 1991, the CRD received a record high of complaints (2,163)⁶⁹ From the Tables in Appendix A, we see that nearly 2,000 cases have been received and closed each year since 1981. Most of these cases concerned individual complaints in the areas of employment, housing, public accommodation. This represents an enormous expenditure of effort and state resources. Over the last twenty years, there have been 28 to 29 investigators on staff. On the assumption that four to five cases per month is a reasonable caseload per case per investigator, it can be seen

⁶⁶ Blumrosen, et. al., "Securing Equality", Op. Cit., page 24.

⁶⁷ Interview with Lynn B. Norcia, Deputy Attorney General, CRD

⁶⁸ It was not possible to undertake a complete budget study of the CRD due to time and budgetary constraints governing this research.

⁶⁹ See Appendix B.



that there is enormous pressure to dispose of cases on procedural bases.⁷⁰ The statistics bear this out.⁷¹ According to Assistant Director of Enforcement, Rolando Torres, complaints of discrimination are vigorously enforced upon presentment to the Civil Rights Division. However, despite the clear lack of education among the public as to the legitimacy of the claim of race/sex discrimination in state contracting under the LAD, there is only enough manpower to handle the existing, enormous caseload of individual complaints. Thus, the question of whether the policy of complaint-driven enforcement should be continued should be examined.

There are other enforcement problems: Confusion at the intake source is a main one. A confidential informant stated that when individual claimants presenting claims of discrimination in state purchasing appeared at Civil Rights Division, they were told either

- a) to go to the Department of Treasury⁷² to file the complaint; or
- b) there was no such type of complaint. Indeed, the intake form used to interview complainants, attached, does not indicate a complaint category for this type of problem so that even if an intake worker were doing an excellent job, she would have no guideline by

⁷⁰ This pressure in fact reflected itself in precisely this way. See Table III, Appendix A. Many cases are dismissed for "No probable Cause" or are settled not on the "merits".

⁷¹ See Tables, Appendix A.

⁷² The logic for referral to the Department of Treasury was apparently this: since Treasury was the department was the place where the money came from, that was the place you should go to file your complaint. When the question of why, despite clear statutory authority, were these complaints being sent to Treasury, one highly place enforcement official speculated that there was probably a letter of delegation from the Civil Rights Division to the Treasury somewhere. When an official request for a copy of the letter was made, another enforcement official stated that there was no such letter; that such a complaint would be handled by the Civil Rights Division.

which to know that this was a permissible basis for a claim.

Another problem is imposed externally. The CRD, as the state's deferral agency for EEOC, is required to comply with the very strict time requirements of handling ADEA cases. This is also an important source of revenue for the CRD. Thus, the handling of these cases receives a priority.

Other Expressions of State Policy

Despite the reluctance to fashion and enforce remedies for complaints of discrimination unless there is vigorous pursuit by the individual complainant, in other areas of business development the state has not hesitated to act. The Economic Development Authority is an example of what is meant.

The major responsibilities of the New Jersey EDA are as follows:

- 1) To promote the economic health of the state by providing low cost loans to labor-intensive New Jersey companies in need of working capital or financing for the expansion of their operations.
- 2) To assist companies relocating to the state; and to promote the development of key industries and economically distressed areas by targeting the aid according to established development policy.
- 3) To provide stimulus for urban redevelopment by financing and developing real estate projects in distressed areas.
- 4) To offer consulting services in planning, marketing, finance and other business functions to manufacturers adversely affected by foreign competition.
- 5) To provide loan processing services for selected state and federal loan programs, e.g., the Veterans Administration.



To achieve these objectives, the EDA offers several forms of financial assistance.⁷³ The agency issues tax-exempt and taxable bonds to provide low interest loans to eligible borrowers, and in addition, offers direct loans and loan guarantees for business retention, expansion and modernization. EDA also processes loans for the recycling business loan program of the Department of Environmental Protection, the Local Development Financing Fund of the Department of Commerce, the Urban Development Corporation's loan programs, and for the U.S. Small Business Administration's 504 loan program. It also performs credit evaluations for the Casino Reinvestment Development Authority and works with municipal and county development agencies.

EDA is an independent, self-financing authority. In a hearing before the state Senate, testimony demonstrated that there is a lack of understanding of EDA operations. First, there is a misperception that tax-free industrial development bonds⁷⁴ have been phased out under federal tax reform. Secondly, the Authority acknowledges the need to find better ways to reach the growing companies that can use their help.⁷⁵

Other business assistance programs include the Urban Enterprise Zone Authority, NJSA 52:27H-60 et seq., NJAC 12A:120-1.1 et seq., NJAC 12A:121-1.1 et seq., NJAC 18:24-31.1 et seq. The Authority has approved various measures to stimulate economic activity in designated zones, including tax credits and skill training

⁷³ A brief guide to the financing services of the New Jersey Economic Development Authority is attached in the Appendix.

⁷⁴ The means by which EDA raises revenue.

⁷⁵ Testimony of George Zeffinger, Commissioner of the Department of Commerce and Economic Development for the State of New Jersey before the Senate Appropriations Committee. April 16, 1991.

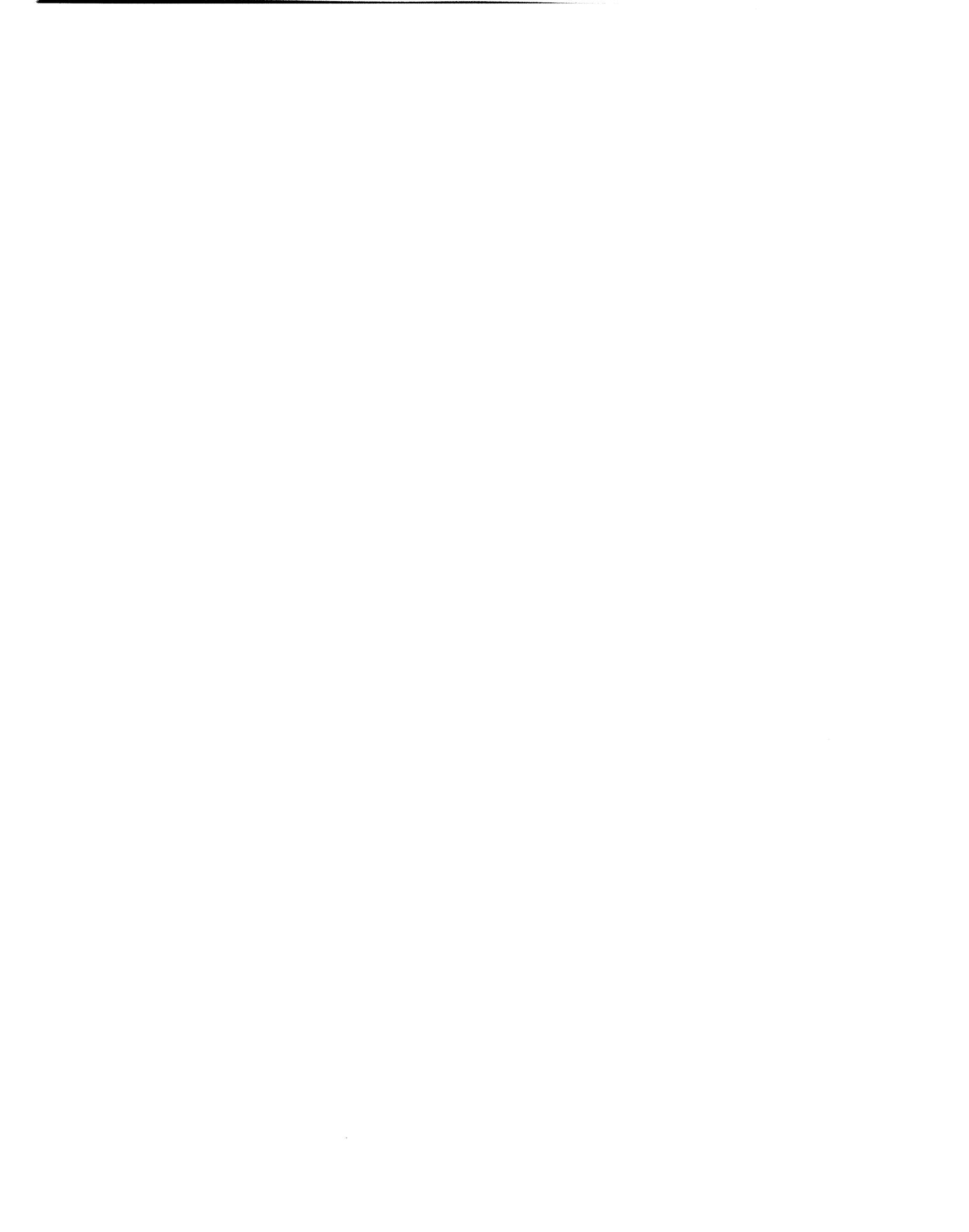


programs. The New Jersey Local Development Financing Fund, NJSA 34:1B-36 et seq., NJAC 19:30-1.1 et seq. creates a state fund to provide direct state financial assistance to local commercial and industrial projects. Financial assistance includes, but is not limited to, loans, loan guarantees, grants, secondary mortgages, and equity participation. Waiver of Bond Requirements is located at NJSA 34:1B-52. The Motion Picture and Television Development Act, at NJSA 34:1B-22. Finally, the Occupational Information Coordinating Committee, established under NJSA 24:1A-76, is responsible for the design and implementation of a comprehensive occupational information system to meet the informational needs for all public training and job placement programs. This independent agency is the state's principal source of long-term, low-interest financing for economic development activities undertaken by private companies. It also acts as a real estate developer in areas in need of economic expansion. In promotional literature, the agency asserts: [EDA's] mandate is to retain and expand job opportunities, enlarge the tax base of the state and its local governments and encourage economic growth and diversity. Since it was established in 1974, the EDA has provided \$7.4 billion in financing to local firms and the resulting economic activity created an estimated 124,000 permanent jobs.⁷⁶ Thus, we conclude that encouragement of business has been an important state function. Yet when we look at the effect on M/WBE's and on minorities and women generally, that effect is statistically insignificant.⁷⁷

Since World War II, the State of New Jersey has established numerous programs

⁷⁶ See Gordon, Robert M., et. al., "Governing New Jersey, The Toughest Management & Policy-Making Jobs in Trenton," Leadership New Jersey.

⁷⁷ See Myers, Demographic Trends, supra.



to ensure the economic health of the state. For example, immediately after World War II, a low-cost loan program to help veterans start businesses or professions was undertaken as a supplement to the federal GI bill that provided assistance in education and housing.⁷⁸ Even prior to World War II, low-cost loans to labor-intensive New Jersey companies and other programs to encourage relocation of large corporations to New Jersey were vigorously pursued. Despite devoting significant portions of the state budget to help business and despite the fact that the statutory and regulatory language creating the programs themselves did not exclude minorities and women,⁷⁹ there is little evidence that such programs benefitted minorities and women. In this sense, there is no clear recognition by the state of a connection between the promulgation of business assistance programs in general and the anti-discrimination provisions under the Law against Discrimination.

For example, the state spends money on tourist advertising to assist businesses in resort areas at the same time as statistics show that few minorities or women own or operate these businesses.⁸⁰ While the state has promulgated programs for small businesses and M/WBE's,⁸¹ there is a continued dominance of public sector contracting

⁷⁸ Tribble, Dr. Romie, "Business Assistance," Report to New Jersey Transit Authority, Task 5.

⁷⁹ In this sense, such programs were race/gender-neutral.

⁸⁰ Ibid., Samuel Myers, Demographic Trends, Charts and Graphs.

⁸¹ For list of the various set aside programs utilized by State agencies, independent authorities and political subdivisions, see the Annotated Bibliography attached to this report which describes the statutes and regulations appearing at N.J.S.A. 52:32-17 et seq., governing state agencies and small businesses, minority businesses and female businesses; N.J.S.A. 10:5-32 et seq., Public Works Contracts Law, N.J.S.A. 5:12-181 et seq., Casino Redevelopment Authority; N.J.S.A. 27:1B-24, New Jersey Transportation Fund; N.J.S.A. 5:10-21.1A, New Jersey Sports and



by large white-owned enterprises who utilize their network to business connections both within the private and public sectors to exclude M/WBE's.⁸²

The impact on the business opportunities of minorities and women of non-targeted business assistance programs is best expressed by Hamilton Bowser, president of Evanbow Construction Co. in East Orange, and past president of the National Association of Minority Contractors.

Before Croson⁸³ firms owned by minorities and women had received between 12 and 15 percent of state highway contracts. Now they are getting less than half a percent...[Referring to white contractors], Majority contractors will continue to exclude minorities and women. They don't want them there...⁸⁴

Issues which one would have thought were long since settled by the enactment of LAD are still ripe for adjudication as a direct result of the state's policy of complaint-driven enforcement in the area of discrimination.

The above history reflects New Jersey's continuing struggle with problems of discrimination and establishes a potentially powerful connection between state behavior and the present shortage of M/WBE's who contract with the state. From the statutory scheme which purports to guarantee equal access and opportunities for minorities and

Exposition Authority; N.J.S.A.58:11B-26(a), New Jersey Wastewater Treatment Trust and the Pinelands Infrastructure Trust Fund administered by the Department of Environmental Protection; N.J.S.A. 52:32-19, New Jersey Urban Development Corporation; N.J.S.A. 18A:18A-52, New Jersey Board of Education and N.J.S.A. 40A:11-42, County and Municipal Governments.

⁸² Sorenson, Georgia and Gary, Carla, "Public Accommodations," Report to the New Jersey Transit Authority (1992), p. ____.

⁸³ *City of Richmond v. J.A. Croson, Co.*, 109 S.Ct. 706 (1989).

⁸⁴ "Minority Businesses Threatened," The North Jersey Herald and News, August 27, 1991.



women we infer that the state knew, or should have known, of any discrimination prohibited by the scheme. Thus, we find that in the construction, manufacturing and service industries there was:

- a) consistent confusion among enforcement agencies regarding implementation responsibility for claims of discrimination from M/WBE's;
- and,
- b) failure to develop systems for processing or tracking complaints of discrimination.⁸⁵

In cases where legal action was taken to redress systemic ills (e.g., against unions to admit minorities and women to apprenticeship programs or social organizations, to membership), there was little evidence of subsequent attempts by the state to act without a complaint from an aggrieved individual or use its statutory powers to the full.

In regulated industries such as finance, casinos, banking and insurance, attempts to file complaints for failure to provide contracting opportunities to M/WBE's were met with assertions of lack of jurisdiction by the government agency with oversight responsibility or, in one case, the judiciary itself, despite clear legislative authority.

Such lack of awareness among enforcement officials of constitutional and statutory powers to remedy discrimination resulted in at least four distinct gaps between the promise of law and performance by the State of New Jersey:

⁸⁵ Anonymous interviews were conducted with state personnel responsible for enforcement of civil rights laws. They told of internal tug-of-war between the Division on Civil Rights and Department of the Treasury as to which agency had primary responsibility for enforcement of claims. They also commented on how the absence of formal complaint mechanisms during their tenure as enforcement personnel contributed to the confusion.

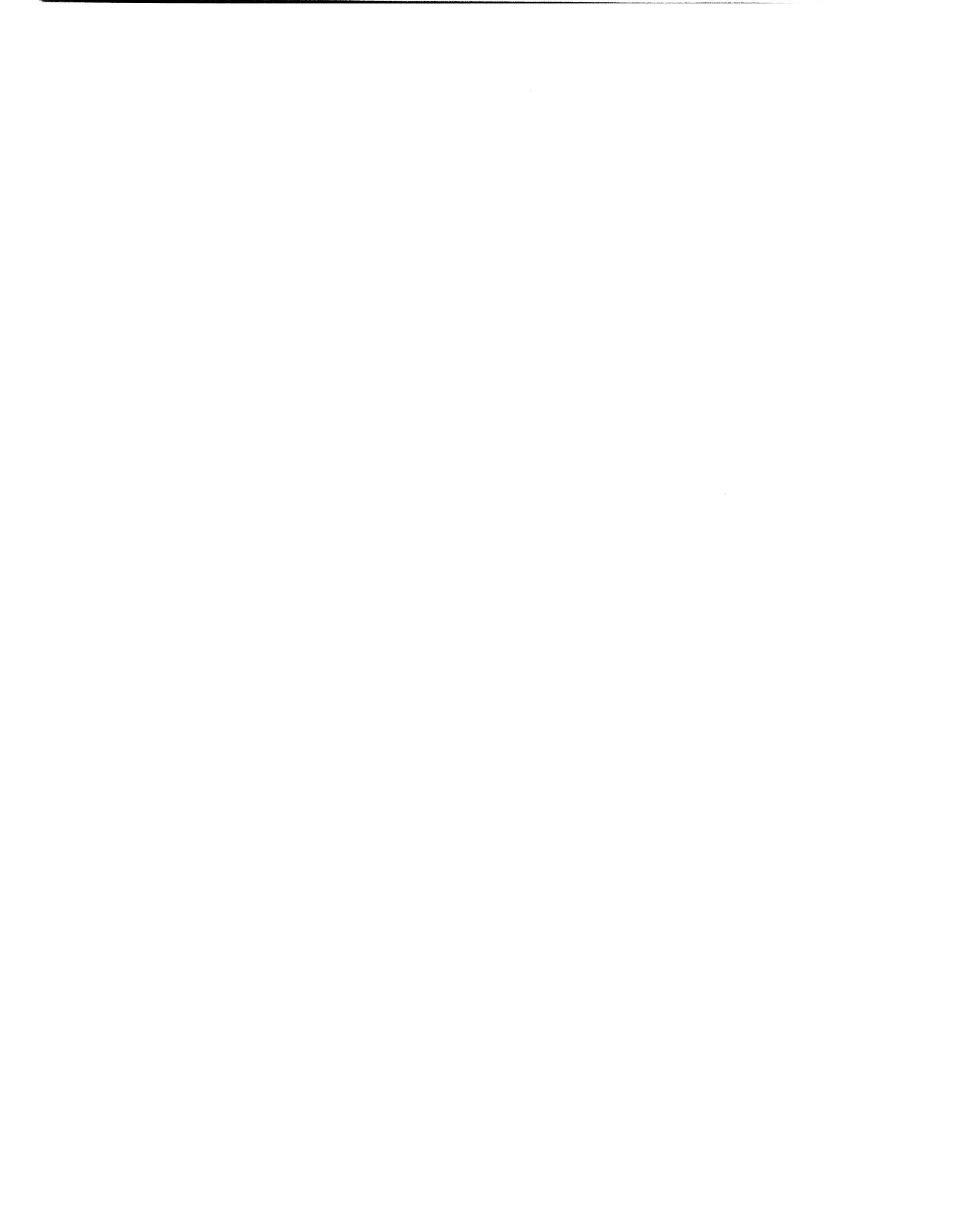
1. weakness in the complaint process in the provision of equal opportunity to M/WBE's;
2. continuation of the policy of complaint-driven mechanisms to redress discrimination complaints;⁸⁶
3. inability of state or M/WBE's to know whether the state contracting system was operating in a discriminatory manner;
4. inability to determine whether enforcement agencies were adequately funded by the State:

The presence of such gaps in the face of an elaborate statutory scheme permits the inference that private discrimination, which may have denied opportunities to minorities and women to be business people, may well have been exacerbated by state action or inaction.

⁸⁶ See Table II - Agency Caseload Performance. Nearly 2,000 cases have been received and closed each year since 1981. Most of these cases concerned individual complaints in the areas of employment, housing, public accommodation. This represents an enormous expenditure of effort and state resources. It would seem therefore that education of the broad protections of LAD in the area of state contracting would be imperative if the policy of complaint-driven enforcement is continued.

APPENDIX A:

TABLES I - VI



**TABLE I:
STATISTICAL SUMMARY OF COMPLAINTS RECEIVED AS A BASIS
OF DISCRIMINATION**

<u>BASIS OF DISCRIMINATION</u>	FY71	FY72	FY73	FY74	FY75	FY76	FY77	FY78	FY79
Age	80	81	81	70	128	132	127	115	93
Ancestry	17	21	28	28	13	12	11	9	2
Color	17	5	4	6	2			2	2
Creed	36	31	29	24	22	22	16	12	17
Family with Children Under 18 Years Old									
Family Leave Act									
Handicapped (Mental)									
Handicapped (Physical)			48	65	65	56	62	70	50
Handicapped (Substance)									
Handicapped (W/Guide Dog)			3		1	1		2	1
Marital Status	18	33	30	28	22	26	13	10	14
Medicaid									
Military Service	14	5	3	6	1	2	3	2	2
National Origin	125	138	96	120	155	126	106	219	97
Race	998	930	755	813	773	686	508	483	460
Reprisal	5	11	16	12	12	15	1	10	7
Sex	174	489	271	355	324	296	237	257	179
Sexual Harassment									
Sexual Orientation									
Systemic									
Multiple Basis	133	213	229	296	361	304	218	223	131
Order Violation	1	1		1					
COMPLAINTS RECEIVED	1618	1958	1593	1824	1879	1678	1302	1414	1055



**TABLE I CONT...
STATISTICAL SUMMARY OF COMPLAINTS RECEIVED AS A BASIS
OF DISCRIMINATION**

<u>BASIS OF DISCRIMINATION</u>	FY80	FY81	FY82	FY83	FY84	FY85	FY86	FY87	FY88
Age	79	135	100	197	177	205	296	193	212
Ancestry	2	5	4	4	5	3	11	10	12
Color			1		2	1	2		3
Creed	16	15	19	24	18	10	26	27	19
Family with Children Under 18 Years Old									
Family Leave Act									
Handicapped (Mental)									
Handicapped (Physical)	61	82	59	120	115	112	170	170	197
Handicapped (Substance)									
Handicapped (W/Guide Dog)		2		1	1	1			2
Marital Status	15	11	11	14	11	8	9	8	11
Medicaid									1
Military Service	3	1	4	3	2	2	1	5	5
National Origin	71	97	79	92	124	145	149	174	154
Race	308	384	359	394	458	524	531	512	488
Reprisal	7	16	18	11	28	23	11	17	23
Sex	190	203	186	229	332	287	283	287	305
Sexual Harassment									
Sexual Orientation									
Systemic	1		1						
Multiple Basis	113	198	130	212	243	271	248	290	303
Order Violation					1				
COMPLAINTS RECEIVED	866	1149	971	1301	1515	1592	1737	1693	1736

**TABLE I CONT...
STATISTICAL SUMMARY OF COMPLAINTS RECEIVED AS A BASIS
OF DISCRIMINATION**

<u>BASIS OF DISCRIMINATION</u>	FY89	FY90	FY91	FY92*
Age	172	176	209	196
Ancestry	21	14	39	28
Color	2	2	3	3
Creed	22	17	26	11
Family with Children Under 18 Years Old				
Family Leave Act			6	9
Handicapped (Mental)			24	25
Handicapped (Physical)	236	158	311	232
Handicapped (Substance)			15	10
Handicapped (W/Guide Dog)	5	3	2	2
Marital Status	6	7	7	4
Medicaid	4			
Military Service		2	2	5
National Origin	158	167	232	126
Race	498	471	600	454
Reprisal	20	35	29	26
Sex	296	304	307	209
Sexual Harassment			58	65
Sexual Orientation				
Systemic				
Multiple Basis	358	308	293	327
Order Violation	1			
COMPLAINTS RECEIVED	1797	1664	2163	1732

* FY 92 FIGURES AS OF 3-31-92

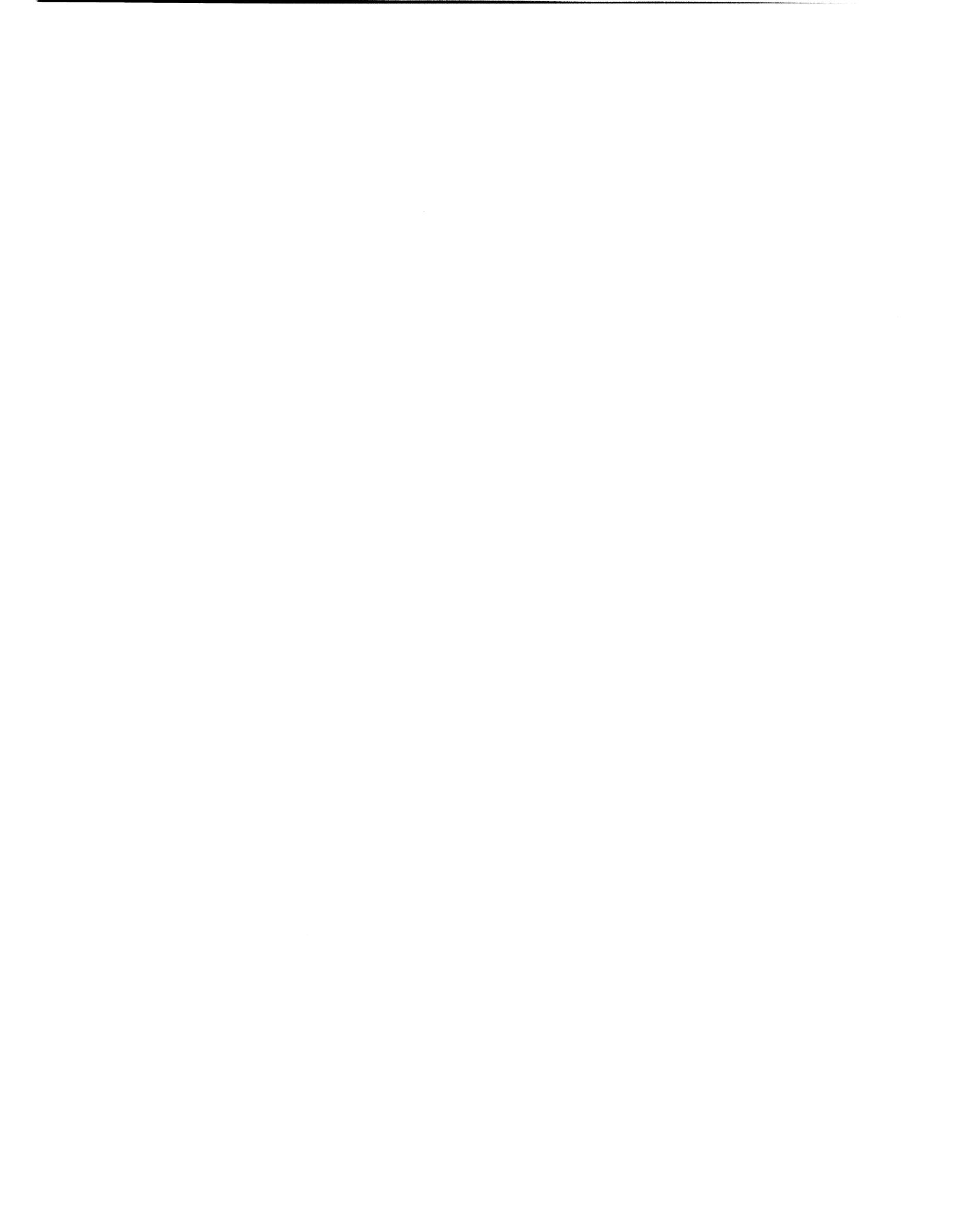
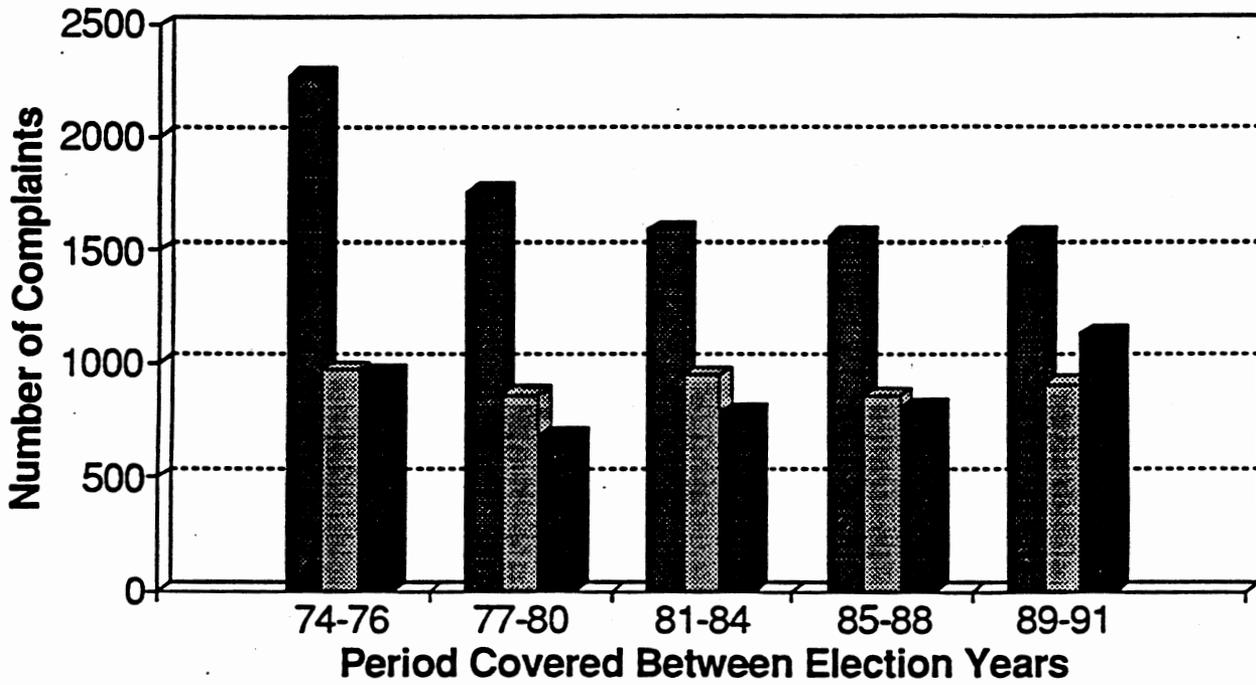


TABLE II

Basis of Complaint Received
Complaints Received From 1974-1991



■ Race Based ■ Sex Based ■ Multi-type Based

TABLE III

<u>RESOLUTION CATEGORIES</u>	FY71	FY72	FY73	FY74	FY75	FY76	FY77	FY78	FY79
Hearing and Order	23	28	6	5	25	26	31	42	14
Hearing Dismissed	7	7	7	2	10	8	11	6	16
Consent Order and Decree	58	88	136	127	173	136	114	92	103
Negotiated Settlement Agreement									
Satisfactory Adjustment	160	211	219	149	245	234	230	297	247
No Probable Cause	586	526	573	382	435	593	780	498	739
Withdrawn by Complainant	222	258	317	244	303	329	382	247	153
Withdrawn with Benefits									
Concluded Administratively	35	66	130	119	198	232	169	241	373
Uncooperative/Unavailable									
Waived EEOC or HUD									
No Jurisdiction	78	317	55	50	32	78	62	18	34
Complaint Moved to OAL (10:5-13)									
FINDING OF PROBABLE CAUSE	NA	NA	NA	NA	257	274	113	134	107
COMPLAINTS RECEIVED	1618	1958	1593	1824	1879	1678	1302	1414	1055
COMPLAINTS CLOSED	1169	1501	1443	1078	1421	1636	1779	1439	1679



TABLE III CONT...

<u>RESOLUTION CATEGORIES</u>	FY80	FY81	FY82	FY83	FY84	FY85	FY86	FY87	FY88
Hearing and Order	26	16	23	22	20	31	10	5	11
Hearing Dismissed	11	2	4	13	10	17	4	2	9
Consent Order and Decree	88	86	114	54	74	23	52	48	26
Negotiated Settlement Agreement						370	309	333	403
Satisfactory Adjustment	255	367	345	417	486	98	44	93	102
No Probable Cause	415	574	644	511	525	493	665	564	715
Withdrawn by Complainant	94	150	188	248	289	378	297	367	371
Withdrawn with Benefits									
Concluded Administratively	93	71	80	38	52	22	23	65	47
Uncooperative/Unavailable									
Waived EEOC or HUD									
No Jurisdiction	23	24	16	16	14	13	9	62	11
Complaint Moved to OAL (10:5-13)									
FINDING OF PROBABLE CAUSE	76	138	120	70	64	86	57	44	35
COMPLAINTS RECEIVED	866	1149	971	1301	1515	1592	1737	1693	1736
COMPLAINTS CLOSED	1005	1290	1414	1319	1470	1445	1413	1539	1695

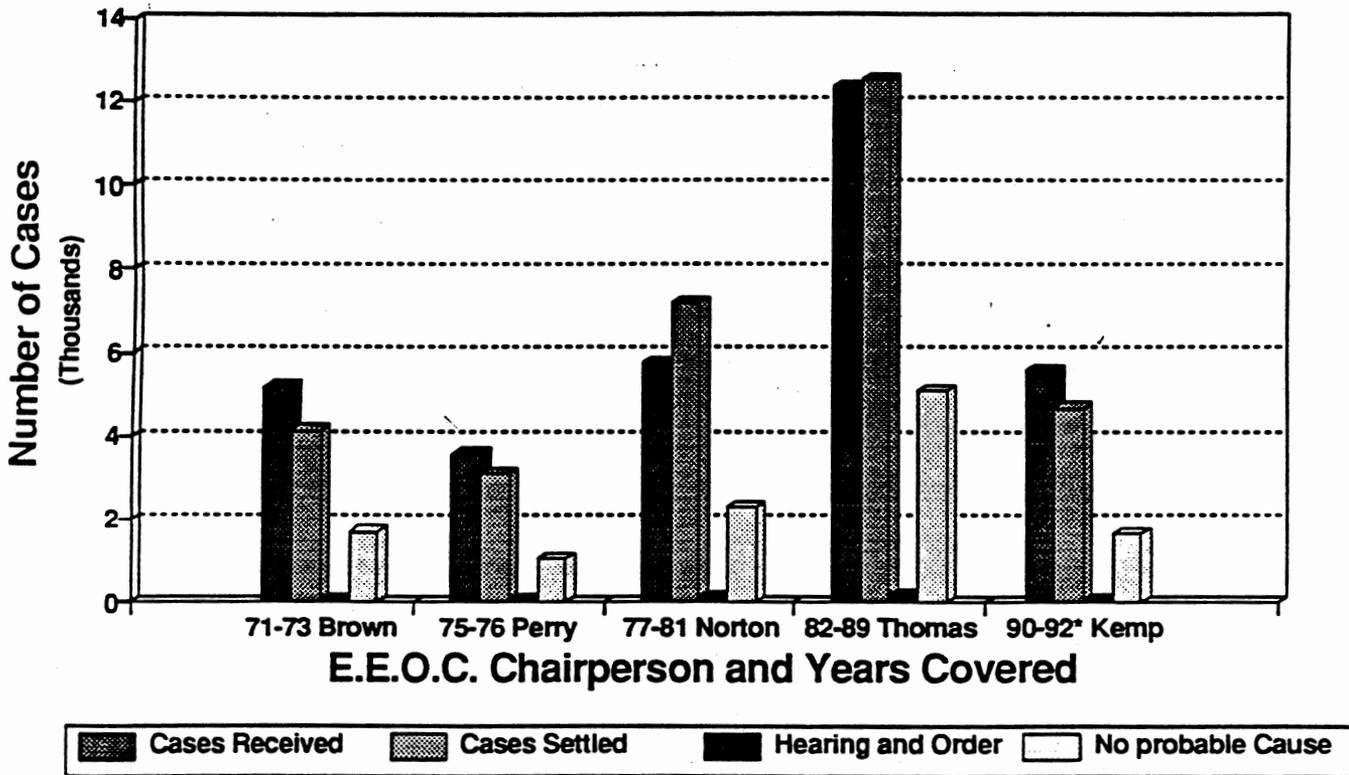
TABLE III CONT...

RESOLUTION CATEGORIES	FY89	FY90	FY91	FY92*
Hearing and Order	27	10	5	4
Hearing Dismissed	10		3	2
Consent Order and Decree	34	9	6	20
Negotiated Settlement Agreement	398	335	352	240
Satisfactory Adjustment	204	161	190	91
No Probable Cause	968	665	595	406
Withdrawn by Complainant	300	451	355	209
Withdrawn with Benefits			13	12
Concluded Administratively	118	32	48	18
Uncooperative/Unavailable			65	195
Waived EEOC or HUD			17	25
No Jurisdiction	9	14	15	12
Complaint Moved to OAL (10:5-13)	167	55	52	18
FINDING OF PROBABLE CAUSE	46	21	72	38
COMPLAINTS RECEIVED	1797	1664	2163	1732
COMPLAINTS CLOSED	2235	1732	1716	1247

* FY92 FIGURES AS OF 3-31-92



Cases Settled by New Jersey Agencies: (F.Y. 71 to F.Y.92*)

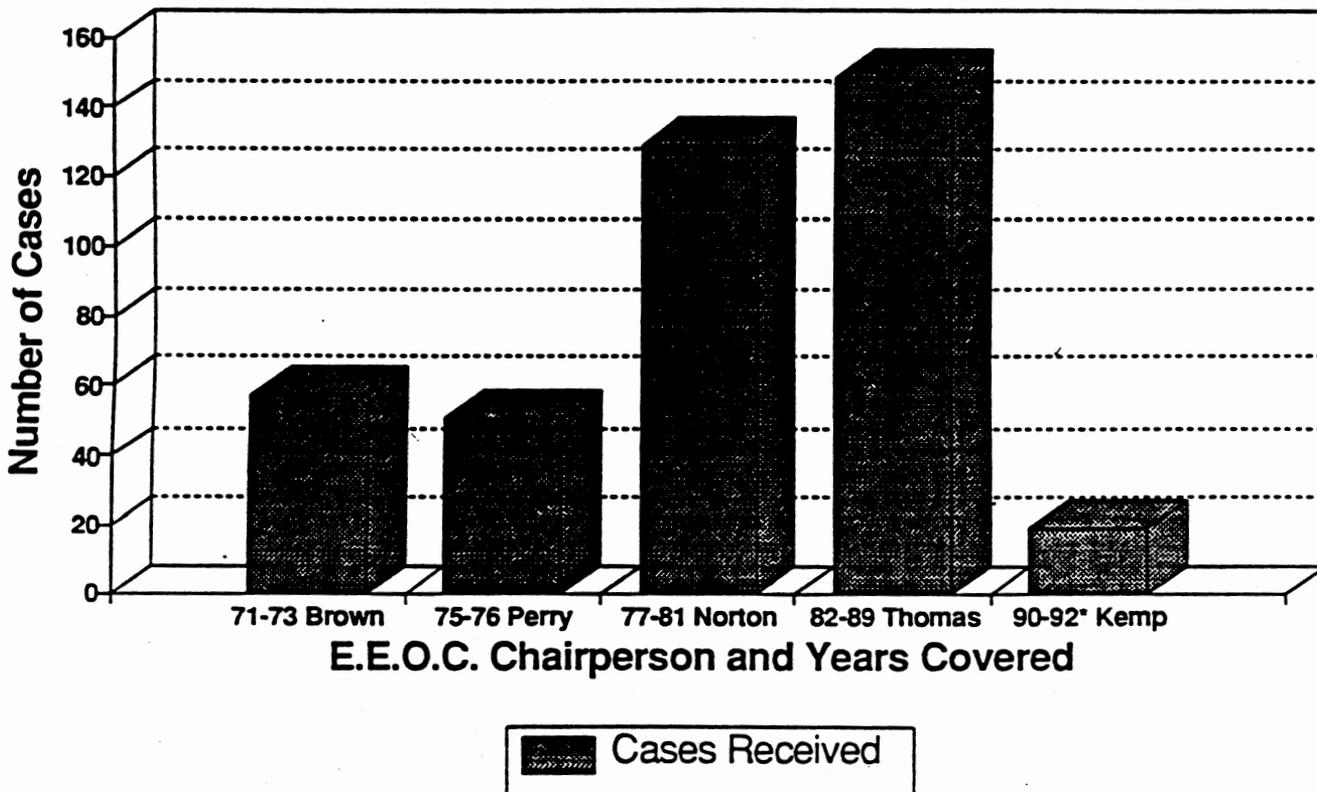


* F.Y. 92 FIGURES AS OF 3/31/92



TABLE V

**Cases Settled by New Jersey Agencies
By Hearing And Order (FY1971-FY1992*)**

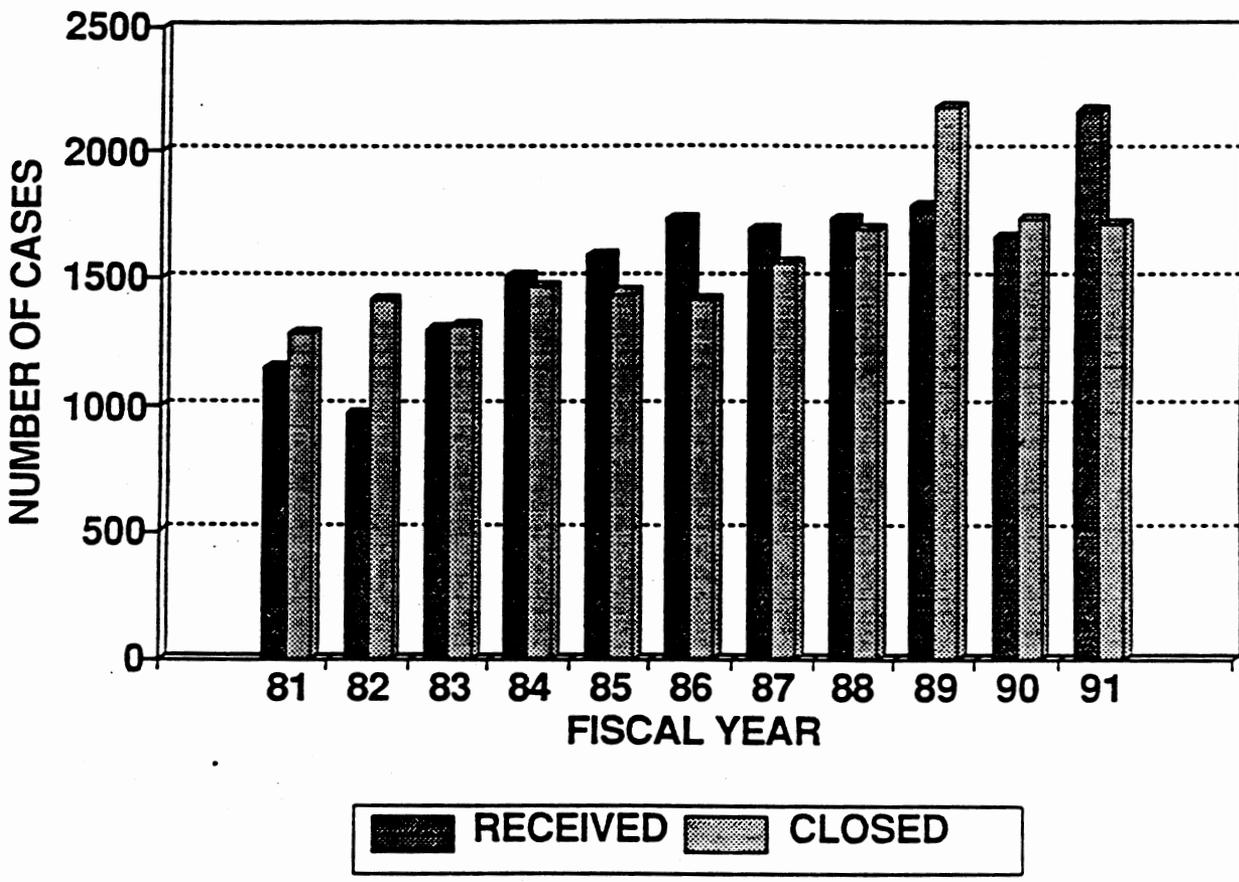


* F.Y. 92 FIGURES AS OF 3/31/92



TABLE VI

AGENCY CASELOAD PERFORMANCE





APPENDIX B:

**DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
MANAGEMENT INFORMATION SYSTEM**

**FISCAL YEAR 1991
STATISTICAL REPORT**



FY 91 STATISTICAL REPORT

FY 91 HIGHLIGHTS

In Fiscal Year (FY) 1991, the Division on Civil Rights established a record high of complaints received (2,163). The second highest was established during FY 72 with 1,958 complaints received. The rise in complaints received during FY 91 represents a 30% increase or 499 complaints increased from FY 90. In addition, the FY 91 figures surpassed the FY 91 budget projection (1,686) for complaints received by 28%. The increase in complaints received increased the total of cases in process from 1,343 (7/1/90) to 1,813 (7/1/91) by 35% or 471 new cases in process.

COMPLAINT CLOSING FLAT

During FY 91, the number of complaints closed changed little from FY 90. In FY 91, the division closed a total of 1,716 complaints and, in FY 90, a total of 1,732. The figures represent less than 1% difference. However, the 1,716 record represents the fourth highest in the division's history. In FY 89, the division established a record high with 2,173 complaints closed, followed by FY 77 with 1,779 complaints closed. Nevertheless, the figures for FY 91 represent a 9% increase or 138 more than the FY 91 budget projection (1,578) for complaints closed in FY 91.

AGE OF OPEN CASES RISES

The age of active cases (180 days and over) rose 42% (287) in FY 91 (969) from FY 90 (682).

FY 91 AGE OF ACTIVE CASES

NUMBER OF DAYS:	0-30	31-60	61-90	91-120	121-160	161-180	181-364	365+	TOTAL
INVEST.	190	167	187	125	180	72	412	450	1702
CONCIL.	—	—	—	—	—	—	2	13	15
LITIGA.	—	—	1	3	—	—	12	80	96

FY 90 AGE OF ACTIVE CASES

NUMBER OF DAYS:	0-30	31-60	61-90	91-120	121-160	161-180	181-364	365+	TOTAL
INVEST.	185	129	85	105	93	53	193	407	1250
CONCIL.	—	—	—	—	—	—	1	10	11
LITIGA.	—	1	—	—	—	—	5	66	72



FY 91 STATISTICAL REPORT

Race continues to be the primary basis for complaints received during FY 91, followed by multi-basis in which race also was the primary basis of complaint. However, physical handicap basis rose 32% during FY 91 from 158 in FY 90 to 209 in FY 91.

BREAKDOWN OF COMPLAINTS RECEIVED IN FY 91

Type of Complaint:

Employment	1,987
Housing	113
Multiple Dwelling Investigations	26
Public Accommodations	37
Special Investigations	0
Total	2,163

BASIS OF DISCRIMINATION

Race	600
Multi-Basis	472
Race	233
Sex	202
Reprisal	119
National Origin	118
Physical Handicap	102
Age	97
Sexual Harassment	55
Creed	30
Marital Status	20
Ancestry	19
Mental Handicap	10
Substance Handicap	8
Color	5
Family Leave Act	4
Sex	307
National Origin	232
Age	209
Physical Handicap	209
Ancestry	39
Reprisal	29
Creed	26
Mental Handicap	14
Substance Handicap	7
Marital Status	7
Color	3
Sexual Harassment	3
Blind with Guard Dog	2
Family Leave Act	2
Military Service	2

FY 91 STATISTICAL REPORT

NO PROBABLE CAUSE PLUNGE

In FY 91, No Probable Cause dispositions decreased 11% from FY 90. During FY 91, the Division closed 595 complaints as No Probable Cause. In FY 90, the Division closed 70 complaints more (665) as No Probable Cause dispositions.

CLOSING CATEGORIES DURING FY 91

No Probable Cause	595 (34.67%)
Withdrawn by Complainant	355 (20.68%)
Negotiated Settlement Agreement	352 (20.51%)
Satisfactory Adjustment	190 (11.07%)
Uncooperative/Unavailable	65 (3.78%)
Complaint Moved to OAL	52 (3.03%)
Concluded Administratively	48 (2.79%)
Waived to EEOC or HUD	17 (.99%)
No Jurisdiction	15 (.87%)
Withdrawn with Benefits	13 (.75%)
Consent Order and Decree	6 (.34%)
Hearing and Order	5 (.29%)
Hearing Dismissed	3 (.17%)

FINDINGS OF PROBABLE CAUSE RISE

In FY 91 Findings of Probable Cause rose over 200% from FY 90. During FY 91, the Division showed a significant increase (243 or 51 more) Findings of Probable Cause (FPC) from FY 90.

FY 91 = 72	
FY 90 = 21	FY 85 = 86
FY 89 = 46	FY 84 = 64
FY 88 = 35	FY 83 = 70
FY 87 = 44	FY 82 = 120
FY 86 = 57	FY 81 = 138

FY 91 STATISTICAL REPORT

MONETARY AWARDS

In FY 91, the Monetary Awards for complainants dropped slightly (\$1,981.83) from FY 90. During FY 91, the Division collected a total of \$1,275,452.15 in Monetary Awards for complainants, \$1,981.83 less than in FY 90 (\$1,277,433.98).

Since the Division has been recording all Monetary Award Settlements, the Division has recorded a total of \$10,703,171.14 as of June 30, 1991.

MONETARY AWARD CASES BY BRANCH/UNIT

<u>BRANCH/UNIT</u>	<u>NUMBER OF CASES</u>	<u>AMOUNT</u>
Asbury Park	55	\$ 83,937.64
Atlantic City	244	629,339.58
Backlog Task Force	11	23,286.00
Camden	607	1,529,153.21
EEOC Project	3	9,130.00
Morristown	68	268,304.68
Housing/Public Accommodation	160	150,694.00
Newark	893	2,850,680.40
Paterson	859	2,717,819.40
Special Investigation	18	238,385.00
Trenton	744	2,095,580.63
Vineland	34	106,860.60
GRAND TOTALS	3,696	\$10,703,171.14

MONETARY AWARD CASES BY BASIS OF DISCRIMINATION

<u>BRANCH/UNIT</u>	<u>NUMBER OF CASES</u>	<u>AMOUNT</u>
Age	374	\$1,490,631.15
Ancestry	13	37,635.40
Armed Forces	8	10,241.00
Color	3	3,550.00
Creed	51	100,079.75
Blind with Guide Dog	6	4,909.54
Handicap:		
Substance Abuse	6	108,584.00
Mental	1	500.00
Physical	341	1,186,810.04
Marital Status	25	52,339.00
Medicaid	0	0.00
Multi-Basis	597	2,102,166.67
Nationality	0	0.00
National Origin	187	397,842.92
Order Violation	0	0.00
Race	1,116	2,586,720.96
Reprisal	31	97,729.00
Sex	936	2,520,049.80
Sexual Harassment	1	3,381.91
Systemic	0	0.00



FY 91 REPORT

COMPLAINTS RECEIVED BY COUNTY

During FY 91, Bergen County continues in first place (2,206) for complaints filed against respondents in Bergen County as in the last 11 years (1981-1991). The ranking remained the same for the other 19 counties with the exception of Camden County which moved up from fourth to third place and Mercer County which dropped from third to fourth place.

COMPLAINTS RECEIVED BY COUNTIES
FROM FY 81 THROUGH FY 91

COUNTY	FY81	FY82	FY83	FY84	FY85	FY86	FY87	FY88	FY89	FY90	FY91	TOTAL
BERGEN	163	210	186	189	203	194	190	196	240	184	251	2206
ESSEX	139	76	164	164	222	261	234	250	189	218	275	2192
MERCER	129	149	103	122	113	122	121	115	181	136	157	1448
CAMDEN	131	152	116	143	126	101	116	104	134	151	188	1462
MIDDLESEX	119	122	111	100	134	143	129	135	130	133	180	1436
PASSAIC	106	125	88	121	123	129	126	112	140	109	146	1325
UNION	83	66	72	83	98	120	137	129	78	130	128	1124
MORRIS	67	61	61	61	66	133	94	154	114	115	131	1057
ATLANTIC	58	61	57	99	70	96	100	129	124	76	118	988
WINDSOR	53	50	72	62	100	116	105	84	90	91	123	946
BURLINGTON	60	100	75	58	93	58	84	59	88	83	110	868
MONMOUTH	43	65	58	123	64	61	66	65	73	67	102	787
SOMERSET	26	30	34	44	30	59	61	45	37	42	53	461
GLOUCESTER	22	41	25	26	32	62	39	30	33	34	53	397
CUMBERLAND	31	30	15	19	44	23	26	41	57	23	62	371
OCEAN	24	20	20	52	25	18	23	29	26	30	43	310
SALEM	12	19	10	15	17	8	9	12	17	13	14	146
CAPE MAY	8	9	5	15	18	11	9	14	13	2	12	116
HUNTERDON	14	7	9	10	3	8	5	13	13	7	8	97
WARREN	6	10	5	5	8	7	13	13	9	11	5	92
SUSSEX	3	11	15	4	3	7	6	7	8	10	4	78
TOTAL	1297	1414	1301	1515	1592	1737	1693	1736	1794	1665	2163	17907



FY 91 STATISTICAL REPORT

OFFICE WITH HIGHEST NUMBER OF COMPLAINTS DOCKETED

The Newark Office continued in the lead with complaints docketed (568) in FY 91. Newark ties the old record (568) for FY 86. The Paterson Office moved up to second from third place and the Trenton Office dropped from second to third place. Morristown moved up to fifth place and Atlantic City dropped to sixth place.

*Newark	- 568	Morristown	- 134
Paterson	- 402	Atlantic City	- 125
Trenton	- 388	Asbury Park	- 109
Camden	- 350	Vineland	- 87

OFFICE WITH HIGHEST NUMBER OF COMPLAINTS CLOSED

The Newark Office remained in first place with 423 closings during FY 91, and the Trenton Office retained second. However, Camden out placed Paterson for the third spot with 290 closings. In addition, Morristown earned fifth place with 110 closings in FY 91 and Asbury Park was sixth.

*Newark	- 423	Morristown	- 110
Trenton	- 369	Asbury Park	- 97
Camden	- 290	Atlantic City	- 95
Paterson	- 282	Vineland	- 50

INVESTIGATORY STAFF

The average number of investigators during FY 91 was 36 and the average time expended on a complaint was 22.57 hours.

During FY 91, the average case production per investigator was 3.97 or a total of 47.66 cases closed per investigator.



NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY
 DIVISION ON CIVIL RIGHTS
 MANAGEMENT INFORMATION SYSTEM

Branch/Unit Caseload Performance

BRANCH	FY 81		FY 82		FY 83		FY 84		FY 85		FY 86		FY 87		FY 88		FY 89		FY 90		FY 91	
	RECD	CLSD																				
NEWARK	265	253	143	187	304	296	367	339	492	387	568	437	471	394	467	528	373	747	471	484	568	423
PATERSON	285	335	207	358	312	339	342	382	368	348	443	353	379	389	337	360	377	485	286	290	402	282
TRENTON	258	341	243	336	225	265	331	286	265	280	226	215	299	240	284	267	361	351	320	351	388	369
CAMDEN	205	231	196	263	184	209	203	199	186	183	192	146	177	207	173	156	245	156	261	243	350	290
H/PA	61	68	103	100	118	104	119	105	130	96	139	134	173	133	66	93	0	6	0	0	0	0
AC	74	58	72	67	74	81	135	128	145	134	156	124	122	119	132	130	153	130	109	130	125	95
SIU	1	1	7	32	4	8	17	13	6	6	10	2	5	16	3	6	0	0	0	35	0	0
EEOC PROJ	0	3	0	4	0	1	1	2	0	0	0	0	0	21	0	0	0	0	0	0	0	0
INLOG T F	0	0	0	67	0	16	0	16	0	11	3	2	0	21	0	3	0	0	0	0	0	0
ASBURY PK	0	0	0	0	0	0	0	0	0	0	0	0	19	0	69	50	81	70	67	35	109	97
VINELAND	0	0	0	0	0	0	0	0	0	0	0	0	24	14	58	47	65	62	12	19	87	50
MORRISTOWN	0	0	0	0	0	0	0	0	0	0	0	0	24	4	142	35	132	166	139	125	134	110
DISP RESD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	0	0	0
TOTALS	1149	1290	971	1414	1301	1319	1515	1470	1592	1445	1737	1413	1693	1558	1736	1695	1787	2173	1665	1732	2163	1716

FY JULY 1, 1981 THROUGH FY JUNE 30, 1991

NOTES-

COMPLAINTS RECEIVED: 17309 DIVIDED BY 11 FYS = 1574 YEARLY AVERAGE

COMPLAINTS CLOSED: 17225 DIVIDED BY 11 FYS = 1566 YEARLY AVERAGE

New Jersey State Library



FY 91 STATISTICAL REPORT

AREAS OF CONCERN

- A. Budget projection figures under-estimated.
- B. Investigators' case productivity below standard.
- C. Age of case load rises.
- D. High number of dispositions for No Probable Cause and withdrawn by complainant.

ANALYSIS AND CONCLUSIONS

Despite the cuts and fiscal constraints during Fiscal Year 1991, the Division demonstrated a remarkable performance despite the limited resources in comparison to preceding fiscal years.

Respectfully Submitted,

Roberto Rodriguez, Supervisor
Management Information System

RR:bc/3857



APPENDIX C:
INTERVIEW FORM



INTERVIEW FORM

Case Assigned to INV. # _____ Office _____ Docket No. _____

Circle First Docket Character:

Date Docketed _____ by _____
Date Assigned _____ (if blank,
same as Date Docketed)

- A- Systemic, Special Investigation
- C- Credit
- E- Employment
- H- Housing
- M- Multiple Dwelling
- P- Public Accommodation

STAT-PROG-AGCY-CONT

- ____ EEOC- C -EEOC-RCP
- ____ ADEA- B -ADEA-ADEA
- ____ HUD - F -HUD -HUD

COMPLAINANT:
ADDRESS:

PHONE# HOME
WORK

CITY:

COUNTY:

Social Security # _____

Driver's License # _____

Name, address, phone # and relation of person through whom you can be reached: _____
RELATIONSHIP: _____

PHONE #:

State the full legal name and address of Respondent (2nd, 3rd, & 4th characters of Docket Number): _____

RESPONDENT:
ADDRESS:

PHONE #:

COUNTY:

State the name, title and location of the person from whom information concerning this charge may be obtained: _____

ALLEGATION:

- | | | |
|---|--|--|
| <input type="checkbox"/> Constructive Discharge | <input type="checkbox"/> Discharge | <input type="checkbox"/> Refusal to Rent |
| <input type="checkbox"/> Demotion/Downgrading | <input type="checkbox"/> Eviction | <input type="checkbox"/> Refusal to Sell |
| <input type="checkbox"/> Denied Accommodation | <input type="checkbox"/> Harassment | <input type="checkbox"/> Refusal to Show |
| <input type="checkbox"/> Denied Application | <input type="checkbox"/> Lay-off | <input type="checkbox"/> Retaliation |
| <input type="checkbox"/> Denied Credit | <input type="checkbox"/> More than two Allegations | <input type="checkbox"/> Sexual Harassment |
| <input type="checkbox"/> Denied Membership | <input type="checkbox"/> No Allegation Recorded | <input type="checkbox"/> Suspension |
| <input type="checkbox"/> Denied Service | <input type="checkbox"/> Other | <input type="checkbox"/> Systemic |
| <input type="checkbox"/> Differential Pay | <input type="checkbox"/> Refusal to Finance | <input type="checkbox"/> Training |
| <input type="checkbox"/> Differential Treatment | <input type="checkbox"/> Refusal to Hire | <input type="checkbox"/> Transfer |
| | | <input type="checkbox"/> Upgrading |



INTERVIEW FORM

CP:

RESP:

Basis of Discrimination: (5th character of docket #):

- | | | |
|---|---|--|
| <input type="checkbox"/> Age (A) | <input type="checkbox"/> Handicap (K=Substance) | <input type="checkbox"/> Order Violation (L) |
| <input type="checkbox"/> Alien Status (E) | <input type="checkbox"/> Handicap (M=Mental) | <input type="checkbox"/> Race (R) |
| <input type="checkbox"/> Ancestry (Y) | <input type="checkbox"/> Handicap (H=Physical) | <input type="checkbox"/> Reprisal (J) |
| <input type="checkbox"/> Armed Forces (D) | <input type="checkbox"/> Marital Status (X) | <input type="checkbox"/> Sex (S) |
| <input type="checkbox"/> Color (Z) | <input type="checkbox"/> Medicaid (G) | <input type="checkbox"/> Sex. Harassment (U) |
| <input type="checkbox"/> Creed (C) | <input type="checkbox"/> Multiple Basis (W) | <input type="checkbox"/> Systemic (V) |
| <input type="checkbox"/> Familial Status (B) | <input type="checkbox"/> Nationality (L) | |
| <input type="checkbox"/> Family Leave Act (F) | <input type="checkbox"/> National Origin (N) | DATE OF BIRTH: _____ |
| <input type="checkbox"/> Guide Dog (P) | | |

Respondent Background: (6th character of Docket #):

- | | | |
|---|--|---|
| <input type="checkbox"/> Agent/Broker (A) | <input type="checkbox"/> Multi-housing unit (W) | <input type="checkbox"/> Public Authority (L) |
| <input type="checkbox"/> Board of Education (E) | <input type="checkbox"/> Municipal Government (M) | <input type="checkbox"/> Public Facility (D) |
| <input type="checkbox"/> Business (B) | <input type="checkbox"/> No Background recorded(-) | <input type="checkbox"/> Realtor (R) |
| <input type="checkbox"/> County Government (K) | <input type="checkbox"/> Non-Profit Org. (F) | <input type="checkbox"/> State Government (G) |
| <input type="checkbox"/> Contract/Developer (V) | <input type="checkbox"/> Org/Club/Private (C) | <input type="checkbox"/> Union (U) |
| <input type="checkbox"/> Financial Institute(I) | <input type="checkbox"/> Private Facility (H) | |
| <input type="checkbox"/> Landlord/Landowner (T) | <input type="checkbox"/> Privately Owned Home (O) | |

Referral Agency: _____ Agency #: _____

Address: _____ Phone #: _____

City: _____ County: _____ State: _____ Zip: _____

Was agency charge taken?: () EEOC Taken () V.C. Taken

1. a. Incident Date: _____ V.C. Date: _____ by _____
 first: _____
 last: _____ Intake Date: _____ by _____

b. Date of Hire/Application: _____

1. a. What were your position, title, duties:

b. Salary & hours:

2. Narrative of incidents and supporting information for charge:

a. What happened:



b. Who was involved? Provide name and title of all persons, if known:

c. Who witnessed the incidents (names of co-workers, other persons):

d. When did the incidents occur (dates):

e. Where did the incidents occur (plant location):

f. Why did incidents occur (Reasons given to complainant):

g. Did it happen to others? (Provide name, address, telephone number, class status i.e., protected or preferred):

h. Did you receive any warnings and/or counseling:

3. Complainant's date of birth:

4. Name, address and phone number of persons of same class as Complainant who received the same harm or differential treatment as Complainant:

5. Name, address, phone number of similarly situated persons of different class. Did they receive different treatment than Complainant and members of Complainant's class? Indicate preferential treatment for each person:



Provide the name, address, telephone number (include discriminatory basis) of other persons who were not discriminated against. Note qualifications, seniority and other reasons for persons named:

Provide the name, address and telephone number of any witnesses to the act of discrimination, and provide driver's license number if available.

Have you begun any legal or agency action?(Y/N):

If so, with whom?:

Are you currently employed?:

If yes, where?:

Company name:
City, State, Zip:
Date of Hire:
Position Held:
Salary:

Permanent: Full-time:
Temporary: Part-time:

What do you feel you are entitled to as a settlement of this complaint?

Date of interview:

Interviewed by:

Complainant's Signature: _____

Complainant's special needs: _____

Interviewer's Recommendation: _____

Docket Don't docket Reason: _____

Supervisor's Signature: _____ Date: _____

**TO: New Jersey Division on Civil Rights (NJDCR)
and
Equal Employment Opportunity Commission (EEOC)**

RE: _____ VS. _____

EEOC and NJDCR have determined by a worksharing agreement that all charges initially received by EEOC which name respondents with addresses in the state of New Jersey will be initially processed by EEOC. Also, charges initially received by the NJDCR that name respondents with addresses in the state of New Jersey will be processed by the NJDCR. However, the determination as to the subsequent processing by either agency will be decided by the charging party. The choices for this processing are as follows: (indicate choice by initialing the selected option).

_____ I elect to waive all rights to an EEOC investigation. I understand that this means that the only investigation of my charge will be done by the NJDCR and that I have waived all of my federal rights as provided for me by EEOC.

_____ I elect to waive all rights to a NJDCR investigation. I understand that this means that the only investigation of my charge will be done by EEOC and that I have therefore waived all my state rights provided for me by the NJ Law Against Discrimination.

_____ I elect to also file my charge with the EEOC. I understand that this means that my federal rights are preserved and that the EEOC may file my charge. However, the EEOC will not begin any active processing of my charge until the closure of my charge by NJDCR unless warranted.

I herein certify that the above choices have been fully explained to me by the D.C.R. Intake Officer.

(Signature)

(Date)



HUMILIATION INTERVIEW QUESTIONS

1. Did you feel hurt or angry or upset as a result of the incident you are complaining about?

Yes _____ No _____

(If yes, obtain the following additional information.)

2. Before incidents, how was your mental and physical health?
3. What were you thinking at the time of the incident?
4. Who was present during the incident (s)?
5. Had you ever been discriminated against before?
6. After the incident (s), did you feel ill? Describe.
7. Did you see a doctor? If yes, give name, address and phone number of doctor.
8. Did you experience any other reaction as a result of the incident (s)? Describe.
9. Did the incident change your relationship with others in any way? How?
10. How long did any of the above actions continue?
How do you know that they resulted from the incident (s)?

Signature

Date



APPENDIX D:

CASES



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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-ATLANTIC COUNTY
DOCKET NO. ATL-L-005353-91

-----x
: PHILIP L. DOUGLAS, III :
: Plaintiff, : TRANSCRIPT OF
: v :
: : MOTION
: BALLY'S GRAND HOTEL :
: CASINO, et al, :
: Defendants :
: :
: :
-----x

Atlantic County Courthouse
Atlantic City, New Jersey
Friday, November 22, 1991

BEFORE: HONORABLE MICHAEL R. CONNOR, J.S.C.

ORDERED BY: FREDERICK H. KRAUS, ESQ.

Reported by: Konstantin Koletas, CSR
Official Court Reporter
Atlantic County Courthouse



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A P P E A R A N C E S:

WILLIAM A. BROMLEY, ESQ.
On Behalf of Plaintiff

JOSEPH G. ANTINORI, ESQ.
On Behalf of Defendants Bally's Grand, Resorts,
Caesars, Trop World and Claridge

KIMBERLY SUTTON, ESQ.
On Behalf of Defendants Trump Castle, Trump
Plaza and Trump Taj Mahal

JACK TAPPER, ESQ.
On Behalf of Defendant Harrah's Marina

Frederick H. Kraus, ESQ.
On Behalf of Defendant Greate Bay

1 We deal with someone who operates a
2 limousine service, Douglas Transportation Systems, a
3 certified minority small business enterprise who
4 claims entitlement to the provisions or protections
5 thereof. For reasons which follow, I determine it
6 does not.

7 The reference has been made to Carney
8 versus Dexter Shoe Company, a decision by Judge
9 Lechner of the United States District Court and I'm
10 satisfied that Judge Lechner's approach is
11 persuasive.

12 It is interesting to note that although
13 argued to the contrary, apparently this dealt with
14 age discrimination as opposed to racial
15 discrimination and I think Judge Lechner in a
16 persuasive fashion sets forth what the law covers
17 and doesn't cover. And it doesn't cover so-called
18 independent contractors as the plaintiff in this
19 particular case would be.

20 The legislature has set forth various
21 areas where it sought to impose liability and to
22 afford certain remedies, employment, real estate and
23 the like. But I am persuaded does not cover by its
24 terms or by its intent independent contractors and
25 thus I'm satisfied that there would be no cause of

1 action under the so-called New Jersey law against
2 discrimination.

3 Next in the statutory scheme we deal with
4 two claims under various portions of the Casino
5 Control Act and more specifically 5:12-84 and
6 5:12-134. With regard to the so-called minority
7 set-aside or the like, I am satisfied that this does
8 not give an independent or private cause of action.

9 If you take a look at 5:12-133B, that
10 provides for exclusive jurisdiction within the
11 Casino Control Commission.

12 Miller versus Zoby isn't this case, but
13 the approach in Miller I think is what is necessary
14 for the Court to consider and deal with in this
15 particular case.

16 And here we have a comprehensive
17 regulatory scheme where the legislature did not set
18 forth a private cause of action. The legislature
19 was extremely mindful it could do so because in the
20 RICCO provisions of the same legislative scheme they
21 did. I think you can gather a pretty clear
22 legislative intent as to what the purpose of the
23 legislature was.

24 If you apply the Cort versus Ash test, the
25 interpretation here in Cort versus Ash, clearly, I

1 think the defendant was -- rather the plaintiff was
2 one who could have been intended to be within the
3 scheme of things, but if you take a look at the
4 straight forward, relatively clear determination by
5 the legislature of what they were doing and indeed
6 what they weren't doing, you come to a conclusion
7 that there was no purpose on the part of the
8 legislature to set forth a private cause of action.

9 So with regard to the so-called minority
10 set aside provisions and the like, it is not that a
11 person is left without a remedy. There has been a
12 criticism of the remedy, but clearly someone is
13 free, if they are aggrieved, to bring the matter to
14 the Casino Control Commission's attention for
15 appropriate action.

16 In any event, I hold that there is no
17 so-called private cause of action for violation of
18 those provisions.

19 The other aspect deals with 5:12-134,
20 construction contracts. That would deal with the
21 initial construction, reconstruction, renovation.
22 By its terms, we are not building a casino. We have
23 someone who is offering as an independent contractor
24 limousine services. This provision of the Casino
25 Control Act rather clearly is not applicable to the



1 matter at hand and, accordingly, I would hold that
2 the complaint does not state a cause of action in
3 that regard.

4 This leaves what is a less than clear area
5 of so-called common law and/or constitutional causes
6 of action. Print Mart makes clear that on a motion
7 to dismiss for failure to state a claim, great
8 indulgence should be granted to the complainant and
9 rarely should a case be dismissed without affording
10 the party against whom the motion is made the
11 opportunity to amend, to more clearly indicate what
12 the common law or in this case constitutional claim
13 is being made. I think that is most appropriate in
14 this particular case.

15 I grant the plaintiff 21 days to amend the
16 complaint to set forth whatever additional either
17 common law, constitutional or the like cause of
18 action is being asserted in this case, but I do hold
19 to reiterate that the three statutory bases which
20 are asserted in the complaint do not state a cause
21 of action and the complaint as to those aspects, the
22 two portions of the Casino Control Act and the New
23 Jersey law against discrimination is dismissed for
24 failure to state a cause of action.

25 MR. ANTINORI: Thank you, your Honor. I



1 will submit an appropriate form of order.

2 MR. KRAUS: Your Honor, one more question
3 or clarification?

4 THE COURT: Yes.

5 MR. KRAUS: Would the defendants be able
6 to file renewed motions to dismiss after the
7 complaint is amended?

8 THE COURT: Absolutely. All I'm saying
9 is, the opportunity to amend or to modify should be
10 afforded, particularly in light of the Court's
11 determination. And whatever may be forthcoming,
12 certainly defendants are entitled to move against.

13 MR. KRAUS: Thank you, your Honor.

14 (Whereupon, the hearing concluded)

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC COUNTY
DOCKET NO. ATL-L-005353-L

PHILIP L. DOUGLAS, III :
 :
 Plaintiff, :
 :
 v. :
 :
 BALLY'S GRAND HOTEL CASINO, :
 BALLY'S PARK PLACE CASINO :
 HOTEL, CAESARS ATLANTIC CITY :
 HOTEL CASINO, CLARIDGE CASINO :
 HOTEL, HARRAH'S MARINA HOTEL :
 CASINO, RESORTS INTERNATIONAL :
 CASINO HOTEL, SANDS HOTEL, :
 CASINO, & COUNTRY CLUB/ :
 ATLANTIC CITY, SHOWBOAT :
 CASINO-HOTEL, TROPWORLD :
 CASINO ENTERTAINMENT RESORT, :
 TRUMP CASTLE HOTEL & CASINO, :
 TRUMP PLAZA HOTEL & CASINO, :
 TRUMP TAJ MAHAL HOTEL & CASINO: :
 :
 Defendants. :

BRIEF IN SUPPORT OF THE DIVISION ON CIVIL RIGHTS
MOTION TO PARTICIPATE AS AMICUS CURIAE AND IN
SUPPORT OF MOTION FOR RECONSIDERATION

ROBERT J. DEL TUFO
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Rights
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LYNN B. NORCIA
Deputy Attorney General
On the Brief

STATEMENT OF THE MATTER

The Division on Civil Rights submits this brief in support of its motion to intervene as amicus curiae for the limited purpose of addressing those issues raised in this matter which involve the interpretation and/or application of the New Jersey Law Against Discrimination ("LAD"). N.J.S.A. 10:5-1 et seq. The Division on Civil Rights ("Division") takes no position on the merits of either party's claims but rather is submitting this brief to offer its guidance as the Court addresses specific issues of law raised in this case.

Plaintiff Philip Douglas III filed a complaint in Superior Court on September 10, 1991, alleging, inter alia, violations of the LAD in that he was the victim of race discrimination by defendants, Atlantic City's Hotels & Casinos (see exhibit "A", Complaint).^{*} Plaintiff has alleged that he is the owner and operator of a limousine business known as Douglas Transportation Systems which is a certified minority business enterprise and that he has since March 1991, solicited business from each and every Defendant for the purposes of providing transportation and/or limousine services to the defendants. Plaintiff further

^{*} The defendants are: Bally's Grand Hotel Casino ("Bally's Grand"), Bally's Park Place Casino Hotel ("Bally's Park Place"), Caesars Atlantic City Hotel Casino ("Caesars"), Claridge Casino Hotel ("Claridge"), Harrah's Marina Hotel Casino ("Harrah's"), Resorts International Casino Hotel ("Resorts"), Sands Hotel Casino & Country Club ("Sands"), Atlantic City Showboat Casino Hotel ("Showboat"), Tropworld Casino Entertainment Resort ("Tropworld"), Trump Castle Hotel & Casino ("Trump Castle"), Trump Plaza Hotel & Casino ("Trump Plaza"), and Trump Taj Mahal Hotel & Casino ("Taj Mahal").



alleges that defendants refused to consider the solicitations of the plaintiff and have denied him any contracts in violation of the anti-discrimination requirements of New Jersey's LAD. (Second Count, paragraph 2).*

On November 22, in an oral decision, the Honorable Michael R. Connor, dismissed the First, Second and Third Counts of plaintiff's complaint with prejudice. On December 2, 1991, a written Order was entered by the court. (Exhibit B). The Order gave plaintiff until December 12, 1991 to file an amended complaint.

On or about December 10, 1991 plaintiff filed an amended complaint alleging a violation of plaintiff's civil rights under "Federal and State Law, as well as a violation of Plaintiff's Federal and State Constitutional Rights and Common Law Rights of the Plaintiff." (Exhibit C).

Defendants have moved to dismiss plaintiff's amended complaint for failure to state a claim upon which relief can be granted, and plaintiff thereafter moved for reconsideration of that part of the court's December 2, 1991 Order which dismissed, the Second Count of plaintiff's complaint alleging a violation of the LAD.

* Plaintiff also alleged that defendants violated portions of the Casino Control Act, specifically N.J.S.A. 5:12-184 et seq. and N.J.S.A. 5:12-134 (Counts One and Three). The Division on Civil Rights takes no position on the court's determination that the Casino Control Act does not provide a private right of action.

The Division on Civil Rights takes no position on the legal issues raised in plaintiff's amended complaint, but rather seeks only to participate on the issue raised by plaintiff's motion for reconsideration.



ARGUMENT

POINT I

THE DIVISION ON CIVIL RIGHTS SHOULD BE PERMITTED TO PARTICIPATE AS AMICUS CURIAE PURSUANT TO R. 1:13-9, BECAUSE THE DIVISION ON CIVIL RIGHTS HAS UNIQUE EXPERTISE IN THE AREA OF ANTIDISCRIMINATION LAW, THE DIVISION IS CHARGED BY STATUTE WITH ENFORCING THE LAW AGAINST DISCRIMINATION, AND THE DIVISION'S PARTICIPATION WILL HELP IN THE RESOLUTION OF A QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE

The Rules of Court, R. 1:13-9, provide that an application for leave to appear as amicus curiae will be granted if under all the circumstances:

the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

The purpose of amicus curiae is:

to provide the court with information pertaining to matters of law about which the court may be in doubt. [Keenan v. Bd. of Chosen Freeholders of Essex County, 106 N.J. Super. 312, 316 (App. Div. 1969)]

Participation of amicus curiae is appropriate in a case involving issues of public importance in which the amicus curiae has a "special interest, involvement or expertise." R. 1:13-9; Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 17 (1976), cert. den. sub nom. Feldman v. Weymouth Tp., 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977).

As the agency charged by statute with enforcing the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-6, the Division on Civil Rights has a strong interest in participating in any case

involving the interpretation and application of the LAD. Moreover, as the agency which enforces the LAD, the Division has a unique expertise in the field of anti-discrimination law. The instant case presents legal issues which are of particular concern to the Division and which have the potential to affect the rights of all individuals. Additionally, the Legislature has recognized the importance of allowing the Division to participate in any proceedings involving an interpretation of the LAD. See N.J.S.A. 10:5-13 (upon application to the Court wherein a matter based upon a violation of the LAD is filed "the division shall be permitted to intervene").

As noted earlier, the Division is seeking herein to intervene solely for the purpose of addressing issues related to the interpretation and application of the LAD in suits claiming discrimination in contracting. This court's decision ordering dismissal with prejudice of Plaintiff's LAD claim, conflicts with the Division's own interpretation and application of the LAD.

Since the Division does not intend to take a position on the underlying merits of the subject case, no party to the litigation will be unduly prejudiced by the Division's participation as amicus curiae.

Because this case presents issues which have the potential to affect the rights of all individuals and businesses, because the Division on Civil rights is charged by statute with preventing and eliminating discrimination actionable under the



LAD, and because the Division has a unique expertise in this area of law, the Division should be permitted to participate as amicus curiae in this matter. R. 1:13.9.



POINT II

THE NEW JERSEY LAW AGAINST DISCRIMINATION
CLEARLY PROHIBITS DISCRIMINATION IN
CONTRACTING SUCH AS IS ALLEGED IN THE
PRESENT CASE

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., clearly prohibits the type of conduct alleged in the subject complaint and this court should therefore, reconsider and vacate that portion of its December 2, 1991 Order dismissing the Second Count of plaintiff's original complaint.

The LAD clearly states that it shall be an unlawful discrimination:

For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, ...of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers...
[N.J.S.A. 10:5-12 1].

The language chosen by the legislature could not be any clearer. Moreover, Plaintiff's allegation clearly articulates a cause of action under §10:5-12 1 of the LAD. Plaintiff has alleged that "each and every Defendant has refused to consider the solicitations of the Plaintiff and have denied him any work or any contract to provide any transportation services." (Exhibit A, First Count, paragraph 4, incorporated by reference

into Second Count).

In dismissing plaintiff's complaint, this court adopted the position, urged in the defendants' motions to dismiss, that the United States District Court decision in Carney v. Dexter Shoe Co., 701 F.Supp. 1093 (D.N.J. 1988) is applicable to this matter and supports the dismissal of plaintiff's LAD claim. The Division on Civil Rights contends that the decision in Carney is both inapplicable to the present case, and was an erroneous interpretation of the LAD in any event.

In Carney, a claim was made under §10:5-12a of the LAD, alleging that the plaintiff had been wrongfully terminated on the basis of his age. Id. at 1095. The court had to determine if the LAD covered independent contractors who might otherwise be considered employees. The court addressed the issue of whether, upon the application of the facts to the law, a shoe salesman was an independent contractor or an employee of the defendant. After articulating the Third Circuit's test for determining whether an individual is an independent contractor or an employee, including, e.g., whether the worker accumulates retirement benefits, whether the 'employer' pays social security taxes and what is the method of payment, the court determined that the plaintiff was an independent contractor. Id. at 1098.

The court thereafter addressed the issue of whether independent contractors are covered under §10:5-12a of the statute. The court relied upon the words of subsection a of section 12. "The statute states that, 'it shall be an unlawful



employment practice... (a) for an employer, ... to [commit the various act]. Because the proscriptions apply to an 'employer,'--as they do under the terms of ADEA -- it is inescapable that the 'individual' on the receiving end of the employer's conduct must be an employee or prospective employee in order for the statute to apply." Id. at 1102 (emphasis in original). The court had no reason to address the issue of the applicability of subsection 1 of section 12 of the LAD.

Clearly, the issue in Carney was not whether an actionable claim existed under the LAD for a business which claims it has been discriminated on the basis of the owner's race in violation of §10:5-12 1 of the LAD, as is claimed by the plaintiff in the present matter. Therefore, the decision reached in Carney is clearly neither relevant nor binding on this court in the resolution of the issue presented in this case.

Since Carney is not relevant to the present dispute, this court should rely upon the clear language of subsection 1 of the statute and the clear legislative intent. As noted earlier, the language of subsection 1 could not be any clearer in its prohibition of the kind of discrimination which is alleged herein. As a remedial statute the LAD should be liberally construed to afford the most protection to potential victims of discrimination. As the Supreme Court has stated "[a]s remedial legislation, the Law Against Discrimination should be constructed 'with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.'"

Andersen v. Exxon Co., 89 N.J. 483, 495 (1982)

Moreover, the Division on Civil Rights has in the past interpreted the LAD as prohibiting discrimination in contracting. Although counsel has been unable to obtain any Director's Orders which demonstrate this interpretation, at least one case is currently pending before the Division which addresses this issue and for which there should be a final order issued before the return date of the subject motion.*

In conclusion, this court should reconsider its earlier Order dismissing Count Two of plaintiff's original complaint and reinstate the LAD claim against the defendants.

* Counsel will provide a copy of the final order to the court and the parties if it is issued before the return date of the subject motion.



CONCLUSION

In conclusion, the Division on Civil Rights is respectfully requesting permission to participate in this matter as amicus curiae so that it may address legal issues raised by this appeal which involve the interpretation and application of the New Jersey Law Against Discrimination. If the Division's motion is granted, the Division urges this court to reconsider this Court's December 2, 1991 Order and reinstate Count Two of plaintiff's original complaint.

Respectfully submitted,

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

By Lynn B. Norcia
Lynn B. Norcia
Deputy Attorney General

Date: January 24, 1992



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Attorneys for Plaintiff

SEP 10 1991

ATLANTIC COUNTY

PHILIP L. DOUGLAS, III, : SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION
Plaintiff : ATLANTIC COUNTY

v.

DOCKET NO. ATL-L-005353-91

BALLY'S GRAND HOTEL CASINO, :
BALLY'S PARK PLACE CASINO :
HOTEL, CAESARS ATLANTIC CITY :
HOTEL CASINO, CLARIDGE CASINO :
HOTEL, HARRAH'S MARINA HOTEL :
CASINO, RESORTS INTERNATIONAL :
CASINO HOTEL, SANDS HOTEL, :
CASINO, & COUNTRY CLUB/ :
ATLANTIC CITY, SHOWBOAT :
CASINO-HOTEL, TROPWORLD :
CASINO ENTERTAINMENT RESORT, :
TRUMP CASTLE HOTEL & CASINO, :
TRUMP PLAZA HOTEL & CASINO, :
TRUMP TAJ MAHAL HOTEL & CASINO:

Defendants

CIVIL ACTION
COMPLAINT AND JURY DEMAND

Civil Rights

Plaintiff, PHILIP L. DOUGLAS, III, residing at 125 North
North Carolina Ave., City of Atlantic City, County of Atlantic
State of New Jersey, by way of Complaint says:

FIRST COUNT

1) At all times here and after mentioned the Plaintiff
a black decorated Vietnam Service Veteran, was the owner and
operator of a limousine business known as Douglas Transportati
Systems, a certified minority small business enterprise.

2) At all times here and after mentioned the Defendant
were the owners and operators of hotel/casinos located in
Atlantic City, New Jersey.

MIKSIS & BROMLEY
ATTORNEYS AT LAW
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SUITE 647
ATLANTIC CITY, N. J. 08401

EXHIBIT "A"



3) Commencing March, 1991 and continuing until this date the Plaintiff did solicit each and every Defendant for the purposes of providing transportation and/or limousine services to said Defendants.

4) On each and every occasion each and every Defendant has refused to consider the solicitations of the Plaintiff and have denied him any work or any contract to provide any transportation services.

5) Defendants' actions were willful, wanton, reckless, improperly motivated and a direct violation of Plaintiff's Civil Rights and in violation and contradiction of N.J.S.A. 5:12-184 et seq.

SECOND COUNT

1) Plaintiff repeats and reiterates all of the allegations set forth in the First Count and makes same a part hereof as if set forth specifically herein at length.

2) Defendants' actions were willful, wanton, reckless, improperly motivated and a direct violation of Plaintiff's Civil Rights and in violation of the Law Against Discrimination as set forth in N.J.S.A. 10:5-1 et seq.

THIRD COUNT

1) Plaintiff repeats and reiterates all of the allegations set forth in the First and Second Counts and makes same a part hereof as if set forth specifically herein at length.

2) Defendants' actions also constituted a violation of the Strong Public Policy Against Discrimination in Employment within the casino industry as expressed by N.J.S.A. 5:12-134.

WHEREFORE, Plaintiff demands damages against the Defendants as follows:

- A) Compensatory damages;
- B) Punitive damages;
- C) Interest, costs and attorneys fees;
- D) Such other relief as the Court deems just and equitable.

Plaintiff hereby request Trial by jury as to all of the issues in this matter.

MIKSIS & BROMLEY
Attorneys for Plaintiff

BY: 
WILLIAM A. BROMLEY

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Tropicana and Claridge

	SUPERIOR COURT OF NEW JERSEY
	LAW DIVISION
	ATLANTIC COUNTY
PHILIP L. DOUGLAS, III,	:
	:
Plaintiffs,	:
	:
v.	:
	:
BALLY'S GRAND HOTEL CASINO,	:
BALLY'S PARK PLACE CASINO HOTEL,	:
CAESARS ATLANTIC CITY HOTEL CASINO,	:
CLARIDGE CASINO HOTEL, HARRAH'S	: ORDER DISMISSING PLAINTIFF
MARINA HOTEL CASINO, RESORTS	: COMPLAINT
INTERNATIONAL CASINO HOTEL,	:
SANDS HOTEL CASINO, & COUNTRY	:
CLUB/ATLANTIC CITY, SHOWBOAT	:
CASINO HOTEL, TROPWORLD CASINO	:
ENTERTAINMENT RESORT, TRUMP	:
CASTLE HOTEL & CASINO, TRUMP	:
PLAZA HOTEL & CASINO, TRUMP T&E	:
MAHLE HOTEL & CASINO	:
	:
Defendants	:
	:
	:

This matter being opened to the court on November 22, 1991
Joseph G. Antinori, Esquire, of the law firm of Horn, Kaplan,
Goldberg, Gorny & Daniels, P.C., attorneys for defendants Bally's
Park Place Hotel & Casino, Bally's Grand Hotel & Casino, Caesar's
Hotel & Casino, Tropicana Hotel & Casino, Resorts Hotel & Casino
and Claridge Hotel & Casino, and Frederick Kraus, Esquire

EXHIBIT "B"

CERTIFICATION PURSUANT TO RULE 4:5-1

AND DESIGNATION OF TRIAL COUNSEL

I hereby certify that the matter in controversy, herei
is not the subject matter of any other action in any other Cou
or arbitration process of which the undersigned is aware.
Further, I hereby certify that no other action or arbitration
process is contrmpted. I further certify that it is not
contemplated that any other party should be joined in this
action.

I hereby certify that the foregoing statements made by
are true and I am aware that if any of the foregoing statement
made by me are willfully false, I am subject to punishment.

Dated: September 10, 1991



WILLIAM A. BROMLEY, ESQ.

Pursuant to Rule 4:25-4, WILLIAM A. BROMLEY, ESQ. is
hereby designated as trial counsel on behalf of the Plaintiff.

Dated: September 10, 1991



WILLIAM A. BROMLEY, ESQ.

MIKIS & BROMLEY
ATTORNEYS AT LAW
1125 ATLANTIC AVENUE
SUITE 647
ATLANTIC CITY, N. J. 08401



STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DKT. NO. CRT 6415-89
DCR DKT. NO. PQ075-01970

SUSAN MACZIK,

Complainant,

v.

GILFORD PARK YACHT CLUB,

Respondent.

ADMINISTRATIVE ACTION
FINDINGS,
DETERMINATION
AND ORDER

William A. Ward, Esq., for the complainant
(Cordo, Murphy & Ward, attorneys)

Joseph Coronato, Esq., for the respondent
(Mulvaney & Coronato, attorneys)

Jeffrey Burstein, Deputy Attorney General, for intervenor,
New Jersey Division on Civil Rights, (Robert J. DelTufo,
Attorney General of New Jersey, attorney)

BY THE DIRECTOR:

This matter is before the Director of the Division on Civil Rights pursuant to claims by the complainant, Susan Maczik, a female, that the respondent, Gilford Park Yacht Club (Yacht Club), discriminated against her on the basis of sex, female, when it denied her club membership. Maczik alleges that such denial is in violation of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

The Yacht Club contends that Maczik's application was not denied but merely set-aside until its by-laws prohibiting females members were changed. ID at 26-27. At the same time, the Yacht



Club concedes that Maczik was the subject of discrimination at the time she applied for membership. ID at 27. Despite such discrimination, however, the Yacht Club contends that Maczik is not entitled to any damages because it intended to change its by-laws to admit women and Maczik, through her impatience, created her own problems by failing to wait for the club to change its admission policy. Id.

The administrative law judge, on May 13, 1991, issued an initial decision, recommending a finding that the Yacht Club discriminated against Maczik on the basis of sex and certain damages. Based upon my thorough review of the initial decision, the record below and exceptions filed by the parties, I affirm the ALJ's finding that the Yacht Club discriminated against Maczik on the basis of sex but reverse and modify his award of damages assessed on behalf of Maczik; and reverse the award of relief to Joseph Maczik, Joseph Simpson and Edward O'Toole, individuals who are not parties to this action.

I. PROCEDURAL HISTORY

This action commenced on February 10, 1988 when Maczik filed a verified complaint with the Division on Civil Rights. The respondent, on March 7, 1988 submitted its answer to the complaint and denied the allegations of discrimination. As a result of the Division's investigation, the Director, on October 2, 1988, issued a finding of probable cause, concluding that Maczik was denied membership based solely on her sex and that the Yacht Club was not a private club which would render it exempt from the LAD.

Subsequent to a prehearing conference and settlement



negotiations by the parties, the ALJ conducted hearings on this matter on October 19, November 2, and December 10, 12, 17 and 18, 1990, and January 14, 1991. The parties submitted post-hearing briefs and the record closed on March 28, 1991.

Counsel for Maczik filed exceptions on May 23 and June 10, 1991 and submitted corrections to his June 10 exceptions in a letter, dated June 11, 1991. Maczik personally filed separate exceptions on May 20, 1991. Counsel for the Yacht Club filed its exceptions on September 20, 1991.

II. THE ALJ'S FINDINGS OF FACTS

A. Undisputed Facts

The ALJ rendered the following findings of undisputed facts:

1. The Gilford Park Yacht Club, Inc. received title to its present premises located at 700 Riverside Drive, Toms River, New Jersey, on July 21, 1936, pursuant to a warranty deed issued to it from the Barnegate Woodlands Corporation (J-2). The deed further specifically stated that membership in the Club was limited to all owners of lands of Gilford Park as well as owners of lands owned by grantor which may have been the subject of development subsequent to the transfer of the deed. The Club is located at the southeastern section of East Dover Township on the Toms River. To its immediate north is the residential community known as Gilford Park. A major highway, Route 37, traverses in an east/west direction through the Gilford Park area and serves as the sole link-up to the recreational area known as Island Beach State Park, as well as such boardwalk communities as Seaside Park and Seaside Heights. Since its inception, the Club has retained its status as



a public facility by leasing a parking lot area from Dover Township and receiving various municipal services over the years.

2. The Club's 1983 bylaws set forth the membership requirements at the Club as follows:

Article VIII, Section I

Any person, citizen of the United States of America over 21 years of age, and property owner of Gilford Park, Toms River area within the boundry (sic) limits of West End Avenue/Vaughn Avenue (from the Toms River north to Bay Avenue) from Vaughn Avenue east along Bay Avenue to Barnegate Bay. Residents of Bay Shore and Island Heights shall be eligible.

Membership shall be open to sons, sons-in-law, brothers, fathers, fathers-in-law and other siblings of members, in good standing or family members of deceased members who were in good standing at the time of death. [P-2].

3. The Club's bylaws were amended on May 10, 1986, as follows:

Any male citizen of the United States of America over 21 years of age and is a property owner of Gilford Park, Toms River area within the boundary limits of West End Avenue, Vaughn Avenue (from the Toms River north to Bay Avenue), from Vaughn Avenue east along Bay Avenue to Barnegate Bay. Residents of Bay Shore and Island Heights, as defined above, shall be eligible. [P-3].

It is noted that the second paragraph of the 1983 bylaws (regarding membership for relatives) was omitted in the 1986 amendment.

4. On January 8, 1988, the Club's secretary, Dave Solt, sent a newsletter to Club members which, in relevant part stated, "to (sic) bylaws changes were passed: 'article VIII, section 1; addition to read; 'membership shall be open to sons of members in good standing and sons of deceased members who were in good standing at the time of death, and such sons shall have reached the age of 21 years.'" (P-30). It is noted that the actual effective



date of the bylaws change was not listed in the Solt letter.

5. Petitioner applied for membership in the Club in the fall of 1987. Pursuant to the Club procedures, petitioner was instructed to come to the Club and await the results of the general membership meeting regarding her application. As a candidate for admission, she was not permitted to attend the meeting in the upstairs room of the Club but was invited to remain in the downstairs bar area. At the conclusion of that membership meeting, petitioner was told that she was not made a member because her status as a woman violated the existing bylaws."

ID at 3-5.1

B. Disputed Facts²

1. Introduction

At the outset of these proceedings, the Yacht Club argued that it is not a public accommodation subject to the provisions of the

1. Hereinafter, "ID" refers to the ALJ's May 13, 1991 initial decision, "1Ce" refers to the complainant's May 20, 1991 exceptions, "2Ce" refers to the complainant's May 23, 1991 exceptions, "3Ce" refers to the complainant's June 10, 1991 exceptions, "Re" refers to the respondent's exceptions, "1T" refers to the transcripts of the October 19, 1990 hearing, "2T" refers to the transcripts of the November 2, 1990 hearing, "3T" refers to the transcripts of the December 10, 1990 hearing, "4T" refers to the transcripts of the December 12, 1990 hearing, "5T" refers to the transcripts of the December 17, 1990 hearing, "6T" refers to the transcripts of the December 18, 1990 hearing and "7T" refers to the transcripts of the January 14, 1991 hearing.

2. The respondent did not file all of the transcripts from the administrative hearing but only filed transcripts of testimony elicited on October 19, November 2 and December 10. Thus, the Director's review of the record below is limited to his review of these transcripts, the initial decision, the exhibits introduced at the hearing and other pleadings submitted on behalf of each party.



Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Subsequently, the Yacht Club conceded that it is a public accommodation under the LAD and therefore, required to admit females for membership under the same terms and conditions as provided to males. ID at 2. In the initial decision, the ALJ identified two issues which were pending before the OAL: (1) was petitioner Maczik unlawfully denied entry to membership to the respondent yacht club or did she unilaterally fail to follow all procedures regarding her admission? and (2) what damages are to be assessed in this matter should this tribunal find that discrimination did in fact take place? Id.

Based upon the ALJ's identification of the issues in this matter and my determination that the ALJ's award of damages to non-parties was not authorized, I have limited my review of the facts relevant to whether Maczik was denied membership to the yacht club on the basis of sex and, if so, what relief she is entitled to.

2. Whether Maczik was denied membership because of her sex

a. The Parties' Proofs

With regard to whether Maczik was denied membership because of her sex or unilaterally failed to follow required procedures regarding her admission, the ALJ summarized the testimony of the witnesses as follows:

Petitioner Susan Maczik (Maczik) purchased the Bay Shore Deli (Deli) and residence, located at 2701 Route 37 east, Toms River, New Jersey, in 1985 and has operated the Deli at that location since that time. At the time of her purchase, petitioner first became aware of the Club and its facilities. As a result, she and her husband attended the Club's open house in September 1985, after which her husband inquired about membership. In September 1986, Maczik and her husband attended a second open house, at which time they were invited



to attend the Club's annual Halloween party. As a result, Maczik's husband submitted his application for membership in December 1986, after which he paid the initiation dues of \$172.50 in January 1987. As a result, he became a member of the Club in February 1987, after which he paid his annual dues of \$75 in March. He also paid \$175 for the leasing of boat slip number 81, to which he was assigned as a new member of the Club. The slip fee was paid to Club Treasurer David Solt. On June 26, 1987, Solt called Maczik's husband and advised him that he could sublease a deeper water slip (number 2) from another Club member named Pasquale Esso for the amount of \$225 per year. In reliance upon the procurement of a deeper slip, he had purchased a larger boat for \$2,500-\$30,000. When Maczik's husband agreed to that arrangement, his initial check for \$175 was returned to him, and Mr. Maczik was entitled to use slip number 2 for the rest of the season.

In the beginning of September 1987, petitioner contacted Mrs. Carol Healy, president of the Club's Women's Auxiliary, regarding membership in the Women's Auxiliary. Although there was a membership fee, no application was required. Healy told Maczik that the Women's Auxiliary was a sister organization of the yacht club, and its function was to perform cooking, cleaning, purchasing and fund-raising. However, the Auxiliary had no voting rights in the Club and they still had to be signed in by a male member any time they wished to enter either the clubhouse or the dock area. Only members were given keys to the Club the gates (sic). Further, only members had the rights to use a boat slip.

The Labor Day Incident

On Labor Day 1987, petitioner volunteered to donate various foodstuffs to the Club as part of its annual Labor Day weekend bash. Since it was raining at the time of her arrival, petitioner used her husband's Club key to enter the front door of the Club so that she could deliver her donations to the Club. As she crossed the floor of the clubhouse, one of the members, Joseph Star, called out "who the hell do you think you are?" Although petitioner was startled, she proceeded onward toward the kitchen area in order to get away from Star. At that time, another member, Joseph O'Brien, abruptly came up to her, pushed her up into a cabinet, and shouted "don't ever walk away from anyone when you are being challenged by a member. When you are being challenged by a member, you answer the challenge. Although petitioner was humiliated and overwhelmed, she apologized and got out of the Club as soon as she could.

Although she was very shaken by the incident, Maczik's husband encouraged her to join the Women's Auxiliary. She submitted her application in October 1987; however, shortly thereafter, the Auxiliary's president, Healy, gave Maczik a copy of the Club deed. It was at that time that petitioner



realized that there was no deed restriction regarding her membership. As a result, petitioner then determined to apply for full membership.

The Membership Process

After she made her initial inquiry regarding membership, Joseph Piotrowski, who was then the Club's bartender, gave petitioner an application, which she filled out and submitted along with a \$235 application and key fee. Piotrowski had already gotten to know the Macziks, having made regular food purchases for the Club at Maczik's Deli for some time. According to the Club procedures, the application was then to be posted on the Club bulletin board and petitioner was required to make three visits to the Club within a short period of time. Club Commodore George Gudat supported her application and insisted upon sponsoring it. Auxiliary President Healy was also in favor of the application. Dave Solt, who was then the recording secretary, contacted petitioner at her Deli, and told her that she was to attend the membership meeting on December 12, 1987. Petitioner arrived at approximately 7:00 p.m. that evening for the general membership meeting. Pursuant to the Club procedures, she remained in the bar area for approximately two hours awaiting the results of that meeting. During that time, she received no word from anyone. She was only aware that the board of trustees had convened at approximately 5:30 that evening, in anticipation of the general membership meeting. Finally, after that extended wait, Maczik's husband arrived at her side very upset, at which time he told her that the board of trustees had voted against her membership without a general membership vote. He also indicated that the trustees had voted against allowing him to continue using the deeper water number 2 boat slip which he had previously sublet from Club member Esso. Amid the emotion-charged atmosphere, Dave Solt confirmed that Maczik's application had been denied by the board of trustees, which had voted upon it. However, she later approached George Gudat who told her that the application was "set aside" until they could take care of the bylaws. He stated that her application had been rejected because she was a woman and that the bylaws did not contemplate women. She asked for specifics about the time frame involved; however, neither Gudat nor Solt could specify the amount of time it would take, other than to tell her it would probably take several months. She then contacted the Club four separate times but received no reply regarding her inquiries. On December 28, 1987, she finally sent a certified letter to Gudat regarding her membership, to which she received no reply (P-4). She then contacted the Division on Civil Rights on January 5, 1988, as a result of which she hired an attorney, Richard D. Caruso, Esq., who wrote the Club on February 2, 1988 (P-4a). When she heard no reply regarding his inquiry, petitioner filed her complaint with the Division on February 10, 1988. She is not aware of any correspondence



between her attorney and the Club's attorney, Joseph Coronato, at any time.

Petitioner also wrote a letter to the clerk administrator of Toms River on December 14, 1987, in which she complained about the Club having sold raffle tickets without having either filed for or obtained a permit for the games of chance (R-1). She claimed that she wrote that letter so that she would not put her own lottery license at risk since she had previously donated various items toward Club raffles, all of which she assumed had been conducted in accordance with the State games of chance rules and regulations. She followed up with a second letter to the clerk on December 28, 1987 (R-2).

Subsequently, on February 5, 1988, Maczik wrote to the Director of Alcoholic Beverage Control, John F. Vassalo, Jr., and advised him of the sex discrimination which had been conducted by the Club (R-3). The Club's annual liquor license was due for renewal in June 1988. She contacted the Dover Township clerk administrator regarding the liquor license on June 2, 1988 (R-8). She wrote to Governor Thomas H. Kean on February 5, 1988 (R-4), to Chief T. Walton of the Dover Township Police Department in January 1988 (R-5), and to the Department of Community Affairs, which replied to her on February 11, 1988 (R-6). She also contacted the Office of the Ocean County Prosecutor, Joan Allen, who is a township committee person as well as the Legalized Games of Chance for New Jersey, after the clerk administrator's office suggested that she make all of those inquiries.

Maczik also testified that she was advised by Dover Township that the Yacht Club was granted a renewal of its liquor license on the condition that the club eliminated its membership policy which discriminated against women. ID at 9. She further testified that she believed that the imposition of this condition was the only reason females were admitted to the Yacht Club in 1988.

She also noted that two other women were denied membership to the club in 1981 or 1982 and in 1985. Id.

Joseph Maczik, who is the husband of the complainant, corroborated Maczik's account regarding her application process. ID at 14. He specifically testified that "at a pre-meeting held prior to the general membership meeting, Commodore Gudat told the



bers that the officers and trustees, after having met earlier
at evening, did not accept Maczik's application since females
could not be accepted as members under the existing bylaws." Id.
Subsequent to Maczik's denial of membership, Joseph Maczik
discussed the issue with other members of the club, "many of whom
indicated that they thought that the Club was a male-only private
club. When he showed them the bylaws, these people were astonished
since the common impression was that the Club had been purchased in
the past from private funds and was not subject to the public
laws." ID at 15-16. He also attempted to change the minds of the
club's members, officers and trustees and understood "that both
Amadore Gudat and Dave Solt were in agreement with female
membership since any increased membership would produce increased
revenues for the Club." ID at 16. He testified that other
officers, namely Joseph Piotrowski, Tony Petto, Terrance Healy and
Jimmy Schaffner, were opposed to admitting females, and that these
men, in particular, threatened him on a continuous basis with
consequences to expect as a result of his wife's activity." Id.
He also heard Piotrowski state that Maczik would be a member of the
club "over his dead body." Id.

Joseph Maczik also testified that he continued to convince
officers and other members of the club to change its membership
policy (ID at 16-17) and that he was particularly perplexed because
Gudat had insisted upon sponsoring his wife for membership. With
respect to the trustees meeting, the ALJ recounted Maczik's
testimony as follows:

...when her application was not voted upon, he found
out that Gudat had backed down at the board of trustees



meeting. He was also upset because the board of trustees had determined at their 5:30 meeting not to permit the application to be acted upon by the general membership. The reason was that the board intended to do it its way regardless of the general membership consensus. Further, when he confronted Gudat with what had happened at the board of trustees meeting, Gudat never stated that the bylaws would have to be changed or would in fact be changed. Everything was left up in the air as a result of the December 12 meeting, and Gudat never told either of the Macziks to be patient, since he had stated that he had no faith that anything would in fact be done.

David Solt testified that he was the secretary of the board of trustees in 1987. ID at 21. He also stated that "there had been discussion regarding Maczik's application at the board of trustees meeting on December 12, 1987, but that it could not be voted upon until the bylaws were changed by the membership." Id. Further, after the trustees meeting he advised Maczik about what transpired at the meeting and that the bylaws needed to be changed. ID at 22.

Raymond Bearce testified that he is serving his third term as commodore of the Yacht Club and that in 1987, he was a trustee of the club where membership consisted of between 235 and 240 members. ID at 22. He noted that at the time of Maczik's application, there were 12 trustees and four officers and that in 1987, the board of trustees was in favor of her application "but for the bylaws problem." Id. He further testified that since the bylaws were changed (in May 1988, ID at 20), no females have been denied membership. Id.

George Gudat testified that he was the club commodore between September 1987 and 1988 and that he insisted upon



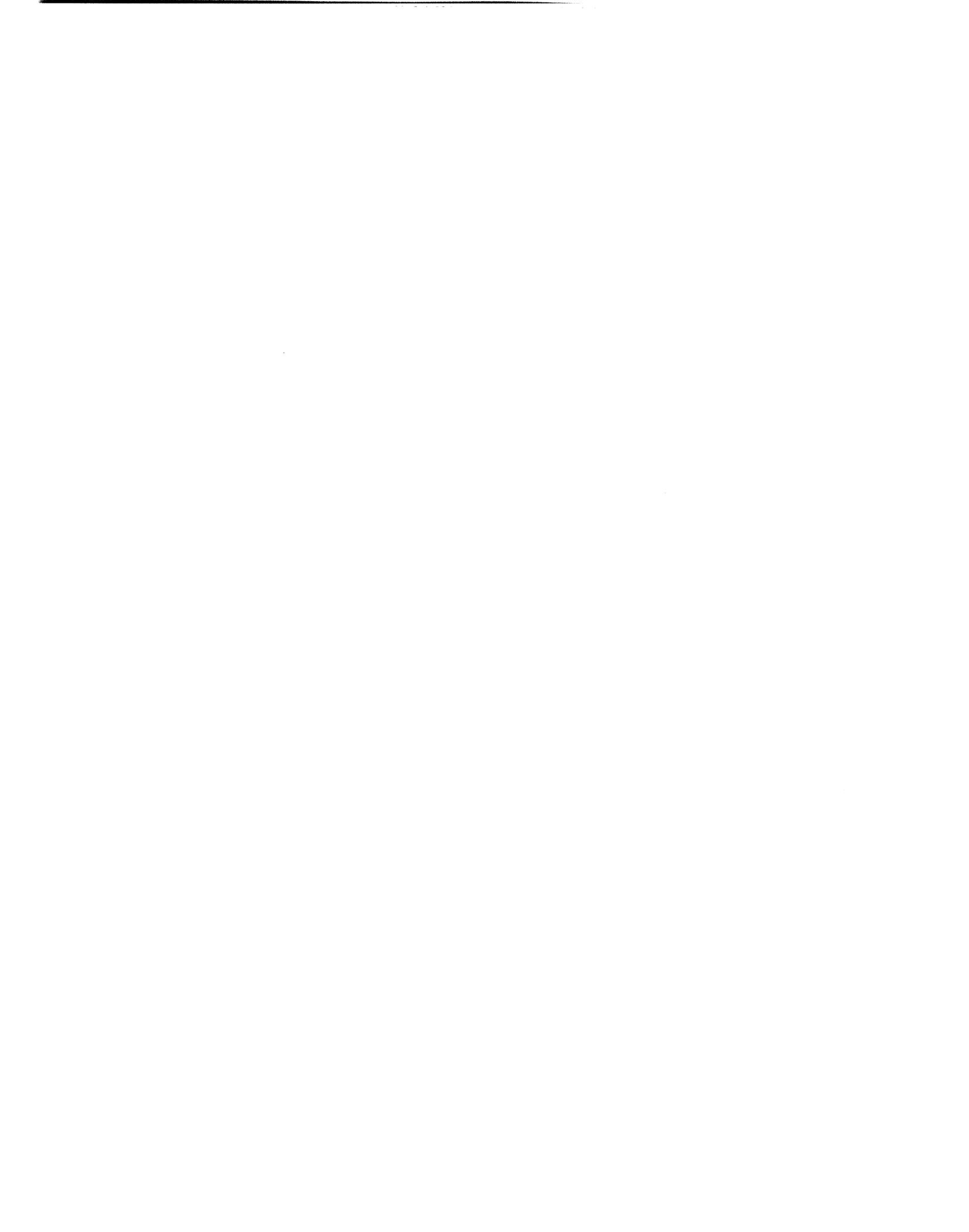
sponsoring Maczik's membership application in September 1987 after Joseph Simpson requested him to sign it. ID at 25. He stated that he advised Maczik and her husband that her application was in direct conflict with the bylaws and that if they waited several months and were patient, he hoped the bylaws would be changed. ID at 25-26. Consequently, Maczik's application was set aside so that the bylaws could be changed at the general membership meeting held on December 12, 1987, which was held after the trustees meeting. ID at 26. He also testified that he instructed David Solt to change the bylaws and that, in his opinion, Maczik "would have been voted in except for what happened later on regarding her letter writing and the complaint being filed with the Division on Civil Rights." Id.

Ronnie Evans, a female, testified that she was admitted as a member of the Yacht Club in May 1988 and that there were five votes cast against her at the time. ID at 20. She admitted, however, that her application for membership was not submitted to the club until after the bylaws change occurred. Id.

b. The ALJ's Findings of Fact

Based upon the above testimony and the Yacht Club's concession that Maczik was the subject of discrimination at the time she applied for membership (ID at 27), the ALJ found that the Yacht Club denied Maczik membership on the basis of her sex. ID at 43.

3. Whether a boycott against Maczik's store was engineered by officers and members of the Yacht Club as a reprisal



for Maczik's efforts to challenge the male only membership policy.

a. The Parties' Proofs

Maczik testified that in February 1988, she attempted to visit the Yacht Club and was confronted by Joseph Piotrowski, who was the Club manager in 1987 (ID at 8, 24) and another club member, Tony Petto. ID at 8. During this confrontation, "Piotrowski told her that if she didn't drop her civil rights suit, a boycott of her business would occur and, as a result, they would put her out of business." Petto responded to Piotrowski's remarks by stating, "Yeah. That's right. Why don't you give up?" Id. Maczik also recounted that Piotrowski, who lives around the corner to Maczik's delicatessen, made purchases at the store almost every day and that subsequent to the confrontation, stopped shopping at the store.

Id.

She also testified that 22 Yacht Club families, all of whom were year-round residents of the Gilford Park area, stopped shopping at the store. ID at 8, P-16. These families were identified by name, P-16, and according to Maczik, only one family has resumed making purchases since the boycott. Maczik calculated that because of the boycott, her sales, including lottery and catering sales, dropped markedly. ID at 9. She specifically noted that during 1987, she catered three events for the Yacht Club and three outside affairs for Yacht Club members. Id.

Maczik stated that subsequent to November 1987 she catered no events for the Yacht Club and only catered one event at the club for Robert H. Monetti, a non-member who rented the club's upstairs room for a bachelor party which was scheduled for June 2, 1989. ID



at 10. The ALJ's account of Maczik's testimony with regard to this event is as follows:

...Monetti originally planned to deliver the food stuffs himself. As a result, Maczik was not aware that the affair was to be held at the Club. When Monetti ran into scheduling problems, he asked Maczik to deliver the order himself. Although Maczik agreed to deliver the order, she hesitated when she found out where the order was going. When she arrived at the Club she was prevented from using the front entrance. Instead she was directed to use the back staircase to bring in the food. As she attempted to walk up the staircase, she was confronted with a man on approximately every fourth step. She recognized Joe Piotrowski, Al Savini and Robert Robertson as being Club members who were in the staircase at the time. As she attempted to get to the second floor, the men shouted derisive comments at her, such as "bitch, cunt or asshole." Maczik was so afraid, upset and humiliated that, after a second attempt to bring food up, she was kept upstairs by her husband and Monetti while they carried the rest of the food up to the party. She further indicated that although she did not know whether they were guests of the party, the people who uttered the disparaging remarks to her were members of the Club.

When asked why she never raised the issue of this incident or its humiliation at her deposition conducted on January 18, 1990, Maczik indicated that she did not feel that the questions asked by respondent's attorney at the deposition required responses relative to the Monetti incident.

Id.

Joseph Maczik testified that after his wife began to write letters to various public agencies about the Yacht Club's membership policies, he was subjected to verbal comments from some of the members about "his wife being too pushy about her membership." ID at 14. On January 30, 1988, he received an order to appear before the club's board of trustees to answer charges against him that he was "acting in a manner injurious to the name, reputation or



welfare of the Club" and "acting in violation of a requirement which states that members shall be responsible for the conduct of their guest." Id. and P-5. The first charge alleged that he "allowed his wife to act contrary to the best interests of the club." ID at 14. This second charge involved an incident in which an individual named Edward O'Toole, was seen removing materials from a club bulletin board. ID at 14 and P-6. On February 13, 1988, he was found guilty of the charges brought against him, fined \$50 and ordered to make payment no later than March 14, 1988. ID at 14 and P-7. In a letter signed by David Solt, Club secretary, Joseph Maczik was advised that "if he failed to pay the fine within the time prescribed, he was to be automatically expelled from membership..." ID at 14. Joseph Maczik testified that he was confused about some of the proceedings and the charges, that certain correspondence was exchanged between him and club officers and members and that ultimately, he lost his boat slip and membership. ID at 14-16.

As noted above, Joseph Maczik also testified that club officers, Joseph Piotrowski, Tony Petto, Terrance Healy and Jimmy Schaffner, threatened him on a continuous basis with the consequences he could expect as a result of his wife's activities regarding her challenge to the club's by-laws excluding females. ID at 16. Joseph Maczik expressed his belief that Piotrowski, in particular, was an instigator who had threatened to put his wife out of business. Id.

Robert Monetti testified that in June 1989, he planned to throw a bachelor party for his best friend and that he reserved the Yacht Club's second floor assembly room for this purpose. ID at 18. He had planned to deliver the food himself but subsequently requested Maczik to deliver the food. Id. When she discovered that the party was scheduled to be held at the club, she expressed reluctance because of problems she had with the club. Id. Monetti advised Maczik that he would call the club and let them know who his party was "because he did not feel that there would be any problems." Id. However, when he called the club, a man identified as Joe yelled, "I don't know who you think you are but there's no way in hell we're letting that bitch on our property." He also stated, "You'd better find someplace to get your food from or someplace to have your party. It's your choice. If she shows up here there's gonna be trouble." ID at 18 and P-17.

Monetti also testified that on June 2, 1989, the day of the party, the Yacht Club officers conducted a special meeting to determine if they were going to let him use the facilities for the party. ID at 18. Subsequently, "they again tried to intimidate him into getting his food from someplace else." Id. According to his testimony, the following ensued:

...When Monetti stood firm, he told them that he would have to get a police escort if necessary because he wanted Maczik to deliver the food. When Maczik showed up, the Club members denied her access to the front entrance. When she attempted to use the back staircase, it suddenly became lined with men. As



Maczik appeared in the upstairs area with the food, she was so humiliated and upset that, after only one subsequent trip with food, she remained upstairs while Monetti and Joseph Maczik brought in the rest of the food. He recalls having seen at least three Club members in that area, "Robby" Robinson, Al Sevini, and Raymond Bearce.

Id.

Joseph Simpson testified that he was a member of the Yacht Club for 40 years and that after he voiced his concern about the treatment of Maczik and sent a letter to the club's attorney expressing his concerns over the litigation costs in this matter, he was expelled from membership. ID at 19-20.

With respect to the boycott, the ALJ recounted Simpson's testimony as follows:

Simpson claims that he heard about the boycott of the Maczik's business on two or three occasions during the summer of 1988, when he overheard Joe Piotrowski, who was then the bar manager, discussing the matter with other people at the bar. After Simpson indicated that he would be a witness to those discussions, he was threatened by various members. He also heard that if anyone patronized the Bay Shore Deli, they would get the same treatment as Joseph Maczik did in being kicked out of the Club.

. . .

Simpson also indicated that Joseph O'Brien, who is not a trustee of the Club, and Joseph Piotrowski had both stated that they would never shop at the Bay Shore Deli because of the Club boycott....

ID at 20.

Anthony Petto testified that he is a Yacht Club member, he had gone to the Bay Shore Deli, on one occasion, to pick up lunch and that he has never boycotted the store. ID at 21.

Edward Kawalek testified that he is also a member and one of the bartenders of the club, was a trustee at the time of Maczik's application and bought papers at the store once or twice. Id.



He also testified that he "never participated in any boycott and has never heard of any boycott." Id. Frank Seidelman testified that he is a member and part-time bartender of the club, has never been in the Bay Shore Deli and has never heard about any boycott at the store. Id. He noted that at the time of Maczik's application, he was a trustee. Id.

David Solt testified that "he has not participated in any boycott nor has he heard anything about it from anyone." ID at 21. Raymond Bearce testified that he permitted Maczik to deliver food to the Yacht Club despite house rules which banned her entry because "neither she nor her husband was a member of the Club." ID at 22-23. Bearce also stated that when an individual is no longer a member of the club, that individual loses "one's rights to do anything with the Club, and that includes business catering" (ID at 23), but denied that he either authorized or there even existed a boycott against the store. ID at 24. He admitted that he did not know if this prohibition is in the bylaws and also "admitted that Joseph Maczik was punished because of the letter-writing actions of his wife." ID at 23.

Joseph Piotrowski testified that Yacht Club purchases ceased at the Bay Shore Deli when Maczik's civil rights complaint was filed but that this was his decision and that there was no written or organized boycott by anyone. ID at 25. He further testified that he believed that individuals made up their own mind not to do business at the store. Id.

It is unclear from the initial decision what the extent of



George Gudat's testimony was relating to the boycott, however, the ALJ noted that Gudat testified "that blackballing was eliminated by the changeover to require that only a majority vote on anything." ID at 26. Finally, C.J. Caputi testified that he shopped at the Bayshore Deli for several years and has been a member of the club for 25 years. Id. He further testified that "[h]e doesn't know who told him that people should stay away from the Deli, except that it was some bartender at the Club." Id.

b. The ALJ's Findings of Fact

Based upon all of the evidence adduced at the hearing, the ALJ found that:

1. A boycott was engineered by a small group of Yacht Club members. ID at 32.

2. The boycott was in essence an act of reprisal for the efforts of Susan Maczik to challenge the all-male membership at the club. ID at 32-33.

3. A concerted effort was generated by that small band of club members to boycott Maczik's deli, embarrass and humiliate her and her husband, and ultimately stifle and eliminate any other club members who overtly supported either the Macziks or the notion of due process at the club. ID at 33.

4. Club members stopped patronizing Maczik's store more out of reprisal and/or fear of retaliation than out of the convenience of going to other stores. ID at 36.

5. The location of Maczik's store never seemed to bother those Club members until the boycott was launched. ID at 36.



III. THE DIRECTOR'S FINDINGS OF FACT

A. Undisputed Facts

The parties did not file any exceptions to the ALJ's findings of undisputed facts. Consequently, the Director, based upon his review of the record, adopts and affirms the ALJ's findings of such facts.

B. Disputed Facts

The parties did not file any exceptions to the ALJ's findings that (1) Maczik was denied membership to the club on the basis of her sex and (2) a boycott against making purchases at the Bayshore Deli was orchestrated by members of the club, as noted above.

Based upon the Director's thorough review of the record below, including, but not limited to, the transcripts of the hearing, exhibits introduced at the hearing, pleadings and exceptions filed by the parties and initial decision of the ALJ, the Director finds that Maczik has established by a preponderance of the evidence that she was, in fact, denied membership on the basis of her sex and that a boycott against Maczik's business was staged by officers and members of the Yacht Club. The Director affirms and adopts the ALJ findings of disputed facts set forth herein.

IV. THE DIRECTOR'S LEGAL CONCLUSIONS REGARDING LIABILITY

The Law Against Discrimination (LAD), N.J.S.A. 10:5-1 et seq., prohibits public accommodations from discriminating on the basis of sex. N.J.S.A. 10:5-12(f). Frank v. Ivy Club, 120 N.J. 73 (1990). The Supreme Court of New Jersey in Frank v. Ivy



Club, supra, 120 N.J. at 110-111, specifically held that it is a violation of the LAD for a public accommodation, such as a non-private club, to have "a general policy that exclude[s] females from consideration as members."

The Court has continually reaffirmed that the "eradication of 'the cancer of discrimination' has long been one of our State's highest priorities." Frank v. Ivy Club, supra, 120 N.J. at 110, Dixon v. Rutgers, The State University of N.J., 110 N.J. 432, 451 (1988), Fuchilla v. Layman, 109 N.J. 319, 334 (1988) and Peper v. Trustees of Princeton University, 77 N.J. 55, 80 (1978). Indeed, the Legislature, in enacting the LAD, has declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions of a free democratic state." N.J.S.A. 10:5-3.

Based upon my thorough review of the record and the factual findings of the ALJ, which I have adopted, I conclude that as a matter of law, the Yacht Club has discriminated against Maczik on the basis of sex, in violation of the LAD. It is undisputed by the parties that the club discriminated against her because of her sex at the time of her membership application. ID at 27. This incident, in itself, constitutes a violation of the LAD and the fact that certain club members supported her prior to her application and that females are now admitted as members are of no consequence because the Director must review the material facts as they pertained to Maczik at the time of the alleged discrimination. See Frank v. Ivy Club, supra, 120 N.J. at 104.

I also find that the Yacht Club violated the LAD under



N.J.S.A. 10:5-12(d), (1) and (n)³ when its officers, trustees and members verbally threatened and abused Maczik after she applied for club membership and sought to enter its premises, and in boycotting her business, all because she sought membership, opposed its discriminatory practices, filed her verified complaint with the Division on Civil Rights, pursued this action and otherwise acted in opposition to the club's membership policies. Although these allegations are not specifically alleged in the verified complaint and the complaint was never amended to include them, I note that the November 17, 1989 pretrial order in this matter reveals that the club had sufficient notice of Maczik's assertions that the club and its members engaged in a boycott against her business, and that the club had a full and fair opportunity, at the hearing, to present evidence relating to these assertions.

The verified complaint was filed with the Division on February 10, 1988 and generally alleged that Maczik was denied

3. N.J.S.A. 10:5-12(d) provides that it is unlawful "[f]or any person to take reprisals against any person because he has opposed any practices or acts forbidden under the act or because he has file a complaint, testified or assisted in any proceeding under [the LAD]."

N.J.S.A. 10:5-12(1) provides, inter alia, that it is unlawful "[f]or any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the" sex of such person.

N.J.S.A. 10:5-12(n) provides, inter alia, that it is unlawful "[f]or any person to aid, abet, incite, compel, coerce, or induce the doing of any act forbidden by subsections 11 l. and m...."



membership by the Yacht Club on the basis of sex, in violation of N.J.S.A. 10:5-1 et seq. Subsequently, the parties, in the November 17, 1989 prehearing order, identified the following issues to be tried at the hearing:

"1. Is respondent a public facility within the meaning of N.J.S.A. 10:5-1 et seq.?

2. Was petitioner unlawfully denied entry to membership to respondent yacht club or did she unilaterally fail to follow all procedures regarding admission?

3. What other damages, if any, to (sic) be assessed in this matter should the tribunal find that discrimination did in fact take place? Petitioner has indicated damages resulting from a: a boycott from her delicatessen business; b: loss of the use of a boat slip at respondent yacht club and procurement of a (sic) alternate boat slip; and c: legal fees."

Based on the above, the Director concludes that the Yacht Club had sufficient notice of Maczik's allegations regarding the boycott against her business and that both parties were given a fair opportunity to present proofs on this issue. The Director also notes that the club did not file exceptions to the ALJ's conclusions that a boycott existed. In consideration of the record below and submissions by the parties, I find that the Yacht Club unlawfully took reprisals against Maczik by subjecting her to verbal threats and other abuse, and by instituting and engaging in a boycott against her business, in violation of N.J.S.A. 10:5-12(d), (l) and (n).

The Yacht Club, in its exceptions, argues that the ALJ



improperly rendered findings that it was liable to Joseph Simpson and Edward O'Toole and further erred when he awarded damages to these individuals. Re6. The club contends that neither individual was a party to this action and at no time was the complaint amended to include them as parties. Id. I agree and reverse the ALJ's finding of liability and award of damages on behalf of Mr. Simpson and Mr. O'Toole. For these same reasons, I also reverse the ALJ's findings of liability and award of damages on behalf of Joseph Maczik because he, too, was never made a party to this action either through the original filing of the verified complaint or by amendment of said complaint.

While these individuals are time barred from filing individual actions with the Division because of the LAD's 180 day statute of limitations, such actions may not be time barred under the six year statute of limitations for filing LAD actions in the Superior Court of New Jersey. See Lautenslager v. Supermarkets General Corporation, - N.J. Super. - (Law Div. 1991).

V. REMEDIES

A. Introduction

I find that the ALJ properly awarded compensatory damages for Maczik's loss of business at the deli. These damages were directly incurred because of discrimination she suffered and her financial losses from the club and membership boycott. However, I also find that the ALJ failed to properly calculate these damages and that in addition to the loss of business from the

lottery sales, Maczik also demonstrated, and therefore should be compensated for, her losses in catering affairs for the club and its members. The ALJ also erred in failing to award Maczik interest and pain and humiliation, and further erred in his calculation of punitive damages and attorneys fees owed to her. Accordingly, the ALJ's award of damages is affirmed, in part; reversed, in part; and modified, as set forth below.

B. Maczik's Lost Profits

1. The Parties' Proofs

Most of the proofs relating to whether Maczik lost business and ensuing profits as a result of her application for club membership were elicited from Maczik and the club's witness, Carol Hedinger, CPA. The ALJ recounted their testimony and other submissions of the parties as follows:

Maczik's Monetary Losses

As stated previously, Maczik contends that, as a result of the discrimination which she faced in the denial of membership, she faced significant losses in her delicatessen business. For purposes of calculating her out-of-pocket losses, she utilized a 160-week period commencing in January 1988 and ending at this current time. Her calculations indicated lost profits due to the membership boycott at \$6.25 per 22 families per week for a total loss over the 160-week period of approximately \$22,000. She also estimates lost profits in sales to the Club at \$17.88 per week, which yields a loss of \$2,828.80 over the 160-week period. She also claims that she lost six catering jobs per year from the Club or its members for a total lost profit of \$1,800 (P-22). Further, she has estimated lost lottery (sic) commissions of \$10 per week for a total of \$1,600. Her total calculated losses amount to \$28,228.80.

Yet, she acknowledged that she actually had an increase in business in 1988 from her previous years' performance. She also noted that there were no business losses in 1989. As a result, even though she acknowledged that she did well in 1988, despite the boycott, she contends that she would have made a lot more money had she



not been boycotted. She alleges that she lost sizable monthly Yacht Club business, but she admitted that she only ever had four catering jobs with the Yacht Club and was never promised monthly Club business.

She also claims total losses of \$125,000 over the years due to capitalization, renovations, and various purchases for her business. When asked where the monies came from, she claimed that the monies which she invested in her business came from the sale of her husband's Manchester home as well as 50 percent of her husband's salary (which was admitted as being between \$28,000 and \$35,000 per year).

She also contended that most of her customers are local residents since she is located on the easterly side of Route 37. The walk-in customer is her stock-in-trade. She noted that in 1988 she advertised a little less than she did in the previous year but, despite less advertising, she still increased her profits from the previous year. For example, her advertising budget for 1987 was \$8,000, the budget for 1988 was \$6,000 and the budget for 1989 was \$5,000. She claims that she has reduced the catering advertising budget because her business van carries a large advertising sign, which offsets direct advertising requirements in her area. She also noted that prior to Christmas 1990, her catering business was steady, even though she had lost her regular customers because of the boycott. She also admitted that her prices are generally higher than the supermarkets' because of the fact that she cannot make bulk purchases like the large supermarket chains.

When called as a rebuttal witness, Maczik indicated that she did not record her Visa sales in the account book but she was satisfied that they were reflected in her total year's receipts. She also indicated that there had been a dispute with her accountant at the time regarding how to classify certain advertising expenses, e.g., uniform costs v. advertising costs. She also challenged the testimony of Anthony Petto, who said that he had never shopped at the Deli. Maczik indicated that Mrs. Petto use (sic) to shop for basic items at the Deli but that she stopped doing that sometime after February 1988. She also reviewed the receipts which were presented by the Club at the hearing for purchases made at the Deli prior to 1988. She pointed out that 32.5 percent of the Club purchases made during that period apparently came from the Deli.

When asked why there was a conflict between her alleged weekly losses of \$440.86 and the figure determined by respondent's expert, Carole Hedinger, CPA, in the amount of \$157 per week, Maczik claimed that she had \$10,000 of catering receipts in credit cards which



Hedinger did not consider.

Carole Hedinger

The respondent Club presented Ms. Carole (sic), a CPA, who had been licensed and employed since 1983 in the state of New Jersey. After several attempts to coordinate the inspection of Maczik's books, Hedinger was finally afforded an opportunity to review several boxes of documents presented by Maczik during a built-in lull in the hearing schedule for that purpose (P-23 and P-24). Hedinger testified that petitioner's business has a fiscal year commencing on September 1 and ending on August 31 of the next year. Her investigation was limited to reviewing only the year-end books supplied by petitioner for 1988 and 1989, which are known as the "dome" books. She had no access to the 1990 "dome" book, which was reported as being with petitioner's accountant at the time. No personal records were produced by petitioner. However, Hedinger was able to determine that petitioner's husband had income as follows: 1986 - \$28,970, 1987 - \$33,021, 1988 - \$28,515, 1989 - \$35,097.

As a result of her inspection of the available documents, Hedinger reviewed the weekly sales and determined that the average sales total between September and December 1987 was \$4,500. In the period between January and August 1988, the average weekly sales total was \$4,900. Her conclusion was that the sales increased as time went on for the ensuing period. Weekly sales for the period of September 1 through December 1988 were \$4,100 and for the period of January through August 1989, they were \$4,600. As a result, she compared the income between January 1, 1988, and the same period in 1989 and determined that there was a \$150 decrease in sales between the comparable periods, representing a three-percent decrease in petitioner's sales for that period. However, Hedinger noted that the three-percent decrease registered by petitioner was significantly less than the Ocean County-wide trend of a 10-to-20-percent decrease for the same period.

Regarding Mascik's (sic) alleged losses, this witness was unable to determine how the weekly losses of three percent were anywhere near the \$429 per-week loss alleged by Maczik in her presentation. There were several factors contributing to losses generally in the Toms River area, most of which represent the economic turnabout occasioned by the decline in the shore industry. Since 1988, the business trends in that area have indicated in some cases as much as a 30-percent decrease, due in large part to the severe economic times, the dried-up home construction market, and rising unemployment. The declining sales in Ocean County are also reflected in the shore communities,

which have created local bank problems. She also noted that an economic summit was held in Ocean County in 1989 in an attempt to address the overall problems. As a result, Hedinger concluded that Maczik appeared to be doing much better than business throughout the rest of the county. She also noted that petitioner's best year was in 1988, with only a slight decline thereafter. As a result, any allegation about business lost due to an alleged boycott could not be demonstrated satisfactorily to this witness. Finally, regarding Maczik's alleged capitalization loans to her business, Hedinger concluded that had there been such funds expended for the benefit of the business, there would have been virtually nothing for the Macziks to live on during that period, based upon the income sources which were testified to by petitioner.

ID at 11-14.

2. The ALJ's Findings

Based upon his review of the above evidence and after making credibility determinations of each witness, the ALJ found:

1. There was an increase in Maczik's profit base as a general rule even at a time when she was complaining about lost profits.
2. There is some basis in fact to support Maczik's allegation that her profits would have been greater during the period immediately after her denial of membership had the boycott not occurred.
3. However, petitioner has not proved by a preponderance of the credible evidence those actual factors which can give her an actual out-of-pocket award on a compensatory basis for those alleged purchase losses.
4. There has been a singular failure to substantiate the actual purchases made by any of the 22 families on a regular basis.



5. Maczik's bookkeeping system has been haphazard, at best.

6. Carole Hedinger's presentation was especially credible, considering the time constraints imposed on her as well as the limited access she had to whatever available records were produced by Maczik.

7. Hedinger's analysis of Maczik's relatively modest decrease in sales after January 1988 (3 percent) versus an overall downward trend in the shore area during the same period of 10 to 20 percent, more accurately reflects a general business downturn in the area, rather than the specific impact of the boycott per se.

8. Based upon Hedinger's testimony, Maczik's alleged losses of \$429 per week are nowhere near the three percent overall decrease in income she actually registered during the period subsequent to January 1988.

9. Notwithstanding the massive downward trends in the shore area during the same period, Maczik actually did remarkably well.

10. Purchases made on behalf of the Club by Joseph Piotrowski amounted to \$236.57 over a 56-week period, or \$4.20 per week.

11. Maczik is entitled to \$4.20 per week from January 1988 through the present time, which consists of 160 weeks, for a total of \$672.00 per week.

12. Maczik failed to establish a sufficient pattern or regularity regarding the utilization of her catering business to allow for compensation for alleged lost profits due to lost



catering jobs at the club, and for individual club members.

13. Maczik failed to establish an actual dollar figure regarding those scattering catering losses with a reasonable degree of certainty and probability.

14. Maczik has satisfactorily demonstrated a \$10.00 per week loss in lottery profits.

15. The general economic turndown was not attributable to the lottery losses since arguments by the club's witnesses about the high cost of Maczik's prices are not reflected in lottery sales.

16. Maczik lost \$1,600 in profit from lottery sales during the 160-week period.

ID at 33-35.

3. The Parties' Exceptions

Maczik contends that the ALJ erred in finding that she had not met her burden of proof on her assertions that she sustained financial losses as a result of the boycott by 22 families who were associated with the Yacht Club. 2Ce1-3. She argues that the ALJ particularly erred in concluding that in order to sustain her allegations, she should have subpoenaed all 22 families and submitted their testimony. Id., see also ID at 34. In her view, "there was no point to be served by parading witnesses before the Court" especially since such witnesses "could reasonably be expected to do nothing other than echo the 'party line.'" 2Ce2.

She also contends that the ALJ erred in concluding that she failed to present documentary proof of her losses. 1Ce1-2,

2Cel-4 and 3Cel-2. She argues that it is unreasonable to believe that she would have customer receipts for all of the individuals who made purchases at the delicatessen. 2Ce2.

Maczik also contends that Hedinger's examination of the delicatessen's accounts, for the last five years, was conducted in a two to three hour period, was far too cursory and failed to consider important purchases and reflect inflationary costs.

1Cel-2, 2Ce2-4. She also noted that Hedinger's review of her weekly sales inaccurately compared winter sales from September through December 1987, when sales are lower because of the

tourist season down the shore (where the delicatessen is located), and January through August 1988 which includes the summer season when sales are higher. 1Cel, 3Cel, ID at 13.

In her view, the sales figures estimated by Hedinger and noted by the ALJ (ID at 13) reflect a decrease in sales when compared against appropriate time periods after the boycott allegedly began. Id. Specifically, from September through December 1987, Hedinger noted that Maczik's sales were \$4,500 per week and from September through December 1988, her sales decreased to \$4,100 per week. 1Cel, ID at 13. Further, from January through August 1988, Maczik's sales were \$4,900 per week and from January through August 1989, her sales decreased from \$4,600 per week.

Id. She contends that this decline in sales was not due to a downturn in the economy but was directly related to the boycott.

1Cel-2, 2Cel, 3Cel-2. In addition, she contends that she is entitled to prejudgment interest in accordance with the Rules Governing the Courts of New Jersey. 2Ce4.



The Yacht Club argues that the record below does not substantiate the ALJ's finding that Maczik suffered \$1,600 in lottery sales (Re1-3) or that she suffered any economic losses as a result of a boycott by the club or its members (Re7). In the club's view, Maczik failed to present any written documentation of these losses. Id. Conversely, its own expert (Hedinger) provided statistical and other documentary proof of the absence of lost profits. Id.

4. The Director's Findings and Conclusions of Law

The Legislature enacted the LAD as "an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights." N.J.S.A. 10:5-2. David v. Vesta Co., 45 N.J. 301, 212 (1965); Jackson v. Concord Company, 54 N.J. 113, 122 (1969). Based upon legislative findings, the Supreme Court of New Jersey has declared that "...prevention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State. In short, such discrimination is regarded as a public wrong and not merely the basis of a private grievance." David v. Vesta Co., supra, 45 N.J. at 327.

To effectuate the important public policy objectives underlying this remedial statute, the Legislature afforded the Director of the Division on Civil Rights broad remedial powers to "take such affirmative action" to "effectuate the purpose of this act." N.J.S.A. 10:5-17. Jackson v. Concord Company,

supra, 54 N.J. at 123. The Court has reaffirmed "that the Director of the Division has been given broad powers to fashion and impose remedies he believes will be effective to accomplish his mission..." Polk v. Cherry Hill Apartments, Inc., et al., 62 N.J. 55, 58 (1972).

Based upon this authority, the Director, after reviewing the record below and exceptions filed by the parties, finds that the ALJ correctly determined that Maczik demonstrated that as a result of the discrimination against her, by the club and its members, she lost \$1,600 in lottery sales in the ensuing 160-week period. ID at 36. The Director also finds that the ALJ correctly assessed her sales losses, from general weekly purchases by the club, at \$4.20 per week or a total of \$672 for such period. ID at 35.

At the same time, the Director has concluded that the ALJ erred in concluding that Maczik failed to substantiate her catering losses as the result of the discrimination alleged. ID at 35-36. Maczik has specified and accounted for all of the catering jobs she performed in 1987 for the club and its members. P-22. In that year, she received \$1,256.85 from such business. Id. After her application for membership at the club, neither the club or its individual members hired her to perform any catering and she estimates that her lost profits, in this regard, amount to \$600 a year or a total of \$1,800. Id.

The Director finds that Maczik's total business losses from the unlawful conduct of the club and its members amount to \$4,072. I agree with the ALJ that Maczik's claim of additional



sses from individual club and member purchases was not efficiently particularized. ID at 33-35. Maczik's failure to submit documentation to substantiate these losses by using standard accounting methods and her inability to rebut the club's expert testimony that such losses were attributable to a general downturn in the economy, simply does not justify a higher award. Id.

However, the Director also finds that the ALJ erred in failing to award three-fold damages because of the club's economic discrimination prohibited by N.J.S.A. 10:5-12(1) and (n). Thus, Maczik is entitled to three times the amount of \$4,072 or \$12,216 for her business losses during the 160 week period identified herein. The Director also finds that Maczik is entitled to interest in the amount of 8.5% of \$12,216 or \$1,038.36, in accordance with R.4:42-11.

C. Pain and Humiliation

1. The Parties' Proofs

Maczik testified to several incidents of discrimination and harassment because of her sex, which caused her considerable humiliation and emotional distress. The first incident occurred on Labor Day in 1987 when she volunteered to donate food to the club as part of its annual Labor Day party. ID at 6. The ALJ recounted this incident as follows:

...Since it was raining at the time of her arrival, petitioner used her husband's Club key to enter the front door of the Club so that she could deliver her donations to the Club. As she crossed the floor of the clubhouse, one of the members, Joseph Star, called out "who the hell do you think you are?" Although petitioner was startled, she proceeded onward toward the kitchen area in order to get away from Star. At that time, another member, Joseph



O'Brien, abruptly came up to her, pushed her up into a cabinet, and shouted "don't ever walk away from anyone when you are being challenged by a member. When you are being challenged by a member, you answer the challenge." Although petitioner was humiliated and overwhelmed, she apologized and got out of the Club as soon as she could.

) at 6; 1T54-58; 2T10-20; R-11 at 15. She further noted that she was very shaken by this incident and that she was so upset that "[t]ears came to my eyes." Id.

The second incident occurred on December 12, 1987, when Maczik waited for two hours outside of the meeting and, "[a]mid the emotion-charged atmosphere" was advised that her request for membership was denied because she was a woman. Id. at 7. According to the ALJ, Joseph Maczik "corroborated [Maczik's] account regarding her application process and the humiliation which she suffered while she waited for the results of" this meeting. Id. at 14, 17.

Maczik testified to a third incident which was previously discussed herein at 13-14, and involved her attempt, in June 1989, to deliver food at the club in order to cater Robert Monetti's bachelor party. Id. at 10. She stated that she was subjected to cruel, malicious and sexist comments such as "bitch, cunt and asshole" and suffered extreme emotional distress as a result of this incident. Id. at 10, 41. Raymond Bearce, Commodore of the club at that time, testified that nothing unusual happened when Maczik made her delivery at the club. Id. at 22. His testimony was totally discounted by the ALJ as "an unqualified mischaracterization and misrepresentation of the events which actually ensued that night." Id. at 41.

Maczik also submitted testimony from a prior deposition in which she stated that she and her employees and members of her family received frequent prank and anonymous telephone calls threatening her to drop her lawsuit and/or threatening them with their personal safety. R-11 at 35-43. She stated that she was personally threatened by Jim Schaffener who advised her to drop her lawsuit or "they would get even" with her. R-11 at 35-36. She testified that Carol Healey, wife of the vice-commodore of the club, threatened her "many times" and advised her to "back off" or she would have "ramifications." R-11 at 36-37. She also testified that Carol Healey's mother, Rose, stated that [t]hey wanted to in their words beat the shit out of me" because of her lawsuit. R-11 at 38.

2. The ALJ's Findings

The ALJ found that Maczik suffered considerable pain and humiliation as a result of the discrimination alleged. These findings are as follows:

1. A concerted effort was generated by a small band of club members to...embarrass and humiliate [Maczik] and her husband. ID at 33.
2. The Labor Day/Appreciation Day incident caused Susan Maczik significant humiliation after having been brutally and cruelly verbally challenged by Joseph Star and Ed Kawalek as she attempted to enter the Club with her donation of goods and confronted by Joseph O'Brien in the rear area of the Club. ID at 39-40.
3. Although there were insufficient proofs to conclude



that O'Brien actually physically touched Maczik or pushed her back into a cabinet, his verbal conduct constituted an inappropriate and unacceptable assault upon Maczik. ID at 40.

4. O'Brien was part of the hard-core group of Club members who advocated and endorsed a boycott at Maczik's deli. ID at 40.

5. Tony Petto was also part of that alliance and his conduct in February 1988 in support of Piotrowski's warning to Maczik that she had better drop the lawsuit or face the consequences of a boycott echoes the same ongoing ruthless and tenacious onslaught against her. ID at 40.

6. When Maczik attempted to deliver the food for Monetti's party, she was ambushed by a bevy of sexist individuals whose conduct can be characterized as nothing better than scurrilous. ID at 41.

7. Joseph Piotrowski was the major instigator in attempting to destroy Maczik and through whatever power he had at his command, endeavored to exhort others to carry out "similar sex discrimination actions" against her and her friends. ID at 42.

8. Piotrowski was part of a hard-core of antagonists who were "hell-bent on humiliating and destroying" Maczik "by whatever means" and who "conducted a malicious and deliberate campaign" against her. ID at 42.

Notwithstanding the findings rendered in his initial decision, the ALJ failed to award Maczik any pain and humiliation damages.



3. The Parties' Exceptions

Maczik contends that the ALJ erred in failing to award her pain and humiliation damages, despite evidence and his findings which support such an award. 2Ce4. The Yacht Club contends that the ALJ improperly admitted and considered Maczik's testimony regarding her catering of Monetti's party in June 1989 because Maczik failed to refer to this incident during her deposition. Re3-4. The club contends that when it deposed Maczik, it specifically requested her to provide all examples of discrimination and embarrassment of which she was complaining. Re3. Because she failed to refer to this incident, the club claims it was unable to properly defend against this allegation and as a matter of fairness, any evidence relating to this incident should not have been admitted. Re3-4.

4. The Director's Findings and Conclusions

Based upon my independent review of the record below and the exceptions of the parties, I find that Maczik suffered considerable pain and humiliation as the result of the discrimination she was subjected to by the club and its members. Maczik's testimony in this regard was thoroughly credible and supports a finding that she suffered pain and humiliation as a result of her denial of membership and the Labor Day and Monetti incidents. Therefore, I adopt the ALJ's findings on this issue, as noted above. I also find that the evidence below established that the club and its members intentionally inflicted emotional stress on Maczik when it engaged in a deliberate concerted effort to put her out of business and upon



subjecting her to demeaning and threatening verbal harassment for seeking membership and otherwise opposing the club's discriminatory membership policies. On several occasions, Maczik was subjected to public embarrassment when she was verbally harassed by the club and its members in the presence of others and during at least one of these incidents, Maczik was so humiliated that she was reduced to tears.

The Supreme Court of New Jersey has upheld the Director's authority to award damages for emotional distress. Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973); Director, Div. on Civil Rights v. Slumber, Inc., 82 N.J. 412 (1980); Andersen v. Exxon Co., 89 N.J. 483, 502-503 (1982). Such damages are remedial in nature and serve to fulfill the objectives of the LAD to make the complainant whole. Andersen v. Exxon Co., supra, 89 N.J. at 502; Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 35 (1981).

In Scaravelloni v. Butterfield Enterprises, Inc., 8 N.J.A.R. 89, 101 (1984), the Director awarded \$5,000 in pain and humiliation damages on behalf of an individual who was denied admission to a disco because she was physically disabled. Based upon the facts in this case, I find that Maczik is deserving of no less than such the award rendered in Scaravelloni, which, I note, was ordered seven years ago. Further, in consideration of the concerted efforts made by officers and other members of the club to boycott her business and publicly and privately humiliate her, I find that she is entitled to pain and humiliation damages in the amount of



\$10,000.

D. Punitive Damages

1. The Parties' Proofs

The parties' proofs relating to whether Maczik is entitled to punitive damages is based on the same set of facts which are alleged to substantiate her entitlement to pain and humiliation damages. These facts will not be restated but are incorporated by reference.

2. The ALJ's Findings

The ALJ awarded Maczik punitive damages based upon the "hard-core of antagonists who were hell-bent on humiliating and destroying Susan Maczik by whatever means." ID at 42. In the ALJ's view, the "malicious and deliberate" campaign against her, in the form of verbal threats and harassment and the boycott, justified such an award. Id. Consequently, he awarded Maczik \$13,764 which was double the amount of the damages she incurred and her supporters incurred as an immediate consequence of the discrimination against her. ID at 44.

3. The Parties' Exceptions

The Yacht Club argues that Maczik is not entitled to an award of double damages as punitive damages because factually, the award is unjustified. Re5. It argues that the ALJ incorrectly assessed Joseph Maczik's damages for the boat slip rental at \$4,200 and failed to consider that if he were a member, his yearly membership fee would have been \$250 and the rental fee would have been approximately \$50 a month. Id. The club also notes that the damages are not supported by any



documentation. Id.

4. The Director's Findings and Conclusions

The Legislature recently declared its intentions that common law remedies, including compensatory and punitive damages, are available to all persons protected under the LAD. N.J.S.A. 10:5-3, N.J.S.A. 10:5-13. With respect to the award of such damages, the Legislature has specifically stated that "this act shall be liberally construed in combination with other protections available under the laws of this State." N.J.S.A. 10:5-3.

To effectuate the purposes of the LAD, the Director has been afforded broad remedial powers to fashion remedies "as broad and flexible as needed to 'comport...with the pre-eminent social significance of the LAD's purposes and objects.'" Shaner v. Horizon Bancorp., 116 N.J. 438 (quoting The Passaic Daily News v. Blair, 63 N.J. 474, 484 (1973)). It is well established that remedies should not be sparingly granted, but should be freely and liberally invoked to further the clear public policy of the LAD to eradicate the cancer of discrimination in the workplace. Id. at 438.

Punitive damages are properly awarded "where the wrongdoer's conduct is especially egregious" and when they are "reasonably related" to the scope of the injury. Leimbruber v. Claridge Associates, Ltd., 73 N.J. 450, 454-458 (1977). Based upon the conduct of the club and its members in subjecting Maczik to repeated malicious verbal assaults during the previously discussed Labor Day and Monetti incidents, and their

boycott of her business, which was intended to ruin her financially and inflict emotional distress upon her, I find that Maczik is entitled to punitive damages. However, I also find that the ALJ erred as a matter of law in applying N.J.S.A. 10:5-17 to justify double damages in order to assess punitive damages against the club. Damages resulting from the economic discrimination suffered by Maczik are separate and distinct from any award which is punitive in nature. Thus, I reverse and vacate the ALJ's award of \$13,764 but also find that the record below justifies an award of \$5,000 in punitive damages.

E. Attorney's Fees

1. The Parties' Proofs

Counsel for Maczik submitted an affidavit of services attesting that he worked 132.17 hours on this matter at \$125 per hour. Based upon this affidavit, he requested an award of attorneys fees in the amount of \$16,521.25. P-32.

The Yacht Club opposed the award arguing that the number of hours expended and thus, the award itself, were excessive. ID at 43, R-25.

2. The ALJ's Findings

The ALJ found that the services listed by counsel for Maczik were "patently excessive, somewhat exaggerated, and/or unreflective of and out of pace with a realistic estimate of time to have been spent on this matter" and that "the alleged time spent are well out of proportion to the issues generated." ID at 43. Subsequently, the ALJ limited the award of counsel fees to \$5,000.



3. The Parties' Exceptions

Counsel for Maczik argues that Maczik is entitled to an award of counsel fees in their entirety and the request for fees, as set forth in his affidavit of services, is justified by the fact that (1) the case was tried for all or part of seven days and (2) the numerous factual and legal issues existing in this case justified the extent of legal services rendered in this matter. 2Ce5-6. Maczik also notes that this matter has been pending for over 3 1/2 years and that in order for victims of discrimination to receive justice, a complainant should be fairly compensated for his or her attorneys fees. 1Ce3-4. Moreover, if she is not fully compensated, lawyers will receive a message that they will not be compensated in discrimination cases and will decline to represent complainants in such cases. 1Ce4.

4. The Director's Findings and Conclusions

The LAD specifically provides that the prevailing party in a discrimination action may be awarded a reasonable attorney's fee. N.J.S.A. 10:5-27.1. Historically, fees statutes have been enacted "to improve enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to take their cases." Evans v. Jeff D., 475 U.S. 717, 753-754 (1986). Thus, the Director is mindful of the legislative purposes underlying the award of attorney's fees in LAD cases, and is particularly concerned that victims of discrimination are able to find competent and able counsel who are willing to represent them.



To effectuate the purposes of the LAD, the Director concludes that prevailing parties who are awarded attorney's fees, are entitled to such fees which are reasonable and account for all fees expended during the entire proceedings. See N.J.S.A. 10:5-27.1. Accordingly, in awarding attorney's fees the ALJ must render findings of facts and conclusion of law which are "accompanied by a concise and explicit statement of underlying facts supporting" the award. N.J.S.A. 52:14B-10(d). State Department of Health v. Tegnazian, 194 N.J. Super. 435 (App. Div. 1984).

Based on the above, the Director finds that the ALJ erred by: (1) awarding attorney's fees without permitting both parties a full opportunity to be heard on the reasonableness of the fees requested, (2) limiting the award to an arbitrary sum of \$5,000 without rendering basic findings of facts and conclusions of law to support such award and (3) failing to account for attorney's fees which would be incurred by Maczik after March 18, 1991, when the application for fees was filed. Accordingly, the Director reverses the ALJ's award of attorney's fees and orders the parties to enter into negotiations in an attempt to stipulate to the fees owed. If such stipulation cannot be entered into, then the matter shall be remanded to the OAL for a hearing, as set forth below.

F. Penalties

The Director finds that the ALJ erred in failing to assess penalties against the Yacht Club. N.J.S.A. 10:5-14.1a. Accordingly, the Director concludes that the club is also liable



to pay \$2,000 in penalties.

VI. Order

It is on this 27th day of December, 1991, ordered that:

1. The Yacht Club and its agents, employees and assigns, shall cease and desist from doing any act prohibited by the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

2. The Yacht Club shall not engage in any retaliatory conduct or discrimination against Maczik, nor allow any of its agents, employees or assignees to engage in such conduct.

3. Within three working days of receipt of this order by the Yacht Club and Maczik, the parties shall undertake negotiations in an effort to stipulate to the amount of attorney's fees owed to Maczik and within 21 days after negotiations have begun, the parties shall notify the Director, in writing, of their success or failure to reach such stipulation.

4. If, within 21 days, the parties are unable to reach a stipulation on the amount of attorney's fees owed to Maczik then this matter will be transmitted to the Office of Administrative Law for a hearing on the precise amounts owed by the Yacht Club.

5. Within 30 days of this order, the Yacht Club shall pay to Maczik \$12,216 for her business losses; \$1,038 in interest on these losses; \$10,000 in pain and humiliation damages; and \$5,000 in punitive damages.

6. Within 30 days of this order, the Yacht Club shall pay to the Treasurer, State of New Jersey, Department of the Treasury, a penalty of \$2,000.



7. The penalty and all payments made by the Yacht Club to Maczik, under this order, shall be made by forwarding checks made payable to Maczik or the Treasurer, State of New Jersey, whichever is applicable, in the appropriate amounts, to Linda Wong Peres, Assistant Director, Division on Civil Rights, Bureau of Policy, CN 089, 383 West State Street, Trenton, New Jersey 08625.

8. Any late payments will be subject to post judgment interest at such amount as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time as received by the Division.

9. Jurisdiction is retained by the Division on Civil Rights to observe and require compliance and to issue supplemental orders, if necessary, to insure compliance with the foregoing provisions of this order.


C. GREGORY STEWART, DIRECTOR
DIVISION ON CIVIL RIGHTS

LWP:gm/1228



APPENDIX E:

- ANNOTATED BIBLIOGRAPHY.



ANNOTATED BIBLIOGRAPHY
TASK 2: STUDY OF LAWS AND COURT DECISIONS

I. Jurisdiction of the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts ("Study Commission").

A. Executive Order No. 213, (August 14, 1989).

1. Pursuant to this Order, the Study Commission is charged with the broad responsibility in two areas:
 - a. investigating the extent to which the effects of past and present discrimination have denied minority and women's businesses fair opportunities to participate in state contracting, either through the active or passive participation of the State, and
 - b. making recommendations concerning remedial measures that should be adopted to overcome the effects of any discrimination which is found to have occurred.
2. The substantive areas for investigation are as follows:¹
 - a. when public or private sector actors refuse to contract with Minority/Women Business Enterprises ("M/WBE's") that are 1) available, 2) equally qualified, and 3) competitively priced; for example, when M/WBE's are unable to obtain information about public sector or private sector bidding opportunities, or where a low bid is not accepted without adequate reason, or when prime contractors are unwilling to consider contracting with anyone other than their circle of "known" subcontractors and suppliers.
 - b. when existing M/WBE's are reasonably qualified to perform the work in question, but are unable to submit a competitive bid due to barriers raised by discrimination and its effects. Examples here include discrimination in access to debt and

¹ Description of mandate synthesized from work product of the Study Commission.



equity capital, past discrimination in the building trades, inferior educational opportunities and restricted access to training, or inability to obtain bonding or insurance on equal terms.

- c. when there is discrimination which results in the artificial depression of availability of M/WBE's either across the board or in particular business sectors. This difference in this type of discrimination as opposed that described above is one of focus. Examples here include reasons M/WBE's have gone out of business, or have been discouraged or prevented from starting their own businesses, or have selected a particular business because it was perceived as the only area where there existed opportunities for them.
- d. an examination and evaluation of race and gender neutral measures that have been attempted in New Jersey to assist M/WBE's; an examination and evaluation of race and gender conscious remedies that have been attempted in New Jersey to assist M/WBE's.

II. Constitutional Provisions Applicable to Analysis

A. N.J. Constitution, Article 1, Section 1 (1947)

- 1. History. Article 1 of the Constitution of 1947 contains the revised and extended Bill of Rights. It is widely recognized as the most forward-looking document of its kind in the United States. The 1844 Constitution provided that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles." The provisions of the 1947 Constitution are broader and more specific.
- 2. Text. "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
- 3. Interpretations. In *Greenberg v. Kimmelman*, 99 N.J. 552 (1985), the Court held that the unalienable rights provision of the [constitution] is similar to the Fourteenth Amendment of the U.S. Constitution but may lead to different results.
 - a. In the context of racial discrimination, the elements of a claim



under Article 1, section 1 of the [constitution] are analogous to the equal protection clause under the U. S. Constitution. *Peper v. Princeton University Board of Trustees*, 77 N.J. 55 (1978). A claim under this provision requires the plaintiff to show that he or she was treated less favorably than a similarly situated person, and that the reason for this disparate treatment was his or her race. Id.

- b. In employment discrimination cases brought under the state constitution, the New Jersey Supreme Court has approved of the use of the proof framework set out in *McDonnell Douglas Corp. V. Green*, 411 U.S. 792 (1973); see *Peper v. Princeton University Board of Trustees*, supra.

B. New Jersey Constitution, Article 1, Section 5

1. This section contains an explicit prohibition against discrimination and segregation. It provides
2. Text. "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race color, ancestry or national origin."
3. Interpretations. This provision has been interpreted as being analogous to the federal equal protection clause and requires essentially the same analysis as that of Article, 1, Section 1. *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297 (Ch 1970).
 - a. One significant distinction between the federal and state constitutional provisions is that, while the fourteenth amendment requires state action in every case, the state constitution reaches some forms of private conduct. *State v. Schmid*, 84 N.J. 535 (1980), holding that state constitutional provisions regarding free speech are applicable to private property where property is open to the public; *Utson v. Resorts International Hotel, Inc.*, 89 N.J. 163 (1982), holding that when property owners open their premises to the general public they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises.
 - b. Claims under the state constitution need not be analyzed



rigidly under the *McDonnell Douglas* formula. Thus, the court approved of an analysis which merely inquired whether the alleged disparate treatment was the product of a legitimate business consideration rather than proscribed discrimination. *Peper, supra*.

- c. It has been held that the mandate against discrimination embodied in the constitution calls for a liberal interpretation of any legislative enactment designed to implement it. *Levitt & Sons, Inc. v. Division Against Discrimination in State Department of Education*, 31 N.J. 514 (1960), appeal dismissed, 363 U.S. 418 (1961). New Jersey's Law Against Discrimination is a legislative implementation of these constitutional provisions.
- d. The power of a Court to enforce rights conferred by the New Jersey Constitution, even in the absence of implementing legislation, was settled in *Cooper v. Nutley Sun Printing Co.*, 36 N.J. 189 (1961).

III. New Jersey Policies on Civil Rights and Equal Opportunity

A. Historical Development of NJSA 10:5 et seq., New Jersey Law against Discrimination²

1. This statute prohibits discrimination because of race or sex not only in State Purchasing but also in Business Assistance, Employment, Unions and the Construction Industry, State Transportation, Finance, Education, Housing and Public Accommodations. This statutory scheme has a legislative history dating back to 1884 when the first Civil Rights Bill was introduced to the New Jersey legislature. To the extent this history may reflect New Jersey's continuing struggle with problems of implementation of its laws against discrimination, a chronology of the development of the Law against Discrimination is provided below:
 - a. Laws 1884 Chapter 219 - the first civil rights bill.

² Source material for this chronology was obtained from the "Legislative History of New Jersey's Law Against Discrimination," prepared by the New Jersey State Library (1976).



- b. **Laws 1917, Chapter 106, Assembly 103 - makes the offender liable not to the person wronged but to the municipality.**
- c. **Laws 1921, Chapter 174, A89 - enables aggrieved party to sue in the name of the State of New Jersey.**
- d. **Laws 1921, Chapter 299 - A212 - extends to women electors equal privilege in holding all offices or employment in the State.**
- e. **Laws 1933, Chapter 277 - A 478 - prohibits discrimination on account of race, creed or color in employment on public works.**
- f. **Laws 1935, Chapter 247 - A325 - fixes schedule of attorney's fees allowable as part of costs in actions under 1884 Civil Rights Law.**
- g. **Laws 1938, Chapter 295 - A445 - forbids state, counties or municipalities to discriminate against applicants by reason of age.**
- h. **Laws 1938, JR11 (AJR14) - creates Good Will Commission, a predecessor of the Division against Discrimination.**
- i. **Laws 1941, Chapter 192 - A184 - creates commission to recommend measure to improve economic, cultural, health and living conditions of urban colored population; appropriates \$16,000. This Commission issued several reports of violations of civil liberties of colored persons in New Jersey.**
- j. **Laws 1941, Chapter 247 - A214 - permits citizens to hold office or employment regardless of sex or marital status; forbids discrimination in compensation, promotion or dismissal based on sex or marital status.**
- k. **Laws 1942, Chapter 114 - A194 - forbids discrimination by reason of race, color or creed in employment on public works or defense contracts.**
- l. **Laws 1945. Chapters 168 to 174 - creates the Division Against Discrimination and broadened all Civil Rights Laws to include "creed, national origin, or Ancestry;" abolishes the Good Will Commission; forbids discrimination in public places**



- (168 - A184), employment (169 - A321), public contracts (171 - A371), schools (172 -A372), hospitals (173 -A373), war industries (174 - A374).
- m. **Laws 1949, Chapter 11, Assembly 65 - combines into one law the substantive provisions of Civil Rights Law and existing Law Against Discrimination. This is law was the result of several attempts at passage and any number of Commission Reports documenting the need for a Civil Rights Law for New Jersey.**
 - n. **Laws 1950, Chapters 105 to 112 - prohibits discrimination by reason of race, creed color, national origin, or ancestry in housing built with public funds or public assistance; parallels similar language of the Veteran's Housing Act. (P.L. 1946)**
 - o. **Laws 1951, Chapter 64 - prohibits discrimination by employers of labor organizations against members of the National Guard, Naval Militia and reserve and those subject to draft.**
 - p. **Laws 1955, Chapter 106 and 107, A424, 425 - prohibit discrimination in granting mortgage loans.**
 - q. **Laws 1957, Chapter 66, Assembly 8 - prohibits discrimination in obtaining the accommodations, advantages, facilities and privileges in any publicly assisted housing accommodation because of race, creed, color, national origin or ancestry; defines publicly assisted housing accommodation.**
 - r. **Laws 1960, Chapter 59 - A474 - creates the Civil Rights Division**
 - s. **Laws 1961, Chapter 106 - A12 - prohibits discrimination in housing.**
 - t. **Laws 1962, Chapter 175 - A515 - prohibits discrimination by employers against applicant for training or apprentice program.**
 - u. **Laws 1962, Chapter 213 - A366 - prohibits discrimination by any contractor or supplier doing any construction, alteration or repair of any public building or public work.**



- v. Laws 1963, Chapter 40 - S78 - transfers Division on Civil Rights from Department of Education to Department of Law and Public Safety.
- w. Laws 1966, Chapter 17 - A 164 - amends the definition of a "place of public accommodation"; prohibits discrimination in the selling or leasing of real property except the rental of an apartment in a 2-family dwelling where the other apartment is maintained by the owner as the household of his family and the rental of rooms by the owner or occupant of a 1-family accommodation.
- x. Laws 1966, Chapter 254 - A474 - includes an employer with fewer than 6 persons in his employ in the law against discrimination.
- y. Laws 1966, Chapter 165 - A564 - provides that complaints of violation of the statutes governing civil rights shall be made to the Attorney General instead of the Commissioner of Labor.
- z. In 1968, laws relating to discrimination were reallocated to Chapter 5 of Title 10, thus, the citation NJSA 10:5.1 et seq.

B. New Jersey Law Against Discrimination: Powers of the Attorney General

1. Section 10:5-8(c) of New Jersey Statutes Annotated (hereinafter "NJSA") gives the attorney general the power to organize a section of the division on Civil Rights to "receive, investigate, and act upon complaints alleging discrimination." The attorney general is also given the power to "conduct investigations, receive complaints and conduct hearings thereon other than those complaints received and hearings held pursuant to the provisions of this act." NJSA 10:5-8(h)³
2. Section 10:5-13, which deals with remedies, filing of complaints, and

³ Prior to 1963, this section read "receive, investigate, and pass upon complaints alleging acts in violation of the provisions of this act." This earlier language may have contemplated a narrow role for the attorney general, which would involve responding to complaints. As amended, however, the statute appears to contemplate the authority of the attorney general's office to initiate investigations and complaints.

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prosecution of suit in the superior court, provides that "[t]he Commissioner of Labor, the Attorney General, or the Commissioner of Education may, in like manner, make, sign and file such complaint."

3. In *Jackson v. Concord Company*, 54 N.J. 113, 253 A.2d 793 (1969), the court held that the authority granted under these sections "is utilizable not only where a wronged individual declines to complain but also in situations where the alleged unlawful conduct is more general." *Id.* 253 A 2d at 798-99.
4. Under Section 10:5-14.1, once a complaint is filed the attorney general is authorized "to proceed against any person in a summary manner in the Superior Court to compel compliance, to prevent violations, attempts thereat or attempts to interfere with or impede enforcement of or the exercise or performance of any power or duty under the act." *Id.* at 799.
5. Section 10:5-6 states that the Division on Civil Rights is given the power to prevent and eliminate discrimination, and is further given "general jurisdiction and authority for such purposes."
6. Section 10:5-9.1 specifically empowers the Division on Civil Rights to "enforce the laws of this State against discrimination in housing built with public funds or public assistance." The annotations to this section refer to investigations by the director, citing NJAC 13:4-2.1, 13:4-2.1.
7. *Hinfey v. Matawan Regional Board of Education*, 77 N.J. 514, 391 A.2d 899(1978) held that the Division of Civil Rights had broad discretionary powers, and that the Division was vested with a wide range of regulatory tools encompassing investigative, educative, prosecutorial, adjudicative and rule-making powers. For example, the Division on Civil Rights has the authority to bring an action for injunctive relief to restrain a landlord from renting an apartment to others while a discrimination complaint is unresolved. *Poff v. Caro*, 228 N.J. Super. 370 549 A. 2d 900 (L. 1987).

C. State Purchasing

1. Generally, the failure to comply with the NJ Law Against Discrimination is grounds for debarment. See regulations, infra, which address the causes for debarment of a contractor.



- a. NJSA 10:2-1 et seq. requires every contract for or on behalf of the State of any subdivision of the State to contain anti-discrimination provisions.
 - b. NJSA 10:5-33 et seq. is similar to NJSA 10:2-1 but also requires bid specifications to include the anti-discrimination provision.
 - c. NJSA 10:5-34 requires each prospective bidder to submit to the State Treasurer his or her affirmative action program.
 - d. NJSA 40A:11-13 (c) and 40A:11-25(d), Local Public Contracts
 - e. NJSA 18A:18A-27(d), Public Schools Contracts
 - f. NJSA 52:18A-78.28, New Jersey Building Authority Act
 - g. NJSA 10:1-10, Defense Contracts
2. Affirmative Action Requirements in the Context of Public Contracts
- a. NJSA 27:25-12(b), New Jersey Public Transportation Act of 1979
 - b. NJAC 16:72-2.13(e), Rejection of bid for failure to comply with all EEO/DBE requirements.
 - c. NJSA 18A:39-3 et seq. and regulation promulgated pursuant thereto NJAC 6:21-15.2(d)(4), contracts for transportation to and from schools requires affirmative action statement and questionnaire to accompany the bid.
 - d. NJSA 34:1b-5.4, NJ Economic Development Authority Act (described at length, infra.)
3. Related Legislation
- a. NJSA 52:27H-21.7 et seq. and regulations NJAC 12A:10-1.1 et seq., Act to create the Division of Development for Small Businesses and Women and Minority Businesses in the Department of Commerce and Economic Development, conferring the power to, inter alia, certify women and minority businesses.



- b. **NJSA 32:33:23-1 et seq., Waterfront and Airport Commission Act. New York/New Jersey compact entered into in response to corrupt hiring practices within the Port of New York district. Act regulates the occupations of longshoremen, stevedores, etc. See also, Waterfront Commission of New York Harbor, NJ Legis. Gen. Assembly, Committee on Labor and Industrial Regulations, Public Hearings on Assembly Bill No 319, held April 28, 1961.**

4. Applicable Regulations

- a. **NJAC 12:9-1.1 et seq., Services to Small Businesses and Women and Minority Businesses - includes training for bidding on government contracts.**
- b. **NJAC 12A:10-1 et seq., Goods and Service Contracts for Small Businesses, Urban Development Enterprises and Micro-Businesses. These rules apply to every State agency with purchasing authority or contracting authority. The State Contracting agencies whose purchases are governed by these rules include the following, as well as all other departments, colleges, authorities, and commissions which may be established in the future:**
 - (1) **Departments: Agriculture; Banking; Personnel; Commerce, Energy and Economic Development; Community Affairs; Corrections; Education; Environmental Protection; Health; Higher Education; Human Services; Insurance; Labor; Law and Public Safety; Military and Veterans Affairs; Public Advocate; State; Transportation; Treasury.**
 - (2) **Authorities: Board of Public Utilities; Casino Redevelopment Authority; Development Authority for Small Businesses, Minorities, and Women's Enterprises; Expressway Authority; Health Care Facilities Financing Authority; Highway Authority; NJ Economic Development Authority; NJ Educational Facilities Authority; NJ Housing and Mortgage Finance Authority, NJ Transit Corporation; NJ Water Supply Authority; Public Broadcasting Authority; Sports and Exposition Authority; Turnpike Authority; and Urban Development Corporation.**



- (3) Colleges: Glassboro State College; Jersey City State College; Kean College of New Jersey; Montclair State College; New Jersey Institute of Technology; Ramapo College of New Jersey; Richard Stockton State College; Rutgers the State University; Thomas E. Edison College; Trenton State college; University of Medicine and Dentistry of New Jersey; Willia Patterson College of New Jersey.
- (4) Commissions: Beach Erosion Commission; Casino Control Commission; County and Municipal Government Study Commission; Election Law Enforcement Commission; Executive Commission on Ethical Standards; Hackensack Meadowlands Development Commission; NJ Commission on Capital Budgeting and Planning; NJ Racing Commission; North Jersey Water Supply Commission; Passaic Valley Sewer Commission; State Commission of Investigation; and the Commission on Science an Technology.
- c. NJAC 12A:10-2.1 et seq., Minority and Female Subcontractor Participation in State Construction Contracts.
- d. NJAC 12A:11-1.1 et seq., Certification of Women-owned and Minority Owned Firms - applies to every woman/minority-owned firm that wishes to do business with any department or agency of the State which has specific programs which required certification.
- e. NJAC 12A:12-1.1 et seq., Grants to Counties and Municipalities for Small Businesses, etc.
- f. NJAC 12A 12-2.1 et seq., Local Development Financing Fund.
- g. NJAC 17:13-1.1 et seq., Goods and Services Contracts for Small Businesses, Urban Development Enterprises and Micro Businesses - scope is same as that given for NJAC 12A:10-1 et seq.
- h. NJAC 17:14-1.1 et seq., Minority and Female Subcontractor Participation in State Construction Contracts - same scope as NJAC 12A:10-1 et seq.
- i. NJAC 17:12-1.1 et seq., Purchase Bureau - bidding under



Department of Treasury's bidding procedures.

5. Selected Case Law

- a. *Watkins v. Resorts International Hotel and Casino, Inc.*, 124 NJ 398, (1991) - (The Casino Reinvestment Development Authority provides financial assistance to businesses. Under NJSA 5:12-181 proceeds received by the Casino Reinvestment Development Authority are set aside for investment in M/WBE's.) In this case, minority bus owners sought relief pursuant to the Law against Discrimination and the Casino Control Act stating that they had been targets of discrimination. Merits not reached because of jurisdictional defects.
- b. *United Building and Construction Trade Council of Camden County v. Mayor and Council of Camden*, 88 NJ 317 (1982) reversed 104 S.Ct. 1020 (1984) - Challenge to NJ Treasury Department's approval of a municipal ordinance requiring that at least 40% of employees of contractors and subcontractors working on city construction projects be Camden residents.
- c. *In re Honeywell Information Systems Inc.*, 145 NJ Super 187 (App Div 1976) - This case illustrates the advantage of having one's foot in the door. State RFP invited proposals for a total data processing system, including hardware, software, conversion, maintenance and training. It outlined the State's performance requirements, and left to the discretion of the bidders the determination of the components of the system which would accomplish the desired goals. IBM and Honeywell both submitted a proposal with IBM submitting the lowest bid. IBM was awarded the contract. Honeywell object to IBM's bid calculation because IBM had deducted purchase option credits of nearly a million dollars in connection with the release of equipment already in use by the State. Honeywell argued unsuccessfully that the bids should be evaluated without consideration of these credits. The Court held that IBM did not gain a competitive advantage by its prior non-competitive rental contract, which led to its ability to offer substantial credits.
- d. *Lenox Awards, Inc. v. Div. of Purchase and Property*, 1 NJAR 94 (1980) - While DPP of DOT (Division) erroneously bypassed Lenox's lower bid, Lenox lacked standing.



However, ALJ also found that both bidder had communicated with Division employees prior to the opening of the bids to tilt the bidding system to their advantage, contrary to NJSA 52:34-12(c).

- e. ***Morie Energy Management, Inc. v. Badame***, 241 NJ Super. 572 (App. Div. 1990) - Cape May Housing Authority sought "facilities management control system" in connection with building renovation. Original bid specifications, which were prepared by a principal of plaintiff, Morie, required bidders to provide a system for which Morie was sole distributor or some equivalent system. Based upon recommendation of its consulting architect, Authority deleted provision allowing for provision of some equivalent system from its bid proposal. Consequently, bidders were required to provide the Morie system. Only Morie and one other contractor submitted bids and Morie was the lowest bidder. The unsuccessful bidder sued and the trial court concluded that the brand name limitation in the specifications violated NJSA 40A:11-13 of the Local Public Contracts Law.

- f. ***Autote Ltd. v. NJ Sports & Expo Authority***, 85 NJ 363 (1981). This case discusses the professional services exception to bidding requirement; i.e., installation and servicing of a complex computer network. This exception could encompass more and more contracts, particularly in the high technology industries and have a possible adverse impact on M/WBE's.

- g. ***Terminal Construction Corp. v. Atlantic City Sewage Authority***, 67 NJ 403 (1975) - Local authority, after competitive bidding pursuant to the Local Public Contracts Law, awarded 5 construction contracts to Plaintiff, Terminal. The construction project was 75% federally funded and the federal government required a right of prior approval with respect to each contractor in order to assure that each contractor complied with the equal opportunity provisions contained in federal laws and regulation. Pursuant to this end, contract specification required the apparent low bidder to attend a pre-award conference with the Federal EPA where the bidder was to specify what affirmative action he had taken or was prepared to take to assure equal employment opportunity on the project. No award could be granted until the federal agency determined that the contractor met agency standards. Terminal was found to be lowest bidder but Terminal informed



the Authority that it had made an error and sought to be relieved of its bid. In an attempt to invalidate its bid, Terminal filed this suit alleging that the attempt to award the contracts before the pre-award conference had been held amounted to a material variance from the bidding. The Authority argued that this specification was not material and could be waived. The Court held that the requirement that contractor comply with equal opportunity requirements was of such materiality that it could not be waived.

D. Business Assistance

1. Programs to promote business and industry fall under the jurisdiction of the New Jersey Department of Commerce and Economic Development. Promoting economic development and serving as the voice of business were functions that moved from agency to agency before being unified in the Department of Commerce and Economic Development in 1981. Since 1989, the Department's major functions have become business development and assistance, urban economic development, advocacy for minority enterprises, and research and publication of economic data and forecasts. Important independent authorities and commissions assigned to the Department include the Commission on Science and Technology, the Public Broadcasting Authority and the Economic Development Authority. The EDA is discussed below.
2. NJSA 52:27H-1 et seq., - creates the Department which is responsible for support and development of business and industry; NJSA 52:27H-21-1 et seq. focuses on small businesses. In 1987, the legislature created the Division of Small Businesses and Women and Minority Businesses within the Department. (NJSA 52:27H-21.7 et seq.) NJSA 52:27H-21.25 authorizes grants of financial assistance to county and municipal governments to assist M/WBE's. It is the EDA which is discussed below.
 - a. The major responsibilities of the New Jersey Economic Development Authority are as follows:
 - (1) To Promote the economic health of the state by providing low cost loans to labor-intensive New Jersey companies in need of working capital or financing for the expansion of their operations.
 - (2) To assist companies re-locating to the state; and to



- promote the development of key industries and economically distressed areas by targeting the aid according to established development policy.
- (3) To provide stimulus for urban redevelopment by financing and developing real estate projects in distressed areas.
 - (4) To offer consulting services in planning, marketing, finance and other business functions to manufacturers adversely affected by foreign competition.
 - (5) To provide loan processing services for selected state and federal loan programs e.g., the Veterans Administration.
- b. This independent agency is the state's principal source of long-term, low-interest financing for economic development activities undertaken by private companies. It also acts as a real estate developer in areas in need of economic expansion. Since it was established in 1974, the EDA has provided \$7.4 billion in financing to local firms and the agency claims that the resulting economic activity created an estimated 124,000 permanent jobs. (See Gordon, Robert M., *et. al.*, *Governing New Jersey, The Toughest Management & Policy-Making Jobs in Trenton*, Leadership New Jersey).
- c. The mandate of the agency is to "retain and expand job opportunities, enlarge the tax base of the state and its local governments and encourage economic growth and diversity." To achieve these objectives, the EDA offers several forms of financial assistance. The agency issues tax-exempt and taxable bonds to provide low interest loans to eligible borrowers, and in addition, offers direct loans and loan guarantees for business retention, expansion and modernization.
- d. EDA processes loans for the recycling business loan program of the Department of Environmental Protection, the Local Development Financing Fund of the Department of Commerce, the Urban Development Corporation's loan programs and for the U.S. Small Business Administration's 504 loan program. It also performs credit evaluations for the Casino Reinvestment Development Authority and works with



municipal and county development agencies.

- e. EDA is an independent, self-financing authority. In a hearing before the New Jersey Senate Appropriations Committee, the Executive Director admitted that there is a lack of understanding of EDA operations and a misperception that tax-free industrial development bonds have been phased out under federal tax reform and that they need to find better ways to reach the growing companies that can use their help. Accord, Testimony of Commissioner George Zeffinger, Department of Commerce and Economic Development (April 16, 1991).
3. Other Business Assistance programs include:
- a. Urban Enterprise Zone, NJSA 52:27H-60 et seq., NJAC 12A:120-1.1 et seq., NJAC 12A:121-1.1 et seq., NJAC 18:24-31.1 et seq. - creates Urban Enterprise Zone Authority. Authorizes various measures to stimulate economic activity in designated zones, including tax credits and skill training programs.
 - b. New Jersey Local Development Financing Fund, NJSA 34:1B-36 et seq., NJAC 19:30-1.1 et seq. - creates a state fund to provide direct State financial assistance to local commercial and industrial projects. Financial assistance includes, but is not limited to, loans, loan guarantees, grants, secondary mortgages, and equity participation. Waiver of Bond Requirements is located at NJSA 34:1B-52.
 - c. Motion Picture and Television Development Act, NJSA 34:1B-22.
 - d. Occupational Information Coordinating Committee, NJSA 24:1A-76 - established committee to design and implement a comprehensive occupational information system to meet the informational needs for all public training and job placement programs.
4. In New Jersey, several different set aside programs are utilized by State agencies, independent authorities and various political subdivisions. These statutes and regulations are described below:
- a. State Agencies



- (a) NJSA 52:32-17 et. seq.,
 - (b) This law establishes a set-aside program for small businesses, minority businesses and female businesses. It provides that State contracting agencies shall establish goals to award at least 15% of their contracts to small businesses, 7% to minority businesses and 3% to female businesses.
 - (c) A small business set aside program, in the Department of Commerce and Economic Development, was already in operation at the time of the law's enactment. These amendments to that law provide for female business and minority business categories. The goals established are calculated independently of each other and any award counts only towards fulfilling one goal. In order to obtain these goals, contracting agencies were required, when necessary, to set aside contracts, or portions of contracts, for which only small businesses, minority businesses or female businesses may bid.
 - (d) The statute also provides that the Department of Commerce and Economic Development must establish regulations controlling the designation of prospective small business, minority business and female business bidders and maintain lists of designated businesses.
- (1) NJSA 52:32-20 and 52:32-21
 - (a) This sections permit contracting agencies to set aside contracts or portions thereof for bidding only by small businesses, minority businesses and female businesses where there is a reasonable expectation that bids may be obtained from three such qualified businesses.
 - (2) NJSA 52:32-26; NJAC 12A:10-1.13(c) and 17:12-6.13(c)



(a) This section of the statutes and regulation pursuant thereto provides that a contract designated as a set aside contract may be re-bid if acceptance of the lowest responsible bid on such contract will result in the payment of an unreasonable price or in a contract otherwise contrary to the governing statutes and regulations or the agency does not receive bids from three qualified vendors.

(3) NJAC 12A:10-1.1 et seq. and NJAC 17:12-6.1 et seq.

(a) The regulations implementing the set aside legislation were originally located here. They were replaced in August 1989 on an emergency basis with a race neutral location and size-based set aside program for procurement contracts and with minority and female subcontractor target program for construction contracts. On October 13, 1989 these regulations were permanently adopted.

(4) NJSA 10:5-32 to 38 and NJAC 17:27-1.1 et. seq. Public Works contract Law and implementing regulations

(a) The NJ Department of Treasury administers a program which establishes minority and female employment goals for public contracts.

b. Independent Authorities

(1) NJSA 5:12-181 et seq. and NJAC 19:52-1.1 et seq., Casino Redevelopment Authority.

(a) The Casino Redevelopment Authority must award 20% of total annual expenditures on eligible projects it finances to minority and female businesses which operate in the construction industry or related fields.

(b) In addition, every casino licensee must establish and make an effort to achieve goals of expending 5% of the value of its contracts for



goods and services, including bus business, with minority and female businesses by the third year of licensure, 10% by the sixth year of licensure and 15% by the tenth year of licensure. NJSA 5:12-186, 187 and NJAC 19:53-2.3, 2.5. The casino licensee must act in "good faith" to meet his goals. NJAC 19:52:2.11(b). Applicants or licensees employing more than 50 employees must submit an affirmative action program indicating that they will make a good faith effort to comply with the minority and female employment goals set forth in the regulations on a county basis. "Good Faith" is defined by consideration of 7 factors:

- i) availability of qualified minority and female workers in the relevant labor market;
 - ii) percentage of minority and female persons in the relevant area;
 - iii) availability of promotable minority and female persons in the applicant's, licensee's, contractor's or sub-contractor's organization;
 - iv) expected expansion, reduction or turnover within the relevant organization;
 - v) existence of training institutions capable of instructing minority and female workers in the necessary areas;
 - vi) amount of training the applicant, licensee, contractor or subcontractor is able to provide; and
 - vii) availability and use of recruitment efforts to attract female and minority workers.
- (c) The possible penalties include termination of present contract, debarment from future



contracts, or suspension, denial or revocation of license. NJAC 19:53-1.17(b).

(d) Minority is defined as a person who is Black, Hispanic, Asian American, American Indian or Alaskan native.

c. NJSA 5:10-21.1A, New Jersey Sports and Exposition Authority.

(1) This authority is directed to establish the small business, minority business and women's business set-aside contract goals specified in NJSA 52:32-17 et seq. supra.

d. NJSA 27:1B-24, New Jersey Transportation Trust Fund

(1) This authority is required to spend at least 10% of its monies, either directly or through sub-contracting, with businesses owned and controlled by socially and economically disadvantaged persons, and to expend at least 4% of its monies, either directly or through subcontracting, with businesses owned and controlled by women. The Act does not provide a definition of "socially and economically disadvantaged persons."

e. NJSA 58:11B-26(a) and NJAC 7:22-4.17, New Jersey Wastewater Treatment Trust and the Pinelands Infrastructure Trust Fund, administered by the NJ Department of Environmental Protection.

(1) At least 10% of the total amount of all contracts for construction, materials and services let by local government units receiving federal funds for waste treatment projects must go to small business enterprises owned and controlled by socially and economically disadvantaged individuals.

(2) The definition of socially and economically disadvantaged individuals is consistent with the federal definition in 15 U.S.C. 637(d)(3) and includes Blacks, Hispanics, Native Americans, Asian Pacific Americans and other minorities.



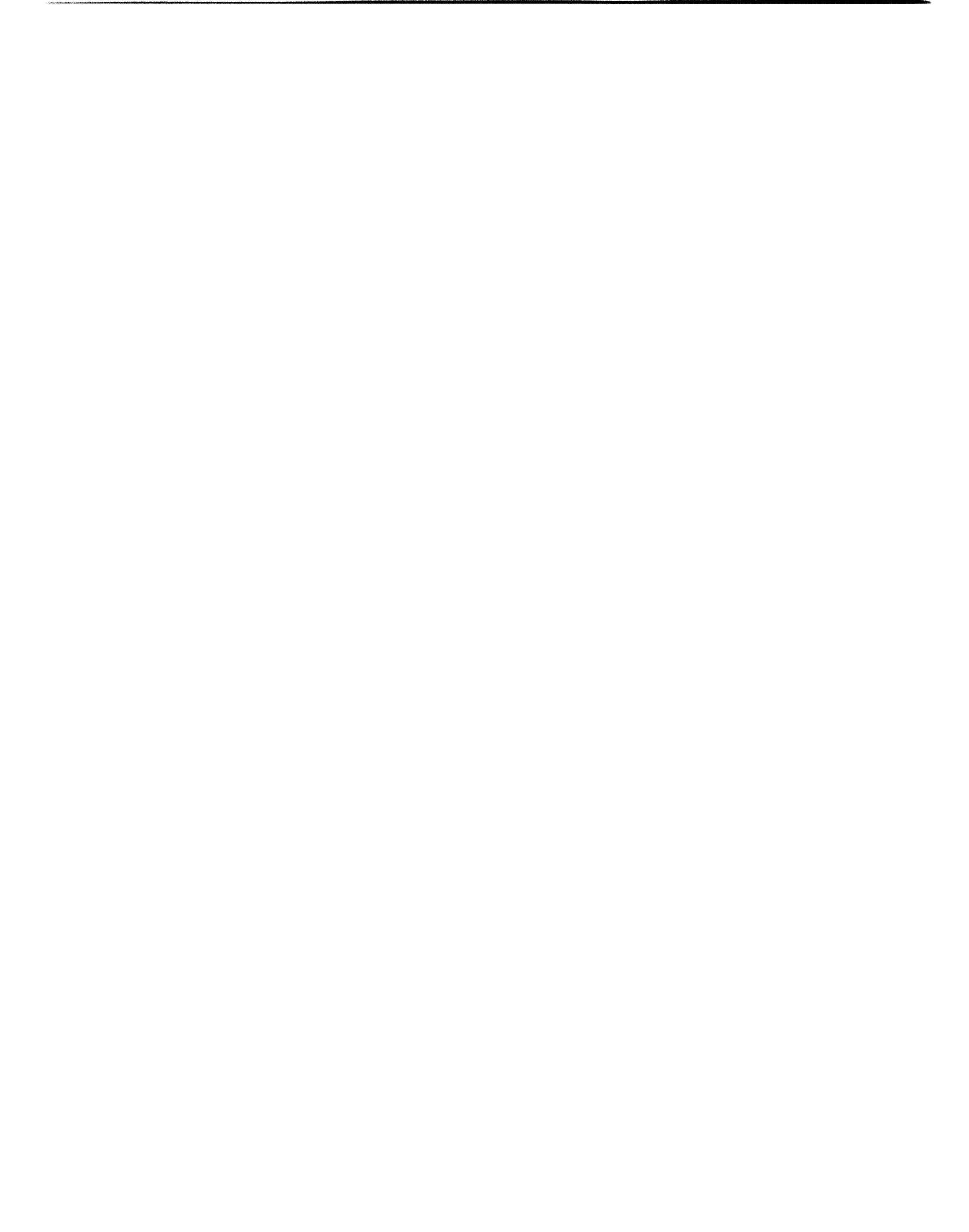
- (3) If the contracting agency decides that acceptance of the lowest bid on a set aside contract will result in the payment of an unreasonable price or in an otherwise unacceptable contract, the bids shall be rejected. NJAC 7:22-9.10(a).

f. **NJSA52: 32-19, New Jersey Urban Development Corporation**

- (1) Projects receiving assistance from this authority under the Urban Small Business Incubator Program must set aside at least 10% of the aggregate construction cost of the project for contracts with small businesses, female businesses and minority businesses. NJAC 12A:80-1.10.
- (2) Any neighborhood development corporation who receives financial assistance from the NJ Urban Development Corporation must set aside 10% of the aggregate project construction cost for contracts with small businesses, female businesses and minority businesses. NJAC 12A:82-1.7(a).
- (3) Both these programs defined minority business as one which is 51% owned and controlled by persons who are Black, Hispanic, Portuguese, Asian American, American Indian or Alaskan natives and which has its principal place of business in New Jersey.

g. **NJSA 18A:18A-52, New Jersey Board of Education**

- (1) This statute allows a board of education to establish qualified minority women and small business enterprise set aside programs which set as goals the awarding of a certain percentage of the dollar value of total procurements to such businesses. There must be at least two bids from qualified bidders and the lowest bid may be rejected if it will result in payment of an unreasonable price.
- (2) Policy Statement of the NJ Board of Higher Education (October 12, 1988). In a statement of the Board, it recommends the adoption of a set aside program for the state and county colleges which is more demanding than the State statutory requirements. The



statement applies the goals in NJSA 52:32-17 et. seq. to the dollar value of purchases and contracts awarded as opposed to the number of purchase orders and contracts issued. The policy also recommends imposing the same goals on all architectural, engineering and construction projects of all institutions of higher education including county community colleges and independent colleges, which use State capital or operating funding which requires approval of the Board of Higher Education and exceeds \$500,000 in costs.

h. NJSA 40A:11-42, County and Municipal Governments

- (1) The statute permits local government entities to establish small business enterprise set aside programs which set as goals the awarding of a certain percentage of the dollar value of total procurements to such businesses.

E. Employment

1. From the foregoing discussion, it is clear that elimination of discrimination in Employment has long been the Concern of the New Jersey Legislature. The plethora of case law in this area indicates that the Courts

F. Unions and the Construction Industry

1. NJSA 10:5-31 to 38 grants the State Treasurer the power to "require all State and local agencies awarding public works contracts to submit their affirmative action programs" for approval. The statute gives broad authority to the State Treasurer "to determine the percentage or population of minority groups in the State from which the work force for public works contracts is or may be drawn."
2. NJSA 10:5-33 bars public works contractors from discriminating on the basis of "...race...or sex...". The Law Against Discrimination does not directly affect contracts between private parties. The minority hiring goals pertain only to contracts with the State, its political subdivisions, and agencies or authorities created by state and local government.
3. NJSA 10:5-32 mandates affirmative action in public contracting by

outlawing public works contracts with any party "which has not agreed and guaranteed to afford equal opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." Under the Act, state and local governments, in their role as marketplace consumers, require that the contractors they hire make efforts to employ minority workers.

4. NJSA:5-36(a)-(b) empowers the State Treasurer to determine percentages of minority populations across the State and establish those populations as guidelines in determining the adequacy of affirmative action programs.
5. NJAC 17:27-7.4 imposes duties on contractors to undertake a good faith effort to comply with the minority hiring goals if the contractor fails to meet the minority hiring guidelines. Pursuant to NJAC 17:27-7.4(1) and (2)(a)(b), the duties required of contractors range from seeking assurances of cooperation from unions to notifying minority referral organizations of hiring needs to contacting individual minority workers who are listed with the contractor as awaiting employment.
6. NJSA 17:27-1.1 to 13.2 includes "employment goals" for the hiring of minorities in each of New Jersey's 21 counties. The rules also provide for the approval of any affirmative action program that conforms to the statutory and administrative requirements and "establishes an employment goal which is not lower than the applicable goal established by [NJSA 17:27-7.3]."

G. Case Law

1. *U.S. v. United States Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada Local Union No. 24*, 363 F. Supp. 808 (D.N.J. 1973) - Action brought by U.S. Attorney General against various unions, associations of contractors and apprenticeship committees for injunctive relief from interference with the implementation of Executive Order 11246 forbidding racial discrimination in employment opportunities by government contractors.

The District Court held that the selection and referral procedures as well as other acts of union and apprenticeship committees resulting in under-representation of blacks and Spanish-surnamed persons in unions were violations of the Civil Rights Act of 1964, section 701 et seq., 42 U.S.C.A., section 2000(e) et seq.

The Court ordered the parties to provide an adequate remedial decree and specific relief was granted to persons found to have been discriminated against. The Court noted that Local 52 did not admit a black into the union until 1966. In 1971, Blacks made up 2.7 percent of the union's membership while 1970 Census Bureau statistics reflect that black persons constituted 30 percent of the population of Essex County, the jurisdictional base of Local 52. The Court also noted that the union had consistently opposed programs which would train persons from minority groups in the electrical field and had instituted practices which, even if facially neutral, had a disparate impact on minorities.

The Court explained that tests or other measuring devices, may be utilized to select applications for union membership provided the tests are not designed, intended or used to discriminate by reason of race, color or national origin. However, when an examination disqualifies a proportionately higher degree of minority applicants than the union must demonstrate by appropriate data that the examination is a reasonable measure of performance for the job for which the examination is being used. The unions' failure to do so demonstrated the invalidity of the examination under the Civil Rights Act of 1964.

2. *Mele v. U.S. Dept. of Justice*, 395 F. Supp. 592 (D.N.J. 1975) - Plaintiff, a white job applicant, brought an action against the International Brotherhood of Electrical Workers No. 52 (IBEW) alleging "reverse discrimination". In dismissing plaintiff's complaint and approving the affirmative action plan at issue, the Court found no conflict between the limitations on quota hiring in Title VII for the 1964 Civil Rights Act and the requirement of minority hiring goals for federal construction contracts. The Court stated that Congress, by enacting Title VII, could not have intended to protect those white males who have traditionally dominated the labor unions.
3. *Jersey Central Power & Light Co. v. Local Unions 327, 749, 1289, 1303, 1309, and 1314 of International Brotherhood of Electrical Workers*, 508 F. 2d 687 (3rd Cir. 1975). - The Court faced with the issue of whether, in reducing a company's work force, an employer is obligated to comply with collective bargaining agreement provisions requiring layoffs in reverse order of seniority, or whether the employer is obligated to implement the provisions of a conciliation agreement made with the EEOC, held that the provisions of the collective bargaining agreement must govern despite the fact that minorities and women would be disproportionately affected.



4. ***United States v. International Union of Elevator Constructors, Local Union No. 5***, 538 F.2d 1012 (1976) - action against a union local whose jurisdiction included 10 counties in New Jersey. In granting relief to overcome the present effects of past discrimination, the Court found that Local 5 had never referred a black to an employer as a new probationary helper; further, that Local 5 had exercised its partial control of work opportunities in the trade to the complete exclusion of blacks.
5. ***United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden***, 88 NJ 317 (1982) - Association of labor organizations challenged state approval of city provisions establishing a 25% minority hiring goal for contracts with the City of Camden. The NJ Supreme Court held that: (1) in approving the city's affirmative action ordinance, the State Treasurer did not act outside the scope of his statutory authority under the Law Against Discrimination; (2) the State Treasurer's approval was not an abuse of administrative agency discretion; (3) the State Treasurer's approval of minority hiring goals, including the 25 percent goal for Camden did not violate the equal protection clause; and (4) the 40% hiring quota for city public works projects was also constitutional and was not preempted by state statute.
6. ***Tuma v. American Can Company et. al.***, 373 F. Supp. 218 (1974) - a sex discrimination action filed by women who had held the lesser position of "Inspection Assistant" which had been eliminated as opposed to "General Inspector" which was not eliminated and for which they had been effectively barred by NJ female labor laws (subsequently repealed). The judge held that they had done nothing affirmatively to indicate that they wanted the job and thus had not suffered from the exclusion. Their unions failure to process a grievance was insufficient to establish a breach of the duty to provide fair representation.

H. Finance

1. NJSa 10:5-12 - NJSa 10:5-112(i) makes it unlawful for a financial institution to whom application is made for any loan or extension of credit to discriminate.
2. NJSa 17:9A-24.14 of the Banking Act of 1948 allows banks to establish subsidiaries for the purpose of originating loans/technical assistance packages for purchase by New Jersey Development



Authority for Small Businesses, Minorities and Women's Enterprises; permits banks to originate loans directly in some cases.

3. NJSA 17:9A-69(c) sets forth an anti-discrimination provision with respect to mortgage loans but does not include women within its scope.
4. NJSA 17:16F-1 to 17:16F-11 - The Mortgage Disclosure (Anti-redlining) Act.
5. NJSA 17:16F-3 - No discrimination in acceptance of applications
6. Attorney General Formal Opinion No. 7 - 1979. Whether the Commissioner of Banking has the authority to investigate certain lending practices un the Mortgage Disclosure Act. At issue was a practice whereby financial institutions in the Newark banking market limited mortgage loans to properties which were owner-occupied or were single family dwellings.
7. NJSA 17:31-1 et seq., prohibits a surety from discriminating against M/WBE's.

I. Public Accommodations

1. Public accommodations Law in New Jersey concerns itself with discrimination against women and minorities in social institutions and social organizations.
2. NJSA 10:5-12(f) prohibits the denial by the operator of any "place of public accommodation" of any of its "accommodations, advantages, facilities or privilege" on the basis of "race, color, national origin, ancestry, marital status of sex" except in the case of sex where the place of public accommodation "is in its nature reasonably restricted exclusively to individuals of one sex."
3. NJSA 10:1-5 states that the general provisions of the Law against Discrimination, NJSA 10:1-2 to 10:7 extend only to places of public accommodation and do not apply to "any institution, club, or place of accommodation which is in its nature distinctly private..."
4. NJSA 10:5-12(1) prohibits any person from refusing "to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise to do business with



any other person on the basis of race, creed, color, national origin, ancestry, age, sex, marital status...or such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers."

5. Case Law

Kiwanis International v. Ridgewood Kiwanis Club, 806 F. 2d 468 (3rd Cir. 1986), petition for rehearing denied in 811 F. 2d 247 (3rd Cir 1987). Kiwanis International sought an injunction to prevent Kiwanis Ridgewood, a chapter of Kiwanis International, from using Kiwanis International's federally registered collective service marks because the Ridgewood chapter had admitted a female member. Kiwanis Ridgewood and the admitted female member filed a state action to enjoin Kiwanis International from terminating the Chapter's license. The two actions were consolidated. The District Court ruled in 627 F. Supp 1381, 1393-94 (D.N.J. 1986) that New Jersey's Law Against Discrimination prohibited the discriminatory policies upon which the licensing agreement between Kiwanis International and Kiwanis Ridgewood was conditioned and upon which the revocation was based. The Court of Appeals reversed and held that Kiwanis International, an organization of hundreds of thousands of members, may discriminate on the basis of sex by denying membership to women and may force unwilling New Jersey licensed clubs to do the same because the organizations are not places of "public accommodation." The Court of Appeals concluded that the Kiwanis Ridgewood Club was not a place of public accommodation" because the "evidence of membership practices and policy does not reflect an open and unrestricted invitation to the community at large to join Kiwanis Ridgewood." There is a vigorous dissent which describes the decision as being based on "archaic assumptions."

Rutan v. Republican Party of Illinois, 641 F. Supp. 249 (C.D. Ill 1986) Employees, applicants for employment and taxpayers brought an action against the Republican Party of Illinois, Republican party officials, the Illinois Governor, and Illinois government officials alleging that the defendants conspired to create an employment system motivated and directed by political considerations. The District Court dismissed the plaintiffs' claims for failure to state a claim upon which relief could be granted and held that the use of political considerations in hiring, promoting, transferring and hiring laid-off state employees did not deprive plaintiffs of their First Amendment rights. The Court also stated that plaintiffs had failed to



show that the defendants singled out a particular group for disparate treatment and selected a course of action for the purpose of causing adverse political effects on the identifiable group. The Court of Appeals, Seventh Circuit, affirmed the holding in 641 F. Supp. 249 in part, and remanded initially in 848 F.2d. 1396, and affirmed and remanded on rehearing *en banc* in 868 F. 2d. 943. Certiorari was granted. The U.S. Supreme Court in 110 S.Ct. 2729 (1990) held that the plaintiffs had stated a claim upon which relief could be granted. The Court stated that (1) promotions, transfers, and recalls based on political affiliation or support are impermissible infringements on public employees' First Amendment rights, and (2) conditioning hiring decisions on political belief and association violates applicants' First Amendment rights in absence of vital governmental interest.

Frank v. Ivy Club, 120 N.J. 73 (1990) Female undergraduate student brought a claim of gender discrimination in membership selection against eating clubs which served Princeton University students. The State Division of Civil Rights dismissed the claim and the student appealed. The Superior Court, Appellate Division, vacated and remanded. Thereafter, a fact-finding conference was conducted. The Division of Civil Rights issued a finding of probable cause that the clubs had discriminated against women in selecting members. The Superior Court, Appellate Division, 228 N.J. Super. 40, 548 A.2d 1142, reversed and remanded. The Division of Civil Rights appealed. The Supreme Court of New Jersey held that (1) the eating clubs are subject to the Law Against Discrimination, NJSA 10:5-1 et seq., based on their symbiotic relationship with the university which itself was subject to the law; (2) the clubs illegally discriminated against women by their policy of rejecting female applicants for membership; and (3) clubs could not be offered the option of disassociating themselves from the university in lieu of abandoning their discriminatory policy. The Court state that central to the resolution of the case was whether the clubs are "places of accommodation" within the meaning of the Law Against Discrimination, or are exempt because they are "distinctly private." The university provided a source of members to the club and the club fed a majority of the university upper-class undergraduate students. Therefore, the court concluded that the Clubs had an integral relationship of mutual benefit with the university which deprived them of private status.

J. Post Croson Programs⁴

1. What Constitutes a "Compelling Governmental Interest" sufficient to justify a race-conscious remedy?

2. Existence of a federal mandate.

a. *Metro Broadcasting Inc. v. Federal Communications Commission, et.al., ___U.S.___, 110 S.Ct. 2997, (1990), decided with Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc., et. al.,*

(1) The case held that benign race-conscious measures mandated by Congress - even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of congress and are substantially related to achievement of those objectives. The vigorous dissent of argues for the application of the *Croson* standard and, in the alternative, contends that the programs do not satisfy even the intermediate level of review enunciated by the majority.

b. *Michigan Road Builders Association v. Blanchard*, 1991 WL 58870 (W.D. Mich. 1991).

(1) In determining that the State had not acted unconstitutionally when setting aside a percentage of contracts containing federal funds for DBE's, the court noted that the "overriding distinction between the federal program held constitutional in *Fullilove* and the state and city programs held unconstitutional in *Croson* is Congress' hand in the *Fullilove* program and [the program under consideration in the case].

c. *Milwaukee County Pavers Association v. Fiedler*, 922 F. 2d

⁴ This analytical framework for examining remedies is extrapolated from a memorandum from the New Jersey Attorney General's office to the Governor's Study Commissions.



419 (7th Cir. 1991).

- (1) The Seventh Circuit stated: "The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that [states] could not do without federal authorization.

3. The combination of convincing anecdotal and statistical evidence.

a. *Coral Construction Co. v. King County*, 941 F. ed 910 (9th Cir. 1991).

- (1) The 9th Circuit stated the a race-based preferential program will only be valid if "actual, identifiable discrimination has occurred within the local industry affected by the program." *Id.* p. 915; or, if the [governmental actor enacting the set-aside program] perpetuated the discrimination to be remedied by the program either through active discrimination or "passive participation", such as the continued "infusion of tax dollars into a discriminatory industry. *Id.* p.____.
- (2) This Court cautioned that reliance on data from outside its boundaries could result in "societal discrimination" becoming the factual basis for the M/WBE program; thus, it felt that the enacting jurisdiction should limit its factual inquiry to the presence of discrimination within its own boundaries.
- (3) On the relationship between statistical and anecdotal evidence, it had this to say: "...anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. Indeed, anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practices. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *ID.* p. 919....Without a statistical foundation, the



picture is incomplete. Strict scrutiny demands a fuller story...." *Id.* p. ___.

- (4) It suggested three ways to rebut statistical evidence:
 - (a) show that the statistics are flawed;
 - (b) demonstrate that the disparities shown by the statistics are not significant or actionable; or
 - (c) present contrasting statistical data.

b. *Cone Corporation, Inc. v. Hillsborough County* __F. Supp.__, 1991 WL 239502 (M.D. Fla. 1991).

- (1) After finding that the statistical evidence in the case indicated that there was discrimination specifically in the construction business commissioned by the County, not just in the construction industry in general, the Court found persuasive the following types of anecdotal evidence:

- (a) testimony from a former County Commissioner that MBE contractors had complained during his tenure;
- (b) complaints from MBE's that prime contractors were unavailable or refused to speak to them when approached;
- (c) complaints that prime contractors would accept estimates from MBE but not submit them;
- (d) complaints that primes would take the minority bids around to find a non-minority who would underbid the MBE;
- (e) complaints that non-minority subcontractors and contractors got special prices and discounts from suppliers which were unavailable to MBE purchasers.

c. *Contractors Association of Eastern Pennsylvania, et. al. v. City of Philadelphia*, __F. 2d__, 1991 WL 190731 (3rd Cir. 1991).

- (1) The opportunity to investigate past and current practices of predominately majority owned contractor organizations and their members in the public and private construction industries must be adequate.



d. ***Associated General Contractors of California, Inc., v. City and County of San Francisco, et.al.*, ___F. 2d___, 1991 WL 255916 (9th Cir. 1991)**

- (1) **The Court found.. "large statistical disparities between the percentage of contracts awarded to MBE's and the percentage of available MBE's." Using the City and County of San Francisco as the "relevant market", the statistics in the case compare the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBE's for the 1987-88 fiscal year. Testimony taken at more than ten public hearings indicated that City departments continued to discriminate against MBE's and WbE's and continued to operate under the "old boy" network" in awarding contracts.**

K. **A gender-based classification is subject to a lesser standard of scrutiny than a race-based classification.**

1. **Important government objective established by intermediate level of scrutiny.**

a. ***Mississippi University of Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 331, 73 L. ED. 2d 1090 (1982).**

- (1) **The Court invalidated a state statute which excluded males from enrolling in a state-supported professional nursing school.**
- (2) **The statutes at issue in the later cases of *Coral Construction v. King County, supra*, and in *Associated General Contractors v. City and County of San Francisco*, 813 F 2d 92 (9th Cir 1987) were measured by this standard.**
- (3) **If the statute passes the strict scrutiny test required to support a race-based remedy, the statute will surely pass constitutional muster if it is applied to WBE's.**

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