



Episode 39: “NYS Division of Human Rights Settlement Conferences and Probable Cause Hearings, Part 1,” With Catherine Ostrowski Martin

Speakers: Ari Kwiatkowski, Barclay Damon,
and Catherine Ostrowski Martin, New York State Division
of Human Rights Buffalo Office

[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey, guys, welcome to “What Employers Need to Know About New York State Division of Human Rights Settlement Conferences and Probable Cause Hearings.” A chat with a division attorney, part one. I am thrilled today to welcome Division of Human Rights attorney Catherine Ostrowski Martin to the podcast. She’s going to be joining us for the next couple episodes. And we’re going to really run through probable cause determination, settlement conferences, the public hearing, and just demystify the process. So, Catherine, welcome.

[Catherine]: Thank you so much. And excited to be here.

[Ari]: Yes. Thank you so much for joining. I know this is going to be such valuable information. But before we dig into it, Catherine, I always put our guests on the spot and ask them to share something fun or interesting about their personal or professional lives. So if you would indulge me and hit our listeners with a fun fact about you.

[Catherine]: Yes, absolutely. So my fun fact, I guess, is personal/professional. When I graduated from college, I wasn’t exactly sure what I wanted to do. I heard about this program in Ireland where you live for a year on a farming community with people with intellectual disabilities. So I ended up going there and working for a year in Kilcullen, Ireland, and that’s where I was inspired to go to law school and become a human rights attorney.

[Ari]: Very cool. Definitely one of the—not to disparage our other guests—but I think one of the more interesting or cool personal facts that we’ve heard and I think you were telling me offline, Catherine. I think it’s okay if I share, that, that really kind of inspired you to be take the path that you’re on right now and where you are today.

[Catherine]: Absolutely.

[Ari]: Very cool. Well, thank you for sharing that. If nothing else to add on that again, you and I could talk for a very long time about Ireland. To our listeners, Catherine, I talked a little offline. I went to Ireland for the first time right before the pandemic, and it’s one of the most beautiful places. So Catherine, we’ll touch base on that at a later time. Okay? All right, guys. So let’s dig in. We’re going to start with probable cause determinations in the settlement conferences involving the Division of Human Rights. Catherine, last time, on our last couple of episodes, we discussed the possible outcomes of an investigation with the Buffalo Office director, Debbie Kent. Let’s pick up where we left off and talk about what happens when the division issues a probable cause determination. Can you just briefly explain for our listeners what is a probable cause determination?

[Catherine]: Sure. So it might be easiest to start explaining by what it is not. It is not a finding that discrimination has occurred. It’s basically the investigators in the regional offices. If they lend

credence to how complainant has told their story and express their side of the facts, there's some at least allegations of discrimination that are going to move forward to the hearing stage.

[Ari]: Understood. I like how you phrase that, Catherine, and how you chose to explain that, because I think if you're an employer, and especially if you're not represented by counsel and you get one of these determinations, it can be a little bit confusing. So thanks for explaining. Catherine, just briefly, how are the parties notified of a probable cause determination and if...Before I let you answer just for our listeners backing up, as I mentioned, we went through the investigation with Debbie Kent, Director Kent and all the possible outcomes. So now we're at the point of the probable cause determination. Catherine, can you tell our listeners how the parties are notified of that?

[Catherine]: Sure. So when the original complaint is filed, the complainant will name a respondent or a few respondents and notices will be sent out at that time. So that's kind of the first correspondence respondents may get from the division. And the same thing when there's probable cause found, a notice is sent out either through email or mail. If you're representing a party, make sure you put in a notice of appearance with the division. So the division is aware and has the attorney's contact information as well, and then we'll copy on everything.

[Ari]: Perfect. So just briefly, Catherine, because we're going to get into detail. Can you just give our listeners a high-level overview of what happens next and what the process is?

[Catherine]: So after probable cause is found, basically the case is either going to settle or it's going to go to a hearing. So the first step is a pre-hearing conference, which is basically a settlement conference, to see if the parties can settle. And if it doesn't, at that point, it moves on to the hearing stage. And that's conducted under the supervision of an ALJ who hears more facts and testimony about the case.

[Ari]: Great. That's a good overview, Catherine, thanks so much. And we'll definitely get into the specifics of the hearing, I think, next week. I wanted to kind of focus on the prehearing settlement conference and just ask you a couple of questions about that. Does the prehearing settlement conference happen in every case? Is that something that always happens when a probable cause determination has been issued?

[Catherine]: So one is scheduled in every case that comes before the division; sometimes it may be a respondent is sure that they don't want to make any sort of settlement offer, they'll request that the conference be canceled. I generally tell people there's no harm in calling in and just seeing, you know, where everyone stands, and there's no pressure to make a settlement at that time.

[Ari]: Right. That's, I think, good advice, Catherine. And, you know, we as attorneys on the respondent side of things, we often counsel our and our clients, our listeners. You know, there's no harm in coming to the table in good faith and just hearing what the other side has to say. There's honestly really nothing to lose.

[Catherine]: Right. And you might be closer than you think. So.

[Ari]: Right. And also, it could be that maybe the...you know, the complainant doesn't necessarily want money. Maybe there's other outcomes or other things they're interested in, which I know we plan to talk about later. So I'll save it for that. So just with respect to the settlement conference, Catherine, briefly, is... how are the parties notified of that? Is that at the time of the probable cause determination or the parties really need to be looking out for additional communication from the division in terms of what the settlement conference might take place.

[Catherine]: Right. So well, it is the next step after the probable cause determination. Just because the

division has so many cases, there's likely going to be at least a few months in between. So I would keep tracking the mail. You'll get a scheduling notice, snail mail or email for the prehearing conference.

[Ari]: Okay. Yes. Also good information. And that means for respondents and complainants, this is an important thing to look out for. And definitely it's probably not going to be the day after you get the determination. But it's important to keep an eye out.

[Catherine]: Absolutely.

[Ari]: So I know you mentioned, Catherine, that an ALJ presides over the settlement conference. Could you just explain that a little bit for our listeners who are mostly employers, respondents, what is an ALJ and what is their authority, where does it come from?

[Catherine]: Sure. So an ALJ is an administrative law judge. And so the division is a bit different than perhaps other courts people are familiar with because we are under the executive branch of the state government. So we're underneath the governor, and then the commissioner, and then the LG is all under that authority there. And so during the hearing, they play, you know, the same kind of role as a judge in other courts. And that's the way that our hearings are conducted, and our rules of evidence are slightly different. They're just found in a different part of the state statute.

[Ari]: Got it. So the ALJ's authority is a statutory authority. And as you pointed out, it's not the same type of judge you would come across in Supreme Court or even federal court, things like that.

[Catherine]: Correct.

[Ari]: Got it. So I did want to ask just from a logistical perspective, Catherine, are settlement conferences typically remote right now? Are there some being conducted in person? What's your experience or is everything just still remote at this time via phone?

[Catherine]: Yeah. So our settlement conferences traditionally have been over the phone even before COVID. So that is continuing currently and for the foreseeable future. You call in, enter a code, and you're in a telephonic conference room.

[Ari]: Yes. So, Catherine, the next question I wanted to ask you is, I think, an important topic, because I think it's a little bit confusing. So that is at this point in the proceedings before the division, if the complainant doesn't have legal representation or doesn't have an attorney, the division appoints a...an attorney such as yourself to present the case in support of the complaint. Is that right?

[Catherine]: Kind of. So the division attorneys such as myself are prosecutors. So we are...we don't have an attorney-client relationship with the complainants. We represent New York State and the state's interest in preventing discrimination and kind of remediating discrimination after it has already occurred. So it's in a similar way that a criminal prosecutor is representing the state in putting forth a case on behalf of the state. And usually it's on the same side as a victim of a crime, but they're not actually representing that victim.

[Ari]: Right. Thanks for clarifying that, because I think a lot of times for respondents, it can be a little bit confusing. And I know we've had clients who, you know, we've begun representation of them—Barclay Damon has, you know—after basically this point or right around this point and the...I would say nine times out of ten the respondent or the employer is under the impression that the division attorney is just personal counsel essentially for the complainant. So I think it can be a little bit confusing. And I'm thankful that you explain that, because I think it...most people think, oh, a division attorney, okay. They're the attorney for the complaining party. But that's...

[Catherine]: No, right. And it's it is confusing.

[Ari]: And I'm sure it results in you being contacted in many different capacities and probably after things have settled like...I'm sure you get contacted a lot just in that.

[Catherine]: We can only advise people, you know, when we're assigned to their case's division proceedings. You know, people ask me many...a myriad of questions, some involved selling their house or criminal law, or something off base; and I say I'm sorry, you need to talk to a private attorney about that.

[Ari]: Right. You mean, Catherine, you don't know the intimate details of all of these types of laws somehow?

[Catherine]: No.

[Ari]: So, Catherine, if I could just ask with that explanation in mind, when is a division attorney typically assigned? Is it right when the probable cause determination is issued as that's...when it's scheduled for hearing or what? What's the timeline like?

[Catherine]: So usually the division attorney will be assigned slightly before that prehearing conference, the settlement conference that we're talking about. And at that time, actually in the settlement conference notice itself, the division attorney's name and contact information will be in there. So all the parties are aware.

[Ari]: Right. So just another reason to underscore the importance of being on the lookout for that prehearing settlement conference notification.

[Catherine]: Yes, please.

[Ari]: So, Catherine, this is a question that I think, you know, we get a lot and it definitely plays out in practice, which is at the point that the division has appointed an attorney, can the parties start to negotiate or talk settlement, actually before the prehearing settlement conference is scheduled or occurs?

[Catherine]: Yes, absolutely. And that's generally really encouraged. I think, you know, the judges always appreciate it. Usually the division attorney will reach out to the complainants and try to start assessing what they may be looking for and then come up with a calculation of damages. That doesn't happen overnight. You know, sometimes we have to ask for documentation. So I usually, you know, like to reach out at least a week before the conference, maybe more, and then communicate that to the respondent's attorney. So they're aware and they can speak with their client and see if they want to make an offer at that point.

[Ari]: Right. And this leads me to my next question, Catherine, which is, you know, in the course of these discussions, you know, there may be a demand received from a division attorney on behalf of a respondent that is for a particular monetary amount or, you know, is it within the respondent's rights to ask for information to back up that settlement demand or, you know, if there's an allegation that the complaining party has suffered some emotional distress as a result, is the respondent able to request information to kind of support the demand? Is that something that's able to occur before the prehearing settlement conference?

[Catherine]: Sure. So sometimes the respondent will ask for that. And, you know, definitely if there's enough time, basically, and if the complainant has that paperwork available, it's not an issue sending that. The only thing I would say is that that's a little bit taxing for some people to gather everything together, maybe the last two years of their wages, to think about getting a HIPAA release from their doctor

and releasing all their medical records, including psychiatric records. It's kind of a lot. So if it goes, you know, that far, the complainant might just say, at this point, I just want to go to a hearing, like I'm already providing all this documentation anyway. And I would just, you know, take note of that.

[Ari]: Yes, I think that's important to think about. And I think you're right of a lot of it probably has to do with timing and how much time, you know, how proactive the respondent was in requesting that information, how much time there may be before the prehearing settlement conference. But it's definitely a question that we've gotten a lot from our clients, so I wanted to throw it out there for your comment.

[Catherine]: Okay.

[Ari]: So, Catherine, can you talk briefly and just kind of give our listeners a rundown of how the settlement conference works? So it's the day of the settlement. I know that you mentioned you...there's a call-in number and you're in the virtual settlement room. But just assuming our listeners maybe have never been involved in a settlement conference with the division or haven't participated in one, can you just give our listeners a high-level overview of what the conference entails?

[Catherine]: Sure. So there are a few people on the phone. So you call in, the division attorney, like myself, would be on there. The complainant, respondent's attorney, like you, Ari, is usually on there, sometimes respondents are not represented. And usually a representative for the respondent calls in as well. And the person conducting the conference, like we talk about, is an administrative law judge. This will not be the judge who eventually hears the case at the hearing stage. This judge's role is basically to see whether or not a settlement can be reached. So they want to know, has the complainant made a demand? Has the respondent made an offer? Are we going back and forth as far as numbers or policy requirements? And if not, it'll be scheduled for a hearing. It's not a time to argue the specific facts and circumstances of the case. It's basically, is it going to settle or not?

[Ari]: Understood. And is there a transcript or is there a reporter taking anything down, Catherine, or is this just all pretty much confidential settlement communications between the parties and with the ALJ.

[Catherine]: So, they're not recorded. There's no transcript or anything like that. It's basically, you know. Settlement discussions, as you know, but maybe not the listeners, are not admissible when it goes to the actual hearing. So no one can be quoting something from the settlement conference or anything like that at the hearing.

[Ari]: Right. And as you pointed out, it's a different ALJ that would preside over the hearing as opposed to the settlement conference.

[Catherine]: Correct.

[Ari]: Great. Thank you. That's very helpful. So one last question before we move on, Catherine. Is a settlement conference typically a day long? Can it be longer if the parties aren't able to settle at the conference but there's some appetite on both sides maybe to continue discussions. Are the parties free to do that on their own? Will another conference be scheduled? How does that work?

[Catherine]: So generally, our conferences are just scheduled for, I think one hour are settlement conferences. And so it's not a lot of time. So that's why, like we talked about, trying to have some communication beforehand is helpful and if it doesn't settle at a conference, the parties can certainly request that the judge have another conference. That's kind of their prerogative at that point or...what usually happens is the division attorney and the respondent's attorney will continue to have communication and all of these cases can settle up to and even during a hearing. So there's you know, there's much potential for a settlement if it doesn't settle at the conference.

[Ari]: Yes. And that's important to point out. Catherine, just as kind of like a primer for our discussion next week about the hearing. Nothing precludes settlement the day of the hearing, during it. So it sounds like if both parties are willing to keep negotiating, there is opportunity to do so. It's not like if you don't settle at the prehearing settlement conference, that's it.

[Catherine]: Correct. Yeah. The only consideration, as you know, both sides are taking the time to prepare as it gets closer to a hearing. People may sometimes be less likely to settle if they already have their documents in order, with the respondents, or complainants with a private attorney have already paid attorney's fees. And so that's why settling a little bit earlier in the process may be a good idea.

[Ari]: Right. That makes sense. Catherine, thank you so much. This discussion was a great primer on, you know, the general overview of what happens when there's a probable cause determination and also the logistics and the process for the prehearing settlement conference. So thank you again so much. I think this is great. And before we sign off for today, is there anything that I've missed or anything you think that you wanted to mention before we sign off?

[Catherine]: I think, you know, just in general, try to go into these conferences with an open mind and understand that maybe an initial demand or an initial offer is just a jumping off point and the parties can make progress from there.

[Ari]: Thank you so much, Catherine. This is great information. To our listeners, we will be back next week again with Catherine. She's graciously agreed to join us again, and we're going to pick up right where we left off and really talk about if the matter settles, what comes next, and what the parties need to be aware of. So definitely tune in next week. You won't want to miss it.

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