



Episode 41: “NYS Division of Human Rights Settlement Conferences and Probable Cause Hearings, Part 3,” With Catherine Ostrowski Martin

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[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 back 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. This is part three; our last segment where we are joined by Catherine Ostrowski Martin. Catherine is a Division of Human Rights attorney. Catherine, thank you so much for joining us for this last episode.

[Catherine]: Thank you, Ari.

[Ari]: Yes, I’m so excited to have you. We’ve kind of moved on from settlement conferences. We’re going through our hypothetical charge and for our last or excuse me, hypothetical complaint, I should not confuse the two. But our last episode, we basically ended with talking about pre-hearing settlement conferences and really the result. But let’s assume, Catherine, for purposes of our discussion this week that the parties were not able to reach a settlement at the pre-hearing settlement conference or really before or after, and now we’re going to a public hearing. Can you give us a rundown, just high level of what the public hearing is?

[Catherine]: Sure. So probably at least several months, if not longer after the settlement conference all the parties will receive a notice of a preliminary conference. So this is the next step in the process. And at that point, the respondents will prepare an answer to the complaint, as well as a preliminary conference statement. And that’s basically a very brief, just rundown of the issues of the case. Maybe just a few sentences on each. You know, this is a reasonable accommodation case. The complainant was denied this type of reasonable accommodation, something like that. Employer will say no, they weren’t or whatever. So and then at that conference, the judge will kind of check in with everyone, go through what evidence may be presented and if there needs to be any scheduling deadlines and that, like if people are requesting medical records and the hearing date will be picked at that conference. So then, again, usually at least a few months after that, the hearing will take place. And right now our hearings occur over Zoom. We started that during the beginning of the pandemic. It could change at any time, but that’s how we’re currently conducting them. So you call in on a Zoom hearing. The division attorney, the complainant, respondent’s attorney, respondent, and the judge will all be in there. First as the division is the prosecuting side, we present the prosecution first. So usually the complainant will testify, tell their story, and present any witnesses that they have, evidence or subject to cross-examination. And then the respondent has their opportunity to present their defense. Same thing: evidence, witnesses, they are subject to cross-examination by a division attorney, and a lot of times that wraps up after that or there is a chance for rebuttal by either side after.

[Ari]: Great. Thank you. That’s a really good high-level overview. And of course, I will ask you some follow-up questions, if that’s okay. All right. So, Catherine, just I wanted to back up. You know, I know it’s a public hearing. So who is permitted to attend? I know you were ... you ran down kind of who usually is there. But are members of the public permitted to attend? And if so, how does that really work with this Zoom format?

[Catherine]: Sure, so yeah, it’s a public hearing, anyone can attend, though the only people who can’t sit and watch would be potential witnesses who are not named parties. They have to be kind of sequestered.

They're not allowed to watch other people's testimony. Besides that, you know, it's open to everyone. I would definitely encourage if you're...if you have an upcoming hearing and you're interested in the process to try to watch, once you have a better understanding of how it goes. When we were in person, you could just walk into the courtroom and watch. Now that we're on Zoom, that easiest thing to do is email our hearings unit. All their contact information is on our website, but basically, it's hearings at DHR dot NY dot gov. And say, "Hey I'd like to call into a hearing." I think they require a 24-hour notice and then they'll send you the link and then you can join as an observer.

[Ari]: That's great advice Catherine, if you are a respondent or respondent attorney and you know that either you or your client will be involved in a public hearing in the near future, it's probably a very good idea to maybe watch one and just see what the process is like if you've never been involved.

[Catherine]: Yes, it's definitely good to get a general overview of how things are probably going to go.

[Ari]: Yes. So Catherine, then just another logistical question, which is typically how long do hearings lasts? Is it a day, a couple of days, half a day? What are they normally scheduled for?

[Catherine]: So all our hearings are scheduled for two days at first. You'll see it's either Monday, Tuesday or Wednesday, Thursday. I say probably about half of them wrap up within those two days. And if additional days are needed, they'll be added at the end of the second day.

[Ari]: Got it. Helpful. So I did want to talk a little bit about how the parties prepare for the hearing, Catherine, and a little bit in more detail. So as you and I know as attorneys before a trial in court or a State Supreme Court, federal court, the parties have the opportunity to exchange documents and subpoena witnesses to testify at the trial. And a lot of times those witnesses have already been deposed in connection with the lawsuit. Is that the case before their hearing? Is there any type of pre-hearing discovery that's permitted?

[Catherine]: Sure. So the parties have an obligation to exchange relevant documents. What is relevant is ultimately going to be determined by the ALJ. So it's usually...I find best to have kind of an informal discussion between the division attorney and the respondent's attorney say, I need this or that. If there's issues, you can always request a conference with the ALJ and eventually at the hearing, if the party is refusing to provide an important document, the other side can ask for what's called an adverse inference at the hearing, meaning that they're asking the judge to assume that, you know, this party is not producing the document for a reason. That either shows that they engage in discrimination or if it's on the complainant's side, shows that the respondent did not engage in discrimination. So you kind of want to avoid an adverse inference, and provide the documents up front.

[Ari]: Makes sense. And what about requesting that certain witnesses be present? Because I think this really probably comes into play more, Catherine, for respondents and maybe the complainant wants to question some current employees at the hearing that weren't named in the charge and maybe even the respondent, you know, hadn't planned on calling as a witness. So how does that work? Is there an opportunity to...is it a formal subpoena or is it just a request basically to the respondent's side?

[Catherine]: Sure. So the rules of practice allow for subpoenas to be issued, either a document subpoena or a witness subpoena. Our ALJs generally will not be the ones enforcing the subpoena. So if it is violated at that time, the side asking for it would have to file in state court disregarding the subpoena. So it's a bit of a process, though. The informal way is usually a bit easier. But, you know, that is an option if things are getting contentious.

[Ari]: Right. That makes sense. And, as I think you mentioned a few minutes ago, I imagine those are also things that are discussed at the preliminary conference. If the parties have gotten that far, I guess, and depending the timing of everything, but it sounds to me like you were saying that the ALJ kind of tries to iron out some of these information-sharing issues prior to the hearing going forward.

[Catherine]: Yes. And most judges are open to having another conference between the preliminary conference and the hearing. If there's ongoing issues that need to be addressed.

[Ari]: Understood. So, Catherine, just I wanted to touch briefly on you mentioned the respondent's answer. If you could just talk a little bit in more detail or slight detail about what that is and what it should include and when it's due. Because I think there are some pretty specific requirements in terms of due dates, deadlines generally. But for this answer in particular.

[Catherine]: Sure. So I'm not a respondent's attorney. I hope I'm getting this right. But I'm pretty sure if you're at the preliminary conference or something like a week beforehand or something like that, when you're kind of getting everything together. And so the answer is basically an answer to the complaint that you should have received a copy of from the beginning. It should be written in, I guess, numbered sentences, so it's very clear. Sometimes the complaints are not written that way. But the judges still want the respondent to break everything down sentence by sentence and allegation by allegation. And so the respondent need to respond those individually either saying, you know, I admit this, I deny this, I don't know this. And then also, it's an opportunity to bring in any sort of affirmative defenses that the respondent may be bringing up at hearing.

[Ari]: Right. Understood. So, Catherine, you gave us a great overview of what the hearing process is. It's you know, I like to think of it as it's basically a trial or a mini trial, really. And the division goes first, puts on their case, then the respondents go, you mentioned the opportunity for rebuttal, and I don't think we'll get into too much detail into rules of evidence and things like that, because we're just trying to give our listeners a high-level overview. But we'll assume for purposes of our discussion that the hearing has concluded, each side has moved forward with their case. They've ironed out all of their issues in terms of witnesses, documents, things like that, and the hearing is concluded. Can you tell us what happens next?

[Catherine]: Sure. So after the hearing has concluded, the ALJ has the opportunity to either ask for a closing statement like oral closing statements or request a post-hearing brief basically from either side laying out what they think the facts are and the relevant law and how it should be applied in support of their case. And after that comes in the ALJ issues a recommended order. It's basically what the ALJ is suggesting that the commissioner finds in the case, and once that is issued, the parties again have an opportunity to submit any objections or comments on that order to the commissioner's office. After that, the commissioner issues a final order, and at that time, you know, all the parties are notified and it will either dismiss the case or find discrimination and include any appropriate remedies going forward.

[Ari]: Understood. And I did want to talk about...you anticipated my next question perfectly, which is let's assume that the commissioner...there's an order of the commissioner that has does not order that the complaint is dismissed, but there has been a finding of discrimination. What types of remedies or damages does the division have the authority to order in that case?

[Catherine]: Sure. So there's a variety—these are all in our statute. So the commissioner can first require that the respondent stop engaging in discriminatory actions, whatever it was. They can order that if it was an employee, that the employee either be reinstated or receive some sort of accommodation. If it was housing, they can require that the housing provider provide some accommodation, whether it's for a physical disability, allowing a service animal, something like that. The commissioner can also order that the respondent undergo training on anti-discrimination law, like we discussed, as part of the settlement process. And the commissioner can award damages to the complainant. So that can include, like we've talked about before, either lost wages and/or mental anguish. And at this level, the commissioner can also award fines and penalties on top of that. Usually when it's a finding of serious discrimination. So that's a little bit of a risk going to hearing as well for the respondent.

[Ari]: Right. And in terms of the damages that you mentioned, Catherine, one of the questions that we get a lot is whether punitive damages can be awarded, because, you know, that's, of course, an area of concern, right, for respondents, because punitive damages, as you and I know, as lawyers kind of kicks it up to another level and is meant to kind of deter certain conduct. So can you talk a little bit about that? Is that something that the division has the authority to order?

[Catherine]: Yes. So the division has the authority to order punitive damages, I think we call them civil fines and penalties. And those can be quite hefty. I think they can go up to \$50,000. And those are for serious cases of discrimination where the conduct was, I think, "willful, wanton, and malicious." So, you know that is a possible penalty that you could face if you go to a hearing.

[Ari]: Thanks for talking about that and elaborating on that. Obviously, that's worst-case scenario. And we hope that, you know, no respondent has engaged in that type of conduct that would justify that award, but wanted to point it out, because it is, I think, a consideration for the parties to consider in moving forward to the hearing.

[Catherine]: Mm-hmm. Absolutely.

[Ari]: So, Catherine, we're nearing the end of our time together. One of my last questions is the following: So the commissioner issues an order with respect to what happened at the hearing. Is that order appealable or is there any mechanism for the complainant or the respondent to appeal that order?

[Catherine]: So it is appealable. I believe within 60 days of the commissioner issuing a final order, either party has the opportunity to appeal it to the state court in the county where the discrimination occurred and so, yes, it is appealable.

[Ari]: Understood. And then I think usually it will go to the appellate division, which is New York state.

[Catherine]: And it will eventually end up with the appellate division.

[Ari]: Understood. Well, Catherine, thank you so much. I think this was a great overview of the public hearing itself. I think it's helpful for our listeners because it really just kind of gives you a roadmap if you are in the situation where you are moving forward with a public hearing, what to expect and kind of how it works. So before we sign off for today, is there anything else you think our listeners should know or anything that you want to share since it is our last segment with you?

[Catherine]: Sure. I think, you know, the minutia of the process can be a little bit distracting or frustrating for some people, which I definitely understand. And I always remind people to kind of try to look at the broader picture. New York State was the first state in the nation to have a nondiscrimination law, back...it was signed into law back in 1945. You know, this has made my favorite fun fact, I guess, is that as a result of this law, Jackie Robinson was able to play for the Brooklyn Dodgers as the first integrated baseball player. And, you know, since then the law has been updated to conform with all sorts of new types of discrimination that we're seeing protecting against, you know, sexual identity, expression, transgender rights. So the overall purpose and intent of the law is to preserve people's human rights, quite simply. So I, for one, am, you know, I feel very lucky that I live in New York State and, you know, I am able to help enforce this law.

[Ari]: Yes. Well, thank you. I think that's a great way to end our segment together, Catherine. Thank you so much for your time. I think this is invaluable information. And, you know, I know that it will provide our listeners with some very helpful context in the event that they unfortunately may be named in a complaint before the Division of Human Rights.

[Catherine]: Yes. Thank you. I am so glad that you had me on.

[Ari]: Yes. Thanks so much, Catherine. To our listeners, tune in for our next segment. A Barclay Damon partner, Mike Murphy, joins me. And we actually go through how to handle a discrimination lawsuit filed in state court. If you have employers in New York state, you definitely don't want to miss it. Lots of helpful information. We'll see you then.

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