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Elmer A. Carter

PRACTICAL CONSIDERATIONS OF ANTI-DISCRIMINATION LEGISLATION — EXPERIENCE UNDER THE NEW YORK LAW AGAINST DISCRIMINATION

*Elmer A. Carter**

> This article shall be known as the "Law Against Discrimination." It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights; and the legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is hereby created with power to eliminate and prevent discrimination in employment and in places of public accommodation, resort or amusement, because of race, creed, color or national origin, and to take other actions against discrimination because of race, creed, color or national origin as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.[1]

When the newly created Commission Against Discrimination entered upon its duties on July 1, 1945, the times may be said to have been propitious. The war in Europe had come to a victorious conclusion and the end of the war in Asia was in sight. More than at any other time in our history the people had been made aware of the terrible consequences which may well follow the exploitation of racial antipathy and religious bigotry.

Efforts during the war to overcome the manpower shortage in defense industries by the elimination of discrimination because of race and color, creed or national origin had met with considerable success on both the federal and the local levels as a result of the work of the Fair Employment Practice Committee created by executive order of the President[2] and the Committee on Discrimination in Employment, an agency established by the New York State War Council.[3] And at the hearings preceding the enactment of the anti-discrimination measure, the Ives-Quinn bill, there was indication that undoubtedly there was an increasing number of

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* See Contributors' Section, Masthead, p. 94, for biographical data.

1 N.Y. Exec. Law § 290.

2 Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) established the Committee on Fair Employment Practice within the Office of Production Management. Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943) substantially re-organized the Committee. Other relevant orders include: Exec. Order No. 8823, 6 Fed. Reg. 3577 (1941); Exec. Order No. 9664, 10 Fed. Reg. 15301 (1945); Exec. Order No. 9980, 13 Fed. Reg. 4311-4313 (1948); Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948).

3 See N.Y.S. Council of Defense, Report (1945).

citizens who had reached the conclusion that the time had come to take positive steps to end the contradiction between the practice of discrimination and the profession of democracy not only because discrimination was morally indefensible, but because in cases of danger it posed a threat to the national defense in that it deprived the nation of needed manpower. And, too, it must be remembered that the citizenry was still under the spell of patriotic emotion and the compelling urge of national unity.

It would be a mistake, however, to assume that there were no misgivings. The enactment of the law had been bitterly fought by powerful industrial and commercial interests. It had been opposed by a distinguished group of citizens, some of whom had been long identified with liberal causes, who honestly believed that such a measure would accentuate racial and religious antipathies; and there were outstanding members of the legal profession who expressed considerable doubt as to its constitutionality. Those who were acquainted with the recent history of discrimination in employment in America were not without apprehension as to the ultimate fate of this legislation, designed to end a practice almost universally accepted, when the excitement and compulsion of wartime economy was no longer present. Nevertheless, it can be said that the Commission began its work in an atmosphere of expectancy. Despite the fears which had been expressed by those who saw in this effort to end discrimination in employment a repetition of the fiasco which attended the prohibition amendment, underneath the anxiety of even the doubtful one could detect a measure of hope. The press of the state as a whole had been extremely encouraging, and there was no anticipation anywhere of serious resistance to the enforcement of the law.

Often overlooked, but of tremendous significance in the administration of the new statute, was the action taken by a number of individual employers voluntarily to abandon previous discriminatory hiring practices and to initiate in their plants a policy of employment without regard to race, creed, color or national origin. Not a few business concerns, some of which employ thousands of people, elected to move swiftly toward compliance without coercion. In some instances personnel departments of companies were carefully briefed on the new law and the intention of management to comply with it. They included public utilities, banks, and insurance companies. Among these was one of America's great life insurance companies which employed a Negro with exceptional experience in the field of human relations as one of its personnel officers to see to it that hitherto excluded groups would have a fair chance and would be

judged by the same standards applied to the dominant majority. Within an incredibly short time Negro men and women began to appear in the personnel of companies that never before had employed them. The example set by these companies undoubtedly had a salutary influence on many other companies engaged in the same field of business enterprise. The Law Against Discrimination gave to employers who perhaps had harbored a genuine desire to end discriminatory hiring practices a rationale which was unassailable. To their questioning or disapproving colleagues or to a resentful labor force they could say, this is the law. The extent of voluntary compliance upon passage of the law must remain conjectural, but there is little doubt that it was widespread throughout the state.

The Law Against Discrimination is not without sanctions.[4] But the success of its administration was deemed to depend not upon results obtained from the application of its punitive provisions, but rather upon the development of techniques of conference and persuasion and conciliation.[5] The conference and conciliation technique of the Commission was put to the test in the first month of its existence.

A few days before the opening of the Commission offices on July 1, 1945, a noisy picket line had patrolled the gates of the Yankee Stadium carrying placards demanding admission of Negro players to organized baseball. For a number of years there had been mounting agitation over the apparent denial of the opportunity for Negroes to participate in the great American sport. The agitation became intensified during the war years when this particular manifestation of racial prejudice in America's most popular sport proved to be an increasingly embarrassing commentary on our democratic pretensions.

A year and a half prior to the passage of the law, the Mayor of the City of New York, Fiorello H. LaGuardia, had appointed a committee of highly regarded citizens of both races to confer with the management of

[4] The penal clause of the law makes any wilful resistance or interference with the commission or any of its officers and any violation of the commission's orders a misdemeanor punishable by one year's imprisonment or a fine of not more than $500 or both. The commission may also issue cease and desist orders and orders for affirmative action. See note 11 infra.

[5] The law provides that "any person claiming to be aggrieved by an alleged unlawful practice" of any person, employer, labor organization or employment agency may file a written complaint with the commission. The chairman of the commission then assigns a member to investigate the complaint. If he finds that "probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion." Only when such efforts fail will the commission conduct a formal public hearing. N.Y. Exec. Law § 297. See p. 46 infra.

the three major league teams in the metropolitan area for the purpose of finding a means of ending discrimination against Negro players. After a series of conferences in which management of the three teams and the committee explored various methods of reducing the racial barriers, the negotiations reached an impasse. Before the formal opening of its offices, the Commission was deluged with letters demanding that something be done about this situation. The letters came from labor unions, civic and social organizations, government officials, high school and college teachers, and just plain citizens. Although there was no verified complaint filed in the Commission's offices by a Negro ball player who had made application for a tryout and been rejected, the Commission decided to initiate conferences with baseball management of the three major league teams in order to seek to bring their hiring practices into compliance with the law. At that time the Commission had not yet formulated rulings to implement the provisions of the statute nor had it adopted other than temporary rules of procedure. Whether the Commission should order a public hearing for the purpose of making the investigation of the alleged discrimination or submit the case to the Attorney General with a request that he file a complaint was a question which had been discussed but not resolved. The Commission was aware that it would be extremely difficult to establish proof of discrimination if the decision were to rest on the judgment of the comparative abilities of two ball players and, therefore, complete reliance of necessity was placed on the possibilities inherent in conference, conciliation and persuasion.

Separate conferences were held with the individual managers of the three major league clubs—the New York Yankees, the New York Giants and the Brooklyn Dodgers. Finally, in August 1945, a joint conference was held with the three managers: Mr. Branch Rickey of the Dodgers, Mr. Larry McPhail of the Yankees, and Mr. Horace Stoneham of the Giants, at the New York Athletic Club. At the individual and joint conferences the provisions of the law were outlined and emphasis was placed on the concern not only of the Commission but of citizens of all races, creeds and colors over the continued discrimination in the great American sport. In the discussions it was pointed out by the managements that of all the men in the United States playing baseball only 400 finally make the big leagues (the player limit being 25 men on each of 16 clubs), and they were of the opinion that there were comparatively few Negroes capable of making a major league team. It was suggested that if the best Negro players were to be drafted by major league clubs it would mean the destruction of Negro organized baseball in which

hundreds of thousands of dollars had been invested. On the question as to the nature and extent of opposition, all were in agreement that in the event a Negro player was signed there would be no serious opposition on the part of the other players, many of whom came from the South. Individually, representatives of each club gave assurance that they would not bar a Negro from tryouts and would afford a Negro aspirant a fair chance, pointing out that the Negro player would have to come up through the farm clubs of the major league teams the same as white players. But save for Mr. Rickey, there was no pledge of affirmative action. At the joint conference Mr. Rickey stated that he planned to engage a Negro for one of the farm teams of the Brooklyn chain, and in the early fall of that year he announced the signing of Jackie Robinson for the Montreal team. The writer is of the opinion that Mr. Rickey had long desired to give a Negro boy a chance. He was awaiting what he believed to be the proper time. He so stated several times during the individual conferences. The Law Against Discrimination established the proper time. It is not depreciative of Mr. Rickey's courage and vision to state that the New York Law Against Discrimination provided him with legal support for his moral conviction and lightened the heavy incubus of possible disapproval for his action. It would seem more than mere coincidence that the signing of the first Negro ball player in modern organized baseball occurred only after the intercession of the New York State Commission Against Discrimination.

Almost ten years have passed since the law was enacted. During this period 2,772 verified complaints alleging discrimination because of race, creed, color or national origin, in violation of the law, have been filed in the five Commission offices in the state. Probable cause to credit the specific allegation in the complaints has been found in 24 per cent of the closed cases and other discrimination in 21 per cent. In other words, some discrimination has been found in employment in 45 per cent of the cases that have come before the Commission. The statistical analysis of complaints filed supports the widely held opinion that the burden of discrimination falls most heavily on the Negro, discrimination because of race and color constituting 71 per cent of all complaints filed with the Commission Against Discrimination, discrimination because of religion—approximately 16 per cent, and other reasons, including nationality—13 per cent.

Discrimination in employment is rarely open and direct. No longer in the State of New York is an applicant rebuffed by the brutal, "We do not hire your people," or, "Negroes are not employed here," nor are sensibili-

ties affronted by advertisements reading, "Christians only" or "Catholics" or "Protestants"—whatever the case may be.

The law provides that:

> Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission.[6]

The Commission at the outset sought to impose certain controls over the hiring process. On the principle that the only information needed by an employer was that which would give him some insight or knowledge of the prospective employee's character, capacity and ability to perform a certain task, the Commission made certain rulings limiting pre-employment interrogations, whether oral or printed on employment application blanks.[7] The rulings are not immutable and in special cases, on a showing of bona fide occupational qualification, have been modified. On the whole, the rulings have met with little resistance. Warrant for these rulings is in Section 296(c) of the Law Against Discrimination:

> It shall be an unlawful discriminatory practice: . . . For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination, unless based upon a bona fide occupational qualification.[8]

In New York State under the rulings of the Commission an employer may not ask the race, the color, the religious creed or the national origin of a prospective employee, nor may he require a photograph, nor may he make any related inquiry (such as place of birth) the answer to which may reveal the applicant's religion, his national origin or his race. It was realized that the lack of this information by an employer would not in itself prevent discrimination. Experience indicates, however, that it may be a deterrent and unquestionably it gives the applicant, who because of his race or religious creed or national origin has suffered from discriminatory treatment, some assurance that he will be judged on his merits.

By virtue of the same section of the law, the Commission was moved

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[6] N.Y. Exec. Law § 297.

[7] See [1949] N.Y. Commission Against Discrimination, Report of Progress 42-45.

[8] N.Y. Exec. Law § 296.

to request the press of the state to refrain from carrying help wanted advertisements which specified the race, creed, color or national origin of the prospective employee, and also to refuse acceptance of situation wanted ads in which the applicant for employment volunteered this information. The press on the whole willingly acceded to this request. Rarely now does an advertisement appear in help wanted or situation wanted columns of the newspapers of New York which carry the inference of preference on the basis of race or creed or color or national origin.[9]

Section 297 of the law specifically sets forth the method and scope of administration of the law:

> After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors. In case of failure so to eliminate such practice, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor union or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before three members of the commission, sitting as the commission, at a time and place to be specified in such notice.[10]

The elements which may constitute probable cause to credit the allegation in the complaint cannot always be precisely defined. There are hundreds of possible variants which can occur in every situation. The circumstances sufficient to persuade the investigating commissioner to make such a finding in one case may not prove to be sufficiently determinative in another. The extent to which subjective judgment of personality traits is influenced by prejudice is often difficult to determine. The investigation of a complaint alleging refusal of employment because of race or color or religion or national origin will ordinarily comprehend at least an examination of the specifications for the job in terms of qualifications of the complainant, the comparative qualifications of the successful applicant or applicants and the rejected complainant, the time the vacancy occurred and was filled, the incidence, if any, of employment of

[9] Domestic employment, however, is not covered by the law. N.Y. Exec. Law § 292(6).
[10] N.Y. Exec. Law § 296.

members of the group to which the complainant belongs, and, finally, a careful examination of the respondent's prevailing employment pattern and the source and method of its recruitment of personnel.

In a specific complaint case it may not be possible to satisfy all the purely legal requisites of proof of discrimination after investigation, although certain indicia may strongly suggest a discriminatory hiring policy: there may be a history of employment marked by an absence of members of complainant's ethnic, national or religious group although they may be readily available in the community; the primary source of recruitment may be schools removed from the locale of the employment where there is an insignificant enrollment of the group to which the complainant belongs while schools nearer the employer's place of business with heavy enrollment of the group are ignored in the recruitment of personnel; or the personnel needs may be filled by so-called inbreeding, viz. the effort to fill all vacancies by offering inducements to the employed personnel to secure prospective employees, thus insuring the perpetuation of the existing pattern of employment; or there may be collective bargaining agreements limiting employment to membership in a union which may have historically excluded certain groups because of race and color; or the employer may utilize fee-charging or even non-fee-charging employment agencies which can be expected to govern their referrals by knowledge of his previous hiring policy. Utilization of these methods of recruitment in themselves may not constitute a discriminatory hiring policy, but frequently they do. Therefore, the methods and sources of recruitment are carefully examined by the investigating commissioner. It is a matter of record that in many cases where the terms of conciliation have required an abandonment or modification of the methods of recruitment cited above, subsequent examination of the employment pattern has disclosed the presence of individuals of those groups hitherto conspicuously missing from the employed personnel.

In cases involving alleged refusal of employment or dismissal from employment in violation of the law, the investigating commissioner, on a finding of probable cause to credit the allegation of the complaint, may submit terms of conciliation which require the employment of the complainant—with or without back pay—or employment of the complainant on the occasion of the first vacancy, depending on the rate of turnover, or compensation for loss of earnings occasioned by the discriminatory act.[11] Of necessity the terms will be dependent upon conditions in the

[11] Authority for the submission of these terms for conciliation is to be found in N.Y. Exec. Law § 297 which authorizes the commission after a formal hearing to issue an order:

respondent's business or the nature of the industry. Very often the complainant will refuse employment even when it is offered as one of the terms of conciliation. "I would not work there anyhow; I know I wouldn't have a chance," is not infrequently the answer of a complainant to a job offer. To the Commission compensation for loss of earnings by reason of discrimination is not the ideal adjustment of a complaint, but it may be the most feasible adjustment under certain circumstances where the possibility of immediate employment for one reason or another is remote.

The question of whether the investigating commissioner, on a finding of probable cause, should require the immediate employment of a complainant even if it compels the dismissal of the person who was hired to fill the vacancy or insist on the creation of a new job that he might fill has been the subject of considerable discussion in all the states having anti-discrimination laws.[12] It has been urged that the immediate employment of the aggrieved person is the only adequate restoration of a civil right, and that the necessary personnel adjustment is the concern of the respondent. The New York Commission has not adopted this course, perhaps in deference to what it conceives to be the greater good, viz. the permanent leveling of barriers with the cooperation where possible of the employer or labor union respondent which is rarely achieved in an atmosphere fraught with bitterness and resentment, a condition which might well follow the abrupt dismissal of a person who in no way was responsible for the discrimination.

A case illustrative of such a situation involves a Negro complainant who was hired as a second mate on a ship, owned and operated by a steamship company engaged in trans-Atlantic trade. Complainant made one voyage as a second mate and when the ship returned to the United States complainant was advised that he was dismissed. Complainant had been to sea since he was a boy of thirteen. After having been in attendance and satisfactorily completing courses in the merchant marine officers school, he had successively satisfied the requirements for rating

requiring . . . respondent to cease and desist from . . . [an] unlawful employment practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this article.

12 Other state anti-discrimination laws include: Conn. Gen. Stat. § 7400 et seq. (1949); Ind. Stat. Ann. § 40-2301 (Burns Supp. 1953); Mass. Ann. Laws c. 151B, § 1 (Supp. 1953); N.J. Stat. Ann. § 18:25-1 (Supp. 1953). N.M. Stat. Ann. § 57-1201 (Supp. 1951); Ore. Laws, 1949, c. 221; R.I. Laws, 1949, c. 2181; Wash. Rev. Code § 49.60 (1951); Wisc. Stat. § 111.31 (1953). See also, Graves, Fair Employment Practice Legislation in the United States, Federal-State-Municipal (1951).

of third mate, second mate and chief mate. Complainant filed a complaint after he had sought restoration by the company without success. The investigation revealed that the master of the vessel had submitted to the management a derogatory report of complainant's abilities and performance on the voyage which led to his discharge. This report differed materially from the report which the master had submitted to the Coast Guard in which he had given the complainant an altogether different rating. Since the master's appraisal involved technical competence, the investigating commissioner availed himself of the services of a maritime expert to assist in judging the complainant's capabilities. This expert not only examined the complainant personally as to his theoretical knowledge, but made a thorough analysis of the ship's log and the record of the voyage maintained by the complainant.

A finding of probable cause was made by the investigating commissioner to credit the allegation in the complaint that the complainant was dismissed from his employment because of his race and color, in violation of the Law Against Discrimination. Respondent accepted the terms of conciliation which included: payment to the complainant of a sum of $4,000 as compensation for loss of earnings the same being determined by the rate of pay for a second mate and the probable earnings he would have had on the voyage, the "reasonable expectation of successive voyages as second mate provided there had been no discharge;" assurance that the respondent company would hire without regard to race, creed, color or national origin in all categories and further assurance that the master's reports of complainant's competency would not be used to impair his value in the labor market; and the pledge to inform its personnel on land and sea of its intention to comply with the law.

The conditions which prevailed in the maritime industry at the time made it extremely unlikely that a vacany for second mate would develop within a predictable time since there had been a decline in maritime activity.

The investigating commissioner was convinced that a subordinate elected to disregard the employment policy adopted by his superiors who had ordered the complainant hired. This is not an uncommon occurrence. Frequently the top echelons of management, not particularly concerned with the race, creed, color or national origin of the personnel, especially in industrial operations, issue pronouncements of unbiased hiring policy which in the absence of positive implementation are flouted by personnel charged with the responsibility of hiring.

Where the discrimination appears to originate in the method and

sources of recruitment, the investigating commissioner may require, as a basis of conciliation, modification and sometimes abandonment of the recruiting methods in use. He may request the use of additional employment agencies such as the New York State Employment Service or the employment agencies of social work organizations which will afford the employer the opportunity of examining and interviewing applicants of various races, creeds and nationalities. He may require the suspension for a year or more of the "inbreeding" method of recruitment. He may ask that other schools be added to those habitually used by the employer if he is convinced that the schools used unwittingly have become a factor in perpetuating discriminatory hiring. The pattern of employment of a large financial institution which disclaimed discriminatory hiring practices seemed to indicate resistance to the employment of Negroes and Jews. Examination of the sources of recruitment utilized by the institution revealed that high schools in northern New Jersey, certain areas in Long Island and Westchester County were utilized to recruit personnel while high schools in the boroughs of Manhattan, Brooklyn and the Bronx, where there was heavy enrollment of Negroes and Jews, were disregarded. When these high schools were added to the list of schools from which employees were sought, an increase in the number of Negroes and Jews in the personnel was noted immediately.

There is, undoubtedly, a tendency to rest a finding of probable cause to credit the allegation of the complaint only if there exists such evidence as would sustain the allegation in a public hearing. This probably accounts for the low percentage of cases in which probable cause has been found in the several states. The Commission has been criticized and charged with excessive caution and timidity. The nature of the problem as well as the law has determined the approach to its solution. Discrimination is pandemic in the United States. The only hope for its permanent elimination lies in the extent to which voluntary compliance with the provisions of the law can be achieved. It is recognized that effective policing of the employment practices of thousands of employers would be an enormous undertaking and well nigh impossible. Always, therefore, the Commission has sought to attain the goals of the law in a spirit of cooperation. And even where there is finding of no probable cause to credit the allegation in a specific complaint, continuous effort is made to persuade the employer or the labor union or the employment agency charged with discrimination to take affirmative action to prevent its occurrence. Results flowing from this approach have established its justification.

Two young women, answering an advertisement which appeared in the daily press, applied for jobs as clerks at the offices of one of the great international banking and travel agencies. Both were rejected and both filed verified complaints at the office of the Commission in which they charged that they had been refused employment because of their race and color, in violation of the Law Against Discrimination. The investigation of the complaints revealed that neither of the young women met the specifications; both were over the maximum age limit which the employer had established for beginning employees in the clerk category for which they applied. The specific complaints were thereupon dismissed on a finding of no probable cause to credit the allegation since it could not be found that any person had been employed who did not satisfy the age requirement. It was ascertained during the course of the investigation that out of a total of upwards of 1,000 clerks there was not a single Negro girl employed as a clerk or in any other category of employment and there was reason to believe that no Negro girl had ever been employed in a clerical capacity by this company. The investigating commissioner informed the representatives of the agency that there appeared to be resistance to the employment of Negro girls even though the finding of no probable cause had been made in the verified complaints. The respondent's representatives protested that there was no inclination on their part to evade the law and willingly accepted the recommendations submitted by the investigating commissioner which were designed to prevent discrimination. Department heads were advised of the intention of management to hire without discrimination; Commission posters which set forth the law's provisions were hung in personnel offices; fee-charging employment agencies utilized by the respondent were advised that no other consideration save competency should govern referrals to it. Six months after the closing of the case, in accordance with the Commission's practice, a review was made of the hiring policy and employment pattern of the respondent. At that time six Negro girls were found in clerical positions. Three years later, the number had increased to 100 and several were being considered for promotion to permanent supervisory posts.

The responsibility for the continuance of discrimination on the basis of race and color and sometimes creed and nationality, but particularly race and color, must be shared by organized labor. For a part of the Negro's struggle for economic equality and survival has been of necessity directed against racial and color barriers erected by labor organizations. One of the early acts of the Commission was to seek the removal of exclusive clauses from the constitutions and by-laws of the great railroad

brotherhoods which limited membership to white males only. By 1947, two years after the law became effective, at the Commission's insistence, these clauses were either removed or made inoperative in the State of New York, and later in all states having laws against discrimination, by the following labor organizations: Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railroad Telegraphers, Brotherhood of Railroad Trainmen, Brotherhood of Railway Carmen of America, the Order of Railway Conductors of America, Brotherhood of Maintenance of Way Employees, Railroad Yardmasters of North America, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station employees, and the Switchmen's Union of North America.

The first Negro ever admitted to membership in the railroad brotherhoods was taken into the Brotherhood of Railroad Trainmen as a result of Commission action following a complaint filed by a Negro steward on a dining car of the Boston and Albany Railroad. At that time the Brotherhood of Railroad Trainmen had jurisdiction over the stewards on this railroad. The efforts of this steward to join the brotherhood met with repeated failure and he filed a verified complaint against the J. F. McGrath Lodge of the Brotherhood of Railroad Trainmen in which he charged that he had been refused admission to that organization because of his race and color. The complaint originated in Massachusetts and jurisdiction being adjudged lacking by the Massachusetts Commission Against Discrimination, the verified complaint was then filed in the Albany office of the New York State Commission. The respondent labor union contended that the complainant was not rejected because of his race and color. The respondent declared that the application of the complainant was referred to the membership committee which approved it; that the recommendation of the membership committee, in accordance with provisions of the by-laws, had been submitted to the full membership; and despite the recommendation of the membership committee, the full membership had rejected him, the number of black balls required for rejection having been cast against complainant's admission. The investigating commissioner was of the opinion that the black balls against the complainant were inspired by the historic policy of exclusion of Negroes, and, on his recommendation, the complainant re-applied for membership after a lapse of six months. He was again rejected. The respondent union on this occasion pointed out to the investigating commissioner in conference that several white applicants whose names were submitted by the membership committee for membership had been re-

jected at the same time and in the same manner at the same meeting at which the complainant was rejected. Four times the complainant made application for membership after the lapse of the required interval and four times his application was rejected by the vote of the full membership. To the investigating commissioner it appeared that the discriminatory exclusion of Negroes from the brotherhood which the Law Against Discrimination forbade was now being achieved by the vote of the membership.

For that reason for month after month conferences were continued by the investigating commissioner with the officers of the J. F. McGrath Lodge of the Brotherhood of Railroad Trainmen. It was the fate of the complainant that he never was received into membership by the J. F. McGrath Lodge. However, before the complaint was finally resolved, a new bargaining agent for the stewards on that railroad (The American Railway Supervisors Association, Inc.) was designated by the National Mediation Board and the complainant became a member of that organization. He probably deserved the distinction of having been the first of his race to break the color line in the railroad brotherhoods. His problem was solved. But the problem of the exclusion of Negroes from membership in the brotherhood was not solved and to this end the investigating commissioner directed his efforts in successive conferences knowing that it would not be easy for the organization to break with tradition and the national exclusive policy which had remained unchanged during the seventy years of its existence. Finally the break came. At one of the conferences, officials of the brotherhood informed the investigating commissioner that a Negro steward on the Pennsylvania Railroad had been elected to membership in the J. F. McGrath Lodge of the Brotherhood of Railroad Trainmen. Within two years all the Negro stewards on the Pennsylvania Railroad eligible for membership had been admitted to the appropriate lodge of the Brotherhood of Railroad Trainmen.

Between the filing of the complaint and its final disposition there elapsed a period of three years. To the superficial observer this may seem to be an unconscionable delay in processing what appears on the surface to be a simple case of discrimination. But not to the individual acquainted with the bitter conflict that has been waged between the Negro railroad employees and the brotherhoods for over a half a century. Nor to those acquainted with the heartbreaking but futile efforts of the Fair Employment Practice Committee during World War II to budge from their historic position of racial exclusion the railroad brotherhoods, the representatives of which sat in defiant silence at the hearing ordered

by the FEPC to probe charges of discrimination.[13] Nor to those who can recall that the special committee composed of distinguished citizens (the Stacy Committee), appointed by President Franklin D. Roosevelt as his personal representatives to investigate the conditions of discrimination on the railroads, recoiled from the implications of their findings and never even rendered an official report.

Another phase of the same problem emerged by virtue of complaints filed by three Negroes against the Pennsylvania Railroad. The complainants charged that they had been refused employment as brakemen on the Pennsylvania Railroad because of their race and color, in violation of the Law Against Discrimination. The aspect of discrimination in the operating divisions of railroads in New York State had been the subject of Commission study for a number of years. Railroads in the state, and generally in the North, present a pattern of stratified employment on the basis of race. Negroes are employed, but segregated employment of the Negro appears to be the rule. They are employed in mail and baggage rooms, dining cars, store rooms, commissaries, as red caps, station porters —but rarely, if ever, as brakemen, trainmen, firemen, telegraph operators, switchmen or flagmen.

It is generally believed, and this belief has been supported by studies of labor economists, that the operating categories on railroads in this state (and most Northern states) to all intents and purposes have been practically closed to Negroes.[14] Until the passage of the Law Against Discrimination the probabilities are that very few Negroes applied for jobs other than those in non-operative departments because they had the conviction that it would be of no avail.

Hiring in the open labor market for jobs in the operating categories could not take place as long as there was in existence rosters of furloughed employees who had job priority in the event of vacancies. When the three Negroes applied for jobs the roster of furloughed employees in the brakeman category had been exhausted. After investigation, probable cause was found to credit the allegation in the complaints. The terms of conciliation submitted by the investigating commissioner required the employment of the three complainants as brakemen. The respondent railroad accepted these terms of conciliation with some apprehension as to the reception which the Negro brakemen would receive from their fellow employees on the job. Because the apprehension had historical

[13] See Malcolm Ross, All Manner of Men 118-141 (1948).

[14] Summers, "The Right to Join a Union," 47 Col. L. Rev. 33, 34 (1947); Northrup, Organized Labor and the Negro 49 (1944).

basis, the investigating commissioner decided to hold a conference of representatives of the three largest railroads in the State of New York and representatives of the brotherhoods, in order to reaffirm and emphasize the intention of the Commission to end discrimination in employment, including railroad employment, and to secure the assurance of a fair chance to the three complainants when they were assigned to jobs.

Participants in the conference were representatives of the Pennsylvania Railroad, the New York Central Railroad, the New York, New Haven & Hartford Railroad, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and the Order of Railway Conductors of America. Each conferee pledged that no obstacle would be placed in the way of Negro employees and that they would be treated the same as all other employees. The pledge has been kept. Only one of the complainants accepted the proffered job as brakeman. He is still employed. His fellow employees have treated him with respect. His employment and his subsequent admission to a brotherhood lodge with jurisdiction over an operating craft was without incident even as it was without precedent.

Present in almost every conference of conciliation is the stereotype of the Negro, the Jew or the descendant of foreign born, dependent upon the group to which the complainant belongs. It is astonishing and sometimes disconcerting to discover how stubbornly highly intelligent men cling to the stereotype, how glibly they repeat half truths long since discredited by social scientist, sociologist-psychologist, and last but surely not least, by contemporary history. "I have no prejudice against Negroes. We have always had Negro maids; but selling, I never thought of a Negro." "You know those people from Latin America are so excitable that they can't stand the noise of a foundry." "Jewish people are not interested in jobs where the starting salary is low and promotion slow as in banks." Part of the task of the investigating commissioner is to banish or exorcise the stereotype, to persuade the respondent charged with discrimination that the doctrine of equality of opportunity is not a dangerous social theory on the one hand, and that, on the other, his apprehensions of the possible consequences of putting it into practice are baseless. Where it has been tried, management in the overwhelming majority of cases has been astonished at the ease with which new workers of different race, religion or nationality have been integrated into the work force. Very often hostile attitudes ascribed to employees are the reflection of the employer's own fears. The suggestion that special lockers should be provided for the young Negro women who were to be hired for

the first time was submitted by the management of a large insurance company to the female personnel and their immediate supervisors, and to its amazement these young women rejected the suggestion saying if colored girls were to be hired they should be assigned lockers the same as all other girls. Literally in thousands of cases where the introduction of a member of a hitherto excluded group into the employed persomiel has taken place nothing untoward has happened. In the very few cases where projected abandonment of discriminatory hiring has provoked resistance it has proved largely ephemeral.

The success of the New York Commission with the conciliation, conference and persuasion technique has led to the belief in some quarters that these conferences present no real difficulties, that they are a sort of amiable tête-à-tête between the respondent and the investigating commissioner. In fact they are not. Sometimes they are prolonged and always present a test of patience; the investigating commissioner is not only engaged in adjusting a single complaint, he is engaged in the effort to change an attitude, a habit of mind and action. Unless he can achieve this, the permanence of the adjustment of the complaint itself may be gravely doubted. What the investigating commissioner seeks is complete compliance in spirit and in truth, the fair adjustment of the specific complaint, the assurance to the extent that it is possible by affirmative action of a policy of non-discrimination in the future.

In 1952 the law was amended to extend the jurisdiction of the Commission to cover discrimination in places of public accommodation in the belief that the technique of conciliation and persuasion might obtain results in this field similar to those obtained in the field of employment.

An important part of the work of the Commission is educational.[15] Every modern method has been utilized to acquaint the citizens with the law and the manner of its administration, and the threat which discrimination poses to national unity. By radio, by television, by kinescope, by means of the pamphlet, the brochure, the car card, and by conferences and workshops in human relations this phase of the Commission's administration of the law is being carried out. In addition, and pursuant to the statute, community councils composed of outstanding citizens have

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[15] The commission shall have the following functions, powers and duties:
. . .
8. To create such advisory agencies and conciliation councils, local, regional or statewide as in its judgment will aid in effectuating the purposes of this article. . . .
9. To issue such publications and such results of investigations and research as in its judgment will tend to promote good-will and minimize or eliminate discrimination because of race, creed, color or national origin.
N.Y. Exec. Law. § 295.

been organized throughout the state to further the development of harmonious relations between various racial, religious and national groups in the communities. In areas of human relationship in which the Commission has no enforcement jurisdiction these councils have exerted tremendous influence in the elimination of discrimination; and even in areas where the Commission has jurisdiction, such as employment and places of public accommodation, resort and amusement, they have succeeded in innumerable instances in developing sensitivity to the law and the initiation of constructive programs to insure compliance. It was felt in Binghamton that Negro children dropped out of school early because they felt it was of no use to continue. There were no jobs for them requiring special skills and training. The employment committee of the Broome County Council, composed of representatives of the larger industries of that area, voluntarily published an advertisement in the daily press of Binghamton in which they invited all employers to join them in a pledge of compliance with the law. As a result of the advertisement employers of over 83 per cent of the employed workers in the Broome County area signed the pledge. The council, armed with this positive assurance of the employment committee, arranged a conference with vocational guidance counselors and leaders of the various racial, religious and national groups in order that the youth of these groups which had suffered discrimination might be encouraged to continue their studies, acquire skills and prepare themselves for new opportunities.

Nothing now remains of the arguments so fervidly advanced against the passage of the anti-discrimination law. None of the awesome prophecies of its opponents has been fulfilled. There has been no exodus of business, no acceleration of racial and religious antipathies, no usurpation of the prerogative of hiring and firing. But there has been change, enormous change, in the opportunities afforded men and women who prior to 1945 were denied equality of opportunity to earn a living because of their race or creed or color or national origin. This has been particularly true of the Negro, who suffers most from discrimination and whose change of occupational status has been little less than spectacular. Doors have been opened which appeared to have been forever closed in almost every category of employment. And they are responding by the acquisition of new skills, by the generation of new ambitions and hopes.

Much remains to be done. Many problems of administration remain to be solved. The Commission is aware that it must address itself to situations and conditions which so far have not yielded to the accepted and approved approach. There are areas of industry in which little visible

change has occurred. Apprenticeship training in skilled trades from which Negroes have been traditionally excluded presents a cruel paradox by virtue of the fact that the individual seeking training must already be employed in the given industry in order to be eligible to apply for apprenticeship training in the skilled crafts of the industry.

The rule of seniority has worked to perpetuate existing discrimination in industries where a color bar has been maintained prior to the passage of the law. It is not that change does not occur but that it is apt to occur so slowly as not to be readily observable. Acceleration of change depends to a great extent upon the vigor with which the Negro and other groups pursue their rights and seek the redress provided by the law when they are denied.

It has been demonstrated that far-reaching change can be effected by the process of conference, conciliation and persuasion supported by sanctions. During the nine years of the Commission's existence, complaints charging discrimination have gone to public hearing only four times, which means that the terms of conciliation have been accepted by the respondents in all of the other complaint cases where probable cause was found to exist. There has been no serious challenge to the constitutionality of the law; and although the question of the Commission's jurisdiction over carriers engaged in interstate commerce and steamship companies engaged in maritime trade has been raised, it has not yet been pressed.

There no longer need be speculation as to whether discrimination in employment and in places of public accommodation because of race, creed, color or national origin can be eliminated and prevented through legislation. In answer to a query from Father Jerome L. Toner of the Commission Against Discrimination of the State of Washington, an important official of the Chase National Bank of New York wrote as follows:

> Our experience under this legislation has been favorable. For many years we have had colored employees, mainly in such positions as messengers and mail clerks. However, since 1945 we have employed a number of colored applicants who were assigned to operating departments, such as Note Tellers, Unit Tellers, Money Transfer, Dividend Audit, Foreign Department, Trust Department, Branches and Library.
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> The two unit tellers in our Branches have proved to be very satisfactory and a great many of our customers have been very complimentary about their services. . . .
>
> Several of these employees have been promoted to positions of a higher grade based on merit.

> As the Commission will not permit segregation, these employees use the same lounges, washrooms and dining room facilities as our other employees without evidence of friction.
>
> You will appreciate that our general standards for all employees are high, and the types are naturally accepted by our employees without unfavorable reaction. . . .

The nine year experience of New York State in the administration of the Law Against Discrimination demonstrates that age old habits and customs can be changed and that long accepted racial and religious and national barriers which limit the opportunities of some of our citizens to earn a living can be leveled. In the records of the Commission are the answers to all the doubts and all the fears that plagued those who could not conceive of the successful administration of such a law. They are calculated to restore faith in the dynamic of democracy, its tremendous capacity to evolve new concepts and to inspire men and women to live at their highest level. If there is not reason for exultation, there is reason for confidence and assurance that the ideal of equality of opportunity can be achieved in our country.