

LEGISLATIVE COMMITTEE MINUTES

SB296

Bill as
Introduced

SB 296 - AS INTRODUCED

2022 SESSION

22-2931

08/05

SENATE BILL **296**

AN ACT relative to complaint procedures in cases before the commission for human rights.

SPONSORS: Sen. French, Dist 7; Sen. Hennessey, Dist 1; Sen. Avard, Dist 12; Sen. Soucy, Dist 18; Sen. Bradley, Dist 3; Sen. Whitley, Dist 15; Sen. Kahn, Dist 10

COMMITTEE: Judiciary

ANALYSIS

This bill provides that only the complainant can remove a case from the state commission for human rights to court.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struck through.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT relative to complaint procedures in cases before the commission for human rights.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 State Commission for Human Rights; Complaint Procedures; Choice of Forum. Amend RSA
2 354-A:21-a, I-II to read as follows:

3 I. ~~[Any party]~~ **A complainant** alleging to be aggrieved by any practice made unlawful
4 under this chapter may, at the expiration of 180 days after the timely filing of a complaint with the
5 commission, or sooner if the commission assents in writing, but not later than 3 years after the
6 alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both, in the
7 superior court for the county in which the alleged unlawful practice occurred or in the county of
8 residence of ~~[the]~~ **either** party. ~~[Any party alleged to have committed any practice made unlawful~~
9 ~~under this chapter may, in any case in which a determination of probable cause has been made by~~
10 ~~the investigating commissioner, remove said complaint to superior court for trial.]~~ A court in cases
11 so removed may award all damages and relief which could have been awarded by the commission,
12 except that in lieu of an administrative fine, enhanced compensatory damages may be awarded when
13 the court finds the respondent's discriminatory conduct to have been taken with willful or reckless
14 disregard of the ~~[charging party's]~~ **complainant's** rights under this chapter. A superior court trial
15 shall not be available to ~~[any party]~~ **the complainant** if a hearing before the commission has begun
16 or has concluded pursuant to RSA 354-A:21, II(b), or to a complainant whose charge has been
17 dismissed as lacking in probable cause who has not prevailed on an appeal to superior court
18 pursuant to RSA 354-A:21, II(a). In superior court, either party is entitled to a trial by jury on any
19 issue of fact in an action for damages regardless of whether the ~~[complaining party]~~ **complainant**
20 seeks affirmative relief.

21 II. The ~~[charging party]~~ **complainant** shall notify the commission of the filing of any
22 superior court action~~], and the respondent shall notify the commission of the removal to superior~~
23 ~~court after a finding of probable cause].~~ After such notice, the commission shall dismiss the
24 complaint without prejudice. A ~~[party]~~ **complainant** electing to file a civil action with the superior
25 court under paragraph I shall be barred from bringing any subsequent complaint before the
26 commission based upon the same alleged unlawful discriminatory practice.

27 2 State Commission for Human Rights; Complaint Procedures. Amend RSA 354-A:21, II(a) to
28 read as follows:

29 II.(a) After the filing of any complaint, one of the commissioners designated by the chair
30 shall make, with the assistance of the commission's staff, prompt investigation in connection
31 therewith; during the course of the investigation, the commission shall encourage the parties to

1 resolve their differences through settlement negotiations; and if such commissioner shall determine
2 after such investigation that probable cause exists for crediting the allegations of the complaint, the
3 commissioner shall immediately endeavor to eliminate the unlawful discriminatory practice
4 complained of by conference, conciliation and persuasion. The members of the commission and its
5 staff shall not disclose what has occurred in the course of such endeavors, provided that the
6 commission may publish the facts in the case of any complaint which has been dismissed, and the
7 terms of conciliation when the complaint has been so disposed of. When the investigating
8 commissioner finds no probable cause to credit the allegations in the complaint, the complaint shall
9 be dismissed, subject to a right of appeal to superior court. To prevail on appeal, the moving party
10 shall establish that the commission decision is unlawful or unreasonable by a clear preponderance of
11 the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld
12 as long as the record contains credible evidence to support them. If it reverses the finding of the
13 investigating commissioner, the superior court shall remand the case for further proceedings in
14 accordance with RSA 354-A:21, II, unless the complainant [~~or respondent~~] elects to proceed with a
15 hearing in superior court pursuant to RSA 354-A:21-a.

16 3 Judicial Review and Enforcement; Complainant. Amend RSA 354-A:22, II to read as follows:

17 II. Such proceeding shall be initiated by the filing of a petition in such court, together with a
18 written transcript of the record upon the hearing before the commission in the case of a petition for
19 judicial review, and issuance and service of a summons as in proceedings in equity. The court shall
20 have power to grant such temporary relief or restraining order as it deems just and proper, and to
21 make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order
22 or decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the
23 order of the commission, with full power to issue injunctions against any respondent and to punish
24 for contempt of court. No objection that has not been urged before the commission shall be
25 considered by the court, unless the failure or neglect to urge such objection shall be excused because
26 of extraordinary circumstances. In petitions to enforce commission orders, the court may, in its
27 discretion, award the [~~complainant~~] **complainant** reasonable attorney's fees and costs.

28 4 Effective Date. This act shall take effect 60 days after its passage.

Committee Minutes

SENATE CALENDAR NOTICE

Judiciary

Sen Sharon Carson, Chair
 Sen Bill Gannon, Vice Chair
 Sen Harold French, Member
 Sen Rebecca Whitley, Member
 Sen Jay Kahn, Member

Date: January 6, 2022

HEARINGS

	Tuesday	01/18/2022
	(Day)	(Date)
Judiciary	State House 100	1:00 p.m.
(Name of Committee)	(Place)	(Time)
1:00 p.m. SB 300-FN	relative to the state commission for human rights.	
1:20 p.m. SB 296	relative to complaint procedures in cases before the commission for human rights.	
2:00 p.m. SB 393-FN	relative to the use of restraints on pregnant women in the custody of a state or county correctional facility.	
2:15 p.m. SB 431-FN	relative to child support in cases with equal or approximately equal parenting schedules.	
2:30 p.m. SB 294-FN	relative to the release of a defendant pending trial.	

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

SB 300-FN

Sen. Avard	Sen. Giuda	Rep. Ammon	Rep. Homola
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Rep. Hill

SB 296

Sen. French	Sen. Hennessey	Sen. Avard	Sen. Soucy
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Sen. Bradley

SB 393-FN

Sen. Whitley	Sen. Watters	Sen. Rosenwald	Sen. Hennessey
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Sen. Kahn

Rep. Wazir

SB 431-FN

Sen. Carson	Sen. Whitley	Sen. Gannon	Rep. Rice
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Rep. Gordon

SB 294-FN

Sen. Bradley	Sen. Hennessey	Sen. Ricciardi	Sen. Carson
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Rep. Deshaies

Jennifer Horgan 271-7875

Sharon M Carson
Chairman

Senate Judiciary Committee
Jennifer Horgan 271-7875

SB 296, relative to complaint procedures in cases before the commission for human rights.

Hearing Date: January 18, 2022

Time Opened: 1:43 p.m.

Time Closed: 2:09 p.m.

Members of the Committee Present: Senators Carson, Gannon, French, Whitley and Kahn

Members of the Committee Absent : None

Bill Analysis: This bill provides that only the complainant can remove a case from the state commission for human rights to court.

Sponsors:

Sen. French

Sen. Hennessey

Sen. Avard

Sen. Soucy

Sen. Bradley

Sen. Whitley

Sen. Kahn

Who supports the bill: Senator French; Senator Hennessey; Senator Avard; Senator Bradley; Senator Soucy; Jeff Dickinson, Granite State Independent Living; Pamela Keilig, NHCADSV; Carole Petruszewicz;; Claire Ketteler; Marissa Chase, NHAJ; Megan Douglass; Samantha Heuring;

Who opposes the bill: Penny Culliton; Stacie DeJoie

Who is neutral on the bill: Executive Director Ahni Malachi, HRC

Summary of testimony presented in support:

Senator French

- This bill is the same as SB509 from 2020.
- This is about fairness
- The bill amends RSA 354-A so that the complainant is the only one that can move a discrimination claim to court from the Human Rights Commission (HRC).
- Under current law, one's employer can force an employee to court after a finding of probable cause of discrimination has been made by the HRC.
- This makes the employee have to start the process over again from scratch.

- The employee is the only one that should be able to decide where to pursue their claim.
- Senator Kahn asked what happened to SB509.
 - Senator Carson read from the bill docket that the bill was heard in 2020, it was then vacated from the Committee and indefinitely tabled.

Megan Douglass (provided written testimony)

- She has been a practicing employment law attorney for about 12 years.
- She provided an analogy of imagining playing a fairly complicated board game where a player gets near to the end of the game board and the other player flips the board. The other player then declares they want to play an even more complicated game.
- What then happens to too many pro se claimants, is that they give up, even though they have probable cause to suggest that they have a good discrimination/retaliation claim.
- She used an example of a claimant, called Jason, who is religious and dresses consistent with his religious beliefs. Jason is harassed by his co-workers and reports it to his supervisor. The supervisor, rather than correcting the harassment, is irritated by the complaint and puts Jason down by giving him a humiliating job task.
- Jason does not have wage loss because he is still employed, so he can't use that to try and get an attorney. All Jason has is the emotional harm, the offense, and the intolerable workplace. So, Jason goes to the HRC and the HRC goes through their process which can take several years. The HRC investigator at the end of this decides if a reasonable fact finder on the HRC could determine Jason was discriminated against or retaliated against.
- If the investigator decides 'no' Jason is done under state law, and the only thing he could do is appeal to superior court, which is arduous and rarely attempted.
- If the investigator decides 'yes', at that point Jason should have the option to go to mediation, and have a hearing before the HRC if the mediation fails.
- What is happening all too often for pro se claimants is that employers are taking the case immediately to court.
- That starts another two-year process for Jason, and often Jason gives up.
- Senator Gannon raised the concern that this is preventing the employer from curing the problem that exists at a mid-stage if they realize they were in the wrong.
 - It would be wonderful if the employer would concede to the problems. Typically, that happens at conciliation at the HRC after the probable cause finding. She suspects that employers are using the knowledge that the employee must start all over again unsupported at superior court. They are just threatening to take the plaintiff to court and be done.
- Senator Kahn asked if currently, the employee is able take the findings from the HRC and use those findings in whatever case proceeds.

- No. When the litigation starts over again in court, the matter of discrimination retaliation is de novo. This means the question of whether discrimination or retaliation occurred is in the purview of the judge. Overcoming the summary judgement hurdle remains with the jury in superior court
- Senator Kahn asked if an employer could have counseled the supervisor that caused the initial complaint such that no further violation occurs between the HRC hearing and the courts hearing, then the claimant would be trying to address something in the past.
 - If someone files a charge with the HRC what he would be asking for by way of relief is for the HRC to intervene to stop the harassment and order compensation from the employer for the emotional harm that he experienced until they took the appropriate steps to fix it. That loss would still be there and he would be entitled to remediation even if the employer had resolved the issue. At times the employers recognize they have a problem and want to offer some monies to correct the emotional hurt, and they promise going to fix it moving forward. In her experience the HRC is where things like that happen.

Samantha Heuring (provided written testimony)

- A large portion of her practice focuses on employment law.
- This is a bill that benefits businesses, employees, and the conservation of the state's resources.
- The HRC is an informal, inexpensive process that people can utilize easily without an attorney.
- When a case is taken to trial by a business, all of the resources the HRC utilized over the course of years has gone to waste and now those efforts are rehashed in the courts.
- She gave an example of someone with down syndrome who works at a grocery store. Some of their co-workers and managers use the person's disability to demean them. The person wants to keep their job, so they go to the HRC to file a complaint and they are relieved to find they don't need an attorney. The way their case is structured, there is no way for the attorney to be compensated for their time and the employee cannot afford a lawyer. At the end of the entire process is the moment when the employer gets to make the person start over.
- It is not just an injustice for the complainant to go back to square one, but also due to the wasting of state resources that could be put to better use.

Summary of testimony presented in opposition:

None

Neutral Information Presented:

Executive Director Ahni Malachi (Human Rights Commission)

- The Commission worked with former Senator Levesque on SB509 in the beginning stages of it.

- Senator Whitley asked if it is her assessment that adjusting the process would lead to a greater chance of resolution for these cases.
 - It is kind of all over the place. When people come to the HRC and a charge is initially filed, both parties are notified. The Commission will present information that the parties have the opportunity for mediation. The HRC offers a free remediation program with volunteer attorneys, mediators, and former judges. That is one opportunity someone has at the beginning of the process to potentially reach a resolution. If that does not work, there is a full investigation by the HRC. Once it is assigned to an investigator, the investigator will ask again if they are interested in mediation. That investigator can work on a settlement agreement if they choose that route. If they are not interested, the investigation moves forward and then there is a finding. When there is probable cause finding, sometimes complainants will go to an attorney, and that attorney may advise them to go through the HRC process first. Once there is a probable cause finding at the HRC the individual can take that finding back to the attorney, and then that attorney could potentially pick up the case. Respondents also do not have to be represented by counsel. If a complainant does get counsel, the next step after a probable cause finding is a conciliation (mediation after a probable cause finding). If that conciliation is not successful, then the HRC schedules a hearing. Often times, during the conciliation process, they come to a conclusion and there is a financial settlement. Sometimes the complainant will file with the HRC, but they are represented by counsel before the probable cause finding and they choose to withdraw the charge and take it to court. There are times where after a probable cause finding the respondent will remove it. After probable cause is the only time a respondent can remove a case; prior to probable cause the complainant can remove it at any time. There are other remedies the court can provide that the HRC cannot. They closed 200 cases in the last federal fiscal year. Previously in 2020, in a five year look back the cases that were removed were pretty close in terms of who removed the cases. Of the ones removed by respondents there were a few complainants that were not represented. Within the last federal fiscal year that could have changed. She will provide the committee with the exact numbers.

Speakers

Senate Remote Testify

Judiciary Committee Testify List for Bill SB296 on 2022-01-18

Support: 9 Oppose: 2

<u>Name</u>	<u>Title</u>	<u>Representing</u>	<u>Position</u>
Culliton, Penny	A Member of the Public	Myself	Oppose
DeJoie, Stacie	A Member of the Public	Myself	Oppose
Hennessey, Sen. Erin	An Elected Official	Myself	Support
Avard, Senator Kevin	An Elected Official	SD 12	Support
Bradley, Senator Jeb	An Elected Official	SD3	Support
Soucy, Donna	An Elected Official	SD 18	Support
Chase, Marissa	A Lobbyist	NH Association for Justice	Support
Dickinson, Jeff	A Member of the Public	Granite State Independent Living	Support
Keilig, Pamela	A Lobbyist	New Hampshire Coalition Against Domestic and Sexual Violence	Support
Petrusewicz, Carol	A Member of the Public	Myself	Support
Ketteler, Claire	A Member of the Public	Myself	Support

Testimony

Jennifer Horgan

From: Nancy Richards-Stower <nrichardssto@igc.org>
Sent: Monday, January 17, 2022 9:35 PM
To: Jennifer Horgan
Cc: Nancy Richards-Stower
Subject: Typo corrected in my email Re: Nancy Richards-Stower to Jennifer Horgan re: SB 296

Typo corrected in my email. Please forgive.

On Jan 17, 2022, at 9:32 PM, Nancy Richards-Stower <nrichardssto@igc.org> wrote:

Dear Ms. Horgan:

In an abundance of caution, I'm forwarding to you my email and its attachments which I originally emailed on Sunday to the Judiciary Committee and you re: SB 296.

Could you ensure that members of the Judiciary Committee received my below forwarded email of ~~January 26~~ January 16 at 10:40 A .M and its attached letter of support and Human Rights Commission chart? I am so sorry to bother you, but I have had intermittent problems with my email service recently.

The hearing on the bill is scheduled for January 18, 1:20 P.M. and I hope that my letter and its attachment will be helpful to the Committee.

Thank you so very much. Best wishes.

Nancy Richards-Stower

Law Offices of Nancy Richards-Stower
Remote Legal Services for NH and MA employees
Office: 603-881-3312
cell: 617-877-4781
nrichardssto@igc.org
www.jobsandjustice.com

Begin forwarded message:

From: Nancy Richards-Stower <nrichardssto@igc.org>
Subject: Nancy Richards-Stower to N.H. Senate Judiciary re: Please support SB 296 re: fixing a procedural problem at the Human Rights Commission
Date: January 16, 2022 at 10:40:18 AM EST
To: Sharon.Carson@leg.state.nh.us, William.Gannon@leg.state.nh.us, Harold.French@leg.state.nh.us, Becky.Whitley@leg.state.nh.us, Jay.Kahn@leg.state.nh.us, jennifer.horgan@leg.state.nh.us
Cc: Nancy Richards-Stower <nrichardssto@igc.org>

To: Members of N.H. Senate Judiciary Committee

From: Attorney Nancy Richards-Stower

Re: Senate Bill 296: Please support it

Dear Senators and Ms. Horgan:

Attached please find my letter in support of SB 296 [SB 296](#) (link to bill text) and the chart I created to explain the procedure at the N.H. Commission for Human Rights. I ask you to accept the attached in lieu of my personally appearing at the hearing on Tuesday.

Please feel free to contact me with any questions or comments, and please know how grateful I am for your continued public service in these difficult times.

Respectfully,

Nancy Richards-Stower

Law Offices of Nancy Richards-Stower
Remote Legal Services for NH and MA employees
Office: 603-881-3312
cell: 617-877-4781
nrichardssto@igc.org
www.jobsandjustice.com

< Dear Senator 296 *.pdf >

< hrc chart 2022.pdf >

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Bar memberships:
NH, MA, VA

**The Honorable Members of the
New Hampshire Senate Judiciary Committee**

January 16, 2022

Senator Sharon Carson, Chair
Senator William Gannon, Vice-Chair
Senator Harold French
Senator Rebecca Whitley
Senator Jay Kahn

Re: **Please support SB 296:** It lets the "complainants" (alleged victims of discrimination) choose how their cases are decided: either at a hearing at the N.H. Commission for Human Rights, or by a court. Presently, the defendants ("respondents") can yank complainants out of the Commission and into court -- against their will.

Dear Senators:

Please support SB 296 which will repair an injustice done by one provision of the 2000 amendments to the Human Rights Commission statute. SB 296 will prevent defendants ("respondents") from being able to yank ("remove") cases from the Commission to state superior (or federal) court when the person alleging discrimination/harassment (the "complainant") wants to stay at the Commission for a more prompt, less formal, less expensive Human Rights Commission hearing under the Commission's decades-old (and successful) hearing procedures under RSA 354-A: 21, II(b).

HOW THE PROBLEM AROSE: In 2000, RSA 354-A was amended -- originally to provide *complainants* the option to take their cases out of the Commission ("removal"), to file them in court for jury trials. **Why?** Because some complainants had other legal claims which could only be heard in court, so it made sense for their attorneys to bring all the claims in one action (e.g. discrimination, wrongful termination, whistleblowing, unpaid wage claims, etc.) **However, court makes zero sense for most complainants** (1) who don't have attorneys ("pro se"), and/or (2) whose cases involve only small damages which would be dwarfed by the costs of litigation; and/or (3) for many victims of sexual harassment/sexual assault who prefer to avoid the glare of a jury trial; and/or (4) for any discrimination complainant who prefers the low key, less formal *more prompt* agency hearing under the Commission process (RSA 354-A:21, II(b)), which, prior to the 2000 amendments, was the sole procedure to decide discrimination claims and provide remedies under state law.

WHAT HAPPENED TO THE ORIGINAL JURY TRIAL BILL? Unfortunately, during the amendment process, advocates for the respondents argued that letting the complainants control where their cases were heard would deprive the respondents of a (non-existent) "constitutional right to a jury trial" when complainants chose to stay at the Commission for an agency hearing.

WHY WERE THEY MISTAKEN? The New Hampshire Supreme Court had decided long ago that the constitutional right to jury trial does not attach to any legal rights which did not exist back in 1794 when the state constitution was adopted; and, in 1794, there was no such thing as an anti-discrimination law or agency¹ and the U.S. Supreme Court had long before ruled that the right to choose the forum "rest[s] with the one seeking redress, rather than the one from whom redress is sought" without any violation of equal protection or due process rights. *Panama R.R. v Johnson*, 264 U.S. 375, 392-393 (1924). (For example: For decades, New Hampshire employees have had the sole right to choose between administrative hearings at the N.H. Dept. of Labor under RSA 275:51 or jury trials in Superior Court pursuant to RSA 275:53, and the same right of forum selection for whistleblower claims, a N.H. Dept. of Labor hearing under RSA 275-E:4, or superior court jury trial under RSA 275-E:2, II).

WHAT'S THE PROPOSED FIX? SB 296 will let only those with discrimination claims decide where their cases will be heard. This amendment would stop respondents from being able to force complainants into court against their will.

EXAMPLES OF CURRENT LAW'S INJUSTICE (*Justice Delayed is Justice Denied*):

One client had a pregnancy case against one of the big box stores. She filed with the Commission in June 2006, the investigation was completed and a Probable Cause determination was issued in August 2008. Had the case not settled, the trial date set by the court was in 2010; her baby would have been 3 years old.

Another client whose pregnancy case was removed to court by the employer planned to have her daughter sitting in the courtroom at age 4.

A disabled client of mine filed her claim at the Commission in January 2013, received a Probable Cause determination in 2018 (after several amendments following several lost promotions over several years) but was removed first to state, then to federal court by the respondent. Her trial was scheduled for the fall of 2020, more than two years after her preferred, scheduled Commission hearing would have been over. Being yanked first to state court, then to federal court, by the employer, while she battled her illnesses and fought for her insurance coverage, exhausted her. Her attorney fees had skyrocketed. The removal by the employer, forced her to start from scratch in federal court, re-victimized her, as it does to all those who prefer to resolve their claims at the Commission. (Her case was settled before her trial, but years after it would otherwise have settled or been heard at the Commission).

¹ Part I, Article 20 of our State Constitution extends the right to a trial by jury only to those "cases for which the right existed when the constitution was adopted in 1784," **but not** "to special, statutory or summary proceedings unknown to the common law" [like discrimination cases under 354-A which did not exist at common law], Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 450 (1994). See also *Hallahan v. Riley*, 94 N.H. 338 (1947)

ABOUT THE N.H. COMMISSION FOR HUMAN RIGHTS: The New Hampshire Commission for Human Rights is a state agency where discrimination claims are filed for investigation and resolution. It is headed by seven Commissioners, nominated by the Governor and approved by the Executive Council. They serve without pay, and, in employment cases, have the power to award traditional civil rights remedies of reinstatement, damages, lost pay and attorney fees to successful complainants who allege and prove discrimination based on age, sex, race, color, marital status, physical or mental disability, religious creed, national origin, sexual identity, and/or orientation. The complaint must be filed within 180 days of the alleged discrimination. After the Commission investigates a complaint, it issues a report with the investigating Commissioner's signed determination of Probable Cause (PC) or No Probable Cause (NPC). A Probable Cause determination is sent to the parties includes the scheduling of an upcoming hearing (often only a few months hence). *Presently the respondent can remove the case to court upon receiving the Probable Cause determination at any time before the scheduled hearing begins. (RSA 354-A:21-a, I).*

ADMINISTRATIVE IMPACT AT THE HUMAN RIGHTS COMMISSION: The agency's hearing docket may increase to the levels before the 2000 amendment, but the agency's successful mediation and post-Probable Cause conciliation processes will result in pre-hearing settlement of some of those cases.

HOW MANY COMPLAINANTS WERE FORCED INTO COURT? Between 2015-2019, Respondents forced 27 cases into court which would otherwise have remained at the Commission for a more prompt, less formal hearing.

FISCAL IMPACT: There will be fewer jury trials in the superior court, which will save the court work and significant funds. Most employment law jury trials take a week or more.

CONCLUSION: Fairness requires that the person bringing a legal claim should be the one who chooses where the claim is heard. SB 296 does that and will eliminate the unfairness suffered by discrimination complainants yanked to court against their will since 2000.

Thank you very much for allowing me to share my experiences and opinions. Fixing this injustice is on my bucket list. I attach a chart explaining the administrative procedure at the New Hampshire Commission for Human Rights for your future reference. I also stand by to answer any questions. Please call my New Hampshire number (603) 881-3312, my cell (617-877-4781), or email me at nrichardssto@igc.org

Very Respectfully,

Nancy Richards-Stower

Nancy Richards-Stower*

* (former member/chair of the NH Commission for Human Rights, 1979-1985)

Attachment:

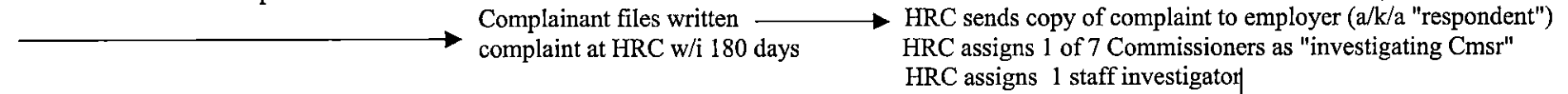
NHCHR Procedure Chart

NH RSA 354-A: New Hampshire Law Against Discrimination (Covers Employment, Housing, Public Accommodation) enforced by N.H. Commission for Human Rights, prohibits discrimination in protected categories.

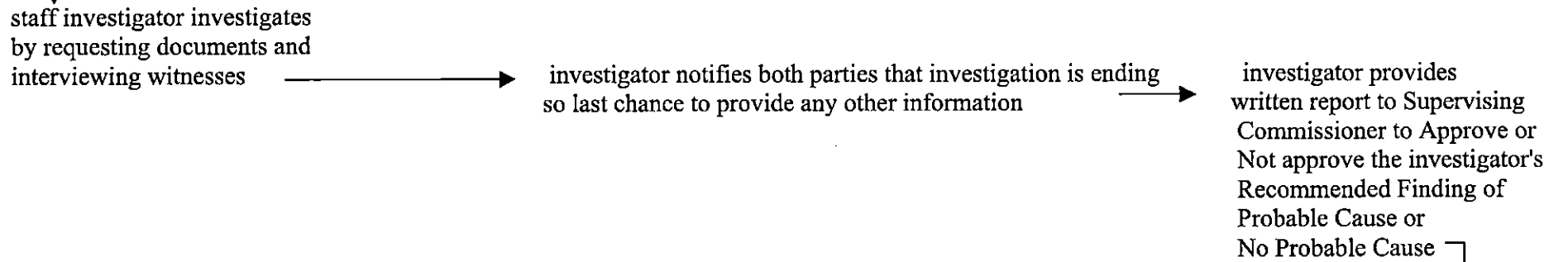
N.H. Commission for Human Rights ("HRC"):

Agency headed by 7 volunteer commissioners w/ power of superior court judges, appointed by governor, confirmed by Executive Council. Commission hires Executive Director, who hires staff (investigators + secretarial) and runs agency under supervision of Commission

Employment Discrimination Occurs =
180 days deadline to file complaint at HRC



180 days after filing the complaint (or earlier w/ permission of Commission) if investigation not complete, complainant can remove to Superior Court for jury trial: RSA 354-A:21-a



PRESENT LAW: RSA 354-A:21-a: FOLLOWING A PC DETERMINATION, PRESENT LAW ALLOWS EMPLOYERS TO REMOVE THE CASE FROM THE HRC TO SUPERIOR COURT AT ANY TIME BEFORE THE HRC HEARING COMMENCES; AND, WHEN THE CORPORATION IS INCORPORATED OUTSIDE OF NEW HAMPSHIRE, THESE CASES CAN BE REMOVED FOR A SECOND TIME, FROM STATE COURT TO FEDERAL COURT VIA FEDERAL DIVERSITY OF CITIZENSHIP REMOVAL STATUTES, ALLOWING THE EMPLOYER TO CHANGE A SIMPLE, AFFORDABLE ADMINISTRATIVE HEARING INTO A COSTLY FEDERAL CASE OFTEN RESULTING IN ATTORNEY FEES FOR THE COMPLAINANT IN EXCESS OF \$150,000. The proposed amendment would return sanity to the process and allow the complainant to select her own forum!

If the HRC hearing is held (very rare since most employers remove the case to court) the Decision of the Commission may be appealed to Superior Court under RSA 354-A: 22, 1.

Jennifer Horgan

From: Claire Ketteler <cketteler@tds.net>
Sent: Tuesday, January 18, 2022 12:15 PM
To: Jennifer Horgan
Subject: Support SB296

Dear Senate Judiciary Committee,

I urge you to vote in support of SB296.

Why should the NH Commission for Human Rights be the sole decision maker regarding if a party wants to file a complaint with the Commission to have them pursue some perceived injustice? Obviously, if for some reason, such as disagreement with the complaint, current politics, or lack of manpower, the NH Commission for Human Rights might not pursue a complaint. This is not justice and does not serve NH citizens well.

Thank you,
Claire Ketteler
Newbury NH

Jennifer Horgan

From: Jennifer Horgan
Sent: Tuesday, January 18, 2022 12:22 PM
To: ~Senate Judiciary Committee
Subject: FW: Support SB296

-----Original Message-----

From: Claire Ketteler <cketteler@tds.net>
Sent: Tuesday, January 18, 2022 12:15 PM
To: Jennifer Horgan <jennifer.horgan@leg.state.nh.us>
Subject: Support SB296

Dear Senate Judiciary Committee,

I urge you to vote in support of SB296.

Why should the NH Commission for Human Rights be the sole decision maker regarding if a party wants to file a complaint with the Commission to have them pursue some perceived injustice? Obviously, if for some reason, such as disagreement with the complaint, current politics, or lack of manpower, the NH Commission for Human Rights might not pursue a complaint. This is not justice and does not serve NH citizens well.

Thank you,
Claire Ketteler
Newbury NH

Jennifer Horgan

From: Jennifer Horgan
Sent: Tuesday, January 18, 2022 1:49 PM
To: ~Senate Judiciary Committee
Cc: Richard Lehmann
Subject: SB509
Attachments: SB509 Docket.pdf

Good Afternoon Committee Members,

SB509 (2020), relative to complaint procedures in cases before the commission for human rights was vacated from the Committee due to the pandemic and therefore that is why the bill did not move forward.

Please find the bill docket attached, and do not hesitate to let me know if you have any questions.

Thank you very much,

Jenny

Jennifer C. Horgan
NH State Senate
Legislative Office Building
Room 5
Concord, NH 03301
(603) 271-7875

Docket of SB509

Docket Abbreviations

Bill Title: relative to complaint procedures in cases before the commission for human rights.

Official Docket of error: The EXECUTE permission was denied on the object 'GCIS_DocketLinks', database 'webnhlms2020', schema 'dbo':.

Date	Body	Description
1/8/2020	S	To Be Introduced 01/08/2020 and Referred to Judiciary; SJ 1
3/5/2020	S	Hearing: 03/10/2020, Room 100, SH, 09:00 am; SC 10
6/16/2020	S	Vacated from Committee and Laid on Table, MA, VV; 06/16/2020 SJ 8

NH House

NH Senate

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Barton L. Mayer
Heather M. Burns
Lauren Simon Irwin
Michael S. McGrath*
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January 14, 2022

Senate Judiciary Committee
State House
107 N. Main Street
Concord, NH 03301

Attention: Hon. Edward Gordon

Re: Support of SB296, relative to complaint procedures in cases before the New Hampshire Commission for Human Rights

Dear Honorable Committee Members:

We submit this letter as written testimony for your consideration.

SB 296 will allow people subjected to discrimination to have their claims heard before the New Hampshire Commission for Human Rights.

The Current HRC Process

If a person who has been discriminated against wants to bring a claim under New Hampshire's anti-discrimination statute, RSA 354-A, the claimant must file a Charge of Discrimination with the New Hampshire Commission for Human Rights. After receiving a Charge of Discrimination, the person against whom the claims were brought, the Respondent, files a response to the Charge of Discrimination.

After receiving the Charge and Response, the Commission investigates the Charge by gathering information from the Complainant and the Respondent. The Commission also tries to help the Claimant and Respondent resolve the issue through its voluntary Mediation Resolution Program.

At the conclusion of the Commission's investigation, the Commission either finds probable cause or no probable cause that the Respondent violated anti-discrimination laws.

If the Commission finds probable cause, the matter is scheduled for a hearing before three Commissioners who are appointed by the governor. At the hearing, both the Complainant and the Respondent present evidence to the Commissioners. After considering the evidence, the Commissioners decide whether there has been a violation of the anti-discrimination laws. If they find there has been a violation, the Commissioners decide what damages to award to the Complainant.

Either the Complainant or the Respondent may appeal the Commissioners' decision to the New Hampshire Superior Court.

The current law allows either the Complainant or the Respondent to remove the matter from the Commission and litigate the Charge in court. The Complainant may remove the matter to Court 180 days after filing a Charge of Discrimination. A Respondent may remove the matter to Court after the Commission finds probable cause. If a case is removed to Court, the parties exchange information in discovery and, after a trial, a jury decides whether the Respondent violated anti-discrimination laws. If the jury decides that the Respondent violated the law, it decides what damages to award the Complainant.

The Proposed Change

SB 296 proposes to remove a Respondent's ability to remove a Charge to Court after probable cause finding. A Respondent would still be able to appeal a decision of the Commission to Court after a hearing by the Commission.

The ability of Respondents to remove a case from the Commission before a hearing is problematic for two reasons:

- 1) Litigation in Court is much more expensive and complicated than litigation before the Commission; and
- 2) A Charge of Discrimination is confidential at the Commission until a hearing.

Complainants in low wage jobs often file at the Commission without an attorney. Litigation in Court is expensive, and most low-wage-earner Complainants cannot afford a lawyer to represent them. It is not unrealistic to believe a Respondent (employer) would remove a charge to Court, knowing the individual that filed the Charge against them would not have the resources to pursue the Charge further. The Commission's investigation and hearing process is easier for unrepresented Complainants to navigate than litigation in Court. As a practical matter, if a Complainant's case is removed to Court and they cannot afford a lawyer, their case has a high likelihood of ending without ever receiving a decision on whether they were discriminated against.

The process before the Commission is confidential until a public hearing. Many Complainants, particularly those who have experienced sexual harassment, do not want public exposure. Allowing these litigants to keep their cases at the Commission until after a probable

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cause hearing allows them a chance to resolve their cases confidentially, and maintain privacy, after a probable cause finding by the Commission.

Summary

The current law allows Respondents to remove a case from the Commission after the Commission has found probable cause of a violation of discrimination laws, but before it holds a hearing on the matter. This removal procedure results in costly litigation in cases where it is not necessary and effectively denies the most vulnerable members of our community – low-wage-earners that have been subjected to discrimination – a chance to have their claims decided on their merits.

SB 296 would remedy this injustice, hold bad actor Respondents accountable, and help to prevent unnecessary and costly litigation for those that cannot afford an attorney.

Respectfully, we urge you to vote SB 296 “ought to pass”. Should you have any questions, please do not hesitate to contact us.

Thank you for your time, and consideration.

Sincerely,

/s/ Lauren Simon Irwin

Lauren Simon Irwin
lirwin@uptonhatfield.com
(603) 224-7791

/s/ Heather M. Burns

Heather M. Burns
hburns@uptonhatfield.com
(603) 224-7791

LSI/HMB/sem

SB 296 FACT SHEET – SB 296 conserves state resources at the NH Commission for Human Rights (HRC) and in our courts by amending RSA 354-A to allow only complainants (persons alleging discrimination) to remove case from HRC to court

Problems: After investigation, if the HRC finds probable cause to believe unlawful discrimination occurred, respondents can remove the case to court.

- **Inefficient use of HRC resources:** By the time a respondent is eligible for removal to court, the HRC has already expended the resources necessary to reach a probable cause finding. This is an inefficient use of resources if the case is removed to court, where it will start all over again from scratch.
- **Inefficient use of judicial resources:** By the time a respondent is eligible for removal to court, the HRC is on the cusp of reaching a final resolution of the case through conciliation. See HRC Process Chart. Removing the case to court, and starting over from scratch, is an inefficient use of judicial resources when the HRC is already in a position to resolve the case entirely.
- **Combined loss of resources:** At the time of removal, the case will have already used 1-2 years of time/resources at the HRC, and it will wait an additional 1-2 years in court before seeing a trial.
- **Inequal access to attorneys:** The HRC process is simple, permitting complainants to proceed without an attorney. However, in court, an attorney is almost always necessary to guide the complainant through complex litigation. Complainants with low damages (e.g., busboy out of work 4 weeks with \$2,000 in lost wages) will have a very difficult time finding an attorney. Low damages cases rarely cover legal fees paid on a contingency basis, and most low wage earners cannot afford to pay hourly attorney fees.

How many cases are affected by these problems?

<i>*Note: 2021 data is through 09/30/21</i>	2015	2016	2017	2018	2019	2020	2021
# of HRC findings with NO probable cause to believe discrimination occurred	72	74	39	34	26	42	64
# of HRC findings WITH probable cause to believe discrimination occurred	26	23	13	23	21	16	19
% of total findings that were findings WITH probable cause (i.e., % eligible for removal)	27%	24%	25%	40%	45%	38%	23%
Respondent removed to court post-finding	13	6	1	7	7	3	5
Case resolved during conciliation	18	13	8	18	7	4	4

SB 296 is the Solution: SB 296 permits only the complainant to choose the forum of their case.

- **SB 296 achieves the original goal of removal:** RSA 354-A was amended to allow complainants to opt out of the HRC process and “remove” their cases to court for jury trial. **Why?** Because HRC complainants with counsel are often headed to court on other claims outside the HRC’s jurisdiction (e.g., federal discrimination, wage, and wrongful discharge claims). ***This conserves state resources*** by permitting complainants to litigate their case in front of a single forum, HRC or the court, instead of both.
- **SB 296 eliminates the unforeseen problems that were created when 354-A was amended to allow respondents to remove cases to court:** The cases that remain at the HRC are generally those brought by unrepresented complainants without other claims outside of the HRC’s purview. Thus, by making only complainants eligible to remove to court, SB 296 eliminates the problem of inefficient use of resources, as described above, that occurs when respondents remove cases that would be better handled at the HRC.
 - ***Why should these cases be left at the HRC?*** Unlike court-based litigation, the HRC is inexpensive, informal, and easily accessible. Further, HRC filings are confidential, while a court complaint is public, making the HRC the best forum for unrepresented people with 354-A claim(s).

SB 296 is Constitutional: No right to a jury trial for 354-A claims exists. Under Part I, Article 20, “the right to trial by jury extends to all cases for which the right existed when the constitution was adopted in 1784...but does not extend to special, statutory or summary proceedings unknown to the common law,” like statutory-based 354-A claims which did not exist at common law. *Op. of the Justices*, 138 N.H. 445, 450 (1994).



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January 18, 2022

Senate Judiciary Committee
Hon. Sharon Carson, Chair

Support for SB 296

Dear Honorable Members of Senate Judiciary Committee:

We respectfully request your support of SB 296, which is a common sense fairness matter that closes a gap in existing law.

Under current law, when an employee feels they have been discriminated against by their employer for one of the classes of discrimination laid out in RSA 354-a, they file a complaint to the Human Rights Commission (HRC). The HRC then initiates an investigation into the allegation. After the investigation, the HRC issues a finding of "probable cause", or "no probable cause". If there is no probable cause, the employee can appeal to the Superior Court which is very rare with little chance of success. If there is a finding of "probable cause", the HRC initiates a type of mediation process, where both the employee and employer state their respective cases.

It is at this point, where there is a finding for probable cause against an employer, that the employer typically removes the case to Superior Court. They do not have to state their reason for doing so, as it is their right in statute. By forcing an employee (who at this point might not yet be represented by counsel) into Superior Court, they make the cost of litigation much more expensive and often times impossible for an employee to continue their claim.

It is a basic issue of fairness that if someone is choosing to make a formal complaint about their employer, they should be the ones to decide venue - not the entity or person accused of wrongdoing. Under the current statutory framework however, the employer has the power to essentially end a claim made against them after a probable cause finding is issued by the HRC. Vesting this power in the employer makes it so that resources at both the HRC and in the judicial system are wasted. There are two key points to know about the timing of the employer's removal: first, the employer's removal occurs after the HRC has already expended the resources necessary to reach a probable cause finding (usually about 1-2 years into the case) and, removing to court starts the case over from scratch, extending the resolution of the case by another 1-2 years spent waiting for trial, even though the HRC was on the cusp of resolving the case either through conciliation (mediation) or a full evidentiary hearing held before the Commission.



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January 18, 2022

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SB 296 corrects this flaw in current law by making it so that only complainants can choose to remove their case to court. Based on data from recent years, this will result in more cases remaining at the HRC with the possibility of resolution through HRC conciliation. This is a better use of the state's resources by, first, making it so that the HRC resources expended to reach a probable cause finding were well-spent by allowing the HRC to resolve the case and, second, by reducing the unnecessary use of judicial resources by leaving the case at the HRC at the very time at which the HRC is ready and prepared to resolve the case, either through mediation or full hearing before the seven commission members.

The bill has the potential to save litigation costs for both employee and employer, by encouraging litigation to proceed along in its usual course, and not double-back and duplicate costs. The HRC's process further includes a mediation requirement, just as the Superior Court process does, where parties are encouraged to reasonably evaluate their cases and reach a cost-effective compromise. It does not impact many cases (in the past 2 years combined, the HRC found 35 cases had probable cause and 8 of those were removed by the respondent) but will make a significant impact in the lives of the few it will help during a turbulent time in their lives.

New Hampshire wage and whistleblower statutes allow employees to file complaints exclusively at the New Hampshire Department of Labor (DOL) and to seek full and final relief exclusively there. At the DOL for example, an employee can compel a hearing and be fully vindicated for being terminated in retaliation for reporting her employer's wage violations. Yet, under current law, that same employee complaining of being terminated for reporting sexual harassment, is subject to having to effectively carry their burden of proof *twice*, once before the HRC and again a second time in court.

Effectively, this means employees fired for reporting discrimination in the work place to have to work harder to obtain justice than those employees who have been fired for reporting their employer's wage violations.

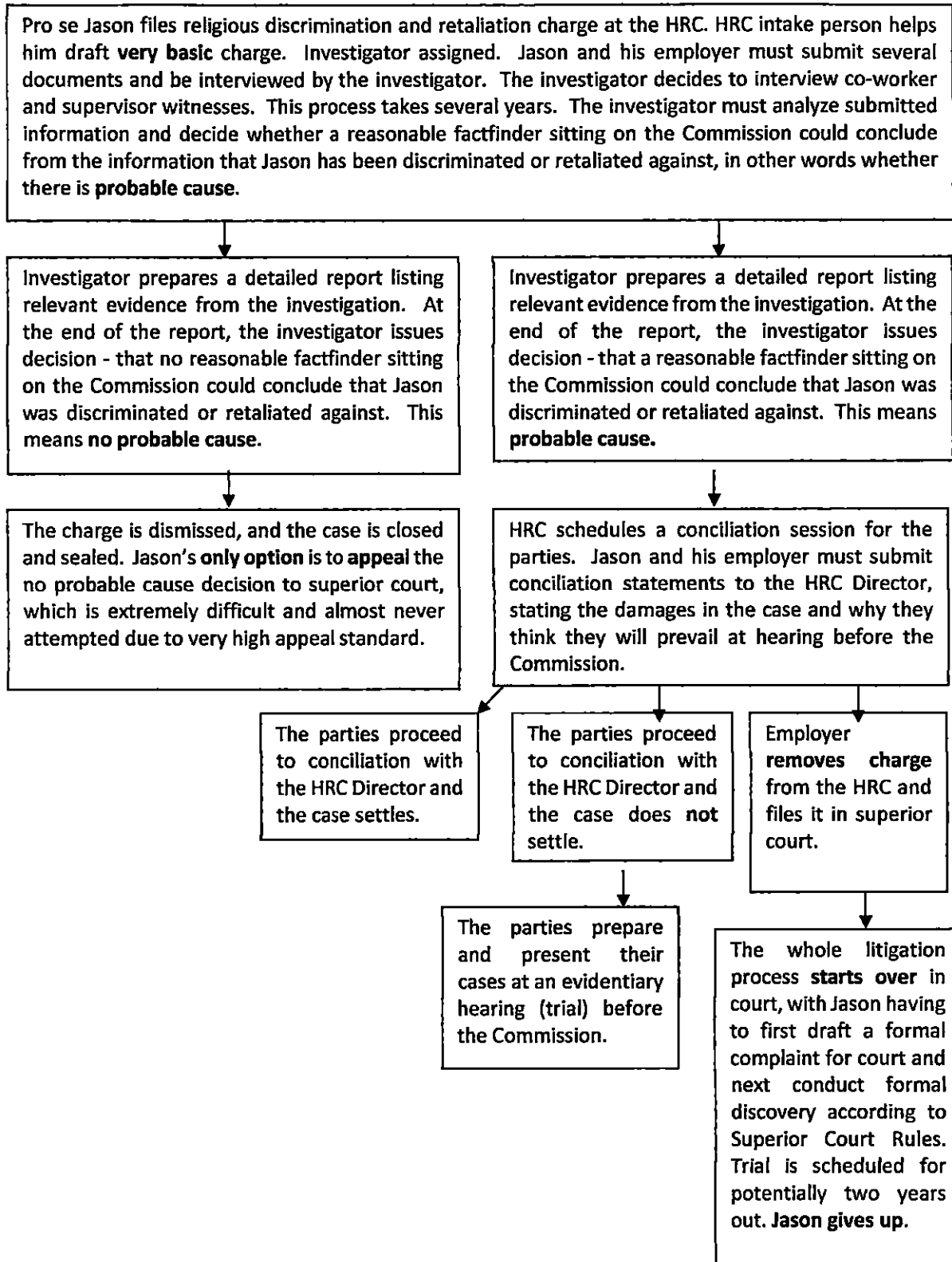
Thank you for your consideration of this important piece of legislation. Please do not hesitate to contact me should you have any questions.

Sincerely,

Marissa Chase

Marissa Chase
Executive Director
NH Association for Justice

Pro Se Jason's Two Paths at the HRC



Voting Sheets

Senate Judiciary Committee
EXECUTIVE SESSION RECORD
2021-2022 Session

Bill # SB296

Hearing date: 1/18

Executive Session date: 1/20

Motion of: OTD Vote: 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: consent Vote: 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: _____ Vote: _____

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Reported out by: French

Notes: make sense heard before excellent HRC
compelling testimony

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Wednesday, January 26, 2022

THE COMMITTEE ON Judiciary

to which was referred **SB 296**

AN ACT

relative to complaint procedures in cases before the
commission for human rights.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS

BY A VOTE OF: 5-0

Senator Harold French
For the Committee

This bill provides that only the complainant can remove a case from the State Commission for Human Rights to court. Current law unfairly allows an employer to pull a complaint from the Commission to the court at any time, forcing the complainant to start the process all over regardless of any amount of time or effort already expended at the Commission. An employee is the only one that should be able to decide where to pursue their claim, and the Committee therefore recommends the passage of SB296.

Jennifer Horgan 271-7875

FOR THE CONSENT CALENDAR

JUDICIARY

SB 296, relative to complaint procedures in cases before the commission for human rights.

Ought to Pass, Vote 5-0.

Senator Harold French for the committee.

This bill provides that only the complainant can remove a case from the State Commission for Human Rights to court. Current law unfairly allows an employer to pull a complaint from the Commission to the court at any time, forcing the complainant to start the process all over regardless of any amount of time or effort already expended at the Commission. An employee is the only one that should be able to decide where to pursue their claim, and the Committee therefore recommends the passage of SB296.

SB296

Bill Details

Title: relative to complaint procedures in cases before the commission for human rights.

Sponsors: (Prime) French (R), Erin Hennessey (R), Avard (R), Donna Soucy (D), Jeb Bradley (R), Whitley (D), Kahn (D)

LSR Number: **22-2931**

General Status: **HOUSE**

House:

Committee: Judiciary

Due Out: 4/28/2022

Status: INTERIM STUDY

Senate:

Committee: Judiciary

Floor Date: 2/3/2022

Status: PASSED/ADOPTED

Bill Docket

Body	Description
S	To Be Introduced 01/05/2022 and Referred to Judiciary; <u>SJ 1</u>
S	Hearing: 01/18/2022, Room 100, SH, 01:20 pm; <u>SC 2</u>
S	Committee Report: Ought to Pass, 02/03/2022; Vote 5-0; CC; <u>SC 5</u>
S	Ought to Pass: MA, VV; OT3rdg; 02/03/2022; <u>SJ 2</u>
H	Introduced 03/17/2022 and referred to Judiciary
H	Public Hearing: 04/07/2022 10:30 am LOB 206-208
H	Executive Session: 04/14/2022 09:00 am LOB 206-208
H	Committee Report: Refer for Interim Study (<u>Vote 20-1; CC</u>)
H	Refer for Interim Study: MA VV 05/04/2022 <u>HJ 11</u>
H	Subcommittee Work Session: 06/15/2022 01:00 pm LOB 206-208

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: SB096

Senate Committee: Judiciary

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

Bill version as it came to the committee

All Calendar Notices

Hearing Sign-up sheet(s)

Prepared testimony, presentations, & other submissions handed in at the public hearing

Hearing Report

Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

___ - amendment # _____ ___ - amendment # _____

___ - amendment # _____ ___ - amendment # _____

Executive Session Sheet

Committee Report

Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

___ - amendment # _____ ___ - amendment # _____

___ - amendment # _____ ___ - amendment # _____

Post Floor Action: (if applicable) {Clerk's Office}

___ Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

___ Enrolled Bill Amendment(s)

___ Governor's Veto Message

All available versions of the bill: {Clerk's Office}

___ as amended by the senate ___ as amended by the house

___ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:


Committee Aide

8/12/22
Date

Senate Clerk's Office AK