

TABLE OF EXHIBITS

- Exhibit "A-1": Court of Appeals' November 11, 1993 decision (Chief Judge Judith Kaye) in *Matter of General Motors Corporation v. Margarita Rosa, et al.*, 82 N.Y.2d 183
- "A-2": Court of Appeals' May 11, 1993 memorandum order in *Matter of General Motors Corporation v. Margarita Rosa, et al.*, 81 N.Y.2d 1004
- "A-3": Appellate Division, Fourth Department's November 18, 1992 decision in *Matter of General Motors Corporation v. Margarita Rosa, et al.*, 187 A.D.2d 960
- Exhibit "B-1": General Motors' January 28, 1993 Notice of Appeal in *Matter of General Motors Corporation v. Margarita Rosa, et al.*
- "B-2": General Motors' February 3, 1993 Jurisdictional Statement in *Matter of General Motors Corporation v. Margarita Rosa, et al.*
- Exhibit "C": General Motors' January 28, 1993 Notice of Motion and Motion for Leave to Appeal in *Matter of General Motors Corporation v. Margarita Rosa, et al.*

(Cite as: 82 N.Y.2d 183)

H

In the Matter of General Motors Corporation--Delco
Products Division,
Appellant,

v.

Margarita Rosa, as Commissioner of the New York
State Division of Human Rights,
et al., Respondents.

Court of Appeals of New York

Argued October 13, 1993;

Decided November 11, 1993

SUMMARY

Appeal, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered November 18, 1992, which, in a proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division by order of the Supreme Court, entered in Monroe County), (1) confirmed a determination of respondent Margarita Rosa, Commissioner of the New York State Division of Human Rights, that General Motors Corporation--Delco Products Division discriminated against complainant Clifford Briggs on the basis of race and color in violation of Executive Law § 296, and (2) dismissed the petition.

General Motors Corp., Delco Prods. Div. v Rosa, 187 AD2d 960, reversed.

HEADNOTES

Administrative Law--Rule of Necessity--Applicability to Commissioner of State Division of Human Rights

(1) The Rule of Necessity, which requires a biased adjudicator to decide a case if and only if the dispute cannot otherwise be heard, is not applicable to authorize the Commissioner of the State Division of Human Rights--who at the time of the hearings in connection with a racial discrimination complaint against appellant employer was Division General Counsel--to issue the final order in the case. "Necessity" must be construed narrowly and strictly, in favor of delegating judicial authority to others whenever possible. Although Executive Law § 293 (1) declares that there shall be "a commissioner" to head the Division and Executive Law § 297 (4) (c) specifies that "the commissioner" is to state findings of fact and issue a final order, and only "the commissioner" is

charged with that ultimate responsibility, the Human Rights Law, in delineating the Division's functions, explicitly empowers the Commissioner to act through a "duly authorized officer or employee" (*see*, Executive Law § 295 [6] [a]). Moreover, Public Officers Law § 9 carries forward the concept that appointment of a subordinate may be made even where not otherwise specified. Thus, there was no necessity for the Commissioner--having appeared as General Counsel in the matter--also to issue the final order rather than appoint a subordinate to conduct the review required by 9 NYCRR 465.*184 15.

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REFERENCES

Am Jur 2d, Civil Rights, § 102; Public Officers and Employees, § 568.

Executive Law § 293 (1); § 295 (6) (a); § 297 (4) (c); Public Officers Law § 9.

NY Jur 2d, Civil Rights, §§84, 101; Civil Servants and Other Public Officers and Employees, §72.

ANNOTATION REFERENCES

See ALR Index under Civil Rights and Discrimination; Public Officers and Employees.

POINTS OF COUNSEL

Baker & Daniels (Wendell R. Tucker of counsel, of the Indiana Bar, admitted *pro hac vice*) and *Harris Beach & Wilcox*, Rochester (James Charles Holahan and Paul J. Yesawich, III, of counsel), for appellant. I. Delco was denied due process and a fair hearing where the Division's Hearing Officer abandoned the robe of impartial arbiter and took on the mantle of advocate, and the prosecutor became the Judge who decided her own cause. (*Wasson v Trowbridge*, 382 F2d 807; *Trans World Airlines v Civil Aeronautics Bd.*, 254 F2d 90; *Matter of City of Rochester*, 208 NY 188, 209 NY 529; *Matter of Beer Garden v New York State Liq. Auth.*, 79 NY2d 266; *Matter of Washington County Cease v Persico*, 120 Misc 2d 207, 99 AD2d 321, 64 NY2d 923; *In re Murchison*, 349 US 133; *Matter of Megson v New York State Tax Commn.*, 105 AD2d 481; *Marshall v Jerrico, Inc.*, 446 US 238; *Rocha v Great Am. Ins. Co.*, 850 F2d 1095; *Anderson v Sheppard*, 856 F2d 741.) II. Delco was denied due process and a fair hearing where the Division reversed

the burden of proof, failed to make required findings of fact and conclusions of law and based its order upon nothing more than conjecture and uncorroborated testimony of an interested and untruthful party. (*Matter of Pell v Board of Educ.*, 34 NY2d 222; 300 Gramatan Ave. Assocs. v State Div. of Human Rights, 45 NY2d 176; *Bache & Co. v State Div. of Human Rights*, 35 AD2d 928, 31 NY2d 1021; *Matter of Simpson v Wolansky*, 38 NY2d 391; *Matter of Multari v Town of Stony Point*, 99 AD2d 838; *Matter of Spetalieri v Quick*, 96 AD2d 611; *Delco-Remy Div., Gen. Motors *185 Corp. v National Labor Relations Bd.*, 596 F2d 1295; *Liberty Mut. Ins. Co. v National Labor Relations Bd.*, 592 F2d 595; *Texas Dept. of Community Affairs v Burdine*, 450 US 248; *McDonnell Douglas Corp. v Green*, 411 US 792.)

Michael K. Swirsky, New York City, and *Lawrence Kunin* for State Division of Human Rights, respondent.

I. The Rule of Necessity obligates the Commissioner of Human Rights to sign all orders after hearing, regardless of any potential conflict of interest in doing so. (*Trade Commn. v Cement Inst.*, 333 US 683; *Matter of Morgenthau v Cooke*, 56 NY2d 24; *Matter of City of Rochester*, 208 NY 188; *Matter of Ryers*, 72 NY 1; *People v Mobil Oil Corp.*, 48 NY2d 192; *People v Gowasky*, 244 NY 451; *State Div. of Human Rights v New York Roadrunners Club*, 101 Misc 2d 239; *Wasson v Trowbridge*, 382 F2d 807; *Matter of Washington County Cease v Persico*, 120 Misc 2d 207, 99 AD2d 321, 64 NY2d 923.) II. In examining General Motor's witnesses and directing the production of evidence, the Administrative Law Judge was acting well within the scope of his authority. (*Reserve Min. Co. v Lord*, 529 F2d 181; *Matter of Tuminia v Kuhlmann*, 139 Misc 2d 394; *Matter of O'Connor [Howell-Hartnett]*, 165 AD2d 946; *Matter of State Div. of Human Rights v Howard Johnson Co.*, 122 AD2d 949.) III. Substantial evidence supports the Commissioner's finding that General Motors discharged Briggs because of his race. (*300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176; *State Div. of Human Rights v City of Niagara Falls*, 61 AD2d 1128; *Matter of Mize v State Div. of Human Rights*, 33 NY2d 53; *Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623; *Matter of Club Swamp Annex v White*, 167 AD2d 400; *State Off. of Drug Abuse Servs. v State Human Rights Appeal Bd.*, 48 NY2d 276; *McDonnell Douglas Corp. v Green*, 411 US 792; *Matter of Pace Coll. v Commission on Human Rights*, 38 NY2d 28; *Flowers v Crouch-Walker Corp.*, 552 F2d 1277; *Cannon v Fargo*, 222 NY 321.)

OPINION OF THE COURT

Chief Judge Kaye.

This appeal arises from a complaint filed with the State Division of Human Rights by Clifford C. Briggs, an African-American, alleging that he was terminated by appellant General Motors Corporation in violation of the Human Rights Law (Executive Law § 290 *et seq.*). Having lost before the *186 Division, appellant challenges the procedures and grounds underlying the administrative determination, contending (1) that the Commissioner--who at the time of the hearings was Division General Counsel--improperly issued the final order in the case; (2) the Administrative Law Judge (ALJ) exceeded his authority at the hearing; and (3) the determination was not supported by substantial evidence. Agreeing with the first ground, we reverse and remit the matter to the Division of Human Rights for further proceedings.

Briggs, a certified welder, was hired by General Motors on August 15, 1983 to perform factory work at GM's Delco Products Division in Rochester, New York. After a five-day orientation, Briggs was assigned to Department 211, where he worked on an assembly line making door locks. On Saturday, August 27, his sixth working day, Briggs was allegedly subjected to harassment by a white co-worker, who thereafter complained about him to their supervisor. In the middle of his shift, Briggs was escorted off the premises and summarily discharged by the supervisor, also white.

Days later, Briggs filed a complaint with the State Division of Human Rights, charging that his termination was motivated by racial discrimination. The Division thereafter conducted an investigation and issued a finding of probable cause. Appellant denied the allegations, asserting that Briggs had been terminated both for repeated violations of shop rules and for threatening a co-worker.

Between June 1987 and September 1988, four days of hearings were conducted before the ALJ. At those hearings, the Division--which presented the case for Briggs--was represented by "Margarita Rosa, General Counsel, New York State Division of Human Rights, Robert P. Leacy, of counsel." While Rosa's appearance was noted for the record, Leacy conducted the proceedings for the Division. In 1990 Rosa was named Commissioner of the Division.

During the hearings, the ALJ questioned each witness

at length, in all asking several hundred questions. After the close of the Division's presentation, and during the examination of appellant's first witness, the ALJ additionally directed appellant to compile and produce statistics showing hires and terminations during 1983, by race, which appellant refused to do. Appellant objected that the ALJ had gone beyond the role of the trier of fact and improperly assumed the role of developing the facts of the case for the Division.*187

In July 1989, the ALJ issued his Recommended Findings of Fact, Decision and Order, concluding that the supervisor's failure to allow Briggs an opportunity to respond to the co-worker's accusations and his failure to conduct a fair investigation by questioning the other workers on the assembly line had been motivated by racial discrimination. These findings were based, in part, on an adverse inference that the statistical evidence requested by the ALJ "if supplied, would have damaged [appellant's] case, and aided [the Division's] case." The ALJ additionally found that Briggs had suffered embarrassment and humiliation as a result of his termination, and had developed a nervous condition requiring medical attention. The proposed order awarded Briggs reinstatement with back pay and compensation of \$25,000 for mental anguish and humiliation.

Appellant objected to the ALJ's submission, and in May 1990 the Division's Adjudication Counsel, having reviewed the record, issued an Alternative Proposed Order dismissing the complaint. Citing evidence that Briggs had threatened his co-workers to slow the pace of the work and had repeatedly violated shop rules, Adjudication Counsel concluded that appellant had terminated Briggs for legitimate, nondiscriminatory reasons. The Division and Briggs filed objections.

In accordance with 9 NYCRR 465.15 (c), both proposed orders were submitted for review to the Commissioner--Margarita Rosa. Commissioner Rosa in March 1991 issued a final order (in her words) "adopt[ing], with only minor stylistic changes" the ALJ's Recommended Findings of Fact, Decision and Order. In her notice accompanying the order accepting the ALJ's determination, she placed particular emphasis on appellant's "refusal to produce pertinent, relevant and material evidence at the hearing, pursuant to the direction of the presiding Administrative Law Judge."

By CPLR article 78 proceeding, General Motors challenged the Commissioner's order, contending that appellant was denied due process of law by Commissioner Rosa's issuance of the final order and

the ALJ's participation in creating the factual record, and further that the finding of unlawful discrimination was not supported by substantial evidence.

After transfer (*see*, Executive Law § 298), the Appellate Division confirmed Commissioner Rosa's order, holding that she was required to issue that order under the Rule of Necessity because no other person was authorized to do so. *188 The court concluded, moreover, that the ALJ had acted within the scope of his authority, and that the substantial evidence supported the finding of discrimination. The appeal is before this Court as a matter of right on constitutional grounds (*see*, CPLR 5601 [b] [1]).

The Rule of Necessity

The participation of an independent, unbiased adjudicator in the resolution of disputes is an essential element of due process of law, guaranteed by the Federal and State Constitutions (*see*, US Const, 14th Amend, § 1; NY Const, art I, §6; *see also*, *Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 161; Redish and Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale LJ 455, 475-505 [1986]). Judicial independence contributes not only to accurate determinations but also to the appearance of fairness, equality between the parties, and predictability and rationality of result (*id.*, at 482-491).

The Rule of Necessity provides a narrow exception to this principle, requiring a biased adjudicator to decide a case if and only if the dispute cannot otherwise be heard (*see*, *Matter of Morgenthau v Cooke*, 56 NY2d 24, 29-31, n 3; *Maresca v Cuomo*, 64 NY2d 242, 247, n 1, *appeal dismissed* 474 US 802; *Matter of Ryers*, 72 NY 1, 10-15; 3 Davis, *Administrative Law Treatise* § 19:9 [2d ed]; Schwartz, *Administrative Law* § 6.19 [2d ed]). Thus, where all members of the adjudicative body are disqualified and no other body exists to which the appeal might be referred for disposition, the Rule of Necessity ensures that neither the parties nor the Legislature will be left without the remedy provided by law (*see*, *Trade Commn. v Cement Inst.*, 333 US 683, 700-703, *reh denied* 334 US 839; *Matter of Morgenthau*, 56 NY2d, at 29, n 3; *Sharkey v Thurston*, 268 NY 123, 128).

Given the principle at stake, "necessity" must be construed strictly, in favor of delegating judicial authority to others whenever possible (*see*, Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations*

for *Our Judges*, 61 S Cal L Rev 1877, 1890-1896, 1935-1937 [1988]).

The Division does not seriously question that Margarita Rosa's two roles in the matter, first as General Counsel and then as Commissioner, presented at least an appearance of unfairness. While there is no reason to believe that she in fact *189 had any bias against appellant by reason of her prior appearances as General Counsel, all other things being equal Commissioner Rosa should not have been the person choosing between the conflicting proposed orders and issuing the final order holding appellant liable for racial discrimination. As we noted in *Matter of Beer Garden v New York State Liq. Auth.* (79 NY2d 266, 279), undertaking the role of prosecutor in an administrative proceeding is "inherently incompatible with ... subsequent participation as its Judge."

The parties' argument, rather, is concentrated on the Rule of Necessity.

The Division insists that the Rule of Necessity is applicable because, by statute, Commissioner Rosa is the only person who could have performed the review and issued the final order, and her disqualification would have both negated the legislative scheme and left Briggs without a remedy. For this proposition, the Division points first to Executive Law § 293 (1), declaring that there shall be "a commissioner"--just one--to head the Division, and second to Executive Law § 297 (4) (c), spelling out the procedure for entry of a final order. As the statute specifies, it is "the commissioner" who is to state findings of fact and issue the order, and only "the commissioner" who is charged with that ultimate responsibility.

The Human Rights Law, however, in delineating the Division's functions-- including the power and duty "[t]o receive, investigate and pass upon complaints alleging violations of this article"--explicitly empowers the Commissioner to act through a "duly authorized officer or employee" (see, Executive Law § 295 [6] [a]; see also, *State Div. of Human Rights v New York Roadrunners Club*, 101 Misc 2d 239, 242). Moreover, Public Officers Law § 9 carries forward the concept that appointment of a subordinate may be made even where not otherwise specified. While the Division urges that Executive Law § 295 can be read as a mere general outline subject to the specific mandate of Executive Law § 297 (4) (c), we reject that interpretation in favor of another reading of the statute: that section 295 (6) (a) means what it says. That

reading is especially appropriate in a situation where "necessity" is to be construed narrowly and strictly.

In the circumstances presented, we are not persuaded that there was any necessity for Commissioner Rosa--having appeared as General Counsel in the matter--also to issue the *190 final order, rather than appoint a subordinate to conduct the review required by 9 NYCRR 465.15. [FN*]

FN* We thus do not reach appellant's argument that, had the Rule of Necessity authorized Commissioner Rosa's adjudication, the final order would have been subject to heightened scrutiny (see, 3 Davis, *Administrative Law Treatise* § 19:9 [2d ed]; 1 Cooper, *State Administrative Law*, at 349-350 [1965]).

That the matter must be remitted to the Division for review by an impartial arbiter before issuance of a final order renders it unnecessary for us to pass upon appellant's remaining contentions. Among other things, the new review may or may not favor the ALJ's findings over those of the Adjudication Counsel; and the new review may or may not place particular reliance, as Commissioner Rosa did, on appellant's refusal to compile and produce the statistical evidence requested by the ALJ. We therefore leave for another day, when such questions are necessary to the disposition of the case before us, the issue whether the ALJ exceeded his authority by actively questioning witnesses and directing the creation and production of documents.

Accordingly, the judgment of the Appellate Division should be reversed, with costs, respondent's determination annulled, and the case remitted for further proceedings in accordance with this opinion.

Judges Simons, Titone, Hancock, Jr., Bellacosa, Smith and Levine concur.

Judgment reversed, with costs, respondent's determination annulled and matter remitted to Supreme Court, Monroe County, with directions to remand to the New York State Division of Human Rights for further proceedings in accordance with the opinion herein. *191

Copr. (c) 2001, Randy A. Daniels, Secretary of State, State of New York.

N.Y. 1993.

Court of Appeals of New York.

May 11, 1993.

Matter of GENERAL MOTORS CORPORATION,
DELCO PRODUCTS DIVISION, Appellant,

v.

Margarita ROSA, as Commissioner of the New York
State Division of Human Rights,
and Clifford Carnel Briggs, Respondents.

*1004 Reported below: 187 A.D.2d 960, 590
N.Y.S.2d 372.

*1005 Motion for leave to appeal denied upon the
ground that an appeal lies as of right.

END OF DOCUMENT

General Motors Corporation, Delco Products Division,
Petitioner,

v.

Margarita Rosa, as Commissioner of the New York
State Division of Human Rights,
et al., Respondents.

Supreme Court, Appellate Division, Fourth
Department, New York

(November 18, 1992)

Determination unanimously confirmed without costs
and petition dismissed.

OPINION OF THE COURT

The Commissioner's determination that petitioner discriminated against complainant on the basis of race and color, in violation of the Human Rights Law (*see*, Executive Law § 296 [1] [a]), is supported by substantial evidence (*see*, *Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623, 630-631; *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176).

We reject petitioner's contention that it was denied a fair and impartial hearing by the Administrative Law Judge. In *961 examining petitioner's witnesses and directing the production of evidence, the ALJ was not improperly assuming the role of an advocate. Rather, he was acting well within the scope of his authority

(*see*, 9 NYCRR 465.10 [e] [4]; *Matter of O'Connor [Howell-- Hartnett]*, 165 AD2d 946, 948).

Petitioner was not denied due process on the ground that Commissioner Rosa had served as General Counsel for the State Division of Human Rights at the time that the Division presented the case in support of the complaint. Petitioner does not challenge the Commissioner's position that she has exclusive authority to make a final agency determination following a hearing (*see*, Executive Law §§ 293, 297 [4] [c]). Because petitioner is unable to identify any other person authorized to make a determination or to issue a final order under the Human Rights Law, we conclude that the Rule of Necessity required Commissioner Rosa to make the determination in the present proceeding (*see*, *Maresca v Cuomo*, 64 NY2d 242, 247, n 1, *appeal dismissed* 474 US 802; *Matter of Morgenthau v Cooke*, 56 NY2d 24, 29, n 3). (Proceeding Pursuant to Executive Law § 298.)

Present--Green, J. P., Lawton, Boehm, Fallon and Davis, JJ.

Copr. (c) 2001, Randy A. Daniels, Secretary of State, State of New York.

N.Y.A.D., 1992.

General Motors Corp., Delco Prods. Div. v Rosa

END OF DOCUMENT

SUPREME COURT, APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT STATE OF NEW YORK

GENERAL MOTORS CORPORATION - DELCO
PRODUCTS DIVISION,

Petitioner,

-vs-

MARGARITA ROSA, as Commissioner
of the New York State Division of
Human Rights, and CLIFFORD
CARNEL BRIGGS,

Respondents.

NOTICE OF APPEAL

Index No.
4963/91

SIRS:

PLEASE TAKE NOTICE that, pursuant to CPLR §2601(b)(1), the Petitioner General Motors Corporation (the "Company"), hereby appeals as of right to the Court of Appeals of the State of New York from an order of the Appellate Division, Fourth Department, construing and applying the provisions of Article I, Section 6, of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, which order was entered in the office of the Clerk of the Appellate Division on November 18, 1992, and which unanimously affirmed an order of the Commissioner of the New York State Division of Human Rights, dated March 18, 1991, ruling that the Company discriminated against Complainant Clifford Briggs on the basis of race and color in violation of New York Executive Law §296.

SB-1

PLEASE TAKE FURTHER NOTICE that the Company appeals from each and every part of the order of the Appellate Division of the Supreme Court, as well as from the whole thereof.

Dated: January 28, 1993

Yours, etc.,

HARRIS BEACH & WILCOX
Attorneys for Petitioner
130 East Main Street
Rochester, New York 14604
Telephone: (716) 232-4440

TO: The Clerk of the Appellate Division,
Fourth Department
501 Hall of Justice
Court Street
Rochester, New York 14614

Lawrence Kunin, General Counsel
State Division of Human Rights
55 West 125th Street
New York, New York 10027
Michael K. Swirsky, of Counsel

Clifford Carnel Briggs
60 Aldine Street
Rochester, New York 14619

STATE OF NEW YORK
COURT OF APPEALS

GENERAL MOTORS CORPORATION - DELCO PRODUCTS
DIVISION,

Petitioner,

Index No.
4963/91

-vs-

MARGARITA ROSA, as Commissioner of the
New York State Division of Human Rights,
and CLIFFORD CARNEL BRIGGS,

Respondents.

JURISDICTIONAL STATEMENT
Pursuant to Court of Appeals
Rule § 500.2

HARRIS, BEACH & WILCOX
Attorneys for Petitioner
General Motors Corporation
130 East Main Street
Rochester, New York, 14604
Telephone: (716) 232-4440

James Charles Holahan
of Counsel

Ex B-2

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EXHIBITS

- Ex. "A" (Dated Notice of Appeal)
- Ex. "B" (The Order of the Appellate Division
appealed from)
- Ex. "C" (The Memorandum of the Appellate Division)
- Ex. "D" (Order of Commissioner of State Division
of Human Rights)
- Ex. "E" (Recommended Order of the Division's
Adjudication Counsel)

1. The title of this case is General Motors Corporation - Delco Products Division, Petitioner, vs. Margarita Rosa, as Commissioner of the New York State Division of Human Rights, and Clifford Carnel Briggs, Respondents.

2. This Appeal is taken from an Order of the Supreme Court, Appellate Division, Fourth Judicial Department.

3. The Notice of Appeal as of right to the Court of Appeals was filed on January 29, 1993.

4. The Order appealed from was entered on December 29, 1993. The Notice of Entry with the attached Order was served upon Petitioner by mail on January 2, 1993.

5. The name and address of the attorney for Respondent New York State Division of Human Rights is:

Lawrence Kunin, General Counsel
State Division of Human Rights
55 West 125th Street
New York, New York 10027
Michael K. Swirsky, of Counsel

Respondent Clifford Carnel Briggs was not represented by counsel during the proceedings below.

6. The Court of Appeals has jurisdiction of this Motion pursuant to CPLR §5601(b)(1), because the Order and Memorandum of the Appellate Division, Fourth Department, construe and apply the provisions of Article I, Section 6, of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

7. The issues already raised and likely to be raised by the Notice of Appeal as of right based on the above-mentioned constitutional provisions, include the following:

- (a) Petitioner was denied a fair and impartial hearing because the administrative law judge improperly assumed the role of advocate in the administrative hearing.
- (b) Petitioner was denied due process of law under the New York and United States Constitutions because the former general counsel of the New York State Division of Human Rights, first prosecuted this case and then later, after she assumed the position of Commissioner, decided it against Petitioner General Motors Corporation.

CONCLUSION

8. For the foregoing reasons, the Court has jurisdiction of the issues raised by the Notice of Appeal as of right.

Dated: Rochester, New York
February 3, 1993

Respectfully submitted,

HARRIS BEACH & WILCOX
Attorneys for General
Motors Corporation
130 East Main Street
Rochester, New York
Telephone: (716) 232-4440

James Charles Holahan,
of Counsel

09.kjf

STATE OF NEW YORK

COURT OF APPEALS

GENERAL MOTORS CORPORATION - DELCO PRODUCTS
DIVISION,

Petitioner,

-vs-

Index No.
4963/91

MARGARITA ROSA, as Commissioner of the
New York State Division of Human Rights,
and CLIFFORD CARNEL BRIGGS,

Respondents.

NOTICE OF MOTION AND
MOTION FOR LEAVE TO APPEAL

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Of Counsel

J.C.

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EXHIBITS

- Ex. "A" (Memorandum and Judgment,
Appellate Division, November 18, 1992)
- Ex. "B" (Respondents' Notice of Entry,
December 29, 1992)
- Ex. "C" (Petitioner's Motion for Leave to
Appeal as of Right, January 27, 1993)
- Ex. "D" (Recommended Order of the Division's
Adjudication Counsel)
- Ex. "E" (Order of Commissioner Margarita Rosa)

STATE OF NEW YORK
COURT OF APPEALS

GENERAL MOTORS CORPORATION - DELCO
PRODUCTS DIVISION,

Petitioner,

-vs-

MARGARITA ROSA, as Commissioner
of the New York State Division of
Human Rights, and CLIFFORD
CARNEL BRIGGS,

Respondents.

NOTICE OF MOTION
FOR LEAVE TO APPEAL
TO THE COURT OF
APPEALS

Index No. 4963/91

MOTION BY:

Petitioner General Motors
Corporation - Delco Products
Division (the "Company").

PLACE AND DATE
OF HEARING:

Court of Appeals, 20 Eagle Street,
Albany, New York 12207, on Monday,
February 8, 1993.

RELIEF SOUGHT:

An Order, pursuant to CPLR
5602(a)(1), granting leave to appeal
from an order of the Supreme Court,
Appellate Division, Fourth Judicial
Department, which confirmed a
determination of the Commissioner
of the New York State Division of
Human Rights that the Company
discriminated against Complainant
Clifford Briggs on the basis of race
and color in violation of New York
Executive Law §296.

DATE OF NOTICE
OF MOTION:

January 28, 1993.

GROUNDS FOR MOTION:

The grounds upon which this leave is requested are set forth in detail in petitioner's motion papers and are concisely stated as follows:

(a) That the record is devoid of evidence supporting a finding of discrimination under the New York Human Rights Law, a conclusion shared by Adjudication Counsel for the New York State Division of Human Rights. (Ex. "A").

(b) That the administrative process before the New York State Division of Human Rights was arbitrary and capricious and denied the Company a fair and impartial hearing. (Note: The Company has separately raised violations of the New York and United States Constitutions in its appeal as of right under CPLR §5601(b)(1).)

(c) The Commissioner failed to following binding precedent of this Court and unlawfully shifted the burden of proof to the Company.

(d) That this appeal is required to avoid manifest injustice to the Company.

**NOTICE OF MOTION
SERVED BY:**

Harris Beach & Wilcox
Attorneys for Petitioner
130 East Main Street
Rochester, New York 14604
Telephone: (716) 232-4440

NOTICE OF MOTION
ADDRESSED TO:

Lawrence Kunin, General Counsel
State Division of Human Rights
55 West 125th Street
New York, New York 10027
Telephone: (212) 870-8671
Michael K. Swirsky, Of Counsel

Clifford Carnel Briggs
60 Aldine Street
Rochester, New York 14619

100-000
7/28/83 4:12pm

-3-

STATE OF NEW YORK
COURT OF APPEALS

GENERAL MOTORS CORPORATION - DELCO
PRODUCTS DIVISION,

Petitioner,

-vs-

AFFIDAVIT IN SUPPORT
OF MOTION FOR LEAVE
TO APPEAL

MARGARITA ROSA, as Commissioner
of the New York State Division of
Human Rights, and CLIFFORD
CARNEL BRIGGS,

Index No. 4963/91

Respondents.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:

JAMES CHARLES HOLAHAN, being duly sworn, deposes and
says:

1. I am an attorney duly admitted to practice in the
Courts of this state and am a member of Harris Beach & Wilcox,
attorneys of record for the above-named petitioner, General
Motors Corporation-Delco Products Division (hereinafter
"Company" or "Petitioner").

2. This affidavit is submitted in support of an
application by the Company for leave to appeal to the Court of
Appeals, from a decision of the Appellate Division, Fourth
Department. That decision confirmed a finding by the
Commissioner of the New York State Division of Human Rights that
the Company discriminated against Complainant Clifford Briggs

on the basis of race and color in violation of New York Executive Law §296. The judgment of the Appellate Division, confirming the Commissioner's findings, was a final determination pursuant to CPLR §5602 (a) (1).

3. Attached hereto as Exhibit "A" is a copy of the Memorandum and Judgment of the Appellate Division, Fourth Judicial Department, entered in the office of the Clerk of the Appellate Division, Fourth Judicial Department, on November 18, 1992.

4. Attached hereto as Exhibit "B" is a copy of the Notice of Entry dated December 29, 1992, which was mailed to the Company on that date and received on January 2, 1993.

5. Attached hereto as Exhibit "C" is the Petitioner's Notice of Appeal as of Right from that portion of the Appellate Division, Fourth Department's Memorandum and Judgment which rejected the Company's constitutional claims that it was denied a fair and impartial hearing (because the Administrative Law Judge improperly assumed the role of advocate in the administrative hearing) and due process (because Margarita Rosa, former General Counsel of the New York State Division of Human Rights, first prosecuted this case and then later, after she assumed the position of Commissioner, decided it) in violation of the United States and New York State Constitutions.

6. The record on appeal to the Appellate Division, including the briefs of the parties, is made a part hereof. I have forwarded copies of the briefs below with these papers and

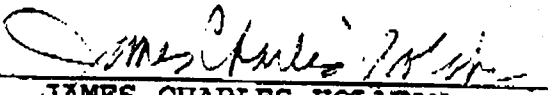
have requested the Appellate Division - Fourth Department to forward the original record directly to this Court.

7. In addition to the constitutional issues appealed as of right, there are several issues raised in this appeal which merit review by the Court of Appeals. First, the record evidence simply does not support the Appellate Division's decision to confirm the Commissioner's finding that the Company discriminated against Complainant on the basis of race and color in violation of New York Executive Law. The Company respectfully submits that the Division clearly failed to establish the prima facie elements of a claim for discriminatory discharge under New York Executive Law §296. Indeed, the Division's Adjudication Counsel reviewed the record in this proceeding and recommended that the complaint be dismissed for lack of evidence (Ex. "D") -- a recommendation which the Commissioner rejected without explanation. (Ex. "E").

8. Assuming, for argument's sake, that the Division established a prima facie case, the Company articulated legitimate non-discriminatory reasons for its decision to discharge Complainant, and there is no proof in the record that these legitimate non-discriminatory reasons were simply a pretext for discrimination. In these circumstances, the Commissioner's determination ignores controlling precedent of this Court and represents an impermissible shifting of the burden of proof to the Company.

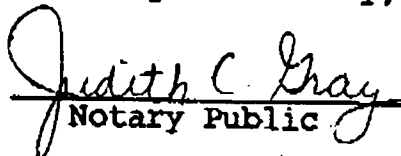
9. The Decision and Order of the Appellate Division is not supported by evidence of discriminatory animus, is erroneous as a matter of law, and is contrary to fundamental principles of equity and justice.

WHEREFORE, it is respectfully requested that leave to appeal to the Court of Appeals be granted, together with such other relief as the Court deems proper.



JAMES CHARLES HOLAHAN

Sworn to before me this
28th day of January, 1993.



Notary Public

JUDITH C. GRAY
Notary Public, State of New York
Monroe County
Commission Expires April 30, 1994

STATE OF NEW YORK
COURT OF APPEALS

GENERAL MOTORS CORPORATION - DELCO
PRODUCTS DIVISION,

Petitioner,

-vs-

MARGARITA ROSA, as Commissioner
of the New York State Division of
Human Rights, and CLIFFORD
CARNEL BRIGGS,

Respondents.

MOTION FOR
LEAVE TO
APPEAL

Index No.
4963/91

QUESTIONS PRESENTED

1. Was it error for the Commissioner to find that the Company discriminated against Complainant Clifford Briggs on the basis of race and color: (a) where the record proof fails to establish that Complainant performed his job satisfactorily, a critical element of a prima facie case of disparate treatment, (b) where the Company articulated legitimate, non-discriminatory reasons for Complainant's discharge, and (c) where the record is barren of any proof that these legitimate non-discriminatory reasons were pretextual.

2. The Appellate Division held that it was not error for the Commissioner to find that the Company unlawfully discriminated against Complainant, even though the Commissioner inexplicably ignored a recommendation from the Division's

Adjudication Counsel that the complaint be dismissed as unsubstantiated.

PRELIMINARY STATEMENT AND BACKGROUND

3. Petitioner General Motors Corporation, pursuant to CPLR 5602(a)(1)(i), seeks leave to appeal from a decision and order of the Appellate Division, Fourth Department, which unanimously confirmed a determination of the Commissioner of the New York State Division of Human Rights that the Company discriminated against Complainant Clifford Briggs on the basis of race and color in violation of New York Executive Law §296.

4. Review by the Court of Appeals is sought because the record evidence was legally insufficient to support the findings of discrimination issued by the Commissioner and confirmed by the Appellate Division. Specifically, the evidence does not establish a prima facie case of disparate treatment. Assuming, for argument's sake, that Complainant established a prima facie case, the record clearly demonstrates that the Company had legitimate non-discriminatory reasons for Complainant's discharge, which were not pretextual.

5. To establish a prima facie case of discriminatory discharge, Complainant must prove that: (1) he belonged to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) after his discharge, the position remained open and the employer continued to seek applicants from persons of Complainant's qualifications. The proof in this case

was legally insufficient to meet this threshold burden because Complainant, a probationary employee who worked for only a few days, failed to establish that his job performance was satisfactory. His repeated violations of shop rules and consistently poor work effort compel the conclusion that his performance was inadequate and unacceptable. Indeed, Complainant admitted that he had violated shop rules with knowledge that such conduct by probationary employees was grounds for discharge.

6. Even if one assumes that Complainant established a prima facie case, the record shows that the Company had legitimate non-discriminatory reasons which justified Complainant's discharge. In these circumstances, Complainant must prove that the Company's reasons for dismissing him were pretextual to prevail on his race discrimination claim. The record is barren of any evidence of pretext, a conclusion shared by the Division's Adjudication Counsel. (Ex. "D"). Significantly, neither the Commissioner nor the Appellate Division made any finding that the Company's reasons for discharge were false or pretextual.

JURISDICTION

7. This Court has jurisdiction of this motion and the appeal sought, pursuant to CPLR 5602(a) (1) (i). The portion of the Appellate Division's Memorandum and Judgment addressed in this motion is not appealable as of right under CPLR 5601(a).

REASON FOR GRANTING LEAVE TO APPEAL

8. There are several issues raised by this motion which merit review by the Court of Appeals. First, the Commissioner's determination, confirmed by the Appellate Division, which found that the Company discriminated against Complainant on the basis of race and color is not supported by substantial evidence. Second, the Commissioner ignored controlling precedent of this Court in analyzing the record and, in so doing, improperly shifted the burden of proof to the Company.

9. The evidence introduced during the hearing on this matter was legally insufficient to support the Commissioner's finding of discriminatory animus, a conclusion shared by the Division's Adjudication Counsel who recommended that the complaint be dismissed. (Ex. "D"). Complainant failed to establish by substantial evidence that he was performing his job duties satisfactorily, an essential element of a prima facie case of race discrimination. Indeed, the record reveals a flagrant pattern of misconduct by Complainant which conclusively demonstrates that his job performance was unsatisfactory.

10. Complainant was a temporary at-will probationary employee who had yet to complete the 90 days of service required before attaining "seniority status" under the collective bargaining agreement between the Company and the Union which represents the Company's production employees. (Tr. 176, 224-

226). Like all other similarly situated probationary employees, Complainant received the standard instructional and orientation program that all new employees in his position receive. (Tr. 14, 77, 180). He was fully aware of his status as a probationary employee and clearly understood that he was expected to perform to the best of his ability. (Tr. 14-17, 77-79).

11. Notwithstanding this training, Complainant compiled a serious and extensive record of shop rule violations during his six days of employment, including: repeatedly failing to wear safety glasses despite instruction and reinstruction, by two different supervisors, of the absolute necessity for wearing safety glasses (Tr. 30-32, 83-84, 178, 397); repeatedly leaving the production line without obtaining a replacement or notifying the supervisor (Tr. 32-33, 83-84, 178, 397); repeatedly returning late from breaks (Tr. 278, 309, 343, 347, 360-361, 364, 371, 454); interfering with the work efforts of fellow employees and restricting production by failing to perform his job in a proper manner (Tr. 46, 91, 175, 178, 275-277, 280-283, 311-313, 348-351, 358, 360-361, 446-465, 468-71, 478-479, 486-488); and directing abusive language toward a fellow employee with the intent to intimidate that employee into restricting production (Tr. 281-282, 311-313, 450-451, 458-461, 516, 518-519). Indeed, Complainant admitted he violated shop rules, fully aware that as a probationary employee he was expected to perform to the best of his ability.

12. It is clear, in light of the foregoing proof, that Complainant's performance was woefully insufficient to merit continued employment -- a conclusion which refutes any inference that his race was the motivating factor for his discharge. Indeed, it is simply incredible to suggest that the Company which only recently had hired Complainant without regard to his race would two weeks later dismiss him because of his race.

13. Moreover, the Company articulated legitimate, non-discriminatory reasons for its decision to discharge the Complainant. These reasons stem from his admitted and repeated violations of shop rules. This Court consistently has held that it is the Complainant's burden to prove that the Company's legitimate, non-discriminatory reasons for its actions were nothing more than pretext for discrimination and that race played a dispositive role in the discharge. Here, the Complainant produced no direct or indirect evidence that would support a finding of pretext. Indeed, the Division's order contains not a single finding with respect to pretext. More importantly, the Commissioner's Adjudication Counsel reviewed this record and recommended that the complaint be dismissed for lack of evidence of any racial animus or pretext on the Company's part. (Ex. "D"). Despite the lack of direct or indirect evidence supporting an inference of pretext, the Appellate Division perfunctorily confirmed the Commissioner's determination that Complainant was dismissed because of his race.

14. The record demonstrates that the Commissioner erroneously shifted the burden of proof to the Company when she found that Complainant's discharge was "precipitous and discriminatory" (Division's Order at 7-8). This conclusion completely disregards the copious and uncontested proof that Claimant was discharged for legitimate non-pretextual reasons. Only by ignoring Complainant's evidentiary burden to prove pretext could the Commissioner find that Complainant's discharge was discriminatory.

15. Aside from the issue of whether the Commissioner's findings are supported by substantial evidence, this motion for leave to appeal to the Court of Appeals should be granted because the administrative process before the Division was arbitrary and capricious and clearly failed to provide the Company with a fair hearing. The Company has appealed as of right, pursuant to CPLR §5601, for review of the constitutional issues raised by the Division's administrative process. Specifically, the Company contends that it was denied a fair and impartial hearing because the Administrative Law Judge repeatedly and impermissibly injected himself into the proceeding to the point where he abandoned his role as a neutral arbitrator and assumed the role of advocate for the Division. The Administrative Law Judge asked more than 700 questions during the hearing, and many of these questions clearly demonstrated that he had abandoned his neutral role of judge and had assumed the role of advocate for Complainant. This conduct

is not only unconstitutional, but arbitrary and capricious as well.

16. Petitioner has also appealed to the Court of Appeals as of right on the ground it was denied due process because the Division's General Counsel, who was responsible for prosecuting this claim at the hearing, subsequently became the Commissioner of the New York State Division of Human Rights and rendered a decision favorable to Complainant. In other words, the Commissioner both prosecuted and decided this case against the Company, ignoring the recommendation of the Division's Adjudication Counsel that the complaint be dismissed because the Company had articulated legitimate, non-discriminatory, and non-pretextual reasons for Complainant's termination. The Commissioner's decision to ignore the recommendation of her own Adjudication Counsel without explanation clearly shows that her initial role as advocate later clouded and unlawfully affected her role as judge.

17. Petitioner respectfully requests that the Court grant leave to appeal so that the substantive issue raised in this motion as well as the important constitutional questions raised in the Company's appeal as of right may be considered together to avoid manifest injustice.

CONCLUSION

18. For the foregoing reasons, this Court should grant Petitioner's motion for leave to appeal.

Dated: Rochester, New York
January 28, 1993

Respectfully submitted,

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