



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING
FAIR EMPLOYMENT & HOUSING COUNCIL
2218 KAUSEN DRIVE, SUITE 100, ELK GROVE, CA 95758
(916) 478-7248 | www.dfeh.ca.gov | e-mail: fehcouncil@dfeh.ca.gov

DIRECTOR KEVIN KISH

FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of September 6, 2017

Minutes

Junipero Serra Building
Carmel Room Auditorium (First Floor)
320 W. 4th Street
Los Angeles, CA 90013

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Lisa Cisneros, Councilmember
Tim Iglesias, Councilmember
Joseph Ortiz, Councilmember
Dara Schur, Councilmember
Kevin Kish, DFEH Director and Ex Officio member

DFEH Staff Present

Holly Thomas, DFEH Deputy Director of Executive Programs
Brian Sperber, DFEH Legislative and Regulatory Counsel
Brenda Valle, DFEH Manager of Quality Assurance and Reporting Unit
Paul Kennedy, DFEH Associate Business Management Analyst

Others Present

Marisa Diaz, Legal Aid at Work
Janet Powers, Fiore Racobs & Powers
Whitney Prout, California Apartment Association

I. Call to Order and Roll Call

Chair Mandelbaum welcomed guests to the FEH Council's 21st meeting and called it to order. He then turned the meeting over to DFEH Legislative and Regulatory Counsel, Brian Sperber, who conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum announced that the Council meeting would be livestreamed on the Council's website and that the recording will be available later on the Council's website and YouTube channel. The public can participate in the meeting by emailing the Council and can find the Attachments to the Agenda on the website.

Chair Mandelbaum then acknowledged Department leaders and members, including: Holly Thomas, DFEH Deputy Director of Executive Programs; Brian Sperber, DFEH Regulatory and Legislative Counsel; Paul Kennedy, DFEH Associate Business Management Analyst; and Brenda Valle, DFEH Manager of Quality Assurance and Reporting Unit.

Chair Mandelbaum then invited the guests in attendance to introduce themselves, on a voluntary basis.

III. Review of the Agenda

Chair Mandelbaum noted that hard copies of the agenda and associated materials were available for people in attendance and that copies are also available on the Council's webpage. He then reviewed the agenda for the meeting.

Chair Mandelbaum announced the highlights of the meeting, which included:

- Consideration of Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistance Animals
- Consideration of Further Modifications to Text of Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information
- Consideration of Modifications to Text of Proposed Employment Regulations Regarding National Origin Discrimination

IV. Approval of the Minutes

Attachment A: Minutes from July 17, 2017 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the July 17, 2017 meeting. During that meeting, the Council, amongst other things, held a public hearing regarding the proposed Regulations Regarding National Origin Discrimination, considered and adopted Further Modifications to Text of Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals, and considered Emergency Regulations Regarding Gender-Neutral Facility Signage. The Council approved the minutes unanimously.

V. Councilmembers' Reports

Chair Chaya Mandelbaum and Councilmembers

Chair Mandelbaum reported that he, Councilmember Brodsky, Councilmember Iglesias, and Councilmember Schur had been reconfirmed by the California Senate for their appointments on the Council. Chair Mandelbaum then invited the Council to report any updates since the last meeting.

Councilmember Iglesias mentioned that he would be giving a housing rights training to a group in San Francisco's Mission District on Saturday, September 23, 2017. He also noted that HUD released a report on September 5, 2017, finding that persons with developmental disabilities continue to face significant housing discrimination.

Councilmember Brodsky reported that she and Councilmember Iglesias are in the process of writing an article on the Council that will be submitted to the University of San Francisco Office of Alumni Engagement, and encouraged others to do the same with their corresponding universities in order to spread awareness of the work done by the Council.

VI. Department of Fair Employment and Housing Report

Kevin Kish, Director, Department of Fair Employment and Housing

Director Kish congratulated Councilmembers Brodsky, Iglesias, Mandelbaum, and Schur on being reconfirmed to the Council.

Director Kish announced that DFEH's updates to its procedural regulations was approved by the Office of Administrative Law and will be effective on October 1, 2017. He also announced that the implementation of DFEH's new case management system, CCRS, is now scheduled to replace the current Houdini system in November 2017.

Lastly, Director Kish reported that Mary Bonilla, DFEH Chief of Enforcement, has retired and after a rigorous and competitive selection process, DFEH has hired Mary Wheat to replace Ms. Bonilla. Ms. Wheat is scheduled to begin at DFEH on September 18, 2017.

VII. Changes without Regulatory Effect to 2 CCR 11024 (Sexual Harassment Training and Education)
Chair Chaya Mandelbaum

Attachment B: Changes without Regulatory Effect to 2 CCR 11024 (Sexual Harassment Training and Education)

A. Discussion by Council

Chair Mandelbaum explained that the Council's 2015 updates to the employment regulations were completed. However, the Office of Administrative Law recently notified DFEH that there are two typographical errors in section 11024 that should be remedied through the changes without regulatory effect process (1 CCR 100).

Councilmember Iglesias inquired regarding the status of a study being conducted on the effectiveness of sexual harassment training. Chair Mandelbaum turned the discussion over to Director Kish to comment on this topic. Director Kish stated that the Department's sexual harassment taskforce has compiled a draft survey to be sent out to California employers in hopes of receiving feedback on the effectiveness of the training. He stated that the survey is expected to be launched in the next few weeks.

Chair Mandelbaum added that the taskforce has also produced a workplace harassment investigation guide that is available on DFEH's website.

B. Public Comment

None.

C. Action by Council

The Council moved, seconded, and unanimously approved the changes to 2 CCR 11024.

VIII. Consideration of Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

Councilmembers Dara Schur and Tim Iglesias

Attachment C: Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

Attachment D: Clean Copy of Additional Modifications to Text of Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

A. Discussion by Council

The Council discussed and modified many terms and phrases, including: “but is not limited to,” “related to,” “person with a disability or disability,” changing “undesirable,” to “negative,” changing multiple instances of “person” to “individual,” changing multiple instances of “should” to “must,” deleting the word “children’s,” and correcting several typographical errors as well as modified capitalizations. In addition, the Council modified multiple definitions, including: “complainant,” “Department” to mean “Department of Fair Employment and Housing,” “housing accommodations,” and “respondent.” As a result of these modifications and corrections, changes in numbering throughout the text was deemed necessary. These changes were accepted and there were no further amendments.

B. Public Comment

The Council heard public comment from:

Janet Powers

Ms. Powers explained the difference between common interest developments and other types of housing providers. Ms. Powers also discussed the ambiguity of the term “reliable verification” as well as offered capitalization and punctuation suggestions.

Whitney Prout, California Apartment Association:

Ms. Prout made multiple suggestions, including: revising current examples of reasonable accommodations; clarifying a connection between accommodation affirmative defenses and an underlying unlawful detainer action; further clarifying the interactive process regulations; providing additional guidance on how to establish whether an animal is a service animal rather than an emotional support animal; and clarifying some terminology.

C. Action by Council

The Council moved, seconded, and unanimously voted to adopt Attachment C as modified and initiate an additional 15-day comment period.

IX. Consideration of Modifications to Text of Proposed Employment Regulations Regarding National Origin Discrimination

Chair Chaya Mandelbaum and Councilmember Dale Brodsky

Attachment E: Modified Text of Proposed Employment Regulations Regarding National Origin Discrimination

A. Discussion by Council

Chair Mandelbaum noted that he and Councilmember Brodsky received a substantial amount of public comment. To address those comments, the subcommittee rewrote part of the regulations. The subcommittee rewrote the definition of national origin to add clarity and consistency. In addition, they changed the phrasing of “business necessity defense” in the context of language restrictions to match the language of the statute addressing this topic – Government Code section 12951 – and added clarity that an employer can, if the position

dictates, ask about language fluency or proficiency. Finally, the subcommittee removed reference to foreign training and experience in their examples of disparate impact because they felt, after reviewing public comment, that the examples may invite confusion.

Councilmember Brodsky discussed additional modifications, including: under subdivision (f) regarding immigration-related practices, the subcommittee used language more consistently to describe undocumented applicants and employees, rather than workers. The subcommittee deleted paragraphs (4), (A), and (B), which have been relocated under subdivision (e) regarding retaliation. Councilmember Brodsky added that under subdivision (f)(2), there were public comments regarding the use of the term “liability phase” creating confusion, so the subcommittee decided to instead reword the paragraph. Next, the height and weight provision now provides some context for its applicability in this topic area; namely that such requirements have the foreseeable effect of creating a disparate impact on the basis of national origin. Lastly, the subcommittee added a reference in the authority note to Government Code section 12951. The Council as a whole did not propose any further amendments.

B. Public Comment

The Council heard public comment from:

Marisa Diaz, Legal Aid at Work

Marisa Diaz thanked the Council for developing and revising the regulations. Ms. Diaz then stated that in regards to the definition of national origin in section 11027.1(b), she agreed that the new structure made the definition much clearer, however she stated the new definition doesn’t mention ethnic group or place of geographic origin, which Title VII and the EEOC guidance addresses. Councilmember Brodsky responded in agreement with Ms. Diaz and noted that the change could be added to subsection (b) of section 11027.1.

Ms. Diaz then referred to the changes in the language restriction provision in section 11028(c) and gave a few suggestions. In regards to the elimination of “type and degree” language, Ms. Diaz felt that including “type and degree” in fact brought clarity to the guidance here, as it makes a distinction between spoken and written language. To the inclusion of “materially interfere” language, Ms. Diaz explained that this standard should only refer to the accent discrimination provision and that “necessary for the effective performance of the specific position” should be kept in the English proficiency provision, since the degree of an individual’s accent is not quantifiable, yet English proficiency generally is. She expressed that neither customer nor coworker displeasure at hearing speech other than English should be a legitimate reason to justify a language restrictive policy as it would only perpetuate and legitimize prejudice. Ms. Diaz then recommended rewording “level of fluency” to read “level of proficiency,” since fluency can commonly refer to speaking without an accent.

Ms. Diaz then referred to comments already submitted in writing regarding section 11028(a)-(c) and asked that the Council reconsider the suggestions. These suggestions included rewording phrasing for clarity as well as elaborating on the types of harassment specific to the national origin context.

C. Action by Council

The Council moved, seconded, and unanimously voted to adopt Attachment E as modified and initiate a 15-day comment period.

X. **Report from Subcommittee Regarding Potential Public Civil Rights Hearings** Councilmembers Tim Iglesias

A. Discussion by Council

Chair Mandelbaum turned the meeting over to Councilmember Iglesias. Councilmember Iglesias reported that he and Councilmember Harris are still planning to hold a civil rights hearing in the Central Valley within the next year, however there is no confirmed date yet.

B. Public Comment

None.

C. Action by Council

None.

XI. Report on Emergency Regulations Regarding Gender-Neutral Facility Signage

Councilmember Dale Brodsky

A. Discussion by Council

Councilmember Brodsky referenced the last FEHC meeting where the Council approved an emergency regulation to comport with Cal/OSHA's regulation regarding signage in certain types of bathrooms. She proposed that Councilmember Cisneros join her on the subcommittee and begin working with DIR to try to harmonize regulations.

B. Public Comment

None.

C. Action by Council

The Council moved, seconded, and unanimously voted to have Councilmember Cisneros join Councilmember Brodsky on the subcommittee.

XII. Report from Subcommittee on Potential New Rulemaking Topics

Councilmembers Lisa Cisneros and Joseph Ortiz

A. Discussion by Council

Councilmember Ortiz discussed two potential, future topics for revisions: 1) age discrimination; and 2) religious discrimination.

Chair Mandelbaum asked Councilmembers Cisneros and Ortiz if they would be interested in forming a new subcommittee aimed at formulating a draft addressing these provisions.

B. Public Comment

None.

C. Action by Council

The Council moved, seconded, and unanimously voted to have Councilmembers Cisneros and Ortiz form a new subcommittee to produce a draft addressing provisions on age discrimination and religious discrimination in employment.

XIII. Consideration of Further Modifications to Text of Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information

Councilmembers Dara Schur and Tim Iglesias

Attachment F: Further Modified Text of Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information

A. Discussion by Council

Councilmember Iglesias said that regarding the seven year “lookback” period imposed on individuals with a criminal history, they received feedback regarding the idea of a rebuttable presumption and proposed having the first clause state the law and the second clause state the principle that shorter lookback periods, such as 5 years for serious crimes, may be less discriminatory alternatives. Councilmember Schur interjected that in struggling to decide on the correct number of years, they are welcoming feedback from the Council and the public to decide whether they should leave the regulation as is or change it.

Chair Mandelbaum commented that he is disinclined to change the current number of years based on current research if the subcommittee includes rebuttable presumption language.

Councilmember Cisneros said it would be helpful to add citations to the federal guidance regarding what the look back is for particular types of crimes. Director Kish responded that citations to authority that is not in statute or state authority go in the initial or final statement of reasons for OAL purposes.

B. Public Comment

The Council heard public comment from:

Whitney Prout, California Apartment Association:

Ms. Prout noted that because the harassment regulations are being moved to a different subchapter but still rely on definitions within the original subchapter, it would be helpful to note where to look for definitions based on this change. In addition, she commented that some definitions added to modifications of the harassment regulations cause some of the discriminatory effect regulations to be duplicative and should perhaps be reconsidered.

Councilmember Schur commented that the sections will be renumbered as they’re moved, and that they cannot reference definitions that have not been adopted.

C. Action by Council

The Council moved, seconded, and unanimously voted to adopt Attachment F as it is reflected in the meeting attachment.

XIV. Further Public Comment

None.

XV. Adjournment

Chair Mandelbaum adjourned the meeting at approximately 4:31 p.m.

Date: September 26, 2017

CHAYA MANDELBAUM
Chair

Renee Rondinone
DFEH Outreach and Education Specialist