



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

DIRECTOR KEVIN KISH

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

FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of August 31, 2016

Minutes

Location

California Public Utilities Commission
505 Van Ness Ave., Auditorium
San Francisco, CA 94102

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Chanee Franklin Minor, Councilmember
Tim Iglesias, Councilmember
Patricia Perez, Councilmember
Andrew Schneiderman, Councilmember
Dara Schur, Councilmember
Kevin Kish, DFEH Director and Ex-Officio Member

DFEH Staff Present

Brian Sperber, Legislative and Regulatory Counsel
Paul Kennedy, Associate Business Management Analyst
Renee Richardson, Legal Analyst
Iva Townsel, Senior Legal Analyst

Others Present

Karen Clopton, California Public Utilities Commission
Tim Sullivan, California Public Utilities Commission
Chris Parkes, California Public Utilities Commission
Noah Frigault, San Francisco Human Rights Commission
Noah Lebowitz, California Employment Lawyers Association
Ron Kingston, California Political Consulting Group
Jon Smock, Apartment Association of Orange County
Marisa Diaz, Legal Aid Society – Employment Law Center
Stacy Villalobos, Legal Aid Society – Employment Law Center
Nayantara Mehta, National Employment Law Project
Sal Morales, County of Alameda
Emma Regidor, California Department of Corrections and Rehabilitation
Evelina Nava, Tenants Together
Sanjay Wagle, CA Association of Realtors
Christopher Ho, Legal Aid Society – Employment Law Center

I. Call to Order and Roll Call

Chair Mandelbaum called the meeting to order at 10:05 a.m. Renee Richardson, DFEH Legal Analyst, conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum stated that the meeting is livestreamed on the Council's website and reminded guests viewing remotely that they could participate in the meeting by emailing the Council and that the attachments were on the website. Chair Mandelbaum thanked the Honorable Karen V. Clopton, CPUC Chief Administrative Law Judge, and Tim Sullivan, CPUC Executive Director, for hosting the meeting.

Mr. Sullivan welcomed the Council as a sister agency to CPUC. CPUC is a regulatory agency that also sponsors \$2 billion in low income subsidies to provide Californians with access to communications and energy infrastructure, including programs to provide internet access to disadvantaged communities and rural parts of the state. Mr. Sullivan then introduced Chief Judge Clopton.

Chief Judge Clopton thanked the Council and welcomed them to CPUC. As a sister agency, both agencies have the same public protection obligations for the 39.1 million residents of the State of California. Chief Judge Clopton worked with Councilmember Perez on equity, diversity, and inclusion issues in California. Chief Judge Clopton acknowledged the importance of the Council's work, in particular the transgender employment discrimination regulations. She and her colleagues are very proud to have worked alongside the first transgender Administrative Law Judge, and now the first transgender superior court judge, Hon. Victoria Kolakowski. Chief Judge Clopton also serves on the California Commission on the Rules of Professional Conduct. She called the Council's attention to the Commission's proposed regulation 8.4.1, which is modeled after the FEHA, and prohibits discrimination against clients and employees by lawyers in California and makes discrimination a cause for discipline. For the last 22 years, the current rule, 2-400, has included a requirement for a final adjudication by a different tribunal prior to a complaint being filed before the California state bar court. This burden has rendered rule 2-400 completely ineffective. Chief Judge Clopton asked the Council to review rule 8.4.1 and to consider formally supporting its adoption. She also encouraged the Council and DFEH to provide guidance to employers about implicit bias awareness, recognition, training, and its importance in all aspects of employment including recruitment, retention, performance, evaluation, investigation, and professional development opportunities. Chief Judge Clopton acknowledged the Council for all the important work that the Council is doing.

III. Review of the Agenda

Chair Mandelbaum highlighted and reviewed the topics for agenda sections VII (Transgender Regulations), IX (Criminal History in Employment Decisions), X (Housing Regulations re: Harassment), XI (Public Workshop), and XII (Council Presentation) of the agenda. Chair Mandelbaum proposed switching agenda items X and XI to have the public workshop before the proposed housing regulations to incorporate revised text and definitions before the Council considers amended rules and votes on them. Councilmember Franklin Minor suggested moving forward with rulemaking because revising definitions may prolong the process. Chair Mandelbaum agreed with Director Kish's proposal to target and vet a portion of agenda item XI by the time the Council votes on agenda item X.

Chair Mandelbaum reviewed the Agenda and invited guests to comment on issues addressed by the Council.

IV. Approval of the Minutes

Attachment A: Minutes from the June 27, 2016 meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the June 27, 2016 meeting. During that meeting, the Council held a public hearing regarding the Proposed Regulations Regarding Transgender Identity and Expression. They also considered modifications to the Text of Proposed Regulations Concerning the Use of Criminal History in Employment Decisions and discussed a working draft of housing regulations.

Chair Mandelbaum asked for comments pertaining to the minutes. Councilmember Iglesias requested the minutes be modified to reflect that he read proposed housing regulations into the public record.

Chair Mandelbaum asked for public comments on the minutes, and receiving none, the Council moved to approve the minutes with Councilmember Iglesias' modification. The motion to approve the minutes was passed with one abstention.

V. Councilmembers' Reports

Councilmember Perez discussed the Sexual Harassment Task Force which includes three initiatives: an academic study on the efficacy of harassment training; use of public hearings; and best practices on the issue of how to prevent and correct wrongful behavior in the workplace.

Councilmember Iglesias seconded Chief Judge Clopton's suggestion that the Council review a proposed rule on attorney discrimination not only in the employment context, but in housing and public accommodations as well.

Councilmember Franklin Minor mentioned that she is an executive producer of a film that exposes child sex trafficking called *Still I Rise*, which is timely given that AB 1684 empowers DFEH to enforce the California Trafficking Victims Protection Act. Councilmember Franklin Minor also stated that there is a need to bring light to police brutality and hate crimes, and implores the Council to do more public hearings as they set priorities in 2017. Councilmember Brodsky suggested working with civil rights organizations to facilitate that effort.

VI. Department of Fair Employment and Housing Report

Director Kish discussed the new state budget which allows the DFEH to hire 30 new employees beginning on July 1, 2016, and to fund a new case management system which will be in place by May 2017. Priorities for the new system include increased accessibility for people with disabilities and people who do not speak English.

Director Kish supports the Council's efforts to hold public hearings and discussed a workplace justice summit on September 7-8, 2016, to address employment discrimination and build relationships between government and civil rights agencies. Agencies in attendance will include: Equal Employment Opportunity Commission, National Labor Relations Board, Agricultural Labor Relations Board, U.S. Department of Labor, and the California Labor Commissioner. On September 15, 2016, the DFEH is participating in a day-long training with U.S. Department of Justice Community Relations Service, which addresses community unrest as a result of civil rights violations.

DFEH released a reasonable accommodation package for employers on DFEH’s website which may also be useful in the housing context. Director Kish noted that the forms are designed to help employers and employees avoid the common pitfalls in the interactive process, such as not responding to a request or considering alternate forms of accommodation.

Director Kish discussed two new pieces of legislation. AB 1684 empowers the DFEH to investigate and prosecute violations of Civil Code section 52.5, the Human Trafficking Protection Act, and becomes effective January 1, 2017. AB 2780 staggers FEHC councilmember terms beginning with appointments after January 1, 2017. Four of the councilmembers will hold 4-year terms and three of the councilmembers will hold 2-year terms to preserve institutional knowledge when members leave the Council.

VII. Consideration of Modified Text of Proposed Regulations Regarding Transgender Identity and Expression

Attachment B: Text of Proposed Regulations Regarding Transgender Identity and Expression

A. Introduction

Councilmembers Brodsky and Perez discussed the latest changes to the proposed regulations regarding Transgender Identity and Expression. A member of the public previously noted that the title of this regulation includes the term “Transgender Identity” rather than “Gender Identity.” DFEH staff researched the issue and found that “Transgender Identity” was included in the working title used by the Office of Administrative Law (OAL) and to change it would require a new regulation with a new 45-day comment period, but that there is otherwise no legal effect. Councilmembers discussed proposed text. Chair Mandelbaum asked for any public comment relating to the text.

B. Public Comment

Noah Lebowitz on behalf of California Employment Lawyers Association. Mr. Lebowitz addressed three items:

(1) Subsection (g). Mr. Lebowitz was primarily concerned with the clarity of the language. CELA suggested using the term “business necessity” rather than “legitimate business purpose” because “legitimate business purpose” has a specific meaning in disparate treatment cases. “Business necessity,” as defined in Cal. Code Regs., tit. 2, § 11010, is established as an affirmative defense, which places the burden of proof on the employer.

(2) Subsection (h)(3). CELA suggested a modification to “ban the box” and to eliminate any question of gender on job applications unless employers can show a question about how gender serves a Bona Fide Occupational Qualification (BFOQ). CELA and Mr. Lebowitz believe that it is improper to inquire about gender on job applications as no other protected status (including race and disability) is disclosed on job applications. CELA asserts that banning the box is within the Council’s authority.

(3) Subsection (i) – Additional Rights. Mr. Lebowitz thanked the Council for adopting CELA’s suggestions in subsection (i)(1)(B)(4) regarding perception of transitioning. CELA further requested the Council adopt other suggested language which describes protected activity related to gender identification and prohibition of retaliation for these activities.

There were no additional public comments.

C. Action by Council

The Council discussed the difference between “legitimate business purpose” and “business necessity,” establishing that “business necessity” should be the standard.

Chair Mandelbaum reviewed the list of proposed modifications before voting to initiate a 15-day comment period.

Councilmember Iglesias asked why the subcommittee did not take Mr. Leibowitz’s suggestion to add language about protected activity and retaliation. Councilmembers Brodsky and Perez indicated that retaliation is covered broadly and it is not necessary to reiterate here.

Chair Mandelbaum proposed adopting the newly modified Attachment B and moving forward with a 15-day comment period. The motion was seconded and passed unanimously.

LUNCH BREAK AT 12:18 P.M. / RESUME AT 1:30 P.M.

VIII. Guest Speakers

Chair Mandelbaum introduced Maria Diaz and Stacy Villalobos from the Legal Aid Society, Employment Law Center. Their comments included a power point presentation, which is available on the Council’s Web site.

Legal Aid Society, Employment Law Center has a long history of helping individuals enforce their rights against discrimination that affect national origin minority and immigrant workers. Since 1995, they have hosted a language rights project, which provides legal assistance to individuals whose primary language is not English.

Ms. Diaz discussed the issue of national origin discrimination, mentioning that 1 in 3 California workers are immigrants. Ms. Diaz said that the EEOC is currently reviewing proposed guidelines on national origin discrimination and suggested the FEHC use these guidelines if the FEHC and DFEH take up this issue under the FEHA. National Origin discrimination is a lesser known form of discrimination, but DFEH statistics show that a significant proportion of complaints received in 2015 were due to national origin discrimination. National origin discrimination includes: place of birth or ancestor’s place of birth, geographic region, Native American tribe, actual or perceived national origin, and language discrimination.

Ms. Villalobos discussed language discrimination. She covered three separate issues: (1) English-only policies, (2) accent discrimination, and (3) English proficiency requirements. The statute that governs English-only policies in California is Government Code section 12951. Though it became effective in 2002, there are no published cases interpreting this statute. Workplace language policies continue to disparately impact protected groups by creating oppressive and intimidating workplaces, harming morale, and impeding efficiency since workers can communicate more effectively in their native language. Ms. Villalobos asks the Council to consider this area a priority in rulemaking, stating the employees and employers are unaware of their rights and obligations under the FEHA. Ms. Villalobos further asked the Council to consider enacting regulations that classify the blanket English-only policies as unlawful under Government Code section 12951. Ms. Villalobos indicated that at the federal level, when establishing national origin discrimination under Title VII, an analysis of whether English-only policies disparately impact national origin minority groups is required before considering whether the policy has a business

necessity. She argues that in California, Gov. Code § 12951 assumes that English-only policies disparately impact national origin minorities. The California statute places a higher burden on the employer in defining business necessity by requiring an overriding legitimate business purpose, requiring a connection between the policy and the purpose, and requiring that there be no alternative practice available. Ms. Villalobos recommended creating regulations on this issue, which clarify that English-only policies are presumed to disparately impact national origin minorities under the FEHA. Finally, she asked the Council to clarify that business necessity is more than simply business convenience, that it truly must be an overriding business purpose.

Ms. Villalobos mentioned that there is no guidance in the FEHA or the Regulations about how to evaluate accent discrimination and English proficiency requirements. Ms. Villalobos recommended that the Council adopt language from 9th circuit case law and from the EEOC guidelines requiring concrete evidence as opposed to unsupported assertions when dealing with negative employment decisions due to accents.

Ms. Diaz continued discussing issues regarding undocumented workers. Title VII protects all workers regardless of immigration status; however, it is unclear what remedies are available to undocumented workers under the FEHA in cases of employment discrimination. Ms. Diaz requested guidance from the Council on this issue. Ms. Diaz also discussed the issue of retaliation against undocumented workers, who are often afraid that if they assert their workplace rights, as they are entitled to do under the FEHA, their employer might report the employee or their family to Immigration and Customs Enforcement. Ms. Diaz requested the Council offer guidance on this problem under the FEHA to make it clear that this type of retaliation is unlawful.

IX. Consideration of Additional Modifications to Text of Proposed Regulations Concerning the Use of Criminal History in Employment Decisions

Attachment C: Further Modified Text of Proposed Regulations Concerning the Use of Criminal History in Employment Decisions

A. Discussion by Council

Chair Mandelbaum indicated that the Council received a significant number of public comments and made additional modifications accordingly.

The subcommittee's draft incorporated the "persuasive basis" language to balance instructions about use of statistics and exceptions. On one hand, the Council heard from employees and advocates about how to use national statistics. On the other, the Council heard from employers, who were cognizant of the fact that not all national statistics will be informative.

B. Public Comment

Nayantara Mehta, from the National Employment Law Project (NELP), discussed section 11071.1(f) regarding licensing and employer defenses. Ms. Mehta believed that the language should be more explicit to reflect that employers are required to follow the statute and regulations on this matter unless they are required to follow a different existing state or federal law or if an employee does not have a required occupational license.

Noah Lebowitz on behalf of CELA, supported and endorsed NELP's position. Further, in subdivision (e)(3), Mr. Lebowitz suggested adding "applicant" to the final sentence about employees. Regarding

subsection (d), Mr. Lebowitz believes the language is unclear. Mr. Lebowitz also requested clarification of “persuasive basis.”

Christopher Ho, from the Legal Aid Society – Employment Law Center, suggested changing the language in section 11017.1(b), “...Except if otherwise permitted ...,” to “except if otherwise mandated.”

C. Action by Council

Chair Mandelbaum moved to adopt the next draft as modified by the Council. Councilmember Perez second. The motion passed unanimously.

X. **Consideration of Proposed Text of Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals**

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

A. Discussion by Council

Director Kish provided a brief outline of the history of the Council’s development of fair housing regulations, dating back to September 2013. The initial draft of these regulations was created in January 2015. The Council received comments from a several advocacy groups, the California Association of Realtors, Mr. Kingston from the California Political Consulting Group, HUD, and from individual attorneys. Over the course of the year, the subcommittee incorporated those comments into a new draft that was presented in January 2016. The subcommittee decided to address specific topics through a public workshop in April 2016, which included retaliation, harassment, sexual harassment, and liability for unlawful harassment. The Council then received comments from non-profit and legal aid groups. In June, the subcommittee added select disability provisions to the draft. The Council then received comments from the California Apartment Association and the California Association of Realtors and non-profit groups. The Humane Society submitted a letter in support.

Director Kish reviewed the proposed text by highlighting areas that were the same and areas that have changed. He reminded the Council that if there is a vote, they need to add any desired changes, including definitions, because nothing can be changed until after the 45-day comment hearing once the rulemaking process has started. Chair Mandelbaum invited public comments on the draft before the Council.

B. Public Comment

Jon Smock, General Counsel for the Apartment Association of Orange County, and Ron Kingston from the California Political Consulting Group presented on behalf of several local apartment associations.

Regarding section 11098.27, Assistive Animals as a Reasonable Accommodation, Mr. Kingston noted that all elements in subdivision (a) preclude an owner from denying an assistive animal preemptively. In subsection (a)(1), the owner would not know if the assistive animal would pose a threat, or whether there are too many assistive animals in the unit, until the animal(s) is/are present in the housing accommodation. Mr. Kingston referred to section 11098.26(b) by stating that an owner can only deny a reasonable accommodation if the tenant does not in fact have a disability, but owners are not legally permitted to inquire about tenant disabilities. Mr. Kingston asked how owners are supposed to determine whether or not a tenant has a disability and mentioned that he would prefer to rely upon federal law. Mr. Kingston asserted that assistive animals can be left unattended in housing accommodations and can thus

be disruptive. Service animals, however, are relied upon by people who may be mobility impaired or blind and rely on the service animal 24/7, thus ensuring the animal is always supervised in the housing accommodation. The housing associations Mr. Kingston and Mr. Smock represent have statutory duties regarding the health and safety of all tenants, and would like the regulations to address this issue.

Sanjay Wagle of the California Association of Realtors noted that he believed the definition of “assistive animal” is unnecessary and confusing. Regarding section 11098.27(a)(3) and the language about an assistive animal posing “direct threat,” Mr. Wagle believes the FEHA should conform to the ADA standard whereby owners need not accommodate assistive animals if they are concerned about a direct threat. Mr. Wagle suggested adding the phrase “at all times” to the clause about ensuring the animal is under the resident’s control in section 11098.27(d).

In section 11098.28, Mr. Wagle suggested adding language requiring tenants to inform landlords as soon as possible if they need an accommodation in order to begin the interactive process and reach an agreement acceptable by both sides. In section 11098.27, Mr. Wagle asked for more clarification regarding who can show proof of disability. Director Kish indicated that section 11098.27 is taken from HUD/DOJ FHEO Notice 2013-01 issued on April 25, 2013 entitled “Service Animals and Assistive Animals for People with Disabilities in Housing and HUD funded Programs.”

C. Action by Council

Chair Mandelbaum suggested that the Council make changes to the draft so that a vote can be taken to enter into the rulemaking process.

After a discussion by the Councilmembers, Attachment D was modified as follows: (1) add “protective basis,” “owner,” “person,” and “practice” as contained in Attachment E of the meeting’s materials to the definitions section and (2) change the title under section 11098.28 to “Undue Hardship and Fundamental Alteration.”

Councilmember Iglesias moved the Council to adopt the proposed regulations as modified at the meeting. Chair Mandelbaum seconded the motion. The motion passed, with one “nay” vote (Councilmember Perez).

XI. Public Workshop and Review of Working Draft of Housing Regulations Regarding Discriminatory Effect and use of Criminal History

Due to time constraints, this discussion was postponed until the next meeting.

XII. Presentation Regarding the Background and History of Residential Occupancy Standards

Due to time constraints, this presentation was postponed until the next meeting.

XIII. Further Public Comment

There was no further public comment.

XIV. Adjournment

Chair Mandelbaum adjourned the meeting at approximately 4:25 p.m.

Date: October 31, 2016

Chaya Mandelbaum
Chair

Iva Townsel
Senior Legal Analyst

Renee Richardson
Legal Analyst