



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING
FAIR EMPLOYMENT & HOUSING COUNCIL
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FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of April 7, 2016

Minutes

Elihu M. Harris State Building
1515 Clay Street, Room 7
Oakland, CA 94612

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Chanée Franklin Minor, Councilmember
Tim Iglesias, Councilmember
Patricia Perez, Councilmember
Dara Schur, Councilmember
Kevin Kish, DFEH Director and Ex Officio member

DFEH Staff Present

Nelson Chan, Chief of Public Policy and Education
Brian Sperber, Legislative and Regulatory Counsel
Jeanette Hawn, Civil Rights Fellow

Others Present

Brooke Barnum, Ferber Law
Beverly Bueno, Berkeley Unified School District
Aaron Buriss
Gabriela Contreras
Max Contreras, Atkinson-Baker
Noah Frigault, San Francisco Human Rights Commission
Noah Lebowitz, California Employment Lawyers Association and Duckworth Peters Lebowitz Olivier LLP
Ron Kingston, California Political Consulting Group on behalf of Regional Apartment Associations
Melissa Morris, Law Foundation of Silicon Valley
Evelina Nava, Tenants Together
Nayantara Mehta, National Employment Law Project
Craig Schechter, Fair Housing Marin
Karen Shain, San Francisco Reentry Council
Jon Smock, Apartment Association of Orange County
Kate Svinarich, Seyfarth Shaw
Salina Vavia-Johnson, San Francisco Municipal Transportation Agency
Gabriela Ventura, Covered California
Charlotte Wu, San Francisco Municipal Transportation Agency

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

CHANÉE FRANKLIN MINOR
COUNCILMEMBER

TIM IGLESIAS
COUNCILMEMBER

PATRICIA C PEREZ
COUNCILMEMBER

ANDREW SCHNEIDERMAN
COUNCILMEMBER

DARA L. SCHUR
COUNCILMEMBER

I. Call to Order and Roll Call

Chair Mandelbaum called the meeting to order at 10:13 a.m. and DFEH Legislative and Regulatory Counsel Brian Sperber conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum announced that the Council meeting will not be webcast live as planned but 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 invited guests in attendance to introduce themselves. Chair Mandelbaum then reminded the guests in attendance that hard copies of the Attachments were available in the meeting room.

III. Review of the Agenda

Chair Mandelbaum reviewed the Agenda for the meeting.

IV. Approval of the Minutes

Attachment A: Minutes from the January 7, 2016 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the January 7, 2016 Meeting. During that meeting, the Council discussed consideration and adoption of draft proposed regulations on the use of criminal history in employment decisions and had a discussion regarding the working draft of the housing regulations.

Chair Mandelbaum invited comments pertaining to the minutes from the Council and the public. There being no comments, the Council moved, seconded, and all voting councilmembers approved the minutes unanimously.

V. Councilmembers' Reports

Councilmember Iglesias discussed a previously-held housing conference at USF School of Law, and stated there will be related publications in the USF Law Review. Councilmember Iglesias will also be conducting outreach at the Sentinel Fair Housing Forum on April 26th in San Mateo County and will be speaking at the annual symposium of the Fair Housing and Public Accommodations subsection of the California Bar's Real Property Law Section in Los Angeles on April 28th.

Councilmember Schur noted that, since this is Fair Housing Month, there will be a lot of symposia.

Councilmember Brodsky noted that DFEH Legislative and Regulatory Counsel Brian Sperber and Noah Lebowitz will appear on a panel regarding regulations at the National Employment Lawyers Association Convention in June 2016.

Chair Mandelbaum noted that he is scheduled to moderate a roundtable and judge's panel on April 21 and 22 at the State Bar's Labor and Employment Law section's annual meeting and annual public sector conference in Berkeley. The roundtable panel will involve state and federal court judges discussing and exploring existing and future efforts to improve the litigation and resolution process in employment disputes so that they can be resolved on the merits or through settlement more efficiently and effectively. Chair Mandelbaum noted that the discussion will be collaborative and encouraged people to attend. Chair Mandelbaum noted that Councilmember Brodsky will be presenting at the conference as well.

Councilmember Franklin Minor observed that, just this week, the City of Oakland declared a housing emergency, and various other bay area cities are exploring the same declaration. She noted that the work that the Council is doing today is very important and that California is in a state of emergency with regards to housing. Councilmember Franklin Minor urged the Council to keep this in mind as it embarked on the day's meeting.

Councilmember Perez expressed appreciation to Director Kish for appearing at a speaking engagement at her firm, Ogletree Deakins. She noted that his presentation was well received by the HR professionals who were primarily in attendance and that they were appreciative of his tone, commitment, and openness.

VI. Department of Fair Employment and Housing Report

Director Kish stated that the spring finance letters were released on April 1, which are amendments to the Governor's budget that was released in January 2016. Director Kish indicated that these amendments provide for DFEH replacing its online case management system. He anticipated that, if approved, on July 1, 2016, DFEH will be ready to begin constructing a system that has accessibility built into it, including enabling complainants and respondents to upload documents directly and receive case status notifications through the system. Director Kish stated DFEH looks forward to working with the legislature and answering their questions and expressed appreciation to the Governor, Department of Finance, and Department of Technology.

VII. Public Hearing: Proposed Regulations Concerning the Use of Criminal History in Employment Decisions

Attachment B: Notice of Proposed Rulemaking

Attachment C: Initial Statement of Reasons

Attachment D: Text of Proposed Regulation Concerning the Use of Criminal History in Employment Decisions

A. Introduction

Chair Mandelbaum confirmed that the court reporter was present and started the public hearing on the Consideration of Criminal History in Employment Decisions Regulations at 10:25 a.m.

Chair Mandelbaum stated the purpose of the public hearing is to receive public comments regarding the issuance of amendments to the Fair Employment and Housing Act regulations concerning the use of criminal history in employment decisions that are being proposed by the Council. He also noted that the Council's rulemaking action clarifies, makes specific, and supplements existing state regulations interpreting the FEHA. The proposed regulations are slated to appear in Title 2 of the California Code of Regulations.

Chair Mandelbaum noted copies of the proposed amendments to the regulations are Attachment D and available in the front of the room and on the Council's webpage. The notice and initial statement of reasons are Attachments B and C, respectively. Chair Mandelbaum discussed the role of the hearing as part of the formal rulemaking process and stated that notice of the public hearing was provided more than 45 days ago. Pursuant to that notice, Chair Mandelbaum stated the Council would hear testimony at the hearing and accept written comments on the proposed regulations until 5:00 p.m., which could be transmitted to the Council via email or by mail. Chair Mandelbaum also stated that copies of written comments could be given to Legislative and Regulatory Counsel Brian Sperber at the meeting before the 5:00 p.m. deadline.

Those who provide testimony, submit written comments, or make a request will receive a copy of changes or amendments made to the proposed amendments to the FEHA regulations by the Council and those who testify or submit written comments will have a 15-day period to submit written comments on any changes proposed by the

Council. Additionally, the Council will consider all comments and will respond to each in writing in the final statement of reasons.

Chair Mandelbaum announced the hearing was being transcribed by a certified court reporter and the transcript of the hearing as well as all written comments received by the Council would be part of the Council's rulemaking record. Because the meeting was transcribed, Chair Mandelbaum described the procedure for providing testimony. Chair Mandelbaum asked for questions before the Council began taking testimony. There being none, he invited public comment.

B. Public Comment

Nayantara Mehta, from the National Employment Law Project, testified. Ms. Mehta and Chair Mandelbaum discussed the *Green* factors in Section 11017.1, subdivision (e), the EEOC guidelines, and what the guidelines require with regards to an individualized assessment. Councilmembers Perez and Brodsky and Ms. Mehta discussed the other relevant factors that Ms. Mehta proposed to be included in the proposed regulations as part of the individualized assessment. They also discussed potential restructuring of Section 11017.1, subdivision (e)(2). Councilmember Perez and Ms. Mehta discussed the process for an employer to prove compliance with an individualized assessment requirement. Chair Mandelbaum, Councilmember Franklin Minor, and Ms. Mehta discussed gender and the statistical demonstration of disparate impact with regards to criminal history and employment. Councilmembers Perez, Brodsky, and Franklin Minor and Ms. Mehta discussed a hypothetical regarding what the process would be if a conviction for a crime against a child is not job related but the employer rejects an applicant due to that criminal conviction because there is a daycare that is part of the workplace. Councilmember Schur and Ms. Mehta discussed how to reconcile Government Code section 12944's adverse impact provision with Business and Professions Code 480, which gives licensing boards the ability to deny a license to someone who has been convicted of a crime. Chair Mandelbaum, Councilmembers Brodsky, Iglesias, and Schur, and Ms. Mehta discussed Ms. Mehta's recommendation that the proposed regulations provide more guidance to a job seeker on how to establish disparate adverse impact.

Director Kish, Legislative and Regulatory Counsel Brian Sperber, and Chair Mandelbaum clarified the process by which the subcommittee will consider the comments and produce another draft, if they choose to redraft the proposed regulations.

Ms. Mehta expressed concern that Section 11017.1, subdivision (f) lumps together too many scenarios and gives employers a free pass to characterize something as a business necessity. Chair Mandelbaum and Councilmember Schur thanked Ms. Mehta for her comments.

Chair Mandelbaum called for recess at 11:27 a.m. Chair Mandelbaum called the meeting back to order at 11:43 a.m. and invited further testimony from the public.

Aaron Buriss testified about his struggle with obtaining employment as he was recently released from prison after 22 years on a life term. Mr. Burris questioned the punishment for employers who automatically reject applicants with felony convictions. Mr. Burris also highlighted his experience and the experiences of others with felony convictions who seek employment after they are released. Mr. Burris expressed appreciation for Ms. Mehta's comments regarding the need for clarity in the regulations because he believes employers will find loopholes. Chair Mandelbaum thanked Mr. Burris for his comments. Councilmember Perez and Mr. Burris discussed what an employer should look for to identify prospective employees who have changed since they were convicted from others who have not. Councilmember Franklin Minor thanked Mr. Burris and stated that it is important for the Council to hear personal perspectives. She also expressed support for the Ban the Box movement and removing barriers to employment for people who have criminal convictions. Councilmember Iglesias and Chair Mandelbaum clarified that, under the proposed regulations, an employer found guilty of

violating the FEHA would be subject to a more significant penalty than the \$50 fine imposed under the San Francisco ordinance referenced by Mr. Burris. Councilmember Iglesias expressed interest in considering a whistleblower regulation and a housing regulation that would address the ways in which a housing provider could use an applicant's criminal history to exclude renters. Mr. Burris, Councilmember Schur, and Director Kish discussed licensing restrictions with regards to criminal convictions, especially when the criminal conviction is related to conduct that is no longer illegal.

Karen Shain, the re-entry policy planner for San Francisco Adult Probation, expressed appreciation to the Council. Ms. Shain stated that housing is a critical piece of this puzzle. Ms. Shain also urged those discussing "sex offenses" to be careful about what the term means and not to adopt an over inclusive regulation. Councilmember Perez clarified that the focus of her question was an applicant's criminal conviction that was not job-related but was somehow related to the workplace environment and whether it would be fair for an employer to consider that.

Noah Lebowitz, Chair of the Fair Employment and Housing Council Regulations Committee of the California Employment Lawyers Association, stated that CELA's goal is for the regulations to be clear and comprehensive and should be written to provide clear rules to help avoid litigation. Mr. Lebowitz stated written comments would be submitted by the end of the day. Mr. Lebowitz expressed appreciation to Director Kish for his work in obtaining DFEH's new online case management system and seeking the input of stakeholders. Mr. Lebowitz brought to the Council's attention a potential drafting error in the proposed regulations. He also expressed support for National Employment Law Project's (NELP) comments in regards to the individualized assessment and urged the Council to insert corresponding language in the regulation based on those recommendations. Mr. Lebowitz discussed the importance of the use of statistics and defining what statistics are available because it has a significant impact on the availability of a lawsuit to an individual. Mr. Lebowitz cautioned that the absence of a clear statement regarding the use of statistics will be a barrier to enforcement because an employer will have less incentive to comply with the FEHA. Councilmembers Perez, Iglesias, Schur, Brodsky, Chair Mandelbaum, Director Kish, and Mr. Lebowitz discussed the role of statistics in the plaintiff's prima facie case. Councilmember Perez and Mr. Lebowitz discussed whether the prima facie case could be proven without statistical evidence and whether the Council should clarify how a plaintiff would prove their case. Mr. Lebowitz, Director Kish, and Councilmember Schur discussed DFEH's authority to address licensing restrictions that violate the FEHA. Mr. Lebowitz recommended the Council undertake a full set of rulemaking on the issue of licensing restrictions. Councilmember Perez, Chair Mandelbaum, and Mr. Lebowitz discussed a hypothetical in which a non-African American or non-Latino applicant is denied employment solely or primarily based on a prior criminal conviction in relation to the zone of interest standard.

Chair Mandelbaum invited additional public comment. There being none, he thanked everyone for their comments and stated the Council would accept written comments until 5:00 p.m. Chair Mandelbaum adjourned the public hearing portion of the Council meeting at 12:56 p.m. and called for a recess for lunch.

Chair Mandelbaum called the meeting to order at 2:15 p.m. and asked the members of the public who intended to testify to indicate what they were present to testify about.

C. Discussion by Council

Councilmember Iglesias suggested the Council consider adding language to the introduction in Section 11017.1, subdivision (a) that would indicate the regulation addresses criminal records, however obtained, to be consistent with the Council's discussion at the last meeting about the regulation extending to activities including considering, using, and seeking criminal records and information. Councilmember Iglesias also suggested an edit to Section 11017.1, subdivision (e)(2) so that it reads ". . . or that an employer *conducted* an individualized assessment . . ." and ". . . applicants or employees excluded by the conviction screen *at the time of the*

employment decision in dispute” to make it clear that the regulation is not talking about an individualized assessment or conviction screen undertaken after the disputed employment decision.

Councilmember Brodsky and Chair Mandelbaum discussed the placement of the definition for “adverse impact” in Section 11017.1. Councilmember Brodsky also suggested edits to Section 11017.1, subdivision (e)(1). She observed that subdivision (f) indicates “employers” is meant to be an abbreviation for “employers and other covered entities,” but is not done anywhere else in the regulations and, for consistency, does not think it should be done in these regulations. Councilmember Brodsky also proposed editing subdivision (e)(2) to replace “otherwise adversely impact” to “*or* adversely impact.” Councilmember Brodsky and Chair Mandelbaum discussed the use of several terms in the proposed regulations.

Councilmember Schur urged the subcommittee to consider the comments submitted by NELA, including the presumptions around state and national standards. She also encouraged the Council to address, to some degree, the licensing provisions that were raised by an earlier speaker. Councilmember Schur noted there may be a way to reconcile the Business and Professions Code with the FEHA regulations. Councilmember Schur also expressed support for the regulations to cross-reference the state statutes regarding credit reporting. Councilmembers Schur and Brodsky and Chair Mandelbaum discussed clarifying some portions of Section 11017.1, including the clause in subdivision (e)(3) discussing conviction-related information that is seven or more years old. Chair Mandelbaum stated that the language derives from the Labor Code and expressed concern about inserting additional clarification in the regulation that could potentially give it a different interpretation than it should have per the Labor Code. Councilmembers Schur encouraged the Council to provide some clarification. She also expressed support for considering the proposal in NELA’s letter regarding procedures and documentation but stated she was unsure if that was something the Council or DFEH should think about. Councilmember Schur encouraged the Council to consider addressing whether an employer should be permitted to consider criminal convictions for conduct that is no longer unlawful or that was once a felony but is now a misdemeanor.

VIII. Draft Proposed Regulations Regarding Transgender Identity and Expression

Attachment E: Proposed Regulations Regarding Transgender Identity and Expression

A. Introduction

Councilmember Perez stated that in drafting these proposed regulations, the subcommittee looked at what other states have done, OSHA guidance, and the DFEH poster. She flagged two issues for the Council to consider: (1) On page 4, Section 11034, subdivision (e)(2)(A) where it says “Employers shall permit employees to use facilities that correspond to the employee’s gender identity or gender expression . . . ,” Councilmember Perez expressed concerned about the use of both terms and does not understand the need to include “gender expression” because the focus is how the employee identifies him or herself; (2) On page 6, Councilmember Perez suggested adding the language “except as noted in subsection 4 below” to the end of the sentence.

Councilmember Brodsky stated that “gender identity” and “gender expression” need to be referenced together and the proposed language in the proposed regulations derives from the Washington, D.C. regulations, Colorado regulations, the Education Code regarding student use of restrooms, and that separating the two terms could create confusion. Councilmember Brodsky observed that there are a lot of regulations that have been implemented in other locales and states, notably D.C., Colorado, and OSHA. Councilmember Brodsky agreed with Councilmember Perez’s suggestion to incorporate a reference to subdivision (h)(4) in subdivision (h)(3).

B. Discussion by Council

Councilmember Iglesias asked whether “sex stereotype” is part of the definition of “sex” in Government Code section 12926. Councilmember Brodsky stated that it is not. Councilmember Iglesias asked whether, for clarity, Section 11034, subdivisions (d)(1)(A) and (d)(1)(B) should be switched to reflect the employer’s primary obligation to make an accommodation. Councilmembers Perez and Brodsky agreed. Councilmember Iglesias asked whether subdivision (g) should include only “legitimate business purpose” or if it should also include “and be job related.” Councilmember Brodsky clarified that it should include only “legitimate business purpose.”

Chair Mandelbaum, Councilmembers Perez and Brodsky, and Director Kish discussed whether employers would be required to get new gender-neutral signs for single-use restrooms under proposed regulation Section 11034, subdivision (e)(2)(D) or if employees could be permitted to use the restroom that corresponds to their gender identity. Councilmember Brodsky clarified that requiring a transgender individual to choose between a male or female single use restroom is itself discriminatory. Councilmember Perez inquired whether changing “shall” to “may” in that provision would resolve the issue. Councilmember Brodsky stated that allowing an employer to retain gendered single-use restrooms would institutionalize the dichotomy that the regulations are intended to address. Director Kish expressed appreciation for Councilmember Brodsky’s acknowledgement that gendered restrooms force individuals into a category but also recognized that the regulations depend upon an understanding of gender as a binary. Director Kish noted that this is an emerging issue. Councilmember Brodsky observed that the proposed regulations are consistent with the D.C. regulations and DFEH FAQs. Councilmember Schur stated that it is important to recognize that people do not always identify as male or female and to the extent the Council can move away from the binary, it will be beneficial as it will not force people to choose. Councilmember Brodsky noted that it is not an onerous obligation because it only applies to single-sex restrooms. Chair Mandelbaum agreed with leaving the proposed regulation as is.

Councilmembers Perez expressed concern there may be situations where the restrooms cannot be changed and does not think this requirement should be mandatory in such situations. Councilmembers Perez and Brodsky, Chair Mandelbaum, and Director Kish discussed edits to the language and agreed to change the proposed regulation to read “Single occupancy facilities under their control.”

Councilmember Perez expressed concern about ensuring regulations do not misstate or create an environment where an employer is allowed to intrude into the employee’s privacy but also noted that the primary complaint by transgender employees is that they make a request but the employer made no response and the employer does not know how to respond. Councilmember Perez stated they wrote the proposed regulations to encourage a dialogue and that they purposefully did not use the term “accommodation,” and used the term “adjustment” instead because this process is distinct from the interactive process in the disability context.

Councilmembers Schur, Brodsky, Perez, and Franklin Minor discussed Section 11034, subdivision (h)(4) and the situations in which an employer would need to use the employee’s gender as indicated in a government-issued identification document to meet a legally-mandated obligation. Director Kish stated that this subdivision clarifies that employers will not be penalized when using an employee’s gender assigned at birth or legal name when it is legally mandated. The Council agreed that (h)(4) should be edited to include “gender *or legal name*.”

Councilmember Iglesias encouraged the Council to be more specific about what “transitioning” entails. Director Kish suggested utilizing the definition of “transitioning” from the DFEH FAQs. The Council agreed. The Council also agreed to refer to the terms “transition or transitioning” in the definition section.

C. Public Comment

There was no public comment.

D. Action by Council

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

CHANÉE FRANKLIN MINOR
COUNCILMEMBER

TIM IGLESIAS
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COUNCILMEMBER

Chair Mandelbaum reviewed the Council’s changes to the subdivisions of the proposed regulation in Attachment E as modified by the Council during the meeting. The Council moved, seconded, and unanimously approved the motion to adopt the proposed regulations as modified and authorize the DFEH to prepare a rulemaking package and notice the regulations for public comment.

IX. Draft Proposed Housing Regulations Regarding Retaliation, Harassment, Sexual Harassment, and Liability for Unlawful Harassment

Attachment F: Proposed Housing Regulations Regarding Retaliation, Harassment, Sexual Harassment, and Liability for Unlawful Harassment

A. Introduction

Chair Mandelbaum noted that these specific proposed housing regulations are introduced by the subcommittee to enter the rulemaking process while the other draft proposed housing regulations on the agenda are a working draft not intended to be adopted at this meeting.

Councilmember Franklin Minor read the authority and reference notes for each proposed subsection aloud because the notes were not included in Attachment F. Councilmember Franklin Minor also observed the timely nature of the proposed regulations given the current housing crisis and the incentive for evictions due to the ability to raise rental rates after an eviction.

B. Discussion by Council

Councilmember Brodsky inquired if there is a reason that “protected activity” is defined in Section 11098.5, subdivision (c) only as informing law enforcement agencies and does not include informing other governmental agencies. Councilmember Franklin Minor agreed that the subdivision should be expanded to encompass informing other governmental agencies.

Councilmember Schur encouraged the Council to refer to the comparable HUD statutes and regulations to ensure substantial compliance with those federal laws and regulations. Councilmember Schur also noted that the breadth of activity is much greater than just rental activities and thinks the Council would benefit from framing the regulations in a broader way to try to encompass all activities that are covered. Councilmember Schur pointed to the recently issued proposed HUD guidelines regarding harassment that are in the process of finalization. She indicated that she found the guidelines to be very informative and encouraged the Council to reconsider the proposed harassment regulations in light of the HUD guidelines. Councilmember Franklin Minor inquired whether there are big differences between the Council’s proposed regulations and the HUD guidelines and Councilmember Schur confirmed that there were. Director Kish recommended that the Council hold off on voting on the proposed regulations and reconsider the proposed regulations in light of the recently issued HUD guidelines. Chair Mandelbaum, Councilmembers Franklin Minor and Schur, and Director Kish discussed how to proceed with the proposed regulations to avoid delay in introducing sections into the rulemaking process.

Councilmember Perez expressed support for Councilmember Schur’s suggestion of referring to HUD’s proposed guidelines. Councilmember Perez also expressed concern about what steps a landlord would need to take to avoid liability for a third party’s acts of harassment. Councilmember Franklin Minor acknowledged the Council could consider how to spell out what the landlord must do to take remedial measures in such a situation. Councilmember Schur indicated that the explanatory material accompanying HUD’s proposed regulation do not cover situations involving co-tenants and it does not really set out a process. Councilmember Perez confirmed that she would like to see a process set out.

C. Public Comment

Chair Mandelbaum invited public comment.

Evelina Nava, legal fellow with Tenants Together, with Gabriela Contreras, testified. Ms. Contreras testified she rented an apartment that seemed to be in good condition but within the first month, there was mold covering half of a wall. Ms. Contreras asked her landlord to complete repairs and he knocked down the wall but then left it for over one month. Her child's nurse contacted the landlord regarding the housing conditions due to her child's asthma. When the landlord was in the process of replacing the wall, he evicted her family. Ms. Contreras stated she continued to pay rent but the landlord would not talk to her. Other repairs were also needed in the apartment. A neighbor who is white stated the landlord responded immediately when she reported issues to him. Ms. Contreras also stated that when she attempted to withhold rent because her car was hit in the parking lot, the landlord refused to allow her to go through the security footage and gave her a three-day notice to pay or quit. Ms. Contreras indicated that her family is still living in the apartment and there is still mold. Ms. Contreras expressed interest in a law that would protect her against such abuses. Councilmember Iglesias told Ms. Contreras that there are laws that would offer protection and inquired whether she contacted an attorney. Ms. Contreras said that she called 211 and was told that her damaged belongings were her responsibility. Councilmember Franklin Minor pointed out that Ms. Contreras's experience highlights an area of the law that is lacking because she was not evicted and that this could constitute a failure to make repairs because of her ethnicity. Councilmember Iglesias also indicated that the warranty of habitability would apply here. Councilmembers Brodsky and Schur stated that the FEHA would apply in this situation. Director Kish encouraged Ms. Contreras to file a complaint with DFEH. Ms. Nava stated that she and Ms. Contreras have an appointment with Bay Area Legal Aid. Ms. Nava further explained that her Equal Justice Works fellowship is focused upon habitability and retaliation. Ms. Nava encouraged the Council to address this issue in its regulations. She also explained that a DFEH investigator conducting a presentation stated that habitability issues are rarely about discrimination and that DFEH investigators are not receptive to calls regarding such failures to repair. Councilmember Franklin Minor expressed appreciation for Ms. Nava's work. Director Kish encouraged Ms. Nava to reach out directly to him about the problems she is aware of with regards to the DFEH.

D. Further Discussion by Council

Councilmember Schur stated that she realized the "dominant purpose" language comes from *Harris* but suggests that the Council take another look at the section to see if there is anything that can be done to tweak it. Director Kish stated that the language does not exist anywhere else and that he asked Legislative and Regulatory Counsel to look at where that language came from and he found that it predates the FEHA and has not been interpreted. Director Kish suggested that an option would be to interpret this in a way that is consonant with more recent and thorough interpretations. Councilmember Schur agreed that an interpretation that is consistent with the case law and HUD would be appropriate. Councilmember Schur also noted that Ms. Contreras and Ms. Nava's testimony points to an area that involves an intersection between different laws and recommended cross-referencing other anti-retaliation statutes (i.e. code enforcement) that might offer protection. Director Kish also acknowledged that the testimony also illustrated the need for competent counsel because non-attorney DFEH staff will not always catch the nuanced fair housing issues. Director Kish and Councilmember Brodsky noted that it also depends on how the story is told to the DFEH investigator and the follow-up questions.

Councilmember Iglesias agreed with the idea of reconsidering the proposed regulations in light of HUD's proposed regulations. He also noted that there are a few precedential Fair Employment and Housing Commission cases that may also be relevant here and encouraged the Council to ensure the proposed regulations are in sync with those decisions. Councilmember Iglesias also agreed with Councilmember Schur on addressing the "dominant purpose" language.

Chair Mandelbaum recommended that “membership, perceived membership, association with members” should be defined so that reference to one includes a reference to all or that the proposed regulations always be consistent in using those terms together. He also recommended adding “without authorization of the individual” to 11098.6 (a)(2)(G). Chair Mandelbaum and Councilmembers Schur and Brodsky discussed the usage of the terms “landlord,” “owner,” and “other covered entity.”

Chair Mandelbaum and Councilmember Franklin Minor discussed that the proposed regulations will go back to the subcommittee for further editing before being adopted to begin the rulemaking process.

X. Report from Subcommittee on Preventing and Eliminating Workplace Sexual Harassment

Councilmember Perez stated that, after reviewing the goals of the taskforce, the subcommittee determined that this project is more closely related to DFEH enforcement work and should be under the purview of the Department, not the Council. Councilmember Perez indicated that any model documents would be targeted at constituents to help them ensure they are complying with enforcement issues. Councilmember Brodsky clarified that the pending action would disband the subcommittee.

The Council moved, seconded, and unanimously approved the motion to undo the previous motion establishing the taskforce under the auspices of the Council.

XI. Report from Subcommittee to Liaise with Human and Civil Rights Groups

Councilmembers Brodsky and Franklin Minor had nothing to report.

XII. Report from Housing Regulations Subcommittee No. 2

Councilmember Iglesias stated that the subcommittee has engaged in several discussions and has worked through documents the subcommittee has been gathering. He indicated the subcommittee hopes to bring to the Council, probably in the summer, proposed regulations on the use of criminal history in housing decisions.

Councilmember Iglesias noted HUD recently issued relevant guidelines that will hopefully be incorporated into the proposed regulations. He also indicated that the subcommittee hopes to put forth disparate impact regulations sometime this fall.

Councilmembers Brodsky and Schur requested Legislative and Regulatory Counsel Brian Sperber circulate the HUD regulations on harassment and criminal history in housing to enable the Council to refer to them.

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

The Council agreed to delay the presentation due to time constraints. Councilmember Iglesias will consider putting together written comments to be made publicly available and then to hold a discussion at a later Council meeting. The presentation will be held at the meeting prior to when the Council expects to dive into this issue and prior to the meeting where public comment will be invited.

XIV. Public Workshop and Review of Select Draft Fair Employment and Housing Act Housing Regulations from Housing Regulations Subcommittee No. 1

Attachment G: Select Draft Fair Employment and Housing Act Housing Regulations

A. Public comment

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

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Jon Smock and Ron Kingston testified regarding occupancy standards. Mr. Kingston noted that he made verbal comments at the January 7, 2016 Council meeting and plans to submit written comments. Mr. Kingston introduced the issues that would be raised in his written comments. Director Kish provided an update regarding Mr. Kingston's previous discussion with the Council about the possibility of forming advisory bodies on this issue to involve other organizations and agencies that will be affected by the proposed regulations in this discussion. Director Kish indicated that he reached out to the Attorney General and such advisory bodies would be subject to the Bagley-Keene Open Meeting Act and therefore they would be limited to holding the discussion in a public forum. Director Kish stated that he would be happy to reach out to other entities to bring them into the discussion. Mr. Kingston stated they would be open to that. Councilmember Brodsky inquired whether Mr. Kingston had any sense of whether health and law enforcement agencies would be willing to provide the Council with written comments. Mr. Kingston answered that many trade associations were unaware of the proposed regulations and indicated that he thought their analysis, and that of other local agencies and interest groups, would be beneficial to the Council. Chair Mandelbaum clarified that procedurally, the input at this stage helps to inform the initial draft and there will be ample time to gather participants that have constructive things to say even before the Council reaches the public comment period. Councilmember Franklin Minor indicated that the initial draft was informed by comments from such agencies and the code used by fire departments.

Mr. Kingston also referenced the previous speaker and noted there has been a lot of recent legislation on mold and there are a lot of specific remedies provided with regards to mold, as well as other laws that would protect her with regards to the other issues that she experienced.

B. Discussion by Council

Chair Mandelbaum noted that some uniformly recommended changes have already been made that could be incorporated into the next draft.

Councilmembers Brodsky, Schur, Perez, and Franklin Minor discussed ensuring that the definitions are consistent across the housing and employment regulations, especially with regards to the regulations concerning transgender people.

Councilmember Iglesias requested clarification about whether the subcommittee was going to redraft the proposed regulations prior to the next meeting. Councilmember Franklin Minor stated that the subcommittee could consider the comments that were already made. Chair Mandelbaum recommended incorporating the more discrete changes that have already been suggested. Councilmember Schur recommended the subcommittee reference the Schwemm treatise on the housing discrimination.

XV. Further Public Comment

There was no additional public comment.

XVI. Adjournment

Chair Mandelbaum adjourned the meeting at 4:39 p.m.

Date: May 16, 2016

CHAYA MANDELBAUM

Chair

JEANETTE HAWN

Civil Rights Fellow