

**Joint Oversight Hearing of the
Senate and Assembly Judiciary Committees**

February 23, 2010
1:00 pm – 3:00 pm
State Capitol, Room 4203

“Fair Employment and Housing 50 years after the FEHA: Where do we go from here?”

**I. The Fair Employment and Housing Act: A Monument of the Civil Rights Era,
And A Continually Evolving Source of Workplace Protections.**

To mark the 50th anniversary of the Fair Employment and Housing Act (FEHA), the Executive Director of the Department of Fair Employment and Housing, Phyllis Cheng and others have documented the long and remarkable history that led to the enactment of the statute in 1959, more than 5 years before its federal counterpart. Portions of their research are excerpted here.

National Employment Rights Movement. In 1941, civil rights leaders A. Philip Randolph and Bayard Rustin began to organize a 100,000 person march to Washington to protest against discrimination in the defense industries. Californian Cottrell Laurence “C. L.” Dellums, a leader of the Brotherhood of Sleeping Car Porters, was one of the organizers. That same year, to call off the March on Washington, President Franklin D. Roosevelt issued Executive Order 8802 to establish a national Fair Employment Practices Commission to handle complaints of race, creed, color, or national origin discrimination. Thereafter, fair employment practices (FEP) legislation was introduced in five states: California, New York, Pennsylvania, Massachusetts, and New Jersey. Every state but California soon adopted an FEP law.

California Committee and March on Sacramento. In 1945, 1949, 1951 and 1953, FEP bills authored by Assembly Members Augustus Hawkins and Byron Rumford were rejected. In 1946, California voters rejected Proposition 11 to adopt a FEP measure.

In 1953, the California Committee for Fair Employment Practices (CA Committee) mounted a March on Sacramento to emphasize the need for FEP legislation. Even though the march appeared to turn the tide on public opinion, legislative efforts continued to be unsuccessful. Despite repeated defeats, the CA Committee continued to press for FEP legislation from 1953 to 1959.

Enactment of the Fair Employment Practices Act (FEPA). Governor Edmund G. Brown took office in January 1959, backed by a Democratic majority in the Legislature. In his inaugural address before a joint session of the Legislature, the Governor urged legislators to pass fair employment legislation, stating that “discrimination in

employment is a stain upon the image of California.” Governor Brown introduced an FEP measure in the Legislature during his second week in office. On April 16, 1959, he signed into law California’s Fair Employment Practices Act (FEPA), which took effect September 18, 1959.

The FEPA prohibited discrimination in employment on the basis of race, religious creed, color, national origin, and ancestry. The Act’s jurisdiction covered employers of 5 or more persons, labor organizations, employment agencies, and any person aiding or abetting the forbidden actions. The new law established a five-member Fair Employment and Practices Commission (FEPC) appointed by the Governor, and an administrative agency, the Division of Fair Employment and Practices, housed in the Department of Industrial Relations, to carry out the policies of the Commission.

The Rumford Act. The 1963 Rumford Fair Housing Act barred discrimination on the bases of race, color, religion, national origin, and ancestry in the sale and rental of housing accommodations. Popular resistance to the Rumford Act led to voter passage of Proposition 14, a constitutional amendment prohibiting limits on landlord’s absolute discretion to refuse to sell or lease real property. Following the election, the federal government cut off all housing funds to California, and in 1967, the United States Supreme Court declared Proposition 14 unconstitutional in *Reitman v. Mulkey*, 387 U.S. 369 (1967), leading to restoration of the Rumford Act.

The Fair Employment and Housing Act. In 1980, Governor Jerry Brown and the Legislature conducted a reorganization of civil rights enforcement. As a result, the FEPA and the Rumford Act were combined and renamed the FEHA to protect Californians from both employment and housing discrimination. The Act is administered by the Department of Fair Employment and Housing (DFEH) with respect to investigation and the Fair Employment and Housing Commission (FEHC) with respect to adjudication.

Subsequent Developments. Since its enactment, the FEHA has been repeatedly amended to respond to changing circumstances and evolving values. In addition to its initial protections, the FEHA now prohibits discrimination in employment on the basis of sex, age, disability, medical condition, sexual orientation, and marital status, making it significantly broader than federal law both in terms of scope of protections and covered employers. Unfortunately, as the UCLA RAND study discussed below indicates, it is not clear whether the existing enforcement model or funding commitments have kept pace with the increasing obligations of the statute or the social and economic diversity of the state.

II. The FEHA at 50: UCLA-RAND Report and Recommendations.

The UCLA RAND Center for Law and Public Policy conducted an evaluation of the efficiency and effectiveness of the FEHA as it is enforced in California at the request of Phyllis Cheng, Director of the California Department of Fair Employment and Housing. The report was released on February 10, 2010, shortly after the FEHA’s 50th anniversary. It makes a number of findings based on available data provided by the Department and

public court records, and highlights some concerns in the operation of the FEHA as a law intended to deter discrimination in the labor market and the workplace, provide compensation to the victims of discrimination, and require changes in discriminatory practices. The report also makes a number of recommendations to correct the identified problems. Some of the report's key findings and recommendations are summarized below.

a) Employment Discrimination Enforcement

California has three systems for enforcing the FEHA and its less expansive federal counterpart, Title VII of the Civil Rights Act of 1964: (1) a system of civil litigation for those able to obtain attorneys; (2) a system of state administrative enforcement that includes both the DFEH and the Fair Employment and Housing Commission (FEHC); and (3) a system of federal enforcement of Title VII enforced through the United States Equal Employment Opportunity Commission (EEOC) and litigation in the federal courts.

A discrimination lawsuit under the FEHA or Title VII cannot be filed until the plaintiff has filed a complaint with either the DFEH or the EEOC and obtained from one of these agencies a "right to sue" letter. Thus, nearly all enforcement of antidiscrimination laws takes place through the processing of individual complaints. The California complaint rate is comparable to that in other large states (excluding approximately 500 that are rejected by the DFEH at the initial intake stage). For every 1 million employees in California, about 1,000 employment discrimination complaints are filed each year. Of these 1,000 complaints approximately:

- 250 will be filed with the EEOC. Of these:
 - 50 will result in a median settlement of \$7,500.
- 750 will be accompanied by a request for an immediate "right to sue" letter. Of these:
 - 165 will result in cases being filed in Superior Court of which about 2 will reach a jury verdict. One verdict will be for the employer and one for the employee, in a median amount of \$205,000.
 - 375 will be processed administratively by the DFEH, of which:
 - 73.5 will be rejected for investigation;
 - 33 will be dismissed for reasons unrelated to case merits;
 - 34 will end when the complainant requests a "right to sue" letter;
 - 20 will be dismissed after a preliminary investigation finds insufficient evidence;
 - 165 will be dismissed because the DFEH finds insufficient probable cause to believe that a violation has occurred; and
 - 46 will be settled or resolved during the administrative process. Of these:
 - 27 will receive a median benefit of \$4,000;
 - 3 will receive some other relief, most often the dissemination of information by the employer or the posting of a DFEH poster;

- 16 will produce benefits or outcomes not recorded in DFEH data;
- 3.5 will be sent to the DFEH Legal Division for possible issuance of an accusation before the FEHC or settlement;
- 2.6 will result in an accusation being filed with the FEHC;
- 0.2 will result in a published decision by the FEHC;

The complaint rate varies with economic conditions and the unemployment rates; during economic downturns, the number of discrimination complaints increases.

The report notes that there is a great deal of additional variation within this overall picture and that discrimination in the labor market and work place remains a significant problem. In particular, statistics show the highest rate of complaints involving African Americans and people with disabilities. Not surprisingly, African Americans file race discrimination complaints at a much greater rate than other minority groups. However, the complaint rate for African Americans is less than the complaint rate for disability discrimination from persons with disabilities.

There are also disparities in access to the litigation system. Controlling for a wide range of other factors, including the basis of discrimination and alleged discriminatory acts, African Americans have half the chance of obtaining a lawyer as compared to Whites. Other people of color fare only slightly better as compared to Whites. This disparity is striking in light of the fact that the FEHA was originally intended to curb racial discrimination in employment. Women are 20% less likely than men to obtain a lawyer. And employees in lower wage occupations and particular industries have a much lower chance of obtaining a lawyer. Those unable to obtain an attorney must rely on administrative processes if they wish to pursue the claims.

b) The Administrative System: DFEH and the FEHC

The FEHA is more expansive than Title VII, both in the categories of persons that it protects and in the remedies available, but there is a great deal of overlap. Three quarters of all employment discrimination complaints in California are in fact filed with the DFEH rather than the EEOC. However, potentially due to a number of factors highlighted in the report, the EEOC has a higher percentage of cases closed in which monetary benefits were obtained for the employee.

DFEH operates with a budget equal to 81 cents per year per California employee. Of the approximately 15,000 employment discrimination complaints filed with DFEH each year, about half are immediately withdrawn from the DFEH administrative process when the complainant or complainant's attorney requests a "right to sue" letter.

The work of processing and resolving complaints is done by consultants under the supervision of more experienced consultants and District Administrators. Consultants typically carry a caseload of 75 cases at one time. Presently, entry into the consultant position requires six months of experience in the fair employment or civil rights field and

a college degree or experience deemed to be the equivalent of a college degree. In practice, most consultants have little more than a high school diploma and four years of experience working for another state agency that may have had nothing to do with the FEHA. This is particularly troubling in light of the fact that consultants are responsible for determining whether complaints are viable, conducting investigations, propounding discovery requests, and engaging in pre-determination settlements. Budget cuts have led to the elimination of formal, systematic training, and it is now done entirely “on the job.” Budget cuts have also led to the elimination of the DFEH’s mediation program, which has since been replaced by efforts to use pro bono volunteers.

Of the complaints that remain within the DFEH and FEHC system, only a small fraction will result in a settlement and some monetary compensation for the complainant. The median administrative settlement amount during the period of study was \$3,000. (For cases closed in 2007-2008, the median monetary benefit was \$4,000.) The odds of a complainant receiving any monetary benefit were about 1 in 14 (7.2%). For employers who retain an attorney to respond to a complaint filed with DFEH, the cost is approximately \$5,000. According to employers, this cost is often exacerbated by having to respond to “boilerplate” discovery requests having nothing to do with the complaint at issue. Thus, as the report notes, the proportion of effort and resources devoted to processing cases, for both the DFEH and for employers, is very high relative to the results. Under the current Director, the DFEH has embarked on a series of reforms to prioritize cases and involve attorneys earlier in the case assessment process. This is intended to the earlier dismissal of unmeritorious cases, thereby imposing fewer transaction costs on employers in these cases, and the allocation of greater resources to more meritorious cases.

Those complaints that are not either dismissed or settled are sent to the DFEH Legal Division for preparation of an accusation before the Fair Employment and Housing Commission (FEHC). Most of these cases begun by accusation are resolved before they reach the FEHC, either by way of settlement or transfer, on the motion of the employer, to Superior Court.

The FEHC is the forum to which the DFEH must bring accusations that are not resolved in the administrative process. Unlike employers/respondents, the DFEH cannot “opt out” of the FEHC process and proceed directly to Superior Court. During the period 2000-2008, the FEHC issued slightly more than five decisions per year. Notably, the majority of decisions published by the FEHC are heavily concentrated in the areas of sex and disability discrimination. Only 5 cases in a period of 12 and half years involved race discrimination. Currently, the FEHC operates with 2-3 administrative law judges in a state with a civilian labor force of more than 18 million people.

Report Recommendations:

- **Improve Effectiveness and Efficiency of DFEH Enforcement**

The DFEH has made substantial progress toward more efficient allocation of resources through the Case Grading System begun in 2009. This reform is intended to prioritize cases based on early assessments of their potential merit and the allocation of more expert resources to cases with higher potential earlier in the process. The report recommends systematic monitoring and evaluating the impact of these reforms.

The report also recommends the following: (1) increasing early, informal disposition of complaints in appropriate cases; (2) reinstating an effective mediation program (the last program was terminated due to budget cuts); (3) upgrading consultant qualifications and training; (4) increasing resources devoted to quality assurance and supervision; (5) reducing use of “boilerplate” information and discovery requests to employers; (6) increasing educational efforts targeted at smaller employers; and (7) improving the DFEH case management information system to make it more useful for both management and strategic planning purposes. Specifically, the data could be used to determine whether particular employers are “repeat offenders.”

- **Relocate DFEH and the FEHC**

At present both the DFEH and the FEHC are located within the State and Consumer Services Agency, which also houses such agencies as the Departments of Consumer Affairs and General Services, the Franchise Tax Board, the State Personnel Board, one park and two museums. The report agrees with the California Performance Review initiated by the Governor that the functions of DFEH would be more effectively and efficiently located within the Department of Labor and Workplace Development, which also contains other administrative enforcement agencies responsible for labor market and workplace issues.

The report states that presently the FEHC is not a very effective adjudicatory commission. According to the report, because DFEH can only bring accusations before the FEHC, its few decisions provide the framework within which all DFEH administrative determinations, including settlements by consultants, are made. Respondents before the FEHC can remove complaints from the jurisdiction of the FEHC to the courts, but neither complainants nor DFEH have that option. The report recommends reinvigorating and relocating the FEHC to the Department of Labor and Workforce Development. In the alternative, the report recommends amending the FEHA to permit the DFEH to bring civil actions directly in Superior Court where claimants with meritorious claims have been unable to secure counsel.

- c) **The System of Civil Litigation**

Of the half of complainants to DFEH who opt out of the administrative process to pursue settlement or litigation in the legal system, nearly half (44.3%) of those will file a case in

Superior Court. However, only a very small number of those will reach a jury trial and verdict. The remainder will be settled or abandoned. The report does not contain information on settlements or other outcomes, except for jury verdicts. Jury verdicts were split evenly between plaintiff and defense verdicts. The median plaintiff verdict in 2007-2008 was \$205,000, representing a 20% decline from the median verdict in 1988-1989 after adjusting for inflation. Median jury verdicts varied substantially by the alleged basis of discrimination.

According to defense counsel and insurance companies the cost is \$75,000-\$100,000 to provide a defense to a FEHA complaint in litigation, through a summary judgment motion, and substantially more for litigation beyond summary judgment.

- **Improve Equal Access to the Legal System**

Under the current contingency fee, lower wage workers who suffer discrimination will be unable to access the civil litigation system. These problems are amplified when lawyers presume that juries will disfavor plaintiffs from certain groups – often the very groups the FEHA was enacted to protect.

The report recommends giving the DFEH Legal Division authority to pursue such cases through the courts, and to authorize DFEH to collect attorneys' fees if DFEH prevails at trial. The attorneys' fees could be used to provide increased efforts at education and prevention. The report also suggests imposing a surcharge on large awards or settlements in FEHA cases to be used to fund nonprofit organizations to represent individuals with meritorious cases who desire representation, but are unable to obtain counsel because of the amount at issue.

In addition, the report recommends charging a regulatory fee paid by the employee and the employer to increase funding to the DFEH. A fee of 10 cents per month would triple the current budget. Any increase in resources can be tied to the implementation of reforms ensuring their most effective and efficient use.

- **Create a Task Force or Commission to Examine Alternatives to Deterrence and Damages as the Sole Means of Reducing Employment Discrimination**

The FEHA's tort-based deterrence model was adopted when intentional, often flagrant, discrimination was common. With the sole exception of discrimination based on disability, the FEHA is predicated entirely on a deterrence model, enforced through the imposition of damages. Because discrimination has become much more covert and often takes the form of implicit bias, an antidiscrimination law based on deterrence and aimed at intentional discrimination may no longer be addressing the most common forms of implicit discrimination or preventing its economic and other harms, which are no less serious.

As an example, the FEHA includes a specific provision imposing liability on employers for failing to take test reasonable steps necessary to prevent discrimination and harassment from occurring. (Gov. Code Sec. 12940(i).) These provisions have been held

to establish a statutory tort, but have generally been applied by the appellate courts only to instances of harassment and hostile workplace environment cases, and then only after improper activity has occurred. The statute has not been interpreted to require that employers take reasonable measures to prevent discrimination more generally in areas such as hiring, retention, and termination where implicit bias can do more harm.

Consequently, the report recommends creating a commission comprised of representatives from every group of stakeholders to be tasked with consideration of alternatives or supplementary measures that might be both more effective and efficient than our current tort system.

III. 2007 Controversy Over State and Consumer Services Agency Proposal Regarding Reduction in Staff At Fair Employment and Housing Commission.

The Legislature's most recent notable oversight efforts in the area of fair employment and housing took place in September 2007 when a controversy arose regarding a proposal by the State and Consumer Services Agency to restructure the FEHC. That proposal, under former Secretary Rosario Marin, surfaced in a media report days before the Commission was to take action, at a meeting scheduled to take place after the Legislature's interim recess. The proposal called for the FEHC to terminate its administrative law judges and transfer their function to the Office of Administrative Hearings. The Legislature responded immediately via a letter to the Governor, signed by the President Pro Tem of the Senate, the Speaker of the Assembly, the chairs of the Senate and Assembly Judiciary Committees and other legislative leaders. In relevant part, that letter stated:

We are deeply concerned about the State and Consumer Services Agency's imminent proposal to divest the Fair Employment and Housing Commission (FEHC) of its administrative law judges (ALJs), transfer the Commission's hearing functions to the Office of Administrative Hearings (OAH), and move what little is left of the FEHC staff to Sacramento – all before October 22 (within 60 days of the budget's passage) and without review or approval by the Legislature.

We think such a decision would be a significant setback to civil rights enforcement in the State of California and contrary to the express intent of the Legislature.

In our view, eliminating Commission ALJs and returning to reliance on OAH is a substantial policy change that appears to be both inefficient and contrary to the intent of the Legislature. Moreover, ... the Agency would gain exclusive control over whether to revive Commission ALJs or relocate the Commission's office – contrary to the Legislature's command that these decisions rest with the Commission itself.

[The] Agency's plan appears to be both precipitous and disproportionate to the alleged productivity problems. It is our understanding that the number of hearings held by the Commission has remained relatively constant over the past five years. Most recently, the Commission held 9 hearings in FY06-07 – one more than the five-

year average – a particularly respectable achievement considering that the Commission’s staff has been cut by 40 % during this period.

We also understand that there is no backlog in the hearings the Commission conducts for the DFEH. While there may be a significant difference between the number of accusations filed each year by the DFEH and the number of hearings conducted by the Commission, that difference can be fully attributed to the number of cases where the parties opt out to court or to ability of the DFEH – often with the assistance of Commission – to settle the case.

Secretary Marin responded in relevant part:

In [January 2007] SCSA began evaluating the efficiency of the Commission’s operations, and whether the Commission’s staff is fulfilling their critical civil rights enforcement mission under the current structure.

This review determined the Commission’s staff was not fulfilling its mission. Specifically, the Commission’s staff has failed to promulgate current regulations in three significant areas: disability law, pregnancy leave law, and housing discrimination law. The Commission’s existing disability and pregnancy leave regulations are woefully out of date, and housing regulations have never been promulgated. By shifting the adjudicatory function to OAH, the remaining FEHC staff will be able to focus their time and expertise on updating the much needed regulations.

This review further determined there is, and for several years has been, an insufficient caseload to justify four full-time staff to hear only FEHC cases. ... It is also important to note that, despite their caseload, between January 2002 and January 2007, Commission ALJs took, on average, 147 days from the last day of hearing to issue their proposed decisions. ... These inexcusable delays are prejudicial to both complainants and respondents.

The SCSA’s proposal to have future FEHC cases heard by OAH will result in greater efficiency, enhanced expertise and the timely adjudication of not only civil rights cases, but other types of cases that the ALJs currently at FEHC will have the opportunity to be able to be involved with at OAH.

Ultimately the SCSA’s proposal was not pursued by the agency, and the Commission never acted on it. Nevertheless, the FEHC has suffered budget cuts and layoffs that have significantly reduced the size of the staff. The DFEH budget has likewise been cut.

IV. Potential Questions For The Committees’ Consideration.

- What are the benefits and the costs of the existing administrative enforcement scheme for both employers and victims of discrimination?

- The UCLA-RAND study states that a well-designed regulatory system should accomplish its goals of compensation, correction, and prevention efficiently, meaning that it: (1) results in accurate assessments of whether particular behavior has occurred and whether it should lead to a legal or regulatory response; (2) does so at a reasonable cost; and (3) with minimal negative unintended consequences. Does the data suggest that we currently have such a system?
- Is there cause for concern that the disparities between the state's two systems of FEHA enforcement (civil litigation and administrative enforcement) could run afoul of the obligation under state and federal law to ensure that government programs provide full and equal access without regard to race, sex, and other factors?
- What accounts for the apparent differences in outcomes between the administrative systems operated by the DFEH and the federal Equal Employment Opportunity Commission (EEOC)?
- Why do so many complainants immediately opt-out of the FEHA administrative process?
- Why has funding for the DFEH and FEHC failed to keep pace with increasing population, societal, and economic diversity, and the obligations of the FEHA?
- Can we have an effective and efficient system for administrative enforcement of the FEHA at current funding levels?
- Have other states faced similar challenges, and if so how have they responded?
- What level of funding would allow the DFEH and FEHC to adequately perform the mission they have been given?
- What could the DFEH and FEHC accomplish for the state's employers and employees if full funding were provided?
- Do we have the resources and the political will to fully and fairly fund these agencies to perform their current mission in light of budget limitations and other demands?
- Does an administrative enforcement model predicated largely on individual complaints of perceived intentional employment discrimination still make sense 50 years after the enactment of the FEHA?
- If the original FEHA model of investigation of every individual complaint, and administrative prosecution of all that are viable, is no longer believed to be practical or affordable – or perhaps necessary in light of the active employment law bar that did not exist 50 years ago – are there cost-effective alternatives that

might result in more efficient enforcement of anti-discrimination laws by more targeted public prosecution efforts?

- What is the expected cost of each of the recommendations set for in the UCLA-RAND study? Might there be potential cost savings in some or all of the report's recommendations?
- Which of the report's recommendations are the highest priorities to help these agencies better accomplish their goals? Is it useful to pursue any of the report's legislative recommendations in isolation from the others?
- Are there mechanisms other than the General Fund to meet the budgetary needs of these agencies?
- If the DFEH and FEHC continue to rely on complaint-driven processes, are there funding mechanisms that would better respond to the increased number of complaints that tend to occur during economic downturns when the state budget is under the greatest strain?
- If the DFEH and FEHC were better funded, might demand increase to meet or exceed their greater capacity?
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