

Daily Journal

www.dailyjournal.com

THURSDAY, AUGUST 2, 2012

Transformative year for civil rights in CA

GUEST COLUMN



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What do 1959, 1980 and 2012 have in common? They are all transformative years for the Fair Employment and Housing Act (FEHA), California's preeminent civil rights law. In 1959, Gov. Edmund G. "Pat" Brown, Sr. signed into law the Fair Employment Practices Act (FEPA), prohibiting employment discrimination for the first time in California. In 1980, Gov. Edmund G. "Jerry" Brown, Jr. combined the FEPA and the Rumford Fair Housing Act into the FEHA to protect Californians from both employment and housing discrimination. Now in 2012, another major transformation of the FEHA is underway.

In order to build a balanced state budget that protects funding for education and public safety while cutting \$8 billion from government to close a \$15.7 billion deficit and build a reserve of nearly \$1 billion, the governor's 2012-2013 Proposed Budget originally proposed the elimination of the Fair Employment and Housing Commission (FEHC), the administrative adjudicatory agency created under the FEHA. The proposal would have placed the commission's administrative adjudication function behind a separate and distinct division of the Department of Fair Employment and Housing (DFEH), the prosecutorial agency created under the FEHA. The proposed plan would also have allowed the DFEH to issue regulations interpreting the law. When stakeholders expressed concerns about the perceived conflict of interest of having the DFEH both prosecute and adjudicate cases, and noted the advantages of maintaining a citizen council, the administration worked on a reasonable compromise that would protect and streamline civil rights enforcement, and achieve budgetary savings.

On June 28 Gov. Edmund G. Brown, Jr. once more revolutionized the FEHA by signing into law budget trailer bill Senate Bill 1038. To eliminate duplication and maximize efficiency, SB 1038 will modernize and take enforcement

of the FEHA to a new level by:

- * Eliminating the Fair Employment and Housing Commission effective Jan. 1, 2013;

- * Saving taxpayers money;

- * Creating within the DFEH the Fair Employment and Housing Council, with seven members to be appointed by the governor, confirmed by the Senate, staffed and funded by the DFEH, to promulgate regulations. The DFEH Director will serve as a nonvoting ex officio member of the council;

- * Allowing DFEH to file cases directly in court. Prior to filing a civil action, DFEH will require all parties to undergo mandatory dispute resolution in the department's internal dispute resolution division, free of charge to the parties;

- * Authorizing courts to award DFEH reasonable attorney fees and costs, including expert witness fees if the department is successful in its litigation. The DFEH will use the attorney general's \$170 per hour rate as its fee basis;

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- * Creating a special fund for the deposit of awarded attorney fees and litigation costs, to be appropriated by the Legislature to offset the costs of the department.

SB 1038 represents a good faith compromise developed after months of budget committee hearings, meetings, and discussion with the Legislature and affected stakeholders. In place of the commission's \$1.1 million annual budget, all civil rights enforcement will be funded by the existing budget of the department. New amendments to the FEHA will allow state civil rights enforcement to catch up to long evolved developments in the employment bar, where precedential holdings are overwhelmingly made in the courts rather than in the administrative setting. In addition to net savings by the commission's elimination, ancillary savings will be realized in abandoning certain collections and writ of administrative mandate practices. To en-

sure that courts' limited budgets are not further strained, the department will be required to provide free dispute resolution through its in-house Dispute Resolution Division before prosecuting any case. The department will be allotted an additional 1.5 mediators for the dispute resolution work. Further, a new Fair Employment and Housing Council devoted to rulemaking will be better able to focus exclusively on regulations that sorely require updating, such as the California Family Rights Act and never before issued housing regulations.

The changes under SB 1038 are consistent with the evolution and maturation of the FEHA over the past 53 years. The FEHA permits complainants to opt out of the administrative process and file civil suits after exhausting their administrative remedies with the DFEH. When the department asks for emotional distress damages or administrative fines, employers can also elect to leave the commission and defend their cases in court. These provisions have spurred growth of the private employment bar, such that half of all administrative complainants today elect to file suit in court. Even the DFEH now prosecutes nearly half of its cases in court. As employment discrimination litigation matured and flourished in court, the gap widened between the prosecution and adjudication sides of state civil rights enforcement. Since 1980, the DFEH has investigated, conciliated or prosecuted nearly half a million discrimination, harassment and retaliation complaints. The department typically wins or settles about 1,000 cases per year, whereby on average only 7.4 cases per year are adjudicated by the commission. The department's largest \$6 million settlement in an employment class action and \$1 million settlement in a single-complainant housing case, along with nearly all of its six-figure cases, were litigated in court rather than before the commission.

SB 1038, in recognition of these changes, makes the necessary adjustments to streamline and create efficiencies while protecting and advancing civil rights enforcement to the next level. SB 1038 shows that innovation can spring from budgetary crisis. As in 1959 and in 1980, creative policymaking has turned 2012 into a watershed year for civil rights reform in California.