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California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50

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Abstract: This paper provides an empirical evaluation of the operation of employment discrimination law in California, with emphasis on the Fair Employment and Housing Act, which was enacted 50 years ago last year. We rely on large administrative datasets from the California Department of Fair Employment and Housing (DFEH) and the EEOC; decisions of the Fair Employment and Housing Commission (FEHC), trial court records, jury verdict reports, interviews, surveys, and other census and survey data. We utilize sequential logistic regression techniques to examine the factors that determine whether complainants obtain a lawyer, and the course of employment discrimination complaints through the DFEH administrative process when they do not. We compare outcomes in the DFEH system with those obtained through the EEOC. We analyze jury verdicts reported in 2007-2008, and compare them to verdicts collected by other researchers for 1998-1999. We analyze the issues and outcomes in all FEHC decisions since 1997. We are aided in interpreting this data through information obtained in semi-structured interviews with DFEH staff and management, attorneys representing both employers and employees, insurance company officials, and others. We make numerous findings and, where these findings and common sense compel them, recommendations to improve how California responds to employment discrimination in the future.

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I. EXECUTIVE SUMMARY

2009 marked the 50th anniversary of the Fair Employment Practices Act, signed into law in 1959 by Governor Pat Brown after a decade of failed attempts to secure an equal employment opportunity law in California. This report describes and evaluates the effectiveness and efficiency of the successor of that law, the Fair Employment and Housing Act (hereafter, the FEHA) as it is actually enforced in California. Although we examined both employment and housing discrimination, this report is limited to the response to employment discrimination. We embarked on this study at the request of the one person most responsible for enforcing the FEHA, Phyllis Cheng, Director of the California Department of Fair Employment and Housing (hereafter, DFEH). Director Cheng asked us to conduct a thorough evaluation and provided open access, without preconditions, to the public record data maintained by her department and encouraged her staff to speak with us anonymously. As we describe below, we have gone considerably beyond her initial request, however, which was to analyze DFEH administrative data that DFEH had not had the resources to fully utilize.

We believe that changes over the past 50 years in both the nature of employment discrimination and our understanding of it are sufficiently dramatic that California policymakers should reconsider the assumptions underlying the law and their implications for reshaping the law. Our contribution in that regard is primarily to identify some of those assumptions and how they depart from current scientific knowledge. A large body of research in social psychology and the neurosciences challenges the central assumption of the FEHA -- that most discrimination is the product of individual, intentional action and can therefore be effectively deterred through imposing risk of economic penalties. To be sure, there remains a good deal of intentional discrimination that can and should be deterred. But a growing body of evidence indicates that discriminatory outcomes are now often the product of unintended actions on the part of actors who do not wish to discriminate and the structure of markets and institutions that perpetuate inequality, problems not as easily addressed through mechanism of deterrence.

Our primary focus in this study, however, has been to examine the operation of the FEHA in its own terms, 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. Our focus has been on the functioning of organizations and markets, and not on the performance of individuals who play a role in either. What we have found raises serious questions regarding whether enforcement of the Fair Employment and Housing Act is either fair or efficient. At the same time, our analyses and interviews with scores of stakeholders from diverse perspectives leads us to believe that these shortcomings are the product of systems and markets rather than the motivations or performance of individuals, many of whom work very hard with inadequate resources.

A. Quick Overview of Employment Discrimination Enforcement

California has not one but three systems for enforcing laws intended to reduce discrimination in the labor market and in the workplace, systems that interact in often complex ways:

- a system of civil litigation for those able to obtain attorneys;
- a system of state administrative enforcement that includes both the DFEH and the Fair Employment and Housing Commission (FEHC); and
- a system of federal enforcement of the less expansive federal analog to the FEHA, Title VII of the Civil Rights Act of 1964, 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. For every 1 million employees in California, about 1,000 employment discrimination complaints are filed each year.¹ 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. We did not examine other outcomes of EEOC charges.
- 750 will be filed with the DFEH, of which:
 - 375 will be accompanied by a request for an immediate “right to sue” letter, in most cases on the advice of lawyers, and not pursued further by DFEH
 - Of these, 165 will result in cases being filed in Superior Court, of which about 2 will reach a jury verdict. Of these:
 - 1 will be a verdict for the employer
 - 1 will be a verdict for the employee, in a median amount of \$205,000
 - We have very limited information about those that are settled after issuance of a right to sue letter but without reaching a jury trial
 - 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” during the course of the investigation
 - 20 will be dismissed after a preliminary investigation finds insufficient evidence

¹DFEH processing data are estimates from for cases closed 2007-2008. FEHC data is estimated from number of decisions published from 2000-2008.

- 165 will be dismissed because DFEH finds insufficient probable cause to believe that a violation has occurred
- 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 other outcomes not recorded in the DFEH data
- 3.5 will be sent to the DFEH Legal Division for possible issuance of an accusation before the Fair Employment and Housing Commission (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

Within this broad picture, there is a great deal of variation, including potentially troubling indications that the antidiscrimination system itself does not operate in a fair and nondiscriminatory manner.

Although the nature of discrimination has changed, it is clear that discrimination in the labor market or in the workplace remains a significant problem for many Californians, particular for those in certain groups.

- While the complaint rate across all California employees for complaints to DFEH is about 1 per year per 1,000 employees. the comparable rate for:
 - African Americans alleging race discrimination is 2.54 per 1,000
 - People with disabilities alleging disability discrimination is 4.65 per 1,000
- These and other complaint rates are in line with evidence from multiple sources on the prevalence of negative attitudes and stereotypes toward members of different groups, which show the highest rates of bias and stereotyping directed toward African Americans and people with disabilities.

To a large extent, access to attorneys willing to accept employment discrimination cases determines the system in which claims are resolved. Useful access to the civil litigation system requires access to an attorney. In that regard, controlling for a wide range of other factors, including the basis of discrimination and alleged discriminatory acts:

- Compared to Whites, African Americans have half the chance of obtaining a lawyer. Other people of color fare only slightly better as compared to Whites.
- Women are 20% less likely than men to obtain a lawyer.
- Employees in lower wage occupations and particular industries have a much lower chance of obtaining a lawyer. For example, the odds that a complainant in

the government sector obtains a lawyer are *six times* those of workers in the construction and wholesale trade industries.

Employees with discrimination claims unable to obtain an attorney can pursue those claims through one of two administrative processes.

B. The Administrative System: DFEH and the FEHC

The FEHA is more expansive than Title VII, both in the categories of persons to whom it affords protection, and in the remedies available, but there is a great deal of overlap. Most complaints could be pursued through either of the corresponding agencies, the DFEH or the EEOC. Complainants who consult attorneys will generally be advised to pursue filing claims with the DFEH. Three quarters of all employment discrimination complaints in California are in fact filed with the DFEH rather than the EEOC. 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 results of which we discuss below.

- Of the complaints that remain within the DFEH and FEHC system, a small fraction will result in a settlement and some monetary compensation for the complainant.
- The median administrative settlement amount during the period of our study was \$3,000. For cases closed in 2007-2008, the median monetary benefit was \$4,000 and the odds of a complainant receiving a monetary benefit were about 1 in 14 (7.42%).
- For employers who retain an attorney to respond to a complaint filed with DFEH, the cost is approximately \$5,000.
- The proportion of effort and resources devoted to processing cases, for both the DFEH and for employers, is thus very high relative to the results.

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. During the period 1998-2001, the DFEH filed an average of 153.5 accusations per year with the FEHC. In the seven years after 2001, the DFEH filed an average of 52.6 accusations, barely one per week. 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.

Apart from its role in issuing regulations interpreting the FEHA, the FEHC plays a minor role in enforcing the FEHA. It is, however, 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, less than half the number it produced per year during 1997-1999.

- Over a period of 12 and half years, the FEHC published 83 employment discrimination decisions, heavily concentrated in the areas of sex and disability discrimination. Only 5 cases in this period involved race discrimination.
- In 2009, the FEHC operated with *one* administrative law judge in a state with a civilian labor force of more than 18 million people. That judge also served as the FEHC's Executive and Legal Affairs Secretary.

The DFEH operates with a budget equal to 81 cents per year per California employee. To enforce antidiscrimination laws that protect 18 million workers, California devotes about half of what is spent by Culver City (with 39,301 residents) to enforce laws of other kinds. Notwithstanding an inadequate budget (at least given the current structure of enforcement) and a long history of cutbacks resulting in the elimination or reduction of training, supervision, and mediation and other programs, under the current Director the DFEH has embarked on a series of reforms that should improve many of the numbers reported above:

- A new system for prioritizing cases and involving attorneys earlier in the case assessment process should lead to:
 - The earlier dismissal of unmeritorious cases, thereby imposing fewer transaction costs on employers in these cases
 - The allocation of more resources to more meritorious cases, which should lead to better outcomes in those cases.
- An increased emphasis on proactive enforcement (through Directors' complaints and class actions) rather than complete reliance on responding in a routine way to individual complaints should lead to greater deterrent effects in regions or industries where violations are more common.

C. The System of Civil Litigation

Of the half of complainants to DFEH who request an immediate right to sue letter and 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. Only a very small number of those will reach a jury trial and verdict. The remainder will be settled or abandoned. There is very little data available as to the outcomes in these settled cases, in part because settlements are confidential and not reported. Insurance companies with data on settlements are, perhaps not surprisingly, unwilling to share it. We do have data on jury verdicts:

- Jury verdicts were, as standard economic theory predicts, 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. Plaintiff verdicts do not include attorneys' fees that may be awarded after the verdict.

- Median jury verdicts varied substantially by the alleged basis of discrimination. Median jury verdicts in cases involving alleged discrimination on the bases below were:
 - Race: \$105,000
 - Sex: \$177,000
 - Age: \$180,597
 - Disability: \$233,288

D. Recommendations

We have limited our recommendations to those suggested by the data and our analyses, in light of common sense rather than particular expertise. The justification for these recommendations is outlined in the brief summary above, but set out more fully in the body of this report. Many of these recommendations fall within the existing legal framework. We also propose the consideration of some alternatives beyond existing law that would require legislative action.

1. Improve Equal Access to the Legal System

Given the current contingency fee system through which, as practical matter, attorneys represent complainants only in cases involving significant potential damages, it is clear that lower wage workers who suffer discrimination will be unable to access the civil litigation system. These problems are amplified when lawyers anticipate (correctly or not) that juries will disfavor plaintiffs from certain groups – often the very groups the FEHA was enacted to protect.

One response to the problem of inadequate representation would be to empower attorneys in the DFEH Legal Division to pursue such cases through the courts, and to authorize DFEH to collect attorneys’ fees if DFEH prevails at trial, some of which might also be used to provide increased efforts at education and prevention. Another solution might be to impose on large awards or settlements in FEHA cases – perhaps particularly punitive damage awards -- a surcharge to be used to fund nonprofit organizations to represent individuals with meritorious cases who wish representation and have meritorious cases, but are unable to obtain counsel because of the amount at issue.

2. Improve Effectiveness and Efficiency of Administrative Enforcement of the FEHA.

The DFEH and FEHC provide the only forum for many people who experience discrimination. Low wage workers, people of color, women – the very groups the civil rights laws were designed to protect – have relatively limited access to the civil justice system. At the same time, many complaints are unwarranted and responding to them is time consuming and expensive for employers. The current management of DFEH has already instituted significant improvements, but more can be done. Improving the effectiveness and efficiency of the administrative enforcement system can help both employees and employers. Our review of the data and interviews with scores of experts

leads us to recommendations in the following areas, upon which we elaborate in our conclusion:

a) Expand Efforts to Target Enforcement Resources

Until very recently, the current FEHA enforcement regime had in recent years been almost entirely driven by complaints processed on a first-in, first-out basis. This had several pernicious results. First, treating all cases substantially the same means that a good deal of time and money is spent, by both DFEH and responding employers, processing complaints that have a very low probability of being found to have merit. Second, relying entirely on complaints means that the enforcement system is insensitive to patterns of discrimination that are not revealed in complaints, even when those complaints are analyzed in a systematic way, because of differences in the likelihood that people who experience discrimination will report it. Finally, responding to individual complaints does not lead to any strategic use of resources to improve practices in particular regions or industries where risks of discrimination are higher. We provide several concrete suggestions for how existing resources might be more effectively and efficiently targeted.

b) Improve Effectiveness and Efficiency of DFEH Enforcement Operations

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 impact of these reforms should be monitored and evaluated systematically, with regard both to the accuracy of decisions and the costs imposed not only on DFEH but also on both complainants and respondent employers. We expand in the conclusion on recommendations in the following areas:

- Increasing early, informal disposition of complaints in appropriate cases
- Reinstating an effective mediation program
- Upgrading consultant qualifications and training
- Increasing resources devoted to quality assurance and supervision
- Reducing use of “boilerplate” information and discovery requests to employers
- Increasing educational efforts targeted at smaller employers
- Improving the DFEH case management information system to make it more useful for both management and strategic planning purposes.

c) Reconsider locating DFEH and the FEHC in the State and Consumer Services Agency

At present both the Department of Fair Employment and Housing and the Fair Employment and Housing Commission 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. For reasons we detail in our conclusions, we agree with the California Performance Review² 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.

d) Reconsider the role of the Fair Employment and Housing Commission

At present, notwithstanding the talent and efforts of its commissioners and staff, the FEHC can only be described as shadow of an effective adjudicatory commission and of its former self, staffed by one administrative law judge and able to produce just five decisions per year. 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. Whereas complainants with lawyers and employers can look to hundreds of jury verdicts for guidance and background, DFEH and unrepresented complainants can look only to the decisions of the FEHC.

Perhaps a reinvigorated FEHC, relocated to the Labor and Workforce Development Department, could regain some of its former effectiveness. In the alternative, perhaps DFEH should be provided with an alternative to the FEHC, and the FEHA amended to permit the DFEH to bring civil actions directly in Superior Court where claimants with meritorious claims have been unable to secure counsel on a contingency basis. Given the interplay of the legal market and the administrative processing system, it is likely that many of these cases would go forward in limited jurisdiction superior courts, where the costs to litigants are substantially lower.

e) Provide an Appropriate Level of Resources for Education and Administrative Enforcement of the FEHA

The current funding rate of 81 cents per year per employee may go back to the one dollar per year it was in the past, but we doubt that that would be sufficient to have a truly effective and more efficient DFEH, even if all necessary reforms were adopted. We are mindful that many of our recommendations for improving the current system would require more resources and that as we write this California is experiencing a financial crisis of historic proportions. As a practical matter, we doubt that enforcement of our antidiscrimination laws will be given the priority of other interests that are seemingly more urgent and certainly better represented in the political process. We therefore propose consideration of alternative means of funding enforcement of the

² See California Performance Review, Chapter 4, "Form Follows Functions," available at http://cpr.ca.gov/CPR_Report/Form_Follows_Function/Chapter_4.html.

FEHA. One possibility would be a regulatory fee paid by the employee and the employer. A fee of 10 cents per month would triple the current budget.

We understand that proposing additional resources for an agency that many believe ineffective might be controversial. To this we offer two responses: First, many of the problems we describe are the consequence of past budget reductions. Second, any increase in resources can and should be tied to the implementation of reforms insuring their most effective and efficient use.

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

We provide in this report a brief look at findings from the social sciences that document not only changes in the nature and extent of discrimination, but also in our understanding of its nature and causes. The FEHA's tort-based deterrence model was adopted when intentional, often flagrant, discrimination was common. Fifty years later it is clear that much discrimination is not the result of conscious intention, but of more subtle, unintentional behavior, and of the structure of labor markets. Findings from hundreds of careful studies suggest that an antidiscrimination law based on deterrence and aimed at intentional discrimination may no longer be addressing the most common forms of discrimination or preventing its economic and other harms, which are no less serious.

Consideration of specific approaches to replace or supplement deterrence has been beyond our scope here. A commission or other body comprised of representatives from every group of stakeholders and provided with the best available research and experience from our universities, human resources professionals and others would be better situated to engage this task. Charged with the task of going beyond our evaluation of the FEHA on its own terms to a consideration of alternatives or supplementary measures that might be both more effective and efficient, such an entity could provide the governor, legislature and people of the state with the information they need to shape how we respond to employment discrimination, over the next 50 years, or until such time as it no longer represents a problem for thousands of Californians.