First published in the California Real Property Journal, a quarterly publication of the Real Property Law Section of the State Bar of California

Through Struggle to the Stars: A History of California's Fair Housing Law

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I. INTRODUCTION

Per ardua ad astra, the Latin phrase for "through struggle to the stars," sums up California's hard-won gains on fair housing. Since its founding in 1848, California has evolved from a position of resisting to one of embracing fair housing. Today, the California Fair Employment and Housing Act (FEHA),[1] Unruh Civil Rights Act (Unruh Act),[2] and the case law that flows from these statutes represent the most progressive fair housing policies in the country. On this fiftieth anniversary of both the FEHA and the Unruh Act, the authors review the long history of California's fair housing policy.

II. EARLY DE JURE AND DE FACTO DISCRIMINATION

California's early legal history fostered a system of *de jure* and *de facto* discrimination in housing, public accommodations, and other policies for minority groups.

In April 1850, one of the early acts of California's newly formed Legislature, "An Act for the Government and Protection of Indians," stripped California's native populations of all claims to land and other rights of citizenship.[3] African Americans were barred from homesteading public land, enrolling their children in public school, using public transportation, and accessing other accommodations.[4] In the 1850s and 1860s, California likewise excluded Chinese children from the public school system.[5] The Alien Land Laws of 1913 and 1920 that followed further prohibited the ownership and lease of California land by "aliens ineligible for citizenship," including Japanese Americans, many of whom earned their living by farming.[6] Similarly, Mexican Americans were relegated to live in barrios with segregated schools and institutions.[7]

The 1920s ushered in a laissez-faire era by the state government.[8] Having avoided the establishment of any monolithic state housing authority, California devolved the setting of such policies to local government.[9] With little oversight, the 1920s and 1930s produced covenants that restricted the sale or occupation of real property on the basis of race, ethnicity, religion, or social class. Real estate developers routinely applied the restrictive covenants on entire subdivisions. Indeed, Los Angeles was one of the major cities known for their widespread use.[10] By the 1920s, 95 percent of Los Angeles' housing stock excluded Blacks and Asians.[11]

III. FEDERAL INTERVENTION IN THE HOUSING MARKET

Both before and immediately after World War II, concerns about a potential economic collapse prompted the federal government to intervene in the housing market.[12] The 1942 Emergency Price Control Act of 1942 (EPCA),[13] the Veterans' Emergency Housing Act of 1946,[14] and the Housing and Rent Acts of 1947 and 1949[15] were enacted during this era of federal preeminence.[16]

To cap inflationary pressures in regions critical to the defense effort, Congress included rent control provisions in the EPCA.[17] As a result, federal agencies, state courts, and local rent control boards swept in to take control of war-critical segments of the California rental market.[18] The EPCA forbade constitutional reviews by state courts, federal district, and federal circuit courts.[19] In turn, the appellate courts and the California Supreme Court held that local and state courts were required to hear litigation pertaining to actions under federal rent control.[20] Accordingly, these federal laws preempted and suspended landlords' business plans and state courts' prerogatives over housing policies.[21]

IV. CALIFORNIA'S CIVIL RIGHTS MOVEMENT

In the aftermath of federal intervention in the housing market, civil rights advocates began a decades-long campaign to pass civil rights legislation in California as well as in other industrialized states.

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. California civil rights leader Cottrell Laurence (C. L.) Dellums, one of the original organizers of the Brotherhood of Sleeping Car Porters' Union,[22] was one of the organizers.[23]

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.[24] In 1945, with little power to handle complaints, the national commission disbanded.[25] Thereafter, fair employment practices (FEP) legislation was introduced in five states: California, New York, Pennsylvania, Massachusetts, and New Jersey. All of the states adopted such laws except California.[26]

In 1945, 1949, 1951, and 1953, California FEP bills sponsored by Assembly Members Augustus Hawkins and Byron Rumford were rejected. In 1946,[27] Californians rejected Proposition 11 to adopt a FEP measure.[28] In 1953, the California Committee for Fair Employment Practices (Cal Committee) mounted a march on Sacramento with hundreds of supports to point up the need for FEP legislation. Even though the march appeared to turn the tide on public opinion, legislative efforts continued to be unsuccessful.[29] Despite repeated defeats, the Cal Committee continued to press for FEP legislation from 1953 to 1959.[30]

In 1959, Dellums and other activists first succeeded in passing the Fair Employment Practices Act (FEPA),[31] which banned employment discrimination, and the Unruh Civil Rights Act,[32] which prohibited arbitrary discrimination by all business estab-

lishments, including property owners. On April 16, 1959, Governor Pat Brown signed the FEPA into law. It took effect September 18, 1959.[33] 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 five or more persons, labor organizations, employment agencies, and any person aiding or abetting the forbidden actions.[34] The new law established a Fair Employment and Practices Commission (the Commission), consisting of five members who were appointed by the Governor and also created an administrative agency called the Division of Fair Employment and Practices, which was housed in the Department of Industrial Relations and carried out the policies of the Commission.[35] That same year, the California Legislature passed the Hawkins Act, [36] a fair housing law that prohibited discrimination in publicly assisted housing. Finally, in 1963, the Legislature passed the Rumford Fair Housing Act,[37] prohibiting housing discrimination in all rental properties with four or more units.

Passage of the Rumford Act did not go unchallenged, however. The California Real Estate Association launched a campaign for property owners' "sacred housing rights" and against "forced housing."[38] This resulted in the November 1964 approval by California voters of Proposition 14 by more than a two-to-one margin. Passage of the Proposition gave California property owners the right to refuse to rent, sell, or lease on the basis of race, religion, or ethnic background.[39] Until struck down by the California Supreme Court in 1966,[40] it gave property owners the right to exclude anyone for any reason.

In 1980, the FEPA and the Rumford Act were joined to create today's Fair Employment and Housing Act (FEHA).[41] Included also in the FEHA was enforcement of the Unruh Civil Rights Act.[42] Two administrative agencies enforce the FEHA. The Department of Fair Employment and Housing (DFEH) investigates, conciliates, and prosecutes discrimination complaints.[43] The Fair Employment and Housing Commission (FEHC) adjudicates these claims and promulgates regulations interpreting the FEHA.[44]

Development of California's fair housing law and a vibrant fair housing bar, however, has lagged far behind comparable developments in California fair employment law. The lag is due in part to decades of limited damages for housing discrimination cases. Until 1981, all damages flowing from discriminatory housing acts, both for actual and for punitive damages, were capped at $1,000 with no provision for attorneys' fees or costs.[45] These mirrored remedies available under the original federal Fair Housing Act of 1968.[46] However, in 1981 the California Legislature modified the FEHA's remedy to provide for full actual damages. Nonetheless, punitive damages remained capped at $1,000, adjusted annually in accordance with the Consumer Price Index.[47]

At the federal level, Congress in 1988 passed the Fair Housing Amendments Act (FHAA),[48] which eliminated the $1,000 cap on punitive damages, thus providing for unlimited punitive damages.[49] The 1988 amendments also made reasonable attorneys' fees and costs available to the prevailing party, other than the United States, for the first time.[50]

In 1992, the California Legislature amended the FEHA to be substantially equivalent to the FHAA.[51] As a result, the FEHA now provides for comparable damages to the FHAA in all housing cases litigated in court: all actual damages, unlimited punitive damages, reasonable attorneys' fees, and costs available to the prevailing party, other than the state.[52]

In the past 50 years, through legislation that broadened the coverage of protected categories and innovative legal advocacy in a number of Fair Employment and Housing Commission and appellate cases, California has steadily expanded its fair housing protections under the FEHA.

V. PUSHING THE LIMITS OF WHO IS PROTECTED FROM HOUSING DISCRIMINATION UNDER CALIFORNIA LAW

Development of California's fair housing law has benefited from the dual coverage provided under both the FEHA and the Unruh Act. Whereas under the FEHA, the protected categories are clearly set forth as providing the universe of who is covered,[53] the Unruh Act lists specific categories of enumerated bases.[54] The Unruh Act categories are deemed illustrative rather than restrictive.[55] Thus, in numerous instances, courts' interpretation of "arbitrary discrimination" and "business establishment" under the Unruh Act has provided coverage for housing discrimination claims long before the California Legislature provided protection under the FEHA.

For example, decided one year prior to the passage of the Rumford Act which prohibited private property owners from discriminating on the basis of race, *Swann v. Burkett* held that an owner of a triplex constituted a "business establishment" for purposes of the Unruh Act. [56] As a result, the court determined that the property owner could not discriminate against a rental applicant on the basis of race.[57] In 1982, 10 years before the Legislature added "familial status" to the 1992 FEHA amendments,[58] the California Supreme Court in *Marina Point v. Wolfson* held that an apartment complex could not ban families with children based on a "generalized prediction" that the class as a whole is more likely to commit misconduct than adults without children. [59] Likewise, in 1982, *Hubert v. Williams*[60] ruled that the Unruh Act protected against sexual orientation housing discrimination, a full 17 years before that basis was added to the FEHA.[61]

VI. USING EMPLOYMENT DISCRIMINATION LAW AS A MODEL

California has also developed its fair housing law by borrowing from concepts first established in comparable areas under employment provisions of the FEHA, as well as equivalent federal employment provisions of Title VII of the 1964 Civil Rights Act (Title VII)[62] or the Americans with Disabilities Act (ADA).[63] In *Brown v. Smith*,[64] for example, the Court of Appeal utilized the few federal sexual harassment housing cases as well as United States Supreme Court employment sexual harassment cases to find that sexual harassment in housing is a form of sex discrimination covered by the FEHA.[65] Similarly, in *Department of Fair Employment & Housing v. River Meadow Trailer Park,* the FEHC drew on its sexual harassment in employment precedents to analyze whether a trailer park manager's unwelcome sexual conduct had created a hostile housing environment for one of the trailer park's female inhabitants.[66]

VII. PROVIDING BROAD AND EFFECTIVE REMEDIES

Although the number of published or precedential decisions is not numerous, available case law has broadened the scope and remedies for fair housing under the FEHA.

In 2002, the California Supreme Court held in *Konig v. Fair Employment & Housing Commission*, 28 Cal. 4th 743 (2002) that the FEHC had the authority to award emotional distress damages to housing discrimination complainants.[67] Prior to the *Konig* decision, *Walnut Creek Manor v. Fair Employment & Housing Commission* had interpreted prior statutory language to mean that an administrative award of compensatory damages for emotional distress under the FEHA violated the judicial powers clause of the California Constitution.[68] As nearly 50 percent of accusations prosecuted by the DFEH are housing cases, the *Konig* decision has been instrumental in creating a growth in housing cases (from 815 cases in 2002 to 1,131 cases in 2008)[69] and larger damages awards.[70]

Smith v. Fair Employment & Housing Commission strengthened the FEHA's prohibition against marital status discrimination in the rental of housing in 1996.[71] The California Supreme Court in *Smith* held that the Act's prohibition of discrimination against an unmarried couple would not "substantially burden" a landlord's religious exercise within the meaning of the Religious Freedom Restoration Act.[72] Nor would the provision violate the landlord's rights under the state Constitution's free exercise and enjoyment of religion clause so as to exempt the landlord from the FEHA.[73]

In 2007, protection against source of income discrimination, which is unique to the FEHA and not available under the federal Fair Housing Act Amendments, was reinforced in *Sisemore v. Master Financial Inc*.[74] The *Sisemore* court held that a day care operator stated a viable claim for intentional source of income discrimination in violation of the FEHA when a lender denied her a purchase money loan.[75]

In 2004, *Auburn Woods I Homeowners Association v. Fair Employment & Housing Commission* upheld the FEHC's determination that a homeowners' association had discriminated against condominium residents, a married couple who suffered from depression and other disorders, in failing to reasonably accommodate their disabilities by permitting them to keep a small companion dog.[76]

VIII. A LEGACY OF PRECEDENTIAL DECISIONS

The Fair Employment and Housing Act authorizes the Commission to issue published opinions that serve as precedent in interpreting and applying the FEHA.[77] In addition to appellate case law, these precedential decisions provide a valuable source of 30 years of opinions interpreting every aspect of fair housing law and are available on Westlaw, LexisNexis, and JuriSearch databases.[78]

IX. RACE DISCRIMINATION

Historically, race discrimination has been the most prevalent basis of housing discrimination complaints. Commission decisions have covered a wide variety of issues relating to race discrimination. For example, in *Department of Fair Employment & Housing v. Gwen-Bar, Inc.*,[79] the Commission held that a failure to consider rental applicants because of their race for future vacancies, not just present vacancies, is also an adverse action and violated the FEHA on the basis of race.[80] In *Department of Fair Employment & Housing v. Green*,[81] the Commission held that a fair housing council had standing to bring a complaint as an "aggrieved person," and that the Council could be awarded damages for diversion of resources in pursuing its fair housing claim.[82] Finally, *Department Fair Employment & Housing v. Davis Realty Co., Inc.*[83] provides an excellent example of how the right expert witness can establish the extent to which racial discrimination can cause lasting and profound emotional distress, resulting in large emotional distress damage awards.[84]

X. FAMILIAL STATUS

The Commission has considered an increasing number of familial status housing discrimination cases over the years addressing all aspects of this issue.

In *Department of Fair Employment & Housing v. Merribrook Apartments*,[85] the Commission held that an apartment's occupancy standard of one person per bedroom discriminated on the basis of age under the Unruh Act, as incorporated into the FEHA at CAL. GOV'T CODE section 12948. The decision found that the standard was used covertly to exclude families with children and that the standard also had an adverse impact on families with children.[86] In *Department of Fair Employment & Housing v. McWay Family Trust*,[87] the Commission held that restrictive rules in an apartment complex which prevented children from being outside after dark with or without their parents were unlawful familial status discrimination.[88] And, in *Department of Fair Employment & Housing v. Jevremov*,[89] the Commission held that a landlord's concern for the safety of a prospective minor tenant is not an affirmative defense to liability for discrimination against families with children.[90]

XI. COVERED HOUSING PROVIDER

The FEHA covers housing providers, including owner-occupied single-family homes where rooms are offered to two or more roomers or boarders.[91] In *Department of Fair Employment & Housing v. Light*,[92] the Commission held that section 12927(c) does not require that more than one roomer actually live in the house, but rather that no more than one roomer "is to live within the household." Respondent had argued that since only complainant had lived in the house during his tenancy, she was not covered by the FEHA. The Commission disagreed, holding that it is the intention of the homeowner to rent to more than one tenant which creates jurisdiction. Since the evidence established that respondent sought to rent out two rooms in her home during the entire time of complainant's tenancy, the Commission held that her unlawful actions, evicting complainant because of his disability, were covered under the FEHA.[93]

XII. RETALIATION

Finally, in *Department of Fair Employment & Housing v. Atlantic North Apartments*,[94] the Commission held that the close timing of a resident manager's complaint to police that a rejected applicant had threatened her, within an hour of service of a DFEH complaint by that rejected applicant, but four days after the alleged threatening behavior, established that the resident manager's motivation was to injure complainants for their efforts to vindicate their civil rights.[95]

XIII. CONCLUSION

Over the years, the employment side of the FEHA has seen a tremendous growth in both the development of case law and legal practice. Too numerous to cite here, there are well more

than 500 published FEHA employment decisions that cover nearly every facet of the law. The employment practice also benefits from a strong connection with bar associations. The State Bar Labor and Employment Law Section boasts over 6,000 members. Indeed, labor and employment law sections are now common in nearly all local bar associations. These groups provide a forum for developing employment law under the FEHA, support a collegial network for sharing resources, foster better client representation, sharpen lawyering skills, allow adversaries to work together for the betterment of the practice, and create opportunities to advance and refine the law.[96]

Until recently, there had been no fair housing presence at any California bar association. Although the State Bar sponsors a large Real Property Law Section with nearly 7,000 members, fair housing has never been part of its traditional practice.

As a result of having so few private attorneys in the fair housing practice, landlords, realtors, lenders, and other potential respondents can unknowingly violate the FEHA without proper advice of counsel. Without a good body of decisions for guidance, these violations tend to be repeated and can be costly. The ultimate effect of this scenario is the deprivation of civil rights for tenants, protracted litigation for all parties, expensive settlements or judgments, and delayed relief.[97]

To rectify the missing link between the Bar and fair housing, a new Fair Housing and Public Accommodations Subsection has been launched under the State Bar Real Property Law Section. Its purpose is to advance the FEHA and Unruh Civil Rights Act in housing and public accommodations. Comprised of a balanced group of attorneys representing plaintiffs, landlords, and neutrals, the Subsection will support the professional growth of attorneys litigating such cases.[98]

Creation of the Subsection is timely in light of the 50th anniversary of the FEHA this year. In April 2009, the Subsection sponsored an inaugural symposium to train lawyers about the fair housing law practice at Golden Gate University School of Law. In November 2009, it sponsored a webinar on disability discrimination in housing. The Subsection's Fair Housing and Public Accommodations E-Circle is the most active electronic member group on the State Bar network. With the new Subsection, fair housing finally has a home at the Bar.

Given California's trajectory on fair housing, the FEHA and the Unruh Act will continue to ascend and light the way for equal housing rights over the next half century.

ENDNOTES

Phyllis W. Cheng was appointed by Governor Arnold Schwarzenegger as Director of the Department of Fair Employment and Housing (DFEH), the nation's largest state civil rights agency. She was formerly a Littler Mendelson counsel, senior appellate court attorney, deputy attorney general, Hadsell & Stormer associate, and FEHC vice chair.

Ann Noel is Executive and Legal Affairs Secretary (ELAS) with the Fair Employment and Housing Commission, California's adjudicatory civil rights agency, which hears complaints involving discrimination in employment, housing, and public accommodations; pregnancy disability leave; family and medical leave; and hate violence. As ELAS, Ms. Noel is the executive officer and principal legal advisor for the Commission, and its chief administrative law judge.

1 CAL. GOV'T CODE §§ 12900-12996.
2 CAL. CIV. CODE §§ 51-53.
3 Shirley Ann Wilson Moore, *We Feel the Want of Protection: The Politics of Law and Race in California, 1848-1878*, TAMING THE ELEPHANT: POLITICS, GOVERNMENT, AND LAW IN PIONEER CALIFORNIA 105 (John F. Burns & Richard J. Orsi eds. 2003).
4 *See In re Perkins,* 2 Cal. 424 (1852); 1850 Cal. Stats. 424, ch. 140; *see also* Ronald Takaki, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 21-31 (1989); CALIFORNIA'S BLACK PIONEERS: A BRIEF HISTORICAL SURVEY 75 (1973).
5 *See* Elmer Sandmeyer, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 40-56 (1939); Ronald Takaki, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 114-116 (1989).
6 *See* Roger Daniels, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 24-25, 27 (1962).
7 *See* Albert Camarillo, CHICANOS IN CALIFORNIA: A HISTORY OF MEXICAN AMERICANS IN CALIFORNIA 14, 26, 27 (1984).
8 Peter P. F. Radkowski III, *Managing the Invisible Hand of the California Housing Market, 1942–1967,* CALIFORNIA LEGAL HISTORY JOURNAL 12 (2006), *available at* http://www.law.berkeley.edu/files/radkowski_paper.pdf.
9 *Id*.
10 *See* Robert M. Fogelson, BOURGEOIS NIGHTMARES: SUBURBIA 1870-1930, at 15, 65, 103, & 131-137 (2005).
11 *See Environmental Justice in Los Angeles: A Timeline*, Environmental Defense Fund (1999 and 2003), *available at* http://www.edf.org/article.cfm?ContentID=2816.
12 Radkowski, *supra* note 8, at 12.
13 50 U.S.C.A. § 901 (Former Supp.II 1942).
14 12 U.S.C.A. § 1743 (1946).
15 61 Stat. 193, 50 U. S. C. Ann. Supp. II, 1881 et seq. (1947); 63 Stat. 26, 50 U.S.C.A. Appendix, § 1899 (1949).
16 Radkowski, *supra* note 8, at 12.
17 *Id.*
18 *Id.*
19 *Id*. at 7.
20 *See, e.g., Lovett v. Bell,* 30 Cal. 2d , 14 (1947) ("Within its scope the [Emergency Price Control Act] is the

supreme law of the land . . . and supersedes state statutes which are inconsistent with its purpose."); *Barkett v. Brucato*, 122 Cal. App. 2d 264, 279 (1953) ("There can be no doubt that during the emergency covered by the federal act the renting of property ceased to be a private matter and became impressed with a public use.").

21 Radkowski, *supra* note 8, at 12.

22 Joyce Henderson, *C. L. Dellums, International President of the Brotherhood of Sleeping Car Porters and Civil Rights Leader*, EARL WARREN ORAL HISTORY PROJECT 115-135 (1973).

23 Phyllis W. Cheng, *FEHA History Makers*, 23 CAL. LAB & EMPL. L. REV. 3 (2009).

24 *Id*.

25 *Id.*

26 *Id*.

27 *Id.*

28 Phyllis W. Cheng, *FEHA History Makers*, 23 CAL. LAB & EMPL. L. REV. at 3.

29 *Id*.

30 *Id*.

31 Former CAL. LAB. CODE § 1410 et seq., *repealed* by 1980 Cal. Stat. 3166. Governor Edmund G. Brown appointed C. L. Dellums to the first Fair Employment Practices Commission where he continued to serve the Commission until 1985. FEHC Records.

32 *See supra* note 2. 1959 Cal. Stat. 4424. *See Burks v. Poppy Const. Co.,* 57 Cal. 2d 463, 469-470 (1962) (Unruh Act covers discriminatory practices of all business establishments, including those selling real property); *Crowell v. Isaacs,* 235 Cal. App. 2d 755, 757 (1965) (Unruh Act applies to those engaged in business of selling real estate, whether as an owner or broker); and *Beliveau v. Caras*, 873 F.Supp. 1393, 1401 (1995) (Unruh Act covers those engaged in sale or rental of real property).

33 *See* Cheng, *supra* note 23, at 22.

34 *Id.*

35 *Id.*

36 Former CAL. HEALTH & SAFETY CODE §§ 35700-35741, repealed by 1977 Cal. Stat. 3902; 1980 Cal. Stat. 3166.

37 Former CAL. HEALTH & SAFETY CODE §§ 35700-35741., repealed by 1980 Cal. Stat. 3166.

38 Richard Delgado & Jean Stefancic, *California's Racial History & Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1547, 1553 (2000).

39 *Id*. at 1547; *see* CAL. CONST. art. I, § 26 (1964), repealed (1974) (incorporating into the California Constitution, Proposition 14: Anti-Fair Housing Initiative).

40 *Mulkey v. Reitman,* 64 Cal. 2d 529 (1966), *aff'd by Reitman v. Mulkey,* 387 U.S. 369 (1967).

41 See *supra* note 1. 1980 Cal. Stat. 3140.

42 CAL. GOV'T CODE § 12948.

43 CAL. GOV'T CODE § 12930.

44 CAL. GOV'T CODE § 12935.

45 Former HEALTH & SAFETY CODE § 35738, repealed by 1980 Cal. Stat. 3166 & recodified at CAL. GOV'T CODE § 12987(2).

46 The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. § 3601 et seq.

47 1981 Cal. Stat., ch. 899, § 3.

48 The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C.A. §§ 3601 et seq.

49 42 U.S.C.A. § 3613(c)(1).

50 42 U.S.C.A. § 3613(c)(2).

51 CAL. GOV'T CODE § 12955.6 provides that the FEHA may not be construed to afford the classes it protects fewer rights or remedies than the FHAA.

52 CAL GOV'T. CODE § 12989.2.

53 Those categories are: race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, and disability. *See* CAL. GOV'T CODE § 12955.

54 The Unruh Act specifically lists "sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status and sexual orientation." CAL. CIV. CODE § 51.

55 *Marina Point v. Wolfson,* 30 Cal. 3d 721, 736 (1982) ("The Unruh Act applies to 'all persons,' and is not reserved for restricted categories of prohibited discrimination."). In *Marina Point*, the landlord of a large apartment complex instituted an unlawful detainer action against tenants who failed to vacate the premises at the expiration of a lease extension. The sole reason for the landlord's refusal to renew the lease was the presence of a minor child on the premises in violation of the no-children policy, which policy the tenants contended violated the Unruh Civil Rights Act. Concluding that the act applied only to a limited number of specifically designated protected classes and that the challenged ban on children fell outside the scope of the act, the municipal court upheld the exclusionary policy and granted the requested relief.
The California Supreme Court reversed. The high court first held that the anti-discrimination provisions of the Unruh Act are not confined only to a limited category of protected classes, but rather protect all persons from any arbitrary discrimination by a business establishment. The court further held that the rights afforded by the act are enjoyed by all persons, as individuals, and that a business enterprise may not exclude an entire class of individuals on the basis of a generalized prediction of misconduct. Thus, the blanket exclusion at issue was impermissible, even assuming children as a class were noisier and rowdier than adults. Nor did the nature of the business enterprise or the nature of the facilities justify the no-children policy. Finally, the court held that age qualifications as to a housing facility reserved for older citizens can operate as a reasonable and permissible means under the act of establishing and preserving specialized facilities for those particularly in need of such services or environment. *Id*. at 721.

56 *Swann v. Burkett,* 209 Cal. App. 2d 685, 694-69,

(1962). In *Swann*, a race discrimination case, the court of appeal held that although the Legislature in enacting the Unruh Civil Rights Act did not define what was meant by "business establishments" or indicate that the act was intended to apply to the renting of small rental units by the owner, the court of appeal is bound by the California Supreme Court's interpretations of legislative intent. On that basis it concluded that the Legislature intended to cover "housing" and "business establishments" in such a broad manner that those definitions would apply to a person renting units in a "triplex" dwelling. *Id*. at 694.

57 *Id.*

58 1992 Cal. Stat., ch. 182, § 2.

59 *Marina Point v. Wolfson*, 30 Cal. 3d at 741.

60 *Hubert v. Williams*, 133 Cal. App. 3d 1, 3-4 (Cal. App. Dep't Super. Ct. 1982) (Homosexuals are protected from arbitrary discrimination in rental housing by the Unruh Act and the right to associate with members of this protected class is also protected.).

61 1999 Cal. Stat., ch. 592, § 1.5.

62 Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq.

63 Americans with Disabilities Act of 1990 (ADA), *amended* by the ADA Amendments Act of 2008 (P.L. 110-325), 42 U.S.C. § 12101, et seq.

64 *Brown v. Smith*, 55 Cal. App. 4th 767 (1997). In *Brown v. Smith*, a former apartment resident and her husband brought an action against their former landlord and his wife, alleging the landlord sexually harassed the resident, in violation of the FEHA and the Unruh Civil Rights Act, and that this conduct was negligent and caused the husband loss of consortium damages. The jury found in favor of plaintiffs on all theories, and awarded compensatory and punitive damages and attorney fees against defendants.

The court of appeal reversed the judgment. The court held that FEHA bars sexual harassment as a form of sexual discrimination in housing, notwithstanding that neither CAL. GOV'T CODE § 12955 (unlawful housing practices), nor CAL GOV'T CODE § 12927(c) (definition of "discrimination" with respect to housing), expressly refers to sexual harassment.

The court also held that the judgment could not stand on the FEHA theory, since the jury instructions were deficient. Although the jury was apparently required to interpret and apply CAL. GOV'T CODE § 12955, there were elements of the statutory cause of action that could not reasonably have been known by the jury absent some statutory interpretation in the form of instructions that went beyond the language of the statute. The court held that the landlord was prejudiced by the lack of more specific instructions on all the elements of such a statutory cause of action.

The court further held that the resident was unable to state a cause of action under the Unruh Civil Rights Act since the act was not intended to include victims of sexual harassment. Further, although the Legislature enacted CAL. CIV. CODE § 51.9 expressly to fill this void in the civil rights law, that section became effective Jan. 1, 1995, but the conduct alleged in the present case took place in 1991.

The court also held that the judgment required reversal since it was more probable than not that the evidentiary basis for the verdict was not sound. In addition to the resident's testimony, the trial court admitted testimony of four other residents to prove plaintiff was sexually harassed pursuant to the landlord's common scheme or plan, yet there was very little indication of how or whether the trial court performed the necessary balancing of factors under CAL. EVID. CODE §§ 352 (probative value of evidence versus undue prejudice) and 1101(b) (evidence of other acts to prove common scheme or plan). *Brown*, 55 Cal. App. 4th at 767.

65 *Id*. at 782. ("[I]t was 'beyond question' that sexual harassment is a form of discrimination, and that the basic principles applicable in employment cases should also apply in the housing context.") (quoting *Beliveau v. Caras,* 873 F.Supp. 1393, 1397 (C.D.Cal 1995).)

66 *Dep't Fair Employment & Hous. v. River Meadow Trailer Park* (Oct. 7, 1998) No. 98-15, FEHC Precedential Decs. 1998, CEB 3, at 14 (1998 WL 916484 at *9 (Cal. F.E.H.C.)). ("We draw from our employment sexual harassment decisions for our analysis of sexual harassment in housing.") In this case, the managing agent of a trailer park sexually harassed a tenant. The Fair Employment and Housing Commission held that the owner had a non-delegable duty to provide a discrimination-free housing environment to the tenant. Moreover, she may be held directly liable for her managing agent's sexual harassment of complainant. *Id.* at *16.

67 *Konig v. Fair Employment Hous. Comm'n*, 28 Cal. 4th 743 (2002). In *Konig*, the Fair Employment and Housing Commission awarded the prevailing claimant, an African-American woman, damages for emotional distress she suffered when the landlady of the rental unit told her she would not rent to her and slammed the door in her face. In mandate proceedings filed by the landlady, the trial court partially granted the petition but struck the $10,000 award for emotional distress and lost housing opportunity on the ground that the Commission was constitutionally prohibited from awarding general compensatory damages for emotional distress. The court of appeal affirmed. The California Supreme Court reversed the judgment of the court of appeal and remanded for further proceedings. The high court held that the Commission was authorized to award the claimant actual damages, including damages for emotional distress (CAL. GOV'T CODE § 12987(a)(4)), and the award did not violate the judicial powers clause (CAL. CONST., art. VI, § 1). The court reasoned that CAL. GOV'T CODE § 12989, which gives both sides in an FEHA administrative proceeding the choice to adjudicate the matter in court, remedied any separation of powers concerns as to impingement of judicial powers in the awarding of mental distress damages. Further, the Legislature made attempts to

ensure the availability of emotional distress damage awards in administrative proceedings in CAL. GOV'T CODE § 12955.6, stating that the FEHA shall not be construed to afford to the classes protected under this part, fewer rights or remedies than the federal statutory scheme, under which emotional distress damages are available in federal administrative proceedings. *Id*.

68 *Walnut Creek Manor v. Fair Employment & Hous. Comm'n*, 54 Cal. 3d 245 (1991), *superseded* by statute as noted in *Konig*, 29 Cal. 4th at 745. In *Walnut Creek Manor*, the Fair Employment and Housing Commission found that a prospective tenant's application for a one-bedroom apartment had been denied on the basis of his racial status (Black) and marital status (single). The Commission awarded the applicant special damages for the cost of his rent and utilities in excess of what he would have paid at the apartment complex. It also awarded attorney fees, $50,000 in compensatory damages for emotional distress, and punitive damages of $40,635 ($1,000 for each of 35 apartment rentals made to others while the applicant's application was pending and within the 120-day jurisdictional time period, as adjusted, plus interest). The apartment complex, the owner of the apartment complex and its rental manager petitioned for a writ of administrative mandamus. The superior court remanded the case to the Commission with directions to reconsider the finding of marital status discrimination and limit punitive damages to $1,000, as adjusted. The court of appeal affirmed in part and reversed in part. It interpreted CAL. GOV'T CODE § 12987 as authorizing the Commission to award unlimited compensatory damages for housing discrimination, but it found that the FEHC's award of general compensatory damages for emotional distress constituted an unconstitutional exercise of judicial power by a non-judicial body in violation of the judicial powers clause (CAL. CONST., art. VI, § 1). It also found that CAL. GOV'T CODE § 12987 authorizes the Commission to order a separate award of punitive damages for each act of discrimination within the jurisdictional period.

The California Supreme Court reversed that part of the judgment of the court of appeal relating to punitive damages, modified that part of the judgment relating to emotional distress compensatory damages with directions to order the superior court to modify its writ to strike the award of compensatory damages for emotional distress, and affirmed the judgment as modified. The high court held that the award by the Commission of compensatory damages for emotional distress was in violation of the judicial powers clause, but that the award of damages for out-of-pocket expenditures for increased rent and utilities did not violate that provision. The court also held that CAL. GOV'T CODE § 12987 is valid insofar as it authorizes the Commission to award quantifiable out-of-pocket restitution damages for housing discrimination, even though it is invalid under the judicial powers clause insofar as it authorizes the award of non-quantifiable general compensatory damages for emotional distress. Finally, the court held that the Commission erred in awarding $1,000 to the applicant for each of the 35 apartment rentals made to others while his application was pending. The court held that the Legislature did not intend to authorize the Commission to impose substantial multiple, cumulative punitive damage awards for a single course of discriminatory conduct against one complainant. *Id*.

69 Gary Blasi & Joseph Doherty, *FEHA by the Numbers: Preview of a Forthcoming Study*, 23 CALIFORNIA LABOR & EMPLOYMENT LAW REVIEW 5 (Sept. 2009). In 2008, newly appointed DFEH Director Phyllis Cheng asked the UCLA-RAND Center for Law and Public Policy to conduct a study of the FEHA using 12 years of data collected on all complaints filed at the Department. In the 50 years since the passage of the FEPA, Unruh Civil Rights Act, Rumford Fair Housing Act, and the FEHA, there have been few studies of either the effectiveness of the law or the efficiency with which it is being enforced. The DFEH had accumulated a large amount of administrative data regarding nearly a quarter of a million FEHA complaints since 1996, but it had not had the resources to analyze it. In addition to analyzing DFEH data, UCLA-RAND has reviewed court records, interviewed scores of stakeholders with diverse perspectives, and prepared on-line surveys of attorneys. The researchers expect to conclude their work by the end of 2009, and to include the recommendations for improving the efficiency and effectiveness of the law that they have received from others. In this short preview article, the researchers summarize some of the basic data regarding administrative enforcement of the FEHA between 1997 and 2008. *Id*.

70 Of note are the largest single-plaintiff post-jury trial settlement of $1 million on a 2005 disability discrimination case in *Dep't of Fair Employment & Hous. v. The 2001 California Street Partnership* (*Carper*), No. CGC-03-42325 (S.F. Super. Ct. 2006), and a 2008 class action pretrial settlement of $618,000 in a familial status discrimination case in *Dep't of Fair Employment & Hous. v. Plaza Patria Court LTD*, No. 05-CC13651 (Orange County Super. Ct. 2008).

In *Carper*, a lawsuit filed in San Francisco County Superior Court, the DFEH contended that the owners of an apartment building violated the civil rights of a tenant with severe degenerative joint disease. The landlord refused her request for reasonable accommodation of her disability. The tenant of 24 years requested a reasonable accommodation for an accessible parking space, and extra keys for her live-in caregiver. The building owner denied her request for an accommodation. The tenant contacted the DFEH and Project Sentinel, a nonprofit organization that deals with housing discrimination and a real party in interest in the lawsuit. For the next three years, the tenant fought for her parking space. It was only after the DFEH filed a lawsuit that the parking space was granted. After an eight day trial and a full day of deliberations, the jury

found the landlord liable for disability harassment and denial of a reasonable accommodation and awarded compensatory damages. Before the jury returned to deliberate on the amount of punitive damages to award, the parties settled the case for $1 million in compensatory damages and affirmative relief. The affirmative relief includes requiring the landlord to: develop and disseminate to all residents a written policy regarding their right to receive, and the owner's duty to provide, reasonable accommodation under the Fair Employment and Housing Act (FEHA), undergo training regarding the duties of a landlord under the FEHA, and post the court's order that the landlord violated the FEHA. *See* DFEH press release, *available at*http://www.dfeh.ca.gov/DFEH/Announcements/pressReleases/TENANT%20RECEIVES%20$%201MILLION%20SETTLEMENT.pdf.

In *Plaza Patria Court,* the landlords were accused of discriminating against tenants with children by imposing overly restrictive "House Rules and Regulations" at the complex. The DFEH alleged that the rules, which included prohibiting children from being in the pool after 6:00 p.m. and playing outside alone unlawfully restricted the manner in which children could use the common areas of the apartment complex. The complaint further alleged that the management staff told parents they would be fined and then asked to leave if children were seen playing alone outside their apartments. Before filing a complaint with the DFEH, the Fair Housing Council of Orange County (FHCOC) investigated numerous complaints filed by families against Plaza Patria Court Apartments and found evidence of familial status discrimination. After conducting its own investigation, the DFEH filed suit against Plaza Patria Court Apartments on behalf of FHCOC and nine families with children who had lived in fear of being evicted for violating the complex's alleged discriminatory rules. The nine families and FHCOC joined the department's suit resulting in a class-action complaint of alleged unfair business practices, fraud, breach of contract, and negligence in addition to the discrimination charges. The out-of-court settlement also requires the owners to revise the complex's rules to ensure compliance with fair housing laws, develop a written policy prohibiting familial status discrimination, inform all tenants of the new rules, and ensure each resident and staff member has detailed information on how to report suspected discrimination. In addition, the owners are required to provide annual fair housing training sessions for a five-year period following the court's approval of the settlement. *See* DFEH press release, *available at*http://www.dfeh.ca.gov/DFEH/Announcements/pressReleases/ORANGE%20COUNTY%20APARTMENT%20COMPLEX.pdf.

71 *Smith v. Fair Employment & Hous. Comm'n*, 12 Cal. 4th 1143, 1162 (1996). In *Smith*, the landlord refused to rent an apartment to an unmarried couple on the basis of her religious belief that having a sexual relationship outside of marriage was sinful. The Supreme Court held that (a) the proscription against discrimination based on marital status contained in the FEHA applies to unmarried, cohabiting couples; (b) neither the United States' nor the California Constitution's freedom of religion clauses exempted the landlord from application of the fair housing statutes; and (c) the federal Religious Freedom Restoration Act did not operate to exempt the landlord from the FEHA, since the proscription against discrimination against persons based on marital status did not place a substantial burden on the landlord's exercise of her religion. *Id*. at 1155-1178.

72 *Id*. at 1176.

73 *Id*. at 1177.

74 *Sisemore v. Master Financial Inc*., 151 Cal. App. 4th 1386 (2007). In *Sisemore*, a home day care operator and fair housing organization brought action against a lender and its employees to recover for violation of the FEHA, Unruh Civil Rights Act, Unfair Competition Law, and Health and Safety Code. The violations were alleged to be based on rejection of an application for a loan to purchase a house in which to operate a day care center. The superior court sustained a demurrer. The operator and the organization appealed.

The court of appeal held that: (1) as a matter of first impression, rejection of a loan application did not violate the Health and Safety Code; (2) alleged rejection of a loan to buy a house for use as a home day care center was arbitrary discrimination on the basis of occupational status and was actionable under the Unruh Civil Rights Act; (3) the FEHA ban on discrimination against any person because of source of income is not limited to landlords and tenants; (4) the operator stated a viable claim for intentional discrimination because of source of income in violation of FEHA; (5) a housing discrimination claim under the FEHA may be founded on a disparate impact theory; (6) the operator stated a housing discrimination claim of disparate impact on women and families with children; and (7) the organization was an aggrieved person with standing to sue under the FEHA. *Id*.

75 *Id*. at 1406.

76 *Auburn Woods I Homeowners Ass'n v. Fair Employment & Hous. Comm'n*, 121 Cal. App. 4th 1578 (2004). In *Auburn Woods*, a Condominium association filed a petition for an administrative writ of mandate to overturn a Fair Employment and Housing Commission determination that the association had discriminated against condominium residents, a married couple who suffered from depression and other disorders, in failing to reasonably accommodate their disabilities by permitting them to keep a small companion dog. The superior court of Placer County granted the petition. On appeal by the FEHC and condominium residents, the court of appeal held that substantial evidence supported the Commission's determination. *Id*.

77 CAL. GOV'T CODE § 12935(h).

78 The Commission did not publish its decisions before 1978.

79 *Dep't Fair Employment & Hous. v. Gwen-Bar, Inc.* (Aug. 4, 1983) No. 83-18, FEHC Precedential Decs. 1982-83, CEB 17 (1983 WL 36467 (Cal. F.E.H.C.)).

80 In *Gwen-Bar*, the applicants, an African American couple, were turned down for an apartment because the owner said that he had a quota on how many blacks he would allow to live in his apartment complex. The owner had argued that in every case, there must be a presently available housing accommodation for a violation of CAL. GOV'T CODE section 12955, subdivision (a), and that the apartment that the applicants wanted was already rented. The Commission rejected this argument, finding that failure to consider applicants for future openings was also an adverse housing action. *Id* at *4.

81 *Dep't Fair Employment & Hous. v. Green* (June 12, 1986) No. 86-07, FEHC Precedential Decs. 1986-87, CEB 1 (1986 WL 74378 (Cal. F.E.H.C.)).

82 In *Green*, the Commission found that the owner misrepresented the availability of housing to a variety of African American and Hispanic testers. The Commission found that respondent violated the Act by misrepresenting the availability of housing on the basis of race and national origin, by making inquiries regarding race, and by making statements of preference or limitation on the basis of race and national origin. In addition, it was determined that the local fair housing council had standing to bring complaints on all of these causes of action. *Id* at *6-8.

83 *Dep't Fair Employment & Hous. v. Davis Realty Co., Inc.* (Jan. 23, 1987) No. 87-02, FEHC Precedential Decs. 1986-87, CEB 5 (1987 WL 114850 (Cal.F.E.H.C.)).

84 In *Davis Realty*, two women, one white and one African American, attempted to rent a house for themselves and the African American woman's two children through a property management firm, Davis Realty. Davis Realty's property manager rejected the application because of the race of the African American applicant. Dr. Nathan Hare a psychologist who had written extensively on the subject of black families in contemporary society and the impact of racism on black people, interviewed all the complainants for the DFEH. Dr. Hare documented the profound and lasting impact on all four complainants because of the rental rejection. Finding that complainants were rejected from consideration on the basis of race and based on Dr. Hare's testimony, the Commission found that the housing rejection caused a deep depression for the mother, an identity crisis for both children, and frustration for the white roommate, the Commission awarded $50,000 to the African American mother, a total of $40,000 to her two children and $5,000 to her white roommate. *Id* at *18.

In addition, the decision held that: (a) allegations in the ultimate accusation that were not in the original complaint are proper so long as they encompass any discrimination like or reasonably related to the allegations of the complaint and growing out of such allegations; (b) the DFEH has discretion to dismiss or never name respondents for a variety of reasons, including procedural defects in its case against them without complaint from respondents unless the dismissed respondent is an indispensible party; and (c) a complainant need not exhaust other remedies, such as a real estate company's internal complaint procedures, prior to filing a complaint with the DFEH. *Id* at *12.

85 *Dep't Fair Employment & Hous. v. Merribrook Apartments* (Nov. 9, 1988) No. 88-19, FEHC Precedential Decs. 1988-89, CEB 7 (1988 WL 242651 (Cal. F.E.H.C.)).

86 In *Merribrook*, the apartment complex imposed a one person per bedroom policy in a building which had one and two bedroom apartments. The complex had business cards stating that it was for "adults only." Applicants listing only adults as tenants were not required to adhere to the one person per bedroom policy, while families with children were. The Commission found both intentional discrimination and also held that unlawful housing discrimination can be found if an apparently neutral housing practice, regardless of its intent, has an adverse effect on persons protected by the FEHA and that no affirmative defense had been shown to justify that discrimination. *Id* at *13-15.

87 *Dep't Fair Employment & Hous. v. McWay Family Trust* (Oct. 2, 1996) No. 96-07, FEHC Precedential Decs. 1996, CEB 1 (1996 WL 774922 (Cal. F.E.H.C.)).

88 In *McWay Family Trust*, the owners instituted a policy that no child could be outside after dark with or without an adult. Michael and Deneen Mortera, tenants in the building who had two children, objected that the policy was illegal and organized other parents in the complex to object to and ignore the policy. When the resident manager came up to Michael Mortera while he was reading to his two children outside on their balcony, and told him to "get your damn kids inside," Mortera called the police. The police responded and informed the resident manager that the curfew policy did not conform to the city's 11 p.m. curfew for youth. Less than ten minutes later, the resident manager served complainants with an eviction notice.

The Commission held that respondents discriminated against complainants on the basis of familial status in the promulgation of a discriminatory curfew policy and by retaliating with an eviction notice when complainant Michael Mortera informed a law enforcement agency of the unlawful practices, in violation of CAL. GOV'T CODE section 12955, subdivisions (a), (c), (d), and (f). *Id* at *10-11. The Commission also held that the unlawful detainer action filed by respondents against complainants did not collaterally estop the FEHA action. *Id* at *12.

89 *Dep't Fair Employment & Hous. v. Jevremov* (Feb. 5, 1997) No. 97-02, FEHC Precedential Decs. 1997, CEB 1 (1997 WL 253179 (Cal. F.E.H.C.)).

90 In *Jevremov*, the owner refused to show applicants a second story dwelling with concrete steps once he learned that they had children. He told them that since he rented at least 50% of his properties to families with

children, he was in compliance with the law.

The Commission held that respondent asked complainant about her familial status, made discriminatory statements to her, and refused to show or rent the second story dwelling to her because of her familial status, in violation of CAL. GOV'T CODE section 12955, subdivisions (a), (b), (c), and (d). Citing federal fair housing law, the Commission held that a landlord's concern for the safety of a prospective minor tenant is not an affirmative defense to liability for discrimination. *Id* at *5.

91 CAL. GOV'T CODE § 12927(c)(2)(A).

92 *Dep't Fair Employment & Hous. v. Light* (Aug. 2, 1995) No. 95-04, FEHC Precedential Decs. 1994-95, CEB 2.1 (1995 WL 908701 (Cal. F.E.H.C.)).

93 In *Light*, respondent rented a room in her home to complainant, who had kidney disease. When respondent learned that complainant required kidney dialysis, she evicted him, telling him that he had "conned" her by not divulging the full extent of his condition. During the time that complainant lived with her, only one bedroom was rented, to complainant, although during this same period of time, respondent advertised for a second roomer. Respondent argued that since she had not rented out two rooms, she was not covered by the FEHA.

The Commission disagreed, noting that respondent's interpretation would mean that a landlord could never be found to have discriminated against a potential tenant who sought to rent the first of two available rooms, because both of the rooms were not currently rented. The Commission held that respondent's actions discriminated against complainant on the basis of his disability, in violation of Government Code section 12955, subdivisions (a) and (d). *Id* at *8.

94 *Dep't Fair Employment & Hous. v. Atlantic North Apartments* (Apr. 7, 1983) No. 83-12, FEHC Precedential Decs. 1982-1983, CEB 13 (1983 WL 36461 (Cal. F.E.H.C.)).

95 In *North Atlantic Apartments*, the resident manager of the apartment complex, Rita Rouille, was willing to rent to complainants, Masoud and Sylvia Nouri, until Rouille learned that Masoud Nouri was Iranian. Saying that she had had problems with Iranian tenants in the past, Rouille returned the Nouris' deposit and refused to rent to them. The Nouris immediately filed a complaint with the DFEH. Four days later, the DFEH served Rouille with the complaint. Within hours, Rouille filed a complaint with the police, stating that Masoud Nouri had threatened her life four days before. The police investigated and found no merit to the charge.

The Commission held that respondents discriminated against complainants on the basis of their national origin and retaliated against them for filing a DFEH complaint, in violation of Government Code sections (a) and (f). *Id* at *3-4.

96 Phyllis W. Cheng, *Playing House with the Bar*, THE DAILY JOURNAL, Forum, at 6, February 23, 2009.

97 *Id.*

98 *Id.*