

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2662 (Kalra)
Version: March 10, 2022
Hearing Date: May 31, 2022
Fiscal: No
Urgency: No
TSG

SUBJECT

Department of Fair Employment and Housing

DIGEST

This bill codifies judicial precedent holding that the Department of Fair Employment and Housing (DFEH) represents the public interest and effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination.

EXECUTIVE SUMMARY

DFEH is responsible for enforcing some of California's most important civil rights laws. Among other things, this role involves educating the public, receiving complaints, and carrying out investigations. When DFEH concludes that a civil rights violation has taken place, DFEH's role sometimes also includes suing the person or entity it believes was responsible. In such cases, defendants sometimes attempt to call into question the nature of DFEH's involvement. Is DFEH there simply to represent the interests of the person whose rights were violated, like a free private attorney? Or is DFEH supposed to do more? Courts reviewing the matter have consistently held that it is the latter: DFEH's mission includes looking out for the broader public interest in upholding the civil rights of all Californians. This bill would codify that judicial precedent, thus removing it from any possible further legal contention and affirming DFEH's role as guardian of the public's overall interest in respect for the civil rights of all.

The bill is author-sponsored. Support comes from consumer attorneys, who applaud the formal recognition of DFEH's public interest role. There is no opposition on file. The bill passed off the Assembly Floor by a vote of 66-0. If the bill passes out of this Committee, it will next be heard on the Senate Floor.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Sets forth DFEH's statutory functions, duties, and powers. (Gov. Code § 12930.)
- 2) Prohibits discrimination and harassment on the basis of specified characteristics in employment and the provision of housing accommodations as well as retaliation for lawfully opposing such discrimination and harassment. (Gov. Code §§ 12940 - 12957.)
- 3) Empowers DFEH to represent individual complainants in civil actions under its own name on behalf of persons injured by FEHA violations. (Gov. Code §§ 12965(a)(1) and 12981(a)(1).)

This bill:

- 1) Codifies judicial precedent concluding that, in performing its statutory functions and duties and exercising its statutory powers, DFEH represents the interests of the state and effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination and other violations of the civil rights laws that DFEH enforces.
- 2) Specifies that when DFEH brings a civil action on behalf of a person claiming to be aggrieved by failure to eliminate unlawful employment discrimination, it does so in the public interest.
- 3) Specifies that when DFEH brings a civil action on behalf of a person claiming to be aggrieved by failure to eliminate unlawful housing discrimination, it does so in the public interest.

COMMENTS

1. Background on DFEH

The Department of Fair Employment and Housing is the state agency tasked with oversight, monitoring, and enforcement of many of California's civil rights laws. As its name suggests, one of DFEH's primary roles is to receive, investigate, and sometimes prosecute allegations of unlawful discrimination, harassment, and related retaliation in the context of housing and employment. However, DFEH is also charged with responding to allegations of civil rights violations in several other contexts as well. Among other things, DFEH is responsible for administrative enforcement of the prohibition on discrimination against consumers (the Unruh Civil Rights Act; Civ. Code § 51), prohibitions on discrimination between businesses (Civ. Code § 51.5), prohibitions on hate crimes (the Ralph Civil Rights Act; Civ. Code § 51.7), and

prohibitions on sexual harassment in business, service, or professional relationships (Civ. Code § 51.9). (Gov. Code § 12930.)

2. Legal question regarding the DFEH's role and judicial rulings on the matter

When, after investigating a complaint, DFEH concludes that housing or employment discrimination has taken place, it has the authority to sue the person or party responsible in civil court. (Gov. Code § 12930(h).) When DFEH exercises this authority, defendants sometime respond by questioning the scope of DFEH's role. They assert that DFEH's only job is to represent the complainant, as if DFEH were effectively nothing more than a free attorney for the complainant.

Where defendants have raised this argument, the courts have consistently responded that DFEH's role is broader. Rather than representing the individual interests of each complainant, the courts have held that DFEH has a broader mandate to exercise its authority on behalf of the public at large and to promote the public interest in respect for the civil rights of everyone. Much like the duty of a criminal prosecutor is to represent "the people" even when doing so may conflict with the wishes of the person who was the victim of the crime in question, the courts have concluded that DFEH, too, occupies a prosecutorial function and is there to vindicate the public interest in civil rights enforcement, separate and apart from the interests of the complainant.

For example, the California Supreme Court has ruled that "the DFEH is a public prosecutor testing a public right." (*State Pers. Bd. v. Fair Employment & Hous. Com.* (1985) 39 Cal.3d 422, 444 [internal quotations, alterations, and citations omitted]). Similarly, California appellate courts have concluded that, in carrying out its civil rights enforcement functions, DFEH serves as a prosecutor representing the "sovereign power of the people of the state" in service of the public interest (*Wood v. Superior Court* (2020) 46 Cal. App. 5th 562, 577-78, 582) and that, in pursuing those goals, DFEH has the authority to "seek remedies to vindicate what it considers to be in the public interest." (*Dep't of Fair Employment and Housing v. Superior Court* (2020) 54 Cal.App.5th 356, 373). All of these legal conclusions are consistent with the U.S. Supreme Court's related determination regarding the role of the Equal Employment Opportunity Commission, DFEH's federal counterpart. (*See E.E.O.C. v. Waffle House, Inc.* (2002) 534 U.S. 279, 291-2.)

This bill codifies the central tenant of these judicial rulings. It draws, in particular, on the following language pulled from a 2020 California Court of Appeal decision:

The DFEH's task is to represent the interests of the state and to effectuate the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination." (*Dep't of Fair Emp. & Hous. v. Cathy's Creations, Inc.* (2020) 54 Cal. App. 5th 404, 410.)

3. Why it matters

The nature of DFEH's role in prosecuting civil rights violations is more than just an esoteric legal debate. Codifying judicial precedent confirming DFEH's public interest, prosecutorial function will have at least three specific practical consequences.

First, the bill should put to rest any possible further legal dispute about whether DFEH is bound by employment agreements to which it is not a party. Since the bill clarifies that DFEH operates with a broader, prosecutorial interest that is separate and apart from the individual interests of the complainant, the bill affirms that cases brought by DFEH cannot be, for example, hailed into arbitration merely because the complainant signed an arbitration agreement. Second, the bill resolves any possible further legal dispute over whether DFEH may continue to litigate cases after the complainant elects to settle their claims. Here again, statutory confirmation of DFEH's duty to represent a separate and independent public interest in respect for civil rights affirms that DFEH can continue to litigate a matter if it determines that a settlement reached with the complainant is not sufficient to vindicate the broader public interest. Third, statutory confirmation that DFEH's role includes representing the broader public interest should facilitate DFEH's ability to seek group or class relief where appropriate.

Finally and more generally, it is worth noting that legislative approval of these judicial precedents should also have the beneficial effect of freeing DFEH, litigants, and the courts to focus their attention and resources on the merits of the claims before them, rather than bickering over the exact nature of DFEH's involvement.

4. Arguments in support of the bill

According to the author:

In 2013, the Legislature transformed the Department of Fair Employment and Housing (DFEH) from an adjudicatory agency to a prosecutorial agency. However, due to DFEH's relatively new authority to prosecute violations of state and federal civil rights laws, case law and legislation surrounding DFEH's prosecutorial powers is less developed. AB 2662 would clarify the functions and duties of DFEH as the State's civil rights agency when acting in the public interest to protect California residents from discrimination and unlawful practices in employment, housing, and public accommodations, as well as hate crimes and human trafficking. By making clear that DFEH acts in the public interest, this bill ensures the department can fulfill its mission and enforce civil rights laws, even in instances where individual plaintiffs settle their claims or otherwise exit lawsuits in class actions.

In support, the Consumer Attorneys of California write:

This bill makes clear that DFEH, acting in the public interest, effectuates the declared public policy of the state so that the department can protect the people of California from violations of the antidiscrimination laws.

SUPPORT

Consumer Attorneys of California

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 807 (Wieckowski, Ch. 278, Stats. 2021) made procedural modifications to how the DFEH enforces California's civil rights and anti-discrimination laws and changed certain deadlines and record retention periods to conform to recent changes in the law.

SB 1038 (Committee on Budget, Ch. 46, Stats. 2012) authorized DFEH to initiate civil actions on behalf of complainants alleging violations of employment- and housing-related civil rights statutes.

PRIOR VOTES:

Assembly Floor (Ayes 66, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)
