LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, FEBRUARY 23, 2009

Playing House With the Bar

By Phyllis W. Cheng

In the 1964 Burt Bacharach hit song "A House Is Not A Home," Dionne Warwick sang: "But a room is not a house and a house is not a home when the two of us are far apart." So too are these lyrics applicable to the historic absence of a relationship between fair housing advocacy and the real property practice at the bar.

Why would fair housing need a home at the bar? After all, since the Rumford Fair Housing Act was enacted in 1963 and later recodified as the Fair Employment and Housing Act in 1980, fair housing advocates, government prosecutors and a handful of private attorneys have developed a system that works. Typically, a case starts with the victim complaining to a fair housing nonprofit organization, which conducts the initial investigation and testing on the alleged violation. Should the fair housing group not pursue the case as a party, it can refer the allegations of discrimination to the Department of Fair Employment and Housing for further investigation, enforcement, conciliation, mediation and prosecution. If the department finds cause and files an accusation, the fair housing group can participate as a complainant and/or intervener in the department's action against the offending landlord, realtor, lender or agent. When the department settles or wins its administrative or civil action, the complainant can be awarded 100 percent of the damages and affirmative relief.

As a result of this unique partnership between advocates and the Department of Fair Employment and Housing, housing complaints now comprise 40 percent of all accusations filed by the department, even though they constitute less than 10 percent of all discrimination complaints received. Under this scheme, the department has garnered significant fair housing victories over the years on every area of discrimination under the FEHA. Of note are the largest single-plaintiff, post-jury trial settlement of $1 million on a 2005 disability discrimination case in *Department of Fair Employment and Housing v. The 2001 California Street Partnership* (Carper), and a 2008 class action pretrial settlement of $618,000 in a familial status discrimination case in *Department of Fair Employment and Housing v. Plaza Patria Court LTD*.

However satisfactory these individual fair housing settlements and unchallenged lower court proceedings may be, they have no precedential value, cannot be cited and leave no progeny. Citable housing case law under the act is few and far between. For example, over the past 20 years, the California Supreme Court has ruled on only three fair housing cases. In 2002, it held in *Konig v. Fair Employment and Housing Commission*, 28 Cal.4th 743 (2002), that the Fair Employment and Housing Commission's authority to award emotional distress damages to housing discrimination complainants did not violate the judicial powers clause.

In *Smith v. Fair Employment and Housing Commission*, 12 Cal.4th 1143 (1996), the court ruled that the FEHA's prohibition against discrimination because of marital status would not "substantially burden" a landlord's religious exercise within the meaning of the Religious Freedom Restoration Act or 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. In *Walnut Creek Manor v. Fair Employment and Housing Commission*, 54 Cal.3d 245 (1991), superceded by statute as noted in Konig, supra, the high court held that an administrative award of compensatory damages for emotional distress under the FEHA violated the judicial powers clause of California Constitution.

The California Courts of Appeal have similarly issued only a limited number of published decisions. *Sisemore v. Master Financial Inc.*, 151 Cal.App.4th 1386 (2007), held that a day care operator stated a viable claim for intentional source of income discrimination in violation of the FEHA. *Auburn Woods Homeowners Association v. Fair Employment and Housing Commission*, 121 Cal.App.4th 1578 (2004), upheld the Fair Employment and Housing Commission'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.

Fair Employment and Housing Commission v. Superior Court (Las Brisas Apartment, Ltd.), 115 Cal. App.4th 629 (2004), held that a writ of administrative mandate challenging the commission's finding of liability against a landlord for race and familial status discrimination must be challenged by writ of administrative mandate within 30 days. *Broadmoor San Clemente Homeowners Association v. Nelson*, 25 Cal.App.4th 1 (1994), held the FEHA protects against unlawful discriminatory restrictions in group housing.

From 1997 to 2008, even the Fair Employment and Housing Commission issued only four precedential housing decisions.

Not a single FEHA fair housing decision has been decided by the U.S. Supreme Court. Likewise, the 9th Circuit Court of Appeals has issued only a handful of FEHA fair housing decisions, but only in connection with the federal Fair Housing Act.

In contrast, 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.

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 mistakes 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.

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. Composed of a balanced group of attorneys representing plaintiffs and landlords, and neutrals, the subsection will support the growth of attorneys litigating such cases.

Creation of the subsection is timely in light of the 50th anniversary of the FEHA this year. With the new subsection, fair housing finally has a home at the Bar. Hopefully, the fair housing practice will grow to be robust and even more fully carry out the FEHA's civil rights mission for the next half century.


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