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TRANSCRIPT OF PROCEEDINGS

DAVIS, CALIFORNIA

DECEMBER 8, 2014

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Transcript of Proceedings taken at 400 Mrak  
Hall Drive, King Hall, Room 1303, Davis, California,  
commencing at 1:35 p.m., MONDAY, DECEMBER 8, 2014,  
before Wendy Harrity, CSR No. 11494.

1 MONDAY, DECEMBER 8, 2014, DAVIS, CALIFORNIA

2 1:36, P.M.

3  
4 MR. MANDELBAUM: We will now be moving into the  
5 hearing portion of our meeting, the hearing related to  
6 the Modified Fair Employment Housing Act Regulations.

7 And so -- are we on the record? Okay. We are here  
8 on the record. The time is 1:36 p.m., on Monday,  
9 December 8, 2014. We're here on the campus of UC Davis,  
10 School of Law, 400 Mrak Hall Drive, Room 1303, Davis,  
11 California.

12 My name is Chaya Mandelbaum, Chairperson of the  
13 Fair Employment and Housing Council. And joining me  
14 today are members of the Fair Employment and Housing  
15 Council, Council members Dale Brodsky, Chanee Franklin  
16 Minor, Patricia Perez, and Andrew Schneiderman, as well  
17 as Ex Officio Member and Acting Director of the  
18 Department of Fair Employment and Housing, Annmarie  
19 Billotti.

20 Even though we had made initial introductions and,  
21 again, welcome you to this hearing, the purpose of this  
22 hearing is to receive public comments regarding issuance  
23 of the amendment to the Fair Employment and Housing Act  
24 Regulations proposed by the Fair Employment and Housing  
25 Council.

1           This rule making action clarifies, makes  
2 specific and supplements existing state regulations  
3 interpreting the FEHA set forth in Government Code  
4 Section 12900xx. As it relates to employment, the FEHA  
5 prohibits harassment and discrimination because of race,  
6 religious creed, color, national origin, ancestry,  
7 physical disability, mental disability, medical  
8 condition, genetic information, marital status, sex,  
9 gender, gender identity, gender expression, age, sexual  
10 orientation and military or veteran status. The  
11 regulations will appear on the California Code of  
12 Regulations, Federal 2, Sections 11005.1 to 11141.  
13 Copies of the proposed amendment to the FEHA regulations  
14 are available on the table outside of the room.

15           For those of you who testify, we will also have  
16 regulations available for your use. The text of the  
17 council's proposed regulation is also available on the  
18 council's web page at [www.dfeh.ca.gov/fehccouncil.htm](http://www.dfeh.ca.gov/fehccouncil.htm).  
19 The council is holding this hearing as the part of its  
20 formal rule making process. We noticed this public  
21 hearing more than 45 days ago in the California  
22 Regulatory Notice Register published on October 24th,  
23 2014, and also via e-mail sent to more than 7,000  
24 individuals and stakeholders and via social media via  
25 Facebook, LinkedIn and Twitter and to more than 800

1 individuals and stakeholders on the same date.

2 Pursuant to this notice, we are taking testimonies  
3 today on the proposed amendment to the FEHA regulations.  
4 We will also accept written comments to the proposed  
5 regulation until 5:00 p.m. today, December 8, 2014.  
6 You may e-mail written comments to the council at  
7 fehcouncil@dfeh.ca.gov. If you prefer, you may mail  
8 them to Council Chair Annmarie Billotti at DFEH  
9 Headquarters at 2218 Kausen Drive, Suite 100, Elk Grove,  
10 California 95758. If you brought a written copy of your  
11 comment, please give them to the Brian Sperber in front  
12 of the room. If you have not brought a written copy of  
13 your comment today, we would appreciate it if you would  
14 provide us a written copy by 5:00 p.m. today,  
15 December 8, 2014. Anyone who testifies here today or  
16 submits written comments will receive a copy the changes  
17 or amendments that council makes to this proposed  
18 amendment to the FEHA regulation. Also anyone who  
19 testifies or submits written comments will have a 15-day  
20 period within which to make written comments on any  
21 further changes to the proposed amendments to the FEHA  
22 regulations. The council and DFEH staff will consider  
23 each comment here today, as well as all written comments  
24 received. The council will respond to each comment in  
25 writing with its final statement of reasons which will

1 become part of the council's rulemaking record. This  
2 hearing is being transcribed by a certified court  
3 reporter. The transcript of the hearing, as well as all  
4 written comments received here today, will also be part  
5 of the council's official rulemaking record.

6 Because this hearing is being transcribed, it is  
7 critical that anyone speaking does so clearly and that  
8 only one person speak at a time. If you have not  
9 already done so, please sign in on the attendance sheet.  
10 If you sign in, we will know that you were here today  
11 and be able to send you a copy of any changes to the  
12 proposed amendment to the FEHA regulations.

13 Also, if you would like to testify, please be sure  
14 that you have indicated on the sign-in sheets that you  
15 would like to testify so we may call on you. You will  
16 not be sworn in when you testify. However, we ask that  
17 you come to the front of the room so that the court  
18 reporter can take down your testimony. Please begin by  
19 stating and spelling your name and stating your  
20 affiliation. Also, if you are commenting on a specific  
21 regulation, please identify the section number of the  
22 regulation so we that may refer to it as you speak. We  
23 will hear testimony until all those wishing to testify  
24 here today have had an opportunity to do so.

25 Does anyone have any questions before we begin?

1 Not seeing any, we are ready to begin. So anyone  
2 wishing to provide a public comment, please feel free to  
3 address us using the podium and microphone in the front  
4 of the room.

5 MR. LEBOWITZ: Good afternoon. My name is Noah  
6 Lebowitz. I can spell it: L-E-B, as in boy, O-W-I-T-Z.  
7 I am a partner in the San Francisco law firm of  
8 Duckworth Peters Lebowitz and Olivier, here today on  
9 behalf as the Chair of the California Employment Lawyers  
10 Association Fair Employment and Housing Council  
11 Regulation Subsidy. So I have written comments from the  
12 organization. I can hand them all to you.

13 MR. MANDELBAUM: Oh, great.

14 MR. SCHNEIDERMAN: You'll have to speak in  
15 French, though.

16 MR. LEBOWITZ: Okay. One of those has original  
17 signatures on it, I apologize. That should be our  
18 official part of the record. Um, so again, I am here on  
19 behalf of CELA.

20 The letter I just submitted dated today has the  
21 bulk -- almost all of our comments contained within it  
22 and I am not going through it piece by piece. I will  
23 leave it to the subcommittee to go through and look at  
24 the technical changes. I am going to hit some  
25 highlights and talk about things that are important to

1 discuss and then another member of our community, Joan  
2 Harrington, is also here today. And she is going on  
3 address the council after I completed on some different  
4 topics. So, um, looking at the letter just submitted,  
5 on the second page is where I would like to start  
6 comments this afternoon on Section 1108, Subsection C.  
7 If you want to reference the actual attachment document,  
8 as well.

9 Is that how you want to do it again?

10 MR. MANDELBAUM: Yeah, I think that's easiest  
11 for people to follow along.

12 MR. LEBOWITZ: Okay. So looking at the  
13 definition of employees on page 4. Hopefully our  
14 versions are the same. So in particular we are looking  
15 at Subsection C5, which is the language talking about  
16 when an individual is potentially employed by either a  
17 temporary service agency or the actual primary employer.  
18 So we're talking about potential dual employment or  
19 joint employment or separate employment by either of the  
20 entities. And we think that -- the intent of the  
21 passage as written is fine to the extent that it is an  
22 attempt to say that a person can be considered an  
23 employee either of the temporary agency or of the  
24 primary employer, for lack of a better word for primary  
25 employer, place where the working is actually taking

1 place. But we also want to make sure that it is not  
2 misconstrued in the negative to say that that person  
3 cannot also be considered jointly employed by both  
4 entities because we know that that is the law. There  
5 can be situations where the employee can be considered  
6 employed by both the temporary service agency and the  
7 employer where the actual work is taking place.

8         So we added -- we have some suggested language here  
9 in our letter to add to the end to supplement the  
10 language that's already here in the regulations or is  
11 being proposed to be in the regulations. That there is  
12 nothing in this definition shall preclude a finding that  
13 an individual is an employee jointly of an employer  
14 contracting, temporary service agency and the temporary  
15 service agency itself with regard to such terms,  
16 conditions and privileges of employment under the  
17 control of both entities. So it counts for both when  
18 separately employed and when they are jointly employed.  
19 That's the reasoning behind that addition we are  
20 suggesting, if you understand.

21                 MS. BRODSKY: Can I ask you a question about  
22 that? When you say preclude a finding, do you have in  
23 mind who would be making that finding or is it  
24 sufficient to say that nothing in this definition shall  
25 preclude an individual from being an employee of both?

1 MR. LEBOWITZ: Or being considered an employee.

2 Yeah, I don't think there's any --

3 MS. BRODSKY: There's no magic in the finding.

4 MR. LEBOWITZ: No. Obviously we're thinking in  
5 some cases of the finding of fact of the judge or  
6 someone analyzing a situation when you are claiming  
7 joint employment in a lawsuit. So in that sense, there  
8 would be a finder or someone making that decision. But  
9 I don't think you want to make any difference to the  
10 substance.

11 So the next page of our comment, page 3,  
12 looking at -- again, in the definition, definition 1108,  
13 Subsection G, which is page 6 of the Code of  
14 Regulations. We have a number of suggestions for  
15 tinkering with this definition of employment benefit.  
16 But the one I want to talk about right now is a -- when  
17 you have time to look at these, you will see what we are  
18 suggesting through some changes. I recommend  
19 elimination of what is presently in G3. And then in  
20 replacement, we would add this language for reasons that  
21 are explained in the letter. But then we have some  
22 language that we believe should be -- what would be in  
23 G3 once you eliminate the current G3.

24 And that accounts for the inclusion of interns and  
25 volunteers, as must be done throughout the regulations

1 now with the passage of the new law incorporating --  
2 including interns and volunteers for coverage.

3         And that we would add to Section G3 that would read  
4 as follows: Employment benefit also includes the  
5 selection and training of any person for and the  
6 discharge of any person from any unpaid internship or  
7 volunteer position. Because right now as written, the  
8 employment benefit does not cover the situation where a  
9 volunteer or intern is discriminated against or has a  
10 loss of employment benefit for an unlawful reason or  
11 reasons prohibited by the act. So we just want to make  
12 sure that that is in there and made clear.

13         Then we come to what we consider perhaps the most  
14 important part of properly stating that within these  
15 regulations, current status of the law that is on the  
16 next page 1109, Subsection C, Principles of Employment  
17 Discrimination. Subsection C is on page 4 of our letter  
18 -- is the place where the counsel is proposing language  
19 to essentially incapsulate -- or as we read it,  
20 incapsulate the Harris versus City of Santa Monica case  
21 and the standard particularly for establishing  
22 discrimination in that case. And we have proposed a  
23 very lengthy revision and supplement to that section.  
24 The first thing to look at is in Subsection C as written  
25 right now. What we have suggested and it might seem

1 counterintuitive for an organization such as CELA to say  
2 this, but we believe that in the principal analysis of  
3 the law that retaliation has to be included in the -- in  
4 the types of actions where this standard applies. So  
5 the standard is the substantial motivating factor is  
6 what we're talking about. Right now the Harris decision  
7 itself only dealt with discrimination, not retaliation.  
8 You know, you will see -- I'll address it in a second,  
9 there's a couple of nuances to this, but as a general  
10 proposition, the reasoning that the California Supreme  
11 Court used in reaching the substantial motivating factor  
12 standard in a discrimination case cannot be -- in a  
13 principal way cannot be distinguished if a retaliation  
14 claim where the retaliation claim includes or is based  
15 on a denial of employment benefit as the source of  
16 retaliation or is the cause of retaliation. So, for  
17 instance, where a claim is for retaliation or  
18 retaliatory termination that, as opposed to a  
19 discriminatory termination, there really can be no  
20 principle way to differentiate between the standard used  
21 between those two cases.

22 Now, right now we know of -- I can't even count --  
23 there are so many cases that are pending in the Court of  
24 Appeal on this particular question. There are -- in my  
25 office alone, I think we have three. And they're all

1 over the state all pending in the Court of Appeal on  
2 this particular question and we just -- the way we look  
3 a it, it's likely that the courts are going to come out  
4 this way. So we might as well take a look at it and see  
5 really how it is going to play out. This is our best  
6 estimate or guess how it is going to play out in the  
7 courts. I think it is best to address it in regulation.  
8 Frankly, by the time the regulatory process is through,  
9 there would be guidelines. I would suggest at least one  
10 published decision will come out on this issue before  
11 these regulations are done. So it's something that will  
12 probably have some further torte on it as we proceed.  
13 But there is a fine distinction to be made on this and  
14 that is because of this: Retaliation can take many  
15 forms. Retaliation can also be in the form of  
16 harassment. You can have someone who engages in a  
17 protected activity. And in retaliation for that  
18 protected activity, is actually suffering harassment.  
19 That harassment, though not a denial of an employment  
20 benefit as defined by the regulations and is a separate  
21 standard for harassment, that harassment itself can be  
22 retaliatory and itself is retaliation. So you have two  
23 kind of parts for retaliation rights. Is it a  
24 retaliation claim based on denial of employment benefits  
25 or it is a retaliation based on harassment. And so we

1 have tried to draw that line and articulate that nuance  
2 in the two subsections -- or in Subsection 2, at least,  
3 of what we suggested here on the bottom of page 4 and on  
4 to page 5.

5           So as we've written it, it reads as follows:  
6 "Retaliation prohibited by Government Code 1294.06,  
7 Subdivision 8 may take many forms, including but not  
8 limited to denial of employment benefit or harassment.  
9 The substantial motivating reason standard shall apply  
10 when retaliation takes the form of denial of employment  
11 benefits. In circumstances where retaliation takes the  
12 form of harassment, in standards articulated in  
13 Section 11019 of the regulations shall apply. So we  
14 tried to draw at that line, draw that distinction, and  
15 draw the reader to the harassment sections and  
16 harassment standards within the regulations. This is  
17 going to take some thought and some process, but we want  
18 to start the discussion. You will also see -- so  
19 Subsection C-1 that we proposed is the actual standard  
20 of substantial motivating factor. And we think that's  
21 important to spell out in these regulations. And we  
22 have given you the authority for this specific language  
23 that we used and it's all California Supreme Court  
24 authority, which you will see. It's really remarkable  
25 when you look at because when we are employment lawyers.

1 We kind of look at cases with blinders on, in a sense  
2 that we are always looking at employment cases,  
3 employment cases and how they look at certain -- how  
4 courts are using language and oftentimes it is unique in  
5 employment cases. But the California Supreme Court when  
6 it decided that the substantial motivating reason  
7 standard was the correct reason or the correct standard  
8 in the Harris case, when you go back and look at Supreme  
9 Court precedents, you will see that the Supreme Court  
10 across disciplinary and across areas of laws has used  
11 that language, substantial motivating reason and  
12 substantial motivating factor in all kinds of areas of  
13 law. And there is a settled and very clear standard  
14 that the California Supreme Court is referring to when  
15 it says, "Substantial Motivating Reason." And that  
16 language that we put in here in the proposed Subsection  
17 C-1, is that specific language. We cited you those  
18 cases, so you can go read it yourselves. There's  
19 criminal cases, asbestos cases. There's all kinds of  
20 different cases where the substantial factor is defined.  
21 And, in fact, it has also been incapsulated in the jury  
22 instructions in KC430. So that is where we believe --  
23 what we believe the Supreme Court was doing and what it  
24 meant and when it said substantial motivating reason in  
25 the Harris case. And since this is a -- we're trying to

1 articulate the standard here in these regulations. We  
2 think it is appropriate to put that definition here in  
3 the regulations because then it's clear. There is no  
4 issue. No one has to worry about it again. This is  
5 right there for everybody. And this is somebody that  
6 all stakeholders will be pleased with, a clear standard.  
7 This is one of those things that everyone is arguing  
8 about all of the time -- what is the standard and what  
9 does this really mean.

10           When you look at the case law in a principle way,  
11 you should see what the California Supreme Court was  
12 doing what it always has done, when it talks about  
13 substantial motivating factor and it's using that same  
14 language and the same reasoning as these other cases we  
15 do.

16           MS. PEREZ: Can I ask a question on the  
17 Subsection 2 language on retaliation?

18           MR. LEBOWITZ: Yes.

19           MS. PEREZ: This is the first time I've seen  
20 the language, so I want to make sure I understand it  
21 clearly.

22           MR. LEBOWITZ: Yes.

23           MS. PEREZ: Because I've seen this in the  
24 workplace so much, I know when I do training, one of the  
25 big questions that I get refer to harassment with a

1 little H and harassment with a big H, meaning the  
2 unlawful harassment versus layman's term of annoying  
3 behavior that may not rise to the level of unlawful  
4 behavior. Which are you referring to? So, for example,  
5 I have seen allegations of retaliation where the adverse  
6 action is the person is annoying me. Again, harassment  
7 with a smaller H, I had seen other ones where the person  
8 is alleging the retaliatory act. It would be something  
9 that maybe would fall under the definition to meet the  
10 elements and the standard of harassment with a capital  
11 H.

12 Is that distinction in here?

13 MR. LEBOWITZ: It is not. That's actually a  
14 remarkable distinction that I did not consider when I  
15 wrote that. Absolutely that distinction, in the sense  
16 that --

17 MS. PEREZ: Because I think that the way it's  
18 written now, you are saying that the only way it can be  
19 an adverse action is if it meets the criteria for  
20 unlawful harassment.

21 MR. LEBOWITZ: I agree and I think that's  
22 incorrect. I think that so -- and so -- and we talked  
23 to clients about this all the time. We have to tell our  
24 clients that -- our potential clients -- that what they  
25 are experiencing may be obnoxious. It may be

1 unsettling. It may be offensive, but not based on one  
2 of the listed characteristics of the protected character  
3 in 1294.08, then it's not unlawful. It is probably bad  
4 business and it's probably really obnoxious behavior,  
5 but the law doesn't really care about it. But in the  
6 case of retaliation, I think it does. I think you're  
7 right in that it should be included. That type of  
8 behavior, if it is -- if there's a causal nexus between  
9 the protected activity and the small H harassment, I  
10 think that's unlawful, I think.

11 MS. PEREZ: I am not stating an opinion, but I  
12 want to make sure I understood where we should fall.

13 MR. LEBOWITZ: I think you are absolutely  
14 correct. And to the extent that we reference -- and I  
15 think that ours is too limiting in the language in the  
16 sense that we reference Section 11019. And I think that  
17 is where it becomes -- I think that's potentially too  
18 limiting remarks to say that that in our -- that we --  
19 that the language we're suggesting is a starting point  
20 discussion.

21 MS. PEREZ: Sure.

22 MR. LEBOWITZ: And I think that this is the  
23 exactly type of discussion we were hoping to spark. And  
24 I would amend or remark to strike the section 11019  
25 reference. But there may be some other way to deal with

1 it, but that's my initial thought just standing here  
2 right now.

3 MS. PEREZ: Yeah. I mean, that's kind of what  
4 I assumed you were going to say, but then I guess the  
5 question would become for future. I am not going to put  
6 you on the spot to define harassment with a small H in  
7 regulation because to --

8 MR. LEBOWITZ: Right, I get it.

9 MS. PEREZ: To distinguish it from the other  
10 one.

11 MR. LEBOWITZ: I'm sure we will do some great  
12 work on this subject.

13 MS. PEREZ: I appreciate the way you explained  
14 it. Thank you.

15 MR. LEBOWITZ: And so the next thing I would  
16 like to talk about today is on page 7 of our comments  
17 dealing with Section 11034, Terms, Conditions,  
18 Privileges of Employment.

19 So page -- looking at page 23, Subsection F2A.  
20 This is the section that talks about severity of  
21 pervasiveness. And the only -- you'll see in our --  
22 that we have suggested adding a sentence in the middle  
23 of this section to account for the D versus Vintage  
24 Petroleum decision from 2003 that we cited for you. And  
25 the language we propose is: A single less severe

1 unwelcome act of harassment may create an unlawful,  
2 hostile work environment when committed by a supervisor.  
3 Those are the facts of D. It is really the only case  
4 that talks about it, so it is presently the state of the  
5 law on that issue - on that very discrete issue, so we  
6 just wanted to point that out.

7         And as we're on this page 23 of the proposed  
8 regulation, there are two items that we neglected to  
9 include in our written comments I wanted to talk about  
10 really quickly. In the very top of the page in the  
11 definition of quid pro quo, sexual harassment. The  
12 current proposal reads quid pro quo is characterized by  
13 explicit or implicit conditioning of -- and language is  
14 a job or promotion. And really, it ought to be an  
15 employment benefit. It should not be limited to a job  
16 or promotion. So it should be consistent with the rest  
17 of the regulations of employment benefit. And then in  
18 the references that support -- that are listed in  
19 support of this entire section of the -- a very long  
20 section, it's 11034, there a lot of different issues  
21 covered. One case we would like to see in the reference  
22 in the authority is Johnson Control case, U.S. Supreme  
23 Court case of Johnson Controls which would be in support  
24 of 11034, Subsection D, dangers to health and safety,  
25 reproduction functions. And then I don't have the site,

1 but I think everyone knows what I am talking about  
2 Johnson Controls case. And the inclusion of the Fair  
3 Rivers versus the City of Boca Ratan case, we think it's  
4 misplaced and should be in federal law and has not been  
5 incorporated into state law and it's a confusing  
6 reference when included here in the regulations.  
7 There's a different standard when that specific question  
8 was raised in the California Supreme Court, it was not  
9 adopted. Instead an alternative test was adopted. So I  
10 think it is confusing to have that reference throughout  
11 or in the regulations.

12 MS. BRODSKY: Could you send a slightly -- just  
13 in an e-mail or something with the citation for that,  
14 for the -- what it does not adopt?

15 MR. LEBOWITZ: Yeah.

16 MS. BRODSKY: Thanks. And also the citation  
17 for Johnson Controls case?

18 MR. LEBOWITZ: U.S. supreme Court, yeah.

19 And then just a couple more. Oh, looking at age  
20 discrimination now, so 11075, so page 69. Just a --  
21 some additions in the 11075, Subsection A, age based  
22 stereotype. We like the way this reads now. We would  
23 think it would be enhanced to include just the phrases  
24 "appearance and demeanor" in that language, as well. We  
25 think the experience of our members have been that is a

1 very common theme that we see especially in Silicon  
2 Valley cases these days and the tech industry where age  
3 discrimination are becoming so much more prevalent and  
4 so much more blatant that these types of things such as  
5 appearance and demeanor have become a very routine means  
6 of excluding employees and ultimately taking adverse  
7 actions again then.

8 MS. PEREZ: Can you give some specific examples  
9 what types of -- how they don't fit in and what your  
10 clients have said about them? I have not heard about  
11 this before.

12 MR. LEBOWITZ: Off the top of my head, I can't  
13 give you that.

14 MS. BRODSKY: How about gray hair?

15 MR. LEBOWITZ: Appearance and demeanor. Well,  
16 frankly some of these things are getting real blatant.  
17 We have a client coming from related industries. You  
18 would not necessarily think the solar industry is a tech  
19 industry, but it pretty much is. And there is  
20 several -- we have seen several cases come out of that  
21 industry and several clients come out of that where the  
22 age bias is blatant.

23 MS. PEREZ: Is it like skinny jeans versus mom  
24 jeans?

25 MR. LEBOWITZ: We have one e-mail from one of

1 these guy old guys.

2 MS. PEREZ: But that is --

3 MR. LEBOWITZ: That's direct evidence.

4 MS. PEREZ: I'm trying to imagine what the  
5 circumstantial stuff would be like.

6 MR. LEBOWITZ: Yeah, you know, this is  
7 something that came up in discussion. I don't have any  
8 particular specific examples for you right now. I am  
9 sure we can give it to you.

10 MS. PEREZ: It would be helpful for me just  
11 because they are kind of vague.

12 MR. MANDELBAUM: I have one for you, Council  
13 Member Perez. I had a case where the supervisor making  
14 future employment decisions characterizes silver tsunami  
15 looking around the room.

16 MS. PEREZ: Yeah, I guess where my question is  
17 coming from is that or like gray hair is something that  
18 is very closely linked to age, unfortunately. So I am  
19 trying to think of something -- I don't want it to be  
20 overbroad, if somebody says we expect you to dress  
21 professionally. So that somehow can be misinterpreted  
22 as you are discriminating against me for some reason.  
23 The example you are giving me to is pretty direct. It  
24 is sort of referring to a characteristic that is  
25 associated with old age as opposed to something that

1 might be more subtle.

2 MR. MANDELBAUM: Right.

3 MS. PEREZ: Any examples, I would appreciate  
4 it.

5 MR. LEBOWITZ: Yeah, I can certainly give you  
6 some. Going back to our committee -- there is banter  
7 about in our committee meetings that there was a lot of  
8 examples. But I just didn't happen to take them down,  
9 but I believe I can get you that information.

10 MS. PEREZ: Thank you.

11 MR. LEBOWITZ: Final thing I want to talk about  
12 is age discrimination. I don't -- I was reading -- I  
13 don't believe there was -- there is not, as I see, a  
14 suggestion or proposal to add anything to Section 11076  
15 regulations. 11076 is the establishing age  
16 discrimination regulation, so it's not in the packet.  
17 It's not something where there is a proposed  
18 modification. I don't know how procedurally we deal  
19 with that's because it's not in the proposal, but we  
20 would suggest that the council would look at 11076 for  
21 possible amendment because it is -- um, we believe it's  
22 in need of an amendment because it doesn't account for  
23 Government Code 12941. And it's an important  
24 distinction 12941 talks about because it is distinction  
25 that is different from federal law in substance.

1 Because in federal law under the ADDA, a decision based  
2 on economics is not an indication of age discrimination,  
3 where in the California law, it can be. So, for  
4 instance, if you are terminating someone who is a  
5 long-term employee because you can pay someone else less  
6 for doing the same job, under the ADDA, that is not an  
7 indicator of age discrimination. Under state law, under  
8 12941, it is potentially an indicator of age  
9 discrimination under indirect discrimination case. So  
10 that distinction is not accounted for in the regulation  
11 right now. We believe that Section 11076 is the place  
12 to do it and ought to be made.

13 MS. BRODSKY: Thank you very much for your  
14 contribution.

15 MS. PEREZ: Thank you.

16 MR. LEBOWITZ: And now, Ms. Harrington has a  
17 few more comments from our committee if that is all  
18 right.

19 MR. MANDELBAUM: Thank you, Mr. Lebowitz.

20 MS. HARRINGTON: Thank you. Unfortunately I  
21 only have one copy that I will need to speak from, but I  
22 will give to Mr. Sperber afterward so that he can  
23 reference it. I only have a couple of substantive  
24 changes that I want to address. And if we look at  
25 page 10 of the regulations, it's Section 11023B. And it

1 refers to a list of things that must be included in a  
2 policy on discrimination, harassment, retaliation  
3 prevention. And, of course, the first thing that needs  
4 to be stated in any such policy is that discrimination,  
5 harassment and retaliation are prohibited and will not  
6 be tolerable. So just some basic firm statements of  
7 this conduct that will not be retaliated. And from the  
8 perspective of the harasser, the harasser needs to be  
9 put on notice of the conduct that constitutes harassing  
10 conduct.

11           And so we would also like maybe some further  
12 examples or alternatively a reference to the DFEH  
13 brochure that you mentioned to give the potential  
14 harasser adequate notice of the kind of conduct that we  
15 are talking about and Ms. Harris, you had talked --  
16 well, I heard your comments about what constitutes  
17 harassment versus what constitutes harassment conduct.  
18 And just thinking off the top of my head about your  
19 comment to Mr. Lebowitz, probably the places to look for  
20 the distinction is in the DFEH function and has a  
21 greatly cited writing and example of harassing conduct  
22 which may rise to the level of severe or preventative  
23 and, thereof, become harassment, unlawful with a capital  
24 H under the law.

25           So maybe the brochure can give the council guidance

1 on there. And then the Yanowitz case, Yanowitz versus  
2 L'Oreal, has examples of harassing conduct which might  
3 not be in and of itself an adverse employment action,  
4 but in the conglomerate, it rises to the level of  
5 creating a hostile work environment. So that is just my  
6 two cents off the top of my head in response to your  
7 comment about harassing with a cap H and harassment with  
8 a small H.

9       The other substantive comment I have is on page 33.  
10 And it is Section 11042, Pregnancy Disability Leave at  
11 Subdivision B, Subdivision C. And this is just a  
12 philosophical problem I am having with the way the  
13 regulations have been drafted. Instead of being a sort  
14 of one stop shop for all of the law, the council, I  
15 think, is making it less easy to reference what is  
16 actually at issue. And here is a good example: The  
17 cross-reference to Government Code Section 12945  
18 requires the person to go in search for 12945 and find  
19 that what is in 12945 is, in fact, the language that is  
20 been stricken, the 1 and 2. So it seems to me that it  
21 actually deters -- inhibits the ease of reference,  
22 having all of these cross-references rather than just  
23 including them in or putting the reference in the  
24 reference section of the regulation.

25               MR. MANDELBAUM: That is one we have struggled

1 with often because of the administrative procedure, but  
2 certainly your opinion is in line with the great weight  
3 of public opinion on the subject of clarity or versus  
4 non-duplication.

5 MS. HARRINGTON: In that same vane, the one  
6 that's most trouble to me is the fact that in Section  
7 11008, going back to the definition of intern and  
8 volunteer. Let's see.

9 MS. BRODSKY: It's J, page 7.

10 THE WITNESS: Yes. Thank you. I -- having  
11 written regulations myself, I understand what council is  
12 trying to do. But someone's coming to the regulation  
13 with the first use and not knowing to cross-reference  
14 the definition of an intern or unpaid intern or  
15 volunteer, won't know that a specific section later in  
16 the regulations apply to them if they haven't read this  
17 section.

18 And so although it is cumbersome, I would ask that  
19 the counsel actually reiterate applicants, employees,  
20 unpaid intern and volunteer in each of the sections or,  
21 at the very least, reference AB1443 and this code  
22 section, Title 2, 11008J in the reference section  
23 underneath each and every regulation where the word  
24 employee is used so that there is at least an  
25 opportunity for someone just looking up a single

1 regulation to know that it also applies to interns and  
2 volunteers.

3       On page 40 and that is Section 11049, Subdivision  
4 D, Distribution of Notices, this section asks the  
5 council that electronic posting is sufficient to meet  
6 this posting requirement provided it's posted  
7 electronically and in a conspicuous place or places for  
8 employees would tend to view it in the workplace. And I  
9 am just having trouble understanding where is a  
10 conspicuous place in the workplace with where it can be  
11 posted electronically.

12           MR. MANDELBAUM: I think because this came up  
13 in the CFR regulations.

14           MS. HARRINGTON: Right.

15           MR. MANDELBAUM: I think what we -- what we  
16 were trying to clarify is that workplaces differ.  
17 Sometimes posting electronically will be more effective  
18 than posting on a board. And sometimes there aren't any  
19 computers which would never be conspicuous, but the idea  
20 is to try to create a flexible idea of using your work  
21 place, it's got to be posted inconspicuously. If you're  
22 someone that's spending the whole day on the computer  
23 and haven't been in a break room for five years, then  
24 maybe there is something that pops up on an Internet  
25 site that's more conspicuous posting a hard copy. But I

1 think the idea is for that to be the underlying  
2 standard, it has to be conspicuous and posted in  
3 workplace if it's electronically. If it is hard copy,  
4 you know, where are employees entering to view these  
5 things?

6 MS. BRODSKY: Did you think it was sufficiently  
7 dealt with in the Stiffer regs?

8 MS. HARRINGTON: I have to admit I didn't -- I  
9 wasn't part of the discussion of Stiffer regs regarding  
10 that; so I can comment.

11 MS. BRODSKY: It's in the proposal 11095. And  
12 so you might want to take a look at that. And it does  
13 -- just off the top of my head, it does seem to make  
14 sense to have them be consistent, but I would like to  
15 get inputs on whether you think that sufficiently deals  
16 with the posting.

17 THE WITNESS: I would happy to send a follow-up  
18 e-mail to you tomorrow rather than this afternoon  
19 because I can't get back to my office until tomorrow.

20 MR. MANDELBAUM: I am not sure how that works  
21 technically. Certainly your public comments are within  
22 the windows. Maybe an example would be to do -- I think  
23 it new people. I think the underlying statute -- or  
24 standard makes sense, but maybe it is as simple as  
25 coming up with an example for -- in what context an

1 electronic posting would be a conspicuous place in the  
2 workplace.

3 MS. HARRINGTON: Then the rest of my comments  
4 aren't really about so much the substance of the  
5 regulations. They deal primarily with the references at  
6 the end of each section. We have the authority  
7 statement and then the reference section. And I need to  
8 tell you a very brief story about experiences that  
9 members have had and I had a similar experience where  
10 the judge has said because it didn't include the  
11 specific code section that it applied to, it doesn't  
12 apply to that section in the references. And therefore,  
13 this regulation does not interpret that section. So  
14 that is how this kind of minutia can affect the outcome  
15 of cases. There is also a story about -- and this  
16 happened to me -- where a judge looked at the DFEH  
17 procedure regulations which start, "These regulations  
18 apply only to the Department of Fair Employment and  
19 Housing," and he took that to apply to all of the  
20 regulations, all of them. So when you use those  
21 pronouns, instead of saying sections so-and-so and  
22 sections so-and-so of these regulations, that's how  
23 picky we need to be when writing these regulations  
24 because that's the kind of outcome -- unintended  
25 consequences that they can have.

1 MS. BRODSKY: So let me just ask you: On that  
2 point when you said that the section needs to be  
3 specifically referenced. For example, throughout we  
4 just referenced to FMLA regs, then 29CFRA25.

5 MS. HARRINGTON: I have very specific examples  
6 how I think it needs to be referenced. And the place  
7 where you find it in the Administrative Procedures Act  
8 is Section 11346.5. And that's just been recently  
9 amended, so that was effective January 1st, 2013, the  
10 new amendment. And basically, if we just look at the  
11 first bunch in particular, you will see what I mean. On  
12 page 4, at the beginning of 1108, you referenced that as  
13 used in this chapter. But then at the bottom of the  
14 regulations, where you have the reference to and the  
15 reference to the authority under the regulations  
16 proposed and reference to the particular code sections  
17 or other provisions of law that are being implemented,  
18 interpreted or made specific, that is what needs to be  
19 there according to the Administrative Procedures Code.  
20 So if you look at the end, you don't have the whole of  
21 this chapter referenced at the end. You only have  
22 12925, 12940, 12941, 12942. So this chapter needs to be  
23 referenced in there whenever the code section is,  
24 whatever the ended code subsection is. Then at least --  
25 at the very least, you should include 12926 and 12923.1,

1 which are the other definition sections. And then it  
2 would also -- I think it also needs to include the  
3 reference to the bill that is the source of authority  
4 for the need to provide the amendments and, in this  
5 case, AB1443, set 2014, Chapter 302, which is the bill  
6 regarding the unpaid interns and volunteers should be  
7 referenced at the end of each and every section since  
8 employee is used in each and every section. That bill  
9 needs to be referenced about at the end, I believe.

10 MR. MANDELBAUM: Right. But aren't those bills  
11 -- with respect to the bills, aren't the bills -- I mean  
12 the bills are amending the underlying Government Code as  
13 referenced, right? Your understanding is that we need  
14 to reference the bill rather than the Government Code as  
15 amended?

16 MS. HARRINGTON: Well, you have it all in your  
17 initial statement reasons you referenced. I think all  
18 bills except for perhaps the one referring to human  
19 trafficking. But it's my understanding and the Office  
20 of Administrative Law -- what I am trying to do is to  
21 prevent the Office of Administrative Law, giving it back  
22 and having yet another delay in the implementation of  
23 these regulations because it didn't comply with the  
24 Administrative Procedures Act, which says that you have  
25 to have the source. And it seems to me the bill is the

1 source of why you need it in there. It is the authority  
2 for the amendment just the way you site case law  
3 underneath. So I think you have to have at least the  
4 bill number and both initial statement of reasons in the  
5 reference section -- following each section. That is my  
6 interpretation of this and that is my experience with  
7 the Office of Administrative Law.

8 MS. BRODSKY: I suppose we can just ask them  
9 what they need.

10 MS. HARRINGTON: Yes, absolutely. Yeah. So  
11 all of the rest of my comments really are addressed to  
12 that concern so they're all just procedural comments.  
13 And I can just hand them off in writing if you wish or I  
14 can or go through them on the website. There is really  
15 nothing substantive here.

16 MR. MANDELBAUM: We will certainly review  
17 anything you submit in writing thoroughly, but you  
18 always have the floor for as the long as you want.

19 MS. HARRINGTON: Okay. I will go through this  
20 roughly then. I am on page 7. Again, here, does this  
21 reference need to be to the entire chapter? No, just  
22 the specific code section and the AB1143, the intern and  
23 volunteer, instead 214, comment on Chapter 302.

24 And then on page 8, you rely on -- you mentioned  
25 Subdivision D on Civil Code 50225 and Penal Code Section

1 236.1, so they are sources of authority for this and  
2 should be listed there, as well. And then the -- I  
3 didn't have the -- I couldn't find the bill number for  
4 the human trafficking law. I think it was passed in  
5 2012, but I think that also needs to be mentioned here.

6 And then, of course, the global mention of AB1443.  
7 At the very least, it should include Government Code  
8 12926 through 1261296, which are sources for definition  
9 because these need to be interpreted in -- consistently  
10 with those two sections that provide the other  
11 definitions.

12 On page 9, again AB1443 needs to be added to the  
13 intern and volunteer. And then 12926 -- I am not so  
14 sure about 12926.1 here because 12926.1 only deals with  
15 disability and this is primarily about harassment. I  
16 think 12926 needs to be mentioned here.

17 Page 11, again, addition 12926 and 12926.1, and if  
18 we look at Subdivision 7, it's sections 11023, B7. This  
19 is part of the comment for objections to the word "valid  
20 complaint," a valid compliant. Under the (inaudible)  
21 City of Oakland, a good faith complaint is sufficient  
22 rather than a valid complaint.

23 And so if the council adopts the strickening of  
24 that or a change to assert good faith for the City of  
25 Oakland in the reference section.

1           On page 17, again the bill should be referenced and  
2 it's from the initial statement of reasons,  
3 AB20553-2014, Chapter 306. On page 18. The reference  
4 should include AB1660 [sic] period, 2014, Chapter 452.

5           MS. PEREZ: Can I interrupt for a second to ask  
6 a question?

7           MS. HARRINGTON: Sure.

8           MS. PEREZ: I am looking at the letter that Mr.  
9 Lebowitz provided and it does not -- just the last  
10 statement you made about changing down to good faith and  
11 I don't see that in there that was provided.

12           Is that going to be in your written comments you  
13 are submitting?

14           MS. HARRINGTON: Yes. That is mine. It's not  
15 Stephen's comment.

16           MS. PEREZ: Okay. I just want to make sure we  
17 have it in writing.

18           MS. HARRINGTON: I think Stephen is saying take  
19 it out entirely, but, in my opinion, we already have law  
20 on this. It says it doesn't have to be a valid  
21 complaint -- the harassment doesn't have to arise to  
22 capital H harassment. Simply harassing conduct is  
23 sufficient and the employee makes a complaint and has  
24 good faith suspicion, that is sufficient under the law.

25           MS. PEREZ: I just want to make sure it is in

1 writing somewhere.

2 MS. HARRINGTON: Just in my handwritten notes  
3 here that I am going to give to Mr. Sperber.

4 MS. PEREZ: Okay. Thank you.

5 MS. HARRINGTON: Page 18, A, Statutory Source.  
6 Again 12926, page 302 needs to be included and the bill  
7 numbers -- I don't have the specific bill number there  
8 for the gender expression, gender ID.

9 MR. MANDELBAUM: I think that's B559 and AB  
10 887.

11 MS. HARRINGTON: That's right. Okay. And then  
12 on page 19, again 12926 needs to be inserted there. And  
13 further down under Section 11030, needs to be AB559,  
14 stats 2011, Chapter 261, Chapter 261, and AB817, Chapter  
15 719 inserted for the source of authority for 11030.

16 And on page 20, again Government Code 12926 and  
17 then SB292, stats 2013, Chapter 88. Page 24, SB559 and  
18 AB887 should be there and, of course, I already asked  
19 for AB1443 to include in all of the sections, the  
20 volunteer and the unpaid volunteers, unpaid interns and  
21 volunteers.

22 Then, again, on page 51, Section 11060, the  
23 referenced bill is AB1964, stats 2012, Chapter 287.

24 And on page 52, the last one, the reference there  
25 for Section 11063 should be AB19164, stats 2012, Chapter

1 207.

2 MR. MANDELBAUM: Great. Thank you. Is there  
3 additional public comment related to the Fair Employment  
4 Housing Act regulations? Anyone else wishing to provide  
5 testimony on this?

6 Seeing none, have we received any e-mails that  
7 we're aware of related to this?

8 MS. BILLOTTI: We have received written public  
9 comments via e-mail from -- a couple on Friday and we  
10 received some today.

11 MR. MANDELBAUM: Obviously that will be part of  
12 the record. But anyone else wishing to go provide  
13 testimony during the hearing? I don't believe so.

14 Seeing no one else wishes to provide testimony, um,  
15 we would like to thank you for taking the time to  
16 provide public comments regarding issues on the proposed  
17 amendment to the regulations. We will accept written  
18 comments on the proposed amendment to the FEHA  
19 regulation until 5:00 p.m. today, December 8, 2014.

20 Anyone who testified here today or submits written  
21 comments will receive a copy of any changes or  
22 amendments the council makes to its proposed amendments  
23 to the FEHA regulations. Also, anyone who testified or  
24 submits written comments will have a 15-day period  
25 within which to make written comments on any changes to

1 the proposed amendments to the FEHA regulations. The  
2 council will consider each comment made here today, as  
3 well as all written comments received. The council will  
4 respond to each comment in writing and respond a  
5 statement of reasons which will become part of the  
6 council's rulemaking record. Again, we thank you for  
7 your testimony and participation in the rulemaking  
8 process.

9 The hearing portion of this meeting is now  
10 adjourned.

11 (Concluded at 2:35 p.m.)

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