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California Employment Discrimination Law and Its Enforcement:

The Fair Employment and Housing Act at 50

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Abstract:

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

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I. EXECUTIVE SUMMARY

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

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

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

A. Quick Overview of Employment Discrimination Enforcement

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

- a system of civil litigation for those able to obtain attorneys;
- a system of state administrative enforcement that includes both the DFEH and the Fair Employment and Housing Commission (FEHC); and
- a system of federal enforcement of the less expansive federal analog to the FEHA, Title VII of the Civil Rights Act of 1964, enforced through the United States Equal Employment Opportunity Commission (EEOC) and litigation in the federal courts.

A discrimination lawsuit under the FEHA or Title VII cannot be filed until the plaintiff has filed a complaint with either the DFEH or the EEOC and obtained from one of these agencies a "right to sue" letter. Thus, nearly all enforcement of antidiscrimination laws takes place through the processing of individual complaints. For every 1 million employees in California, about 1,000 employment discrimination complaints are filed each year.[1] Of these 1,000 complaints, approximately:

- 250 will be filed with the EEOC. Of these:
  - 50 will result in a median settlement of $7,500. We did not examine other outcomes of EEOC charges.
- 750 will be filed with the DFEH, of which:
  - 375 will be accompanied by a request for an immediate "right to sue" letter, in most cases on the advice of lawyers, and not pursued further by DFEH.
    - Of these, 165 will result in cases being filed in Superior Court, of which about 2 will reach a jury verdict. Of these:
      - 1 will be a verdict for the employer.
      - 1 will be a verdict for the employee, in a median amount of $205,000.
    - We have very limited information about those that are settled after issuance of a right to sue letter but without reaching a jury trial.
  - 375 will be processed administratively by the DFEH, of which:
    - 73.5 will be rejected for investigation.
    - 33 will be dismissed for reasons unrelated to case merits.
    - 34 will end when the complainant requests a "right to sue letter" during the course of the investigation.
    - 20 will be dismissed after a preliminary investigation finds insufficient evidence.
    - 165 will be dismissed because DFEH finds insufficient probable cause to believe that a violation has occurred.
    - 46 will be settled or resolved during the administrative process. Of these:
      - 27 will receive a median benefit of $4,000.
      - 3 will receive some other relief, most often the dissemination of information by the employer or the posting of a DFEH poster.
      - 16 will produce benefits or other outcomes not recorded in the DFEH data.
        - 3.5 will be sent to the DFEH Legal Division for possible issuance of an accusation before the Fair Employment and Housing Commission (FEHC) or settlement.
        - 2.6 will result in an accusation being filed with the FEHC.
        - 0.2 will result in a published decision by the FEHC.

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

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

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

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

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

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

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

B. The Administrative System: DFEH and the FEHC

The FEHA is more expansive than Title VII, both in the categories of persons to whom it affords protection, and in the remedies available, but there is a great deal of overlap. Most complaints could be pursued through either of the corresponding agencies, the DFEH or the EEOC. Complainants who consult attorneys will generally be advised to pursue filing claims with the DFEH. Three quarters of all employment discrimination complaints in California are in fact filed with the DFEH rather than the EEOC. Of the approximately 15,000 employment discrimination complaints filed with DFEH each year, about half are immediately withdrawn from the DFEH administrative process when the complainant or complainant's attorney requests a "right to sue" letter, the results of which we discuss below.

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

Those complaints that are not either dismissed or settled are sent to the DFEH Legal Division for preparation of an accusation before the Fair Employment and Housing Commission. During the period 1998-2001, the DFEH filed an average of 153.5 accusations per year with the FEHC. In the seven years after 2001, the DFEH filed an average of 52.6 accusations, barely one per week. Most of the cases begun by accusation are resolved before they reach the FEHC, either by way of settlement or transfer, on the motion of the employer, to Superior Court.

Apart from its role in issuing regulations interpreting the FEHA, the FEHC plays a minor role in enforcing the FEHA. It is, however, the forum to which the DFEH must bring accusations that are not resolved in the administrative process. Unlike employers/respondents, the DFEH cannot "opt out" of the FEHC process and proceed directly to Superior Court. During the period 2000-2008, the FEHC issued slightly more than five decisions per year, less than half the number it produced per year during 1997-1999.

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

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

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

C. The System of Civil Litigation

Of the half of complainants to DFEH who request an immediate right to sue letter and opt out of the administrative process to pursue settlement or litigation in the legal system, nearly half (44%) of those will file a case in Superior Court. Only a very small number of those will reach a jury trial and verdict. The remainder will be settled or abandoned. There is very little data available as to the outcomes in these settled cases, in part because settlements are confidential and not reported. Insurance companies with data on settlements are, perhaps not surprisingly, unwilling to share it. We do have data on jury verdicts:

- Jury verdicts were, as standard economic theory predicts, split evenly between plaintiff and defense verdicts.
- The median plaintiff verdict in 2007-2008 was $205,000, representing a 20% decline from the median verdict in 1988-1989 after adjusting for inflation. Plaintiff verdicts do not include attorneys' fees that may be awarded after the verdict.
- Median jury verdicts varied substantially by the alleged basis of discrimination. Median jury verdicts in cases involving alleged discrimination on the bases below were:
  - Race: $105,000
  - Sex: $177,000
  - Age: $180,597
  - Disability: $233,288

D. Recommendations

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

1. Improve Equal Access to the Legal System

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

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

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

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

a) Expand Efforts to Target Resources

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

b) Improve Effectiveness and Efficiency of DFEH Enforcement Operations

The DFEH has made substantial progress toward more efficient allocation of resources through the Case Grading System begun in 2009. This reform is intended to prioritize cases based on early assessments of their potential merit and the allocation of more expert resources to cases with higher potential earlier in the process. The impact of these reforms should be monitored and evaluated systematically, with regard both to the accuracy of decisions and the costs imposed not only on DFEH but also on both complainants and respondent employers. We expand in the conclusion on recommendations in the following areas:

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

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

At present both the DFEH and the FEHC are located within the State and Consumer Services Agency, which also houses such agencies as the Departments of Consumer Affairs and General Services, the Franchise Tax Board, the State Personnel Board, one park and two museums. For reasons we detail in our conclusions, we agree with the California Performance Review[2] initiated by the Governor that the functions of DFEH would be more effectively and efficiently located within the Department of Labor and Workplace Development, which also contains other administrative enforcement agencies responsible for labor market and workplace issues.

d) Reconsider the Role of the FEHC

Notwithstanding the talent and efforts of its commissioners and staff, the FEHC can only be described as a shadow of an effective adjudicatory commission and of its former self, staffed in 2009 by one administrative law judge and able to produce just five decisions per year. Because DFEH can only bring accusations before the FEHC, its few decisions provide the framework within which all DFEH administrative determinations, including settlements by consultants, are made. Respondents before the FEHC can remove complaints from the jurisdiction of the FEHC to the courts, but neither complainants nor DFEH have that option. Whereas complainants with lawyers and employers can look to hundreds of jury verdicts for guidance and background, DFEH and unrepresented complainants can look only to the decisions of the FEHC.

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

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

The current funding rate for the DFEH of 81 cents per year per employee may go back to the one dollar per year it was in the past, but we doubt that that would be sufficient to have a truly effective and more efficient DFEH, even if all necessary reforms were adopted. We are mindful that many of our recommendations for improving the current system would require more resources and that as we write this California is experiencing a financial crisis of historic proportions. As a practical matter, we doubt that enforcement of our antidiscrimination laws will be given the priority of other interests that are seemingly more urgent and certainly better represented in the political process. We therefore propose consideration of alternative means of funding enforcement of the FEHA. One possibility would be a regulatory fee paid by the employee and the employer. A fee of 10 cents per month would triple the current budget.

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

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

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

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

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

II. INTRODUCTION

A. Purposes of the Study

We were asked to evaluate how the Fair Employment and Housing Act (FEHA) is working as response to employment and housing discrimination in 2009 in its 50th anniversary year. This report addresses our evaluation of that question as it applies to employment discrimination in California. We expect in a subsequent report to address how FEHA is operating with regard to housing discrimination.

Legal and regulatory systems typically are designed to meet goals of three kinds: compensatory, corrective and preventive. In the context of employment discrimination, FEHA and the systems by which it is enforced provide *compensation* to persons who have incurred damages as the result of discrimination, *correction* by means of administrative or judicial orders to alter behavior, and *prevention* by means of monetary and other disincentives to discriminate. Well-designed systems of law and regulation also accomplish these goals *efficiently,* meaning both that they (1) result in accurate assessments of whether particular behavior has occurred and whether it should lead to a legal or regulatory response; (2) do so at a reasonable cost and (3) with minimal negative unintended consequences. The FEHA, like many comparable statutes, is modeled on our tort system: these goals are accomplished through the resolution of complaints brought by victims of alleged discrimination, and the imposition of economic costs on discriminators.

Although we evaluate FEHA in terms of its original (and current) design in the context in which it now operates, it is important to remember that tort-based models are not the only available means meeting the goals of adequate compensation, correction, and prevention. Workplace injuries and safety, for example, are regulated through the workers' compensation system and Cal-OSHA, which together provide means of compensation, correction, and prevention. We deal with environmental problems not only through tort litigation and regulation but also by promoting by other means more environment-friendly behavior on the part of businesses and the general public.

Like other laws crafted to respond to discrimination several decades ago, FEHA was designed based on tort concepts at least in part because of the nature of discrimination and its causes at the time. Employment discrimination in 1959 was not subtle; few people doubted that those who discriminated intended to do so. Today, the picture is more complex. Indeed, scientific advances in the past two decades on the nature of biases and stereotypes have made clear that discrimination can occur even when those whose decisions and behavior operate to discriminate lack any discriminatory animus or intention. Legal and regulatory systems designed to respond to and prevent intentional behavior may be less well-suited to responding to discrimination that is unintended, or at least more subtle. We return to the implications of these changes in discrimination and our understanding of it in the later sections of this report, after evaluating FEHA on its own terms.

Finally, it is important to recognize that FEHA operates alongside other responses to employment discrimination. FEHA is enforced by the Department of Fair Employment and Housing (DFEH), the Fair Employment and Housing Commission (FEHC), and through civil litigation, primarily in the California courts. The primary federal analog to FEHA, Title VII of the Civil Rights Act of 1964, covers many of the same kinds of discrimination and is enforced by a federal agency, the Equal Employment Opportunity Commission (EEOC) and through the federal courts. Other federal statutes also enforced by the EEOC cover some of the aspects of employment discrimination included within the ambit of FEHA. Both FEHA and the Americans with Disabilities Act prohibit discrimination against, and in some cases require "reasonable accommodations" of, people with disabilities.[3] Both FEHA and the federal Age Discrimination in Employment Act (ADEA) bar, under some conditions, discrimination on the basis of age against persons over the age of 40.[4] The California Family Rights Act[5] (CFRA, incorporated into the FEHA) requires some employers in some circumstances, to make accommodations for employees with family care or medical leave needs, as does the federal Family and Medical Leave Act (FMLA).[6]

In this study we examine the processing of 212,144 complaints of employment discrimination filed with DFEH during 11 years, 1997-2008[7]. Of these, 74,748 (35.2%) were also within the jurisdiction of the EEOC but processed by DFEH under an agreement between the two agencies. In addition, as we point out in detail in this report, FEHA is enforced by what are essentially two separate systems of enforcement: (1) the administrative system of DFEH and FEHC and (2) the civil litigation system of lawyers and courts. Of the 209,084 complaints that were closed during our study period, 94,396 (45.1%) opted out of the administrative system within the first week, with another 11,836 (5.6%) opting out of the DFEH process at a later point to pursue private litigation. Our report provides more detailed information regarding the enforcement of the FEHA through DFEH and FEHC, in part because there is much better data regarding this system. We do, however, also examine the other parts of what might be called the "ecology" of antidiscrimination law and regulation, the EEOC and the state civil litigation system.

As regards the overlapping state and federal jurisdictions, we compare complaints filed with the DFEH and the EEOC in cases that might have been appropriately lodged with either agency (so called "dual filed" cases), during the four year period, 2005-2008. Because of lack of available data, we are unable to provide anything like the same level of analysis for FEHA employment discrimination complaints that found their way into the civil litigation system but did not reach a jury trial. We did, however, examine available court records regarding what happened to a random sample of 400 complaints in which complainants opted for litigation at the time of filing of the complaint. We also conducted an extensive search for jury verdicts in employment discrimination cases in state courts during 2007 and 2008, and are able to compare these to a similar sample obtained by Professor David B. Oppenheimer of the U.C. Berkeley Law School as to jury verdicts rendered in 1998-1999.

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3 FEHA's provisions regarding disability discrimination are found in Cal. Gov. Code §§ 12940(a) & 12926. The analogous provisions of the ADA are found at 42 U.S.C.A. § 12101 et seq.

4 The ADEA is found at 29 U.S.C.A. § 621 et seq; age (over 40) is an enumerated category protected by FEHA, Cal. Gov. Code §§ 12940(a) & 12926(b).

5 Cal. Gov. Code § 12945.1 et seq.

6 28 U.S.C.A. § 2601, et seq.

7 All data regarding complaints for employment discrimination comes from data provided to the research team by the Department of Fair Employment and Housing, in accordance with the California Public Records Act.

B. The Nature of Employment Discrimination in Social Science and in Law

Evaluating the effectiveness of the FEHA and the means by which it is enforced requires understanding the various phenomena generally included with the concept of "employment discrimination." As with most legal concepts, there are both instances as to which virtually everyone can agree and cases at the margins. The phenomena that gave rise to the first employment discrimination laws, in California and elsewhere, were not subtle. In one month in 1949, the four major Los Angeles newspapers carried 966 advertisements for jobs specifically limited to whites.[8] In July, 1949, Whites comprised 689 of the 690 professionals placed by the California State Employment Service.[9] Discrimination, particularly toward both racial and religious minorities was a matter of openly stated intention and animus. Discrimination on the basis of sex, sexual orientation, disability and age was deeply embedded in the culture and openly expressed. It was in this context that the Fair Employment Practices Act, the precursor of FEHA, was enacted.

1. Overview: Antidiscrimination Law

It is not surprising, then, that FEHA was designed to respond to discrimination in this form, though the statute did not define "discrimination." Rather, the FEHA bars certain employers (and others, including unions and employment agencies) from engaging in certain "unlawful employment practices," which include taking certain actions "because of" the membership of a person in specified protected categories (now including race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation).[10] FEHA parallels Title VII of the Civil Rights Action of 1964, which uses the same "unlawful employment practice" and "because of" language.[11] In 1991, Congress added clarifying language to Title VII to specify that "because of" includes situations in which the protected category "was a motivating factor for any employment practice, even though other factors also motivated the practice." California has not followed suit in amending the FEHA,[12] perhaps because our courts have generally relied on federal court precedent interpreting Title VII because of the basic similarities between FEHA and Title VII.[13]

As it has been interpreted by our courts, the FEHA still bears the marks of its origins at a time when discrimination was open and intentional, rooted in racial and religious animus and undisguised stereotyping, and resulting in dramatically different treatment of individuals based on their group membership. For such "disparate treatment" discrimination, the analogy to the law of intentional torts was inescapable. As the federal courts came to consider discriminatory outcomes less obviously the result of intentional discrimination, California followed suit. For example, courts considered circumstances in which employers did not directly discriminate against minorities or women, but utilized employment tests or criteria that operated differentially against protected categories and did not have much connection to the actual requirements of the jobs at issue. To address these and analogous situations, the courts developed the doctrine and procedures to evaluate such "disparate impact" discrimination. Finding disparate impact discrimination did not require a finding of animus or intended discriminatory outcome, thus creating another form of liability also rooted in tort law, but this time in the doctrine of strict liability. The importation of tort law into antidiscrimination law was, however, incomplete. As Professor Oppenheimer noted in a widely cited 1993 article[14], federal antidiscrimination law did not openly import from tort law the concept of "negligent discrimination," wherein an employer might be responsible for failing to take reasonable steps to prevent discrimination where it knows discrimination is occurring or likely to occur. As Professor Oppenheimer and numerous scholars since have observed, this left federal antidiscrimination law ill-equipped to respond to much discrimination that did not arise from conscious animus or intent on the part of the employer. Other scholars have observed that the federal case law has imported some aspects of negligence liability, but only in the narrow context of imposing liability on employers for failing to prevent harassment of employees by third parties and making accommodations to protect victims of harassment.[15]

The FEHA itself includes a specific provision imposing liability on employers (and unions, employment agencies, and others) who "fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[16] These provisions have been held to establish a statutory tort, as to which is applied the conventional negligence analysis of legal duty of care, breach of duty (negligent act or omission), legal causation, and damages. But so far as we can determine this provision has been applied by the appellate courts only to instances of harassment and hostile workplace environment cases, and then only after the improper activity has occurred. The plain language of the statute has not been interpreted to require that employers take reasonable steps to prevent discrimination more generally, in such routine areas as hiring, retention, and termination.

In some particular areas of discrimination law, and expressly in the case of discrimination against people with disabilities, the law did develop a different approach, one not focused on deterring discrimination as much as on encouraging "reasonable accommodation" of differences that come with membership in protected groups. In antidiscrimination law, this approach was applied to sex discrimination in the case of pregnancy, and to religious discrimination in the case of religious observance. The Americans with Disabilities Act (ADA) and the FEHA specifically require employers to "reasonably accommodate" persons with disabilities

8 The Council for Equality in Employment, *Final Report on the Campaign for a Los Angeles Equal Opportunity Ordinance* (1949), Appendix Table 2, Discriminatory Help Wanted Ads, Principle Los Angeles Newspaper, February, 1949. The Council was a distinguished group, including Will Rogers, Jr, Edward J. Roybal, James Roosevelt and Glenn M. Anderson. Frustrated by the failure to pass any employment discrimination law at the state level beginning in 1946, they sought (unsuccessfully) to pass a Los Angeles ordinance.

9 Id., at Table 1, White and NonWhite Placements by Occupation, California State Employment Service.

10 Cal. Gov. Code § 12490(a).

11 42 U.S.C.A. § 2000e-2(a)(1).

12 California did add "motivating factor" language to the provisions of FEHA prohibiting housing discrimination, in 1993. Cal.Gov.Code § 12955.8.

13 *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 378 (2000) ["Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes."]. California courts do not, however, follow federal law in areas in which state statutes diverge from their federal analogs. *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 74 (2000*); State Department of Health Services vs. Superior Court*, 31 Cal. 4th 1026, 140 (2003) [federal precedent has little weight in interpreting FEHA sexual harassment claims].

14 David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U.Pa. L. Rev. 899 (1993).

15 Noah D. Zatz, *Managing the Macaw: Third Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357 (2009).

16 California Government Code 12940(i). *Trujillo v. North County Transit District*, 63 Cal. App. 4th 280, 286-287 (1998).

unless the accommodation would impose an undue hardship on the business, and impose liability on employers who, with or without discriminatory intent, fail in their duty to accommodate. The same rubric of "reasonable accommodation" was also applied to discrimination on the basis of religion, regarding religious practice, and sex discrimination, regarding pregnancy.

In examining the evolution and current landscape of current antidiscrimination law, some legal scholars have suggested reforming legal doctrine to better accord with contemporary forms of discrimination. That might include importing a negligent discrimination standard from tort law. Other scholars have suggested that the "reasonable accommodation" approach most well-developed in the case of disability law is a more suitable conceptual foundation for contemporary antidiscrimination law.[17] Others suggest that courts should be less concerned with imposing liability than with remedies that require organizational changes to prevent discrimination.[18] Still others argue that legal doctrine should flow from fundamental principles, providing remedies at least in some cases when employers fail to take reasonable steps to prevent employment-related harm resulting from the membership of employees in a protected category.[19]

These few paragraphs are far from an exhaustive survey of efforts of legal scholars to reconcile antidiscrimination law with the challenges of contemporary forms of discrimination. We include it primarily to suggest that in reviewing both the accomplishments and shortcomings of the FEHA and its enforcement in subsequent sections of this report, and considering what reforms might be appropriate, there is a substantial body of legal (and scientific) scholarship upon which to draw.

While legal scholars have continued to critique the rationality and limitations of antidiscrimination law, particularly in responding to modern forms of discrimination, federal antidiscrimination law itself has continued down the same path begun in the 1960's, guided primarily by the Title VII jurisprudence of an increasingly conservative United State Supreme Court and for the most part ignoring developments in the social and psychological sciences about how discrimination actually functions. Although federalism certainly permits California courts to develop their own jurisprudence in interpreting the FEHA, with few exceptions dictated by specific requirements of our statutes, California courts have consistently followed the lead of the federal judiciary. As a consequence, although the FEHA protects people in more categories than does Title VII, the general means by which it does so is the same.

2. Basic Legal Concepts and Relevant Sciences

Over the past decades, courts have constructed out of the general language of the statutes both concepts and procedures for applying those laws in different circumstances and on the basis of certain assumptions – generally unstated -- about how people and organizations behave. Five important concepts, in particular, have evolved regarding the potential causes of discrimination:

- *Disparate treatment discrimination* is, perhaps, closest to the kinds of obvious, intentional and blatant discrimination that was the focus at the inception of these laws. We now recognize that such discrimination can result from (1) the animus of an employer toward group members; (2) employer actions based on the animus of customers or coworkers toward group members; or (3) employer beliefs that group members are likely to be less satisfactory employees. The last concept is also known as "statistical discrimination," and, when such beliefs are empirically correct, "rational" discrimination. Disparate treatment can also result from causes located outside the control of any single decision maker.
- *Disparate impact discrimination* occurs when an employer adopts a facially neutral practice or policy, without a sufficient relationship to job requirements that has disproportionate adverse effect on protected group members. For example, height requirement for employment may operate to discriminate against women or members of certain minority groups. Prohibiting all employees from wearing the beards that some religious practices require of men will discriminate against members of such religions, at least where there are alternatives to accomplish the same business objective of, e.g., keeping hair out of food products.
- *Reasonable accommodation*, a concept generally (but not necessarily) connected to disability discrimination, take account of the fact than in certain circumstances treating all people equally in some respects will disfavor people in certain protected groups. Requiring all employees to take the stairs to their second floor offices will discriminate against those physically unable to do so.
- *Structural or institutional discrimination* is a concept better developed by social scientists than by courts: effective discrimination against group members resulting less from individual decisions (associated with disparate treatment) or specific policies or practices (associated with disparate impact) than with the organizational or social context in which decisions are made and policies carried out. For example, hiring only friends or relatives of existing employees will, in a socially segregated community, operate to exclude equally qualified people who are dissimilar to existing employees. Such a practice may, but need not, be the product of any specific decision or policy, but may instead merely reflect structures or institutions inherited from the past.

Over the same period that legislators, courts and legal scholars have been developing the legal concepts to sort out which circumstances ought to constitute legal violations, social scientists in a number of disciplines – notably psychology, sociology and economics -- have been studying discrimination as a phenomenon of social behavior. Each of these disciplines comes to a problem with different empirical tools and framings of the issue. Social psychologists and cognitive neuroscientists study how people respond to other people, including how they respond to people in different social categories, like race, gender, disability, and so on, across a range of settings, including those relevant to employment discrimination. Psychologists and neuroscientists tend to rely on carefully controlled experiments and then to generalize from the results of many experiments to make judgments about how people are likely to behave in more realistic settings. Sociologists and management scholars are more interested in how the structures and organizations through which people interact contribute to outcomes. Sociologists tend to look at the organizations and social structures in which decision-makers are situated, often making use of quantitative data of various kinds to

17 Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination and Reasonable Accommodation*, 46 Duke L. J. 1 (1996).

18 Most notably, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001); but see, Samuel R. Bagenstos, *The Structural Turn and the Limitations of Antidiscrimination Law*, 94 Cal. L. Rev 1 (2006) [critiquing the potential reach and practical impediments to this approach].

19 *supra*, note 14.

test hypotheses about whether and how discrimination is affecting decisions or outcomes, controlling for the effects of other possible causes. Economists generally make certain assumptions about how individuals and firms behave, and then use powerful mathematical techniques to show how those assumptions can be expected to play out in labor markets, both inside and outside firms. Economists also analyze labor market data and use sophisticated statistical techniques to try to isolate the effects of discrimination and to identify other factors that contribute to different labor market outcomes for members of protected categories.

It is important to note that, in enacting and interpreting legislation to deal with problems like employment discrimination, legislators and judges also rely upon assumptions and theories about how individuals, organizations, and markets operate. These assumptions and theories may or may not be well justified, particularly to the degree that common knowledge and common sense do not keep up with findings generally accepted in the sciences. In this section we review briefly some of those findings and how they compare to the assumptions underlying current law.

3. Disparate Treatment Discrimination and the Related Science

Social psychologists consider discrimination as the behavioral component of prejudice,[20] typically defining prejudice as a "negative attitude toward a group or members of the group"[21] and recognizing that stereotypes play an important role in the development and expression of those attitudes. There is less unanimity about the nature of stereotypes.[22] Generally speaking, however, stereotypes are (in the words of Walter Lippmann, who coined the term in this meaning) "pictures in the head." Generally speaking, attitudes reflect whether we feel positively or negatively toward a person or group, while stereotypes reflect a belief that most or all members of a group share certain characteristics, perhaps reflected in that "picture in the head." Discrimination can result from either attitudes or stereotypes, or both. For example a stereotype of women as vulnerable and needing protection can lead to discrimination even on the part of people who feel quite positively, at least in the general sense, toward women. More commonly, perhaps, stereotypes and attitudes are mutually reinforcing: an antipathy toward members of group X is combined with, and perhaps justified by, a belief that group X members are lazy, hostile and of low intelligence. Notably, even members of group X can internalize such attitudes and stereotypes.

Economists describe discrimination motivated by prejudice as "taste-based" discrimination, following the lead of economist Gary Becker's seminal 1957 work, *The Economics of Discrimination.*[23] In most analyses by economists, taste-based discrimination is considered to represent a conscious decision based on the subjective value placed by the employer on excluding or subordinating targets of discrimination. But the assumption of conscious decision-making on the basis of explicit preferences of the employer is not necessary: taste-based discrimination can also be predicated on the perceived discriminatory "taste" of others, including potential co-workers or customers.

In addition, economists recognize a form of discrimination called "statistical discrimination." Statistical discrimination is not predicated on animus or any intention other than maximizing profit under conditions of limited information. As explained by John Donohue:

> A central feature in these models is that unobservable attributes of workers that differ by sex, race or ethnicity prevent employers from ascertaining their true individual capabilities. Consequently, the existence of imperfect information induces employers to form hiring and wage decisions based on whatever observable information they can gather (including the worker's race or sex) as well as their prior beliefs about the expected ability of potential workers.[24]

For example, if an employer is hiring for a position requiring good basic skills of the kind average students acquire in good high schools, then the employer may base a decision in part on the high school attended by the student. The employer might give applicants a battery of tests, but that would be expensive and time consuming, and decide instead to simply reject all applicants from high schools falling below some standard of adequacy. This may lead an employer to hire a mediocre student from a better school and reject one of the top students at a worse school, even if the latter is much more capable. From an economic point of view, this is rational behavior when the costs of obtaining accurate information exceed the differential in potential productivity of the two candidates. If the education system is such that African Americans, for example, are much more likely to attend schools with fewer resources[25], this economically rational policy, undertaken without animus of any kind, will tend to exclude African Americans. Notably, for those excluded, the economic (if not psychological) consequence is the same as if they had been refused employment "because of" their race in a more straightforward or intentional way.

In all of the forms of discrimination discussed thus far, discrimination is based on the conscious decisions and preferences, sometimes based on prejudice and sometimes based on simple economic calculations. In either case, it is the conscious intention of individuals who are in a position to meaningfully "treat" people in one category differently from those in another. Our lay understanding of the notion of "treating" people is consistent with notions of intentionality and conscious decision making. Over the past two decades, however, neuroscientists and social cognitive psychologists have established that each of us may in fact "treat" people differently without intending to do so and in ways that may actually run counter to our consciously held preferences and attitudes. In other words, when asked about our attitudes toward a group or to the degree to which we believe the group fits some stereotype, we may quite honestly disclaim any negative attitude or any belief in any stereotype, and yet still behave "as if" we consciously adhered to particular biases or stereotypes.

How can scientists examine attitudes and stereotypes of which we are ourselves unaware? Primarily by measuring what we do in addition to what we say. By this means they can determine the degree to which we behave as if we hold "implicit" attitudes or stereotypes. Although there are several such reaction time (or

20 Sherry R. Levy & Mulie Milligan Hughes in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION, (Todd D. Nelson, ed, 2009) at 25.

21 Charles Stangor, The Study of Stereotyping, Prejudice, and Discrimination within Social Psychology: A Quick History of Theory and Research, in Nelson (2009) at 2.

22 Id.

23 Kerwin Kofi Charles & Jonathan Guryan, Taste-based Discrimination, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS, Online Edition, 2009, available at http://www.dictionaryofeconomics.com/article?id=pde2009_T000251

24 John J. Donohue III, *The Law and Economics of Antidiscrimination Law*, (National Bureau of Economic Research Working Paper 11631 2005), available at www.nber.org/papers/w11631, at 22.

25 This example is, unfortunately, not hypothetical. See UCLA IDEA, California Educational Opportunity Report, California African American Students and Their Schools, available at http://idea.gseis.ucla.edu/publications/eor-listening-to-public-school-parents

"response latency") measures, all rely on the facts that (a) our reaction time is affected by our biases and stereotypes and (b) it is very difficult to control how quickly we react to particular stimuli. The most commonly used such test is the Implicit Associations Test (IAT), which can be taken via the internet.[26] Although a handful of researchers disagree, the overwhelming majority of scientists in the field agree that: (1) All of us have implicit attitudes and stereotypes that may vary significantly from our conscious or reported attitudes or stereotypes, and (2) these implicit attitudes and stereotypes can predict certain kinds of behavior across a wide variety of settings, although a combination of measures of both implicit and explicit attitudes is an even better predictor.[27] A recent meta-analysis of the combined results of 122 research studies involving 184 separate samples of people, totalling 14,900 research subjects, found that self-reported attitudes were not as effective as implicit measures in predicting behavior.[28] A chapter in a forthcoming book authored by seven scholars in the field summarizes the scientific evidence that the existence of implicit bias is beyond reasonable doubt, responds to the critics and concludes with what it calls an "Executive Summary of Ten Studies That No Manager Should Ignore."[29]

Implicit bias can predict behaviors that can be highly relevant in an employment setting. Measures of implicit bias and stereotyping toward Black men predict whether research subjects have threatened the person or property of Blacks, have made hostile gestures or ethnically offensive comments or jokes, or have avoided or excluded Blacks from social gatherings or organizations because of their ethnicity. Measures of implicit stereotypes predict the amount of money people would allocate to an organization, depending on whether they believe the organization mainly serves Christians, Jews, Asians, or Whites, even after controlling for reported explicit attitudes toward members of those groups.[30] Measure of implicit attitudes and stereotypes also predict whether or not people encountering a member of the group in question make eye contact, smile, fidget, hesitate in their speech, laugh at jokes, and so on,[31] or how they rate job applicants for a position,[32] at least in an experimental setting, with simulated materials in a laboratory.

Of course, it is a long way from measures of reaction times on a computer or in a laboratory to predicting or explaining disparate treatment in all the complex environments of the workplace or the labor market. First, the prevailing view among social psychologists is that how we react to people is the product of dual processes: our immediate reaction, captured in measures of implicit attitudes and stereotypes, followed by more conscious decision making that can prevent discriminatory behavior. Unfortunately, however, such corrective action requires not only the motivation to do so, which may be common, but an awareness of the potential for bias at the time the conscious decision is made, which is generally less common. Simply put, it is difficult to be "on guard" against prejudice at all times. It is possible that workplace interventions (diversity trainings and the like) may reduce bias, prejudice or discrimination. There is some reason to be optimistic in this regard, although there is some evidence that poorly designed efforts may, in fact, produce a negative "rebound effect."[33]

Given what we know both about indicators of the prevalence of employment discrimination and the divergence between explicit and implicit attitudes regarding members of groups protected by FEHA, some of which is described in Section IIB, it seems safer in 2009 to assume that some significant part of employment discrimination occurs without hostility, animus, or even conscious intent on the part of anyone. This is particularly the case because our tort-based legal statutory system for assigning liability for employment discrimination is largely based on the assumption that potential intentional discriminators will be deterred if we raise the potential risks of discrimination.

4. Disparate Treatment Discrimination under FEHA

As noted, FEHA does not define employment discrimination but rather defines as an "unlawful employment practice" the taking by an employer of certain actions "because of" the membership of a person in one of the protected categories subject to certain exceptions.[34] While a near consensus among scientists has emerged over the past decades that disparate treatment can arise from implicit biases and stereotypes as well as conscious intention, both federal and California employment discrimination law have continued to acknowledge only the latter. As the California Supreme Court put it, "'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds."[35] No California appellate court has taken account of the scientific consensus that no complete account of "intention" as related to human behavior with consequences for others can ignore the effects of both explicit and implicit attitudes and stereotypes.

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26 At https://implicit.harvard.edu/implicit/

27 The dissenters generally disagree only with the second finding, regarding the utility of measures of implicit prejudice to predict discrimination-associated behaviors. See: Philip E. Tetlock & H.R. Arkes, *The implicit prejudice exchange: Islands of consensus in a sea of controversy*. 15 Psychological Inquiry 311 (2004); Philip E. Tetlock & Gregory Mitchell, *Calibrating prejudice in milliseconds*. 71 Social Psychology Quarterly 12 (2006); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination law and the perils of mindreading*. 67 Ohio State University Law Review 1023 (2006); Amy Wax, *The discriminating mind: Define it, prove it*. 40 Connecticut Law Review 1 (2008); Amy Wax & Phillip Tetlock, *We are all racists at heart*. Wall Street Journal, (December 1, 2005) p. A16; Hart Blanton, et al, *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 Journal of Applied Psychology 567 (2009), (but see responses by Allen R. McConnell & Jill M. Leibold, *Weak Criticisms and Selective Evidence: Reply to Blanton et al*. (2009), 94 Journal of Applied Psychology (2009) 583 and Jonathan C. Ziegert & Paul J. Hanges, *Strong Rebuttal for Weak Criticisms: Reply to Blanton et al*. 94 Applied Psychology 590 (2009).

28 Anthony G. Greenwald et al, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 Journal of Personality and Social Psychology 17 (2009).

29 The Existence Of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore, Research in Organizational Behavior (edited by B. M. Staw & A. P. Brief), in press, summarizing the evidence and responding to the critics identified above, n. 27.

30 Laurie R. Rudman and Richard D. Ashmore, *Discrimination and the Implicit Associations Test*, 10 Group Processes and Intergroup Relations 359 (2007).

31 Allen R. McConnell & Jill M. Leibold, *Relations among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 Journal of Experimental Social Psychology 435 (2001).

32 Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 Journal of Applied Psychology 553 (2005).

33 Nilanjana Dasgupta, Mechanisms Underlying the Malleability of Implict Prejudice and Stereotypes: The Role of Automaticity and Control, in HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION (Todd D. Nelson, ed., 2009), 277.

34 California Government Code § 12490(a). The exceptions concern "bona fide occupational qualifications" specific to an occupation and state or federal security regulations.

35 *Guz v. Bechtel Nat. Inc.*, *supra*, note 13, at 354. [Citations omitted; emphasis added].

Thus, California courts have adopted from federal Title VII law a procedure for deciding disparate treatment cases first set out in the U.S. Supreme Court case, *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973):

> At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is "not onerous" he must at least show "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion'...."[36]

If the employee can meet this burden, "then the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason."[37] If the employer does this, then the employee has

> the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.[38]

References to "pretext" or "dishonest reasons" reinforce the notion that "disparate treatment" discrimination is entirely a matter of subjective, conscious intention, if not outright hatred or animus.

The courts' analyses of so-called "mixed motive" cases, in which the employer is alleged to have had both proper and improper bases for the alleged discriminatory action, makes the point with even greater clarity: In these cases, "the plaintiff must produce 'evidence of *conduct or statements that both reflect directly the alleged discriminatory attitude* and that bear directly on the contested employment decision.'"[39] (Emphasis supplied). Notably, though following the lead of the federal courts, they have not followed the lead of the U.S. Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003), holding that discrimination may be found if an improper criterion was a motivating factor for the challenged employment practice.[40] The practical result is to require employees in such cases to prove the existence of a "pretext," with all the intentionality that that term conveys.[41]

Taken together, both the "pretext" and "mixed motive" analyses presuppose that the issue in disparate treatment cases is existence of a consciously held, subjective intention to discriminate, although this subjective intention may be inferred from circumstantial evidence.

Our conventional understanding of "harassment" carries with it the notion of intentionality, although the nature of the intention is often contested. Harassment, based on any protected category is prohibited both by the general prohibition on discrimination[42] and by a specific prohibition against "harassment"[43] and a requirement that employers "take all reasonable steps necessary to *prevent* discrimination and *harassment* from occurring."[44] Harassment can thus be considered a form of disparate treatment discrimination prohibited by FEHA's general antidiscrimination provision when it leads to the loss of tangible job benefits ("compensation or . . . terms, conditions or privileges of employment"). While the FEHA bans in general terms acts or policies that constitute "discrimination," the Act treats harassment explicitly, separately, and differently in several respects.[45] The anti-harassment provisions of the FEHA are not limited to employers with five or more employees. Persons who employ only one person, who obtain the services of independent contractors, who act as agents of an employer, supervisors and other employees are also liable under the Act. The employer is strictly liable for the harassing acts of supervisors and is liable as well under a negligence standard if the employer, its agent or supervisor "knows or should have known of [harassing acts], unless it can show that it took immediate and appropriate corrective action."[46]

5. Disparate Impact Discrimination in the Social Sciences

The most common forms of disparate impact litigation under either Title VII or FEHA are those that result from discrete practices or policies that have a negative effect that is correlated with race, gender, or some other protected category. For example, basing a hiring decision on the existence of a prior arrest will necessarily

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36 Id. at 378-379. Citations omitted

37 Id. at 379. Citations omitted

38 Id at 380. Citations omitted.

39 *Heard v. Lockheed Missiles & Space Co.*, 44 Cal.App.4th 1735 (1996), citing Fuller v. Phipps 67 F.3d 1137, 1142 (4th Cir. 1995). See also, *Frank v. County of Los Angeles*, 149 Cal. App. 4th 805, 823 (2007).

40 For example, the Court of Appeal for the First Circuit declined to decide "whether a mixed-motive analysis applies under the FEHA or in this case." *Arteaga v. Brinks, Inc.*, 163 Cal. App. 4th 327, 357 (2008).

41 In dicta (because the plaintiff had not invoked a "mixed motive" analysis), the Court of Appeal for the Sixth District analyzed the relationship between "pretext" and "mixed motive" cases in *Reeves v. Safeway Stores, Inc*, 121 Cal. App. 4th 95, 111 n. 11 (2004). Noting that Congress and the Supreme Court had lifted a prior requirement that plaintiffs offer "'direct' evidence of discriminatory motive- whatever that means," the Court observed that: " This raises the possibility-some would say "hope"-that the "mixed motive" approach may displace all but the first stage of the McDonnell Douglas framework. That framework is perfectly serviceable when confined to its proper field of operation, but its frequent misconstruction has led too many courts to replace basic principles of procedure, evidence, and logic with elaborate and essentially arbitrary obstacles to relief." Foremost among these is the notion, which pervades innumerable decisions, that on summary judgment in a case of this kind, the "ultimate issue" is "pretext." (*Hugley v. Art Institute of Chicago* (N.D.Ill.1998) 3 F.Supp.2d 900, 906, fn. 7.) Certainly "pretext" is a useful term for encapsulating certain recurring concepts or patterns in a discrimination case, but calling it the "ultimate issue" is like saying, in a traffic case where two drivers give mutually irreconcilable testimony about who had the green light, that the "ultimate issue" is "perjury." In both cases one can decide the real ultimate issue-the state of the traffic signal, or the role of discriminatory animus-without deciding that one version of events was perjurious, or that a stated reason was "pretextual." We do not doubt that a general correlation exists between pretext and discrimination: If the fact finder in a FEHA case refuses to credit an employer's innocent explanation, and finds that the employer really acted for retaliatory or discriminatory reasons, it will usually be accurate to also conclude that the innocent explanation was a "pretext." The confusion arises when the correlative conclusion is viewed as a necessary prerequisite, so that the "pretext" tail wags the whole anti-discrimination dog. As conceived by the high court in *McDonnell Douglas* and its sequelae, "pretext" is merely one way of raising an inference of discrimination-not an indispensable precondition to such an inference.

42 Cal. Gov. Code § 12940(a).

43 Cal. Gov. Code § 12940(j).

44 Cal. Gov. Code § 12940(k). Emphasis supplied.

45 Cal. Gov. Code § 12940(j).

46 *State Department of Health Services v. Superior Court*, 31 Cal. 4th 1026, 1041 (2004).

affect persons in groups most likely to have been arrested, including those who were innocent and never charged. Requiring employees to be of a certain height or to possess certain physical strength will have a disproportionate impact on women. While social scientists become involved as experts in the application of these principles to specific cases or types of cases, the basic issues are straightforward and not often the subject of more generalized research by scientists. As discussed below, however, social scientists have examined the disparate impact of policies and practices that are embedded in institutions or structures of decision making.

6. Disparate Impact Discrimination under the FEHA

The FEHA has been interpreted consistent with federal courts' interpretation of Title VII to bar "disparate impact" discrimination. Unlike the much more common disparate treatment cases, the plaintiff in a "disparate impact" case need not prove discriminatory intent. To some extent, the conceptualization of disparate impact discrimination in California still bears the imprint of its origins in the United States Supreme Court's decision in *Griggs v. Duke Power Co, ,* 410 U.S. 424 (1971). In *Griggs*, the Court held that a facially neutral employment practice adopted without a business necessity – there an education and testing requirement that disproportionately impacted African Americans -- could nevertheless be found discriminatory under Title VII. Other examples of facially neutral practices that have been held to violate Title VII include height and weight requirements, physical tests, and the reliance on discretionary and subject procedures to make hiring, promotion and retention decisions.[47] Very few California appellate cases applying disparate impact doctrine outside the testing context have upheld employer liability on a theory of disparate impact.[48]

In *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988) the U.S. Supreme Court held that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests," reasoning that although disparate treatment doctrine might be sufficient to address the problem of supervisors acting with discriminatory intent, "the problem of subconscious stereotypes and prejudices would remain."[49] This does not mean, however that all subjective employment criteria are illegal. The employee still has the burden of demonstrating that the subjective employment criteria are a cause of the discrimination and, even on that showing, demonstrate the existence of a reasonably less discriminatory alternative to the challenged system. We have found no California appellate case upholding liability under FEHA based on the use of subjective employment criteria.[50]

7. Reasonable Accommodation under the FEHA

With the sole exception of discrimination based on disability, protection from discrimination in both federal law and the FEHA is predicated essentially entirely on a deterrence model, enforced through the imposition of damages. And while the provisions regarding disability discrimination in the ADA and FEHA also include liability rules and damages for discrimination, they do something more: both require employers to engage in an interactive process with the employee to reach a situation that reasonably accommodates the employee with a disability. In order to obtain the protections of the law in this regard, the employee must both cooperate with the employer in the process and demonstrate that he or she is otherwise qualified.

Employees with disabilities are protected from discrimination both by federal and state law. The Americans with Disabilities Act (ADA)[51] covers private sector employers with more than 15 employees and the Rehabilitation Act[52] covers federal agencies, federal contractors, and recipients of federal funds. The FEHA is more expansive, covering all employers with 5 or more employees. The FEHA is more expansive in other respects as well, extending to disabilities that "limit" a major life activity, regardless of the effect of mitigating measures, compared to the ADA, which covers only disabilities that "substantially limit" a major life activity, even after the employee takes mitigating measures. In addition, unlike the ADA, under the FEHA there is no limit on damages that may be awarded in a civil action under the FEHA. For liability purposes, however, disability discrimination claims under the FEHA are treated much like disparate treatment discrimination claims as to other protected categories, relying in large part on concepts imported from federal Title VII law, even though Title VII does not itself bar discrimination based on disability.[53]

Like its federal analogs, the FEHA not only prohibits discrimination on the basis of disability, but requires employers to provide "reasonable accommodation" to an employee with a disability or medical condition, either making adjustments to current job requirements or identifying another position for which the employee is both qualified and able to perform. In addition, the statute provides that the employer must engage in a "timely, good faith interactive process… in response to a request for reasonable accommodation."[54] Case law goes beyond the requirement of any express request and makes clear that the employer has an affirmative duty to initiate the process when the employer "becomes aware of the condition."[55] The employee, in turn, is obliged to cooperate with the employer, for example, in providing information.

8. Structural or Institutional Discrimination

Apart from the kind of disparate impact discrimination that may result from discrete policies or practices, social scientists and legal scholars recognize another kind of discrimination called "structural," "institutional," or "context" discrimination. These researchers show that disparate outcomes may also be a consequence of how

47 *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995 (1988).

48 *San Francisco v. Fair Emp. & Housing Com*, 191 C.A. 3d 976 (1987) [disparate impact of written promotional examination on African American firefighters found]; compare the following no-liability disparate impact cases: *Frank v. Los Angeles*, 149 C.A. 4th 805 (2007) [differential pay between predominantly white deputy sheriffs and predominantly minority county police officers*]; Carter v. CB Richard Ellis, Inc*. 122 Cal. App. 4th 1313 (2004) [Defendant company's reorganization plan demoted administrative managers, all but one of whom were women]; *Guz v. Bechtel Nat. Inc*., 24 Cal. 4th 317 (2000) [Removal and dismissal of in-house management information unit with differential effect on older workers]; *Hall v. County of Los Angeles*, 148 Cal. App. 4th 318 (2007); [Employees of legal services corporation that assisted county counsel, predominantly female, were paid less than predominantly male county counsel].

49 *Watson*, supra, note 47, at 990.

50 Two cases have rejected such contentions. *Hicks v. KNTV Television, Inc*., 160 Cal. App. 4th 994 (2008) [holding that in the absence any other evidence that employer made decisions on improper ground, the mere use of subjective criteria was not enough to second-guess an employer and find discrimination]; *Morgan v. Regents of University of California*, 88 Cal. App. 4th 52 (2000) [the inclusion of subjective criteria with others does not render employment criteria suspect].

51 42 U.S.C. §§ 12101 et seq.

52 28 U.S.C. § 701 et seq.

53 See, for example, *Mixon v. FEHC*, 192 Cal. App. 3d 1306, 1316 (1987), requiring proof of discriminatory intent in disability discrimination case.

54 Gov. Code § 12940(n).

55 *Faust v. California Portland Cement Co.*, 150 Cal. App. 4th 864, 887 (2007).

institutions or organizations function in social context and over time. Institutions and social structures – put simply, persisting patterns of how people interact and make decisions – can also continue the effects of past discrimination into the present, even in the absence of any other form of discrimination in the present.

For example, patterns of residential segregation and segregation within the educational system, whatever their source and entirely apart from personal preferences and biases, limit the contacts people will have with people of other races. Against this background, if an employer hires primarily from applicants referred by current employees and those current employees' informal networks do not include very many people in Group X, then we are not surprised to see a persistent absence of Group X members among the employees of the firm. This form of "network hiring" can result in a discriminatory effect as to those beyond the reach of a particular network, in effect depriving potential job applicants of even the opportunity to be discriminated against, given that they have no means of learning about potential job opportunities.[56]

Structures, institutions and practices can also magnify or minimize the effects of individual-level propensities to discriminate. For example, if we posit that most people today believe that discrimination on the basis of race or sex is wrong and try avoiding discriminating in both their private and workplace lives, but also believe that many people nevertheless have implicit biases or stereotypes that may affect their decisions, then how decisions are structured makes a difference. Under those assumptions, being in a formal management meeting where a termination decision is to be made might elevate awareness of the potential for discrimination, a potential that can be corrected by conscious effort. However, if the employee's record upon which that decision is made, including the opportunities the employee had to achieve, is largely the product of hundreds of informal encounters where the participants were less vigilant, then a perfectly non-biased decision in the meeting can nevertheless result in discrimination, as the product of *both* implicit bias *and* the manner in which work is conducted and decisions are made in the firm. Note that the employee in this case may still have been terminated "on account of" her race or sex, even in the complete absence of bias at the time and place the decision to terminate was made. Proving that this was the case in individual cases may be nearly impossible, although the prevalence of subjective criteria in promotion or retention may provide an explanation for statistically different outcomes for protected groups in "disparate impact" cases.

C. Evaluating Legal and Other Responses to Employment Discrimination

The statutory purposes of the FEHA are expressly declared in its Findings and Declarations of Policy:

> In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons.[57]

The tort-based FEHA thus aims by its own terms to respond in all of the areas we expect of legal and regulatory regimes: correction, compensation, and prevention. Corrective goals include undoing harms to the extent they can be undone, such as by reinstatement to a position lost as the result of discrimination. Compensatory goals include providing monetary compensation for lost wages and the other harms, economic and non-economic, of discrimination. Preventative goals include deterring potential discriminators from engaging in discriminatory conduct, as well as reducing the likelihood of discrimination by other means (for example, education about the benefits of a diverse work force). Implicit in the operationalization of these core goals is that they be achieved efficiently and without undesirable, if unintended, consequences.

A well designed system will thus accomplish goals of correction and compensation by means that (1) accurately distinguish between those who have incurred damages as the result of discrimination and those who have not; (2) provide an amount of compensation fairly related to the loss and injury sustained; (3) provide appropriate corrective relief beyond compensation; and (4) do these things efficiently, in terms of costs to the public and to victims of discrimination.

An efficient system relying on deterrence to prevent discrimination will: (1) detect discrimination when it takes place, whether on the basis of complaints from victims or otherwise, and do so accurately; (2) impose sufficient costs on discriminators that, when those costs are combined with the probability of detection, outweigh any perceived benefit of discriminating; (3) make potential discriminators aware of the potential costs that may be imposed as the result of discrimination.; and (4) do these things efficiently, imposing as few costs as possible on those who have not discriminated.

Effective prevention of discrimination by means other than deterrence requires that the enforcement system: (1) inform employers and employees of their rights and obligations; (2) require appropriate actions of employers to prevent discrimination; (3) inform employers and employees of the nature of discrimination and how those wishing to avoid discrimination can best do so; (4) provide to employers information regarding "best practices" to avoid discrimination.

The current system for enforcing FEHA has all of these features, to considerably varying degrees, as we demonstrate with our analysis of DFEH and other data in the body of this report. Although the DFEH in particular also engages in education and other activities aimed at preventing discrimination, by far the most effort, both by DFEH, the Fair Employment and Housing Commission, and our civil litigation system, is devoted to meeting the goals of correction, compensation, and deterrence through the processing of individual complaints brought to the attention of DFEH or the courts by those claiming their rights under the FEHA have been violated. Particularly until recently, when DFEH began to issue more "Director's complaints" to respond to discriminatory patterns and practices[58], California's system of responding to the problem of employment discrimination has been entirely reactive, responding only to complaints and thus entirely dependent on the vagaries of who complains and who does not. Moreover, the DFEH has not made use of information it has through its processing of thousands of complaints, or the other information it receives from the EEOC, to identify regions or sectors of the labor market that may deserve more scrutiny.

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56 Roger Waldinger & Michael I. Lichter, How the Other Half Works, 181-182 (2003). At the same time, reliance on networks containing connections to low wage work may in fact depress the pay of those who do obtain employment by this means. See, e.g. Green, Gary P., Leann M. Tigges, and Daniel Diaz. "*Racial and Ethnic Differences in Job-Search Strategies in Atlanta, Boston, and Los Angeles*." 80 Social Science Quarterly 263 (1999).

57 Cal. Gov. Code § 12920.5.

58 From 2008 until January 19, 2010, DFEH filed eight Director's or class complaints in employment discrimination matters. This is a dramatic increase from previous years.

It is thus important to assess the FEHA and its enforcement on its own terms, as a tort-model system almost entirely driven by the processing and resolution of individual complaints of discrimination. It is also important to understand how the FEHA operates through different dispute resolution systems, and in a context where there is a substantially parallel law (Title VII), enforcement agency (the EEOC) and litigation system (in federal courts).

D. The Origin of Complaints and Complaint Rates

In the classic formulation[59] claims begin with a "perceived injurious experience" which is blamed on someone else, resulting in a "grievance." A grievance becomes a claim when "someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy," which in turn requires that the person "believe that something might be done in response to the injury."[60] In the context of employment discrimination, victims of discrimination – particularly applicants for employment -- may never suspect that discrimination has taken place. Applicants for employment, for example, rarely know much about other applicants for the same position, their qualifications, or their characteristics. Accordingly, the great majority of complaints filed with the DFEH (and with EEOC) are filed by employees, not applicants for employment. When an employee does believes she or he has been the victim of discrimination, the employee can do several things: complain to a supervisor or other employer representative, quit, file a complaint with DFEH or the EEOC, consult an attorney, or simply do nothing. That last possibility may be more likely if there are substantial risks in voicing a grievance regarding discrimination, such as those that might follow from doing so while still employed, absent believable assurances of non-retaliation.

At the same time, complaints can also be the product of incorrect belief that an adverse event is the result of discrimination. Moreover, in any complaint-based system where responding to a complaint imposes a financial or other cost on the respondent, some people will file complaints for ulterior purposes. For example, at-will employees terminated for reasons they believe unfair may turn to the one of the few outlets for receiving grievances about termination, including the DFEH or the EEOC. And, no doubt, some employees file complaints for personal reasons or to retaliate against a supervisor or employer for some perceived grievance. The purpose of a dispute resolution system is to accurately and efficiently sort out merited from meritless complaints, according to appropriate legal and procedural standards.

There is little, and mixed, empirical evidence about the percentage of grievances regarding discrimination that result in claims (sometimes, called the "claiming rate"). However, across all kinds of claims, people who believe they have experienced discrimination or other harms very often do nothing, with only a percentage taking any action or filing a complaint. Empirical studies that include all kinds of claims, including those raised with the employer as well as with agencies or courts, have arrived at claiming rate estimates of 29%[61] and 57%[62] for employment discrimination cases, with the difference being largely a matter of definition. One of the surveys used in these studies found that among people reporting having experienced discrimination on the job, 28% complained to a supervisor or employer and 10% filed a complaint with a state or federal agency.[63] The few studies of the subject have agreed that claiming rates are lower for discrimination cases than many other types of cases,[64] perhaps in part because people who attribute negative events to discrimination are often seen as troublemakers.[65] But we do not have good or current data regarding the percentage of people who believe that they have experienced job discrimination who actually do anything about it, including filing a complaint with DFEH or the EEOC.

Nor do we have good data regarding the number of either mistaken or bogus complaints. Clearly some people file complaints regarding acts that do not constitute discrimination, or file false claims for some ulterior purpose, like retaliating against a supervisor for some lawful decision or simply on the expectation of some unwarranted financial gain. But unless we assume the accuracy of the claims adjudicating process (which is a focus of this study rather than an assumption), we also cannot say what percentages of complaints are either mistaken or bogus. It is also important to recognize that the number of complaints filed with DFEH or the EEOC does not establish the prevalence of discrimination in the labor market or in the workplace, and should be considered along with other relevant information. Other relevant information would include both our judgments about human behavior generally, and data on the prevalence of bias, stereotyping and discriminatory behavior generally, such as that summarized in Section IV.

Of course, not all people who harbor negative racial biases act on those biases, but unless they have a different propensity to act on their biases that also varies across races, we should expect to see more discrimination against groups against whom negative attitudes and stereotypes are most common. For example, as we describe in Section II, there is strong evidence from many sources that the prevalence of negative attitudes and stereotypes toward other racial groups is dramatically high with regard to African Americans than any other racial or ethnic group. We should not therefore be surprised to see a much higher complaint rate for race discrimination among African American employees, absent evidence that employers, supervisors and co-workers are somehow able to dramatically reduce the effects in the workplace of such biases and stereotypes. Although not the only determinate of complaint rates, the prevalence of discrimination and its antecedent biases and stereotypes is surely an important factor.

E. The Dispute Pyramids of Employment Discrimination

Once a complaint has materialized and not been satisfied immediately, the complaint becomes a dispute. Social scientists and sociolegal scholars have devised fairly standard ways for conceptualizing and analyzing systems for the processing of disputes, relying on a "dispute pyramid" metaphor,[66] illustrated in

59 William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming …*, 15 Law & Soc'y Rev 630 (1981).

60 Id. at 635.

61 Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 Law & Soc'y Rev. 525, 539-40 (1980)

62 Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 Law & Soc'y Rev. 875, 880-82 (1991)

63 Id. The survey was reported in 1990.

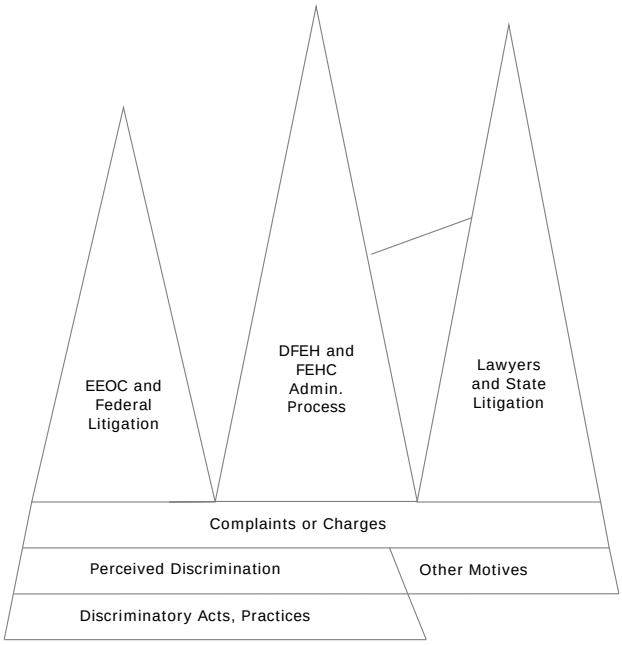
64 Miller & Sarat, n. 61; Kritzer et al, n. 62.

65 Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 Group Processes & Intergroup Relations 227 (2003).

66 Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 11 (1983).

Figure 1 below. In this metaphor, complaints (or their antecedents) comprise the base of the pyramid. Then, following the procedural rules and practices of the system, at each level of the pyramid, complaints either exit the system or move to the next higher level. Conventionally, for example, in descriptions of U.S. civil legal systems, the jury trial and verdict occupy the highest level of the pyramid, and constitute a tiny fraction of the cases that begin with the filing of a complaint for relief in the trial court. The "pyramid" metaphor describes the aggregate of the different paths followed by thousands of individual complaints of discrimination, many of whom have a choice of which pyramid to enter. For, example, about half of all complaints to DFEH immediately leave the DFEH administrative process and enter the realm of lawyers, negotiations, and state court litigation. Once in that state court litigation system, some cases are dismissed, others settle, and a tiny fraction eventually reaches a jury trial. Roughly speaking, of approximately 9,000 cases a year in which complainants seek immediate "right to sue" letters from DFEH – a necessary predicate to litigation – about 4000 will result in lawsuits being filed in California courts. But only about 100 of those will result in a reported jury verdict. Similarly, of the approximately 9,000 cases a year that remain within the DFEH administrative process, only about 60 will result in accusations being filed with the Fair Employment and Housing Commission. All the rest will be dismissed or settled before the preparation of an accusation is even considered. These dispute resolution pyramids, then, have a broad base of all possible and filed complaints, tapering to a very small fraction that are resolved on the merits through a hearing before an agency or court.

Figure 1
The Pyramids of Employment Discrimination Dispute Resolution



One of the characteristics of all such dispute pyramids is that as disputes move up the pyramid, the nature of the disputes remaining in the system changes, because disputes of different kinds exit the system at different rates. In other words, at each step of the system, or level of the pyramid, the decision processes are operating only on the complaints that remain, having not been disposed of by other means earlier in the process, or lower in the pyramid. By definition, then, those cases that settle are those that were not dismissed or abandoned earlier, and those that go to trial are those that survived the pretrial litigation process and were not settled.

As illustrated in the "pyramids" figure, employment discrimination complaints in California are processed through three largely distinct complaint processing systems: the EEOC and federal court litigation system, the DFEH and FEHC administrative system, and the state court civil legal system. There are significant differences in state and federal law and thus, the jurisdictions of the DFEH and the EEOC, but a large majority of employment discrimination complaints can be filed with either. At least at the outset, the choice of pyramids is made by the complainant. Either acting alone or with the assistance of a lawyer, an employee with a grievance can file a complaint with either the EEOC or the DFEH. For purpose of possible later legal action, that filing is sufficient to begin the process of complying with certain administrative exhaustion requirements for either the EEOC or DFEH system. In either case, the agency receiving the complaint notifies the other, so that the agencies do not open simultaneous investigations of the same claim. Moving the dispute into either the federal or state civil litigation systems requires, at a minimum, the filing of a complaint and a request for issuance of a right to sue (RTS) letter from the agency. In the case of the DFEH, the RTS letter can be obtained immediately upon filing the complaint. As a practical matter, however, there is an important set of decision makers and market that determine whether a RTS letter will actually be followed by the filing of a civil complaint: lawyers and the legal market. While it is legally permissible for an employee to file civil complaint for employment discrimination pro se, this is a very complicated area of the law and such filings appear to be very rare. In our search of court records to determine whether a law suit followed the issuance of 400 randomly selected RTS letters, we found no lawsuit in which the complainant represented himself or herself.

For this reason, although the trajectory of many cases may be different, we may usefully think about the presentation of a potential claim to an attorney for possible representation as a step in the process – level of the pyramid – prior to the presentation of a complaint to the DFEH. This appears to be the case in practice for the very large percentage of complainants who seek a RTS letter immediately after the filing of a complaint, thus entering and exiting the DFEH administrative process within less than one week. For reasons we discuss in Section VI, we believe it highly likely that these complainants are acting in at least the expectation that they will be assisted by attorneys. It is also possible for complainants to exit the DFEH administrative system at any time upon their request. These requests are fairly constant over the one year maximum time for DFEH to process complaints, peaking in the few weeks before the one year deadline expires.

III. OVERVIEW OF FEHA IN LEGAL CONTEXT

Before turning to a detailed examination of what happens to complaints, we elaborate on the legal context that defines the architecture of the discrimination complaint processing pyramids in California, and the procedural law of the FEHA that prescribes the path that a complaint may follow once filed.

A. The Legal and Adjudicatory Context: DFEH and the EEOC

An employee who believes that he or she has been the victim of discrimination may be able to pursue a claim under several different

laws, which are enforced by different administrative agencies and court systems. The range of choices depends on, among other things, the nature of the claim, when the claim occurred, and the knowledge of the potential claimant. The FEHA offers more protections than Title VII in several respects. For example, FEHA specifically prohibits "harassment" as well as "discrimination," and does so with respect to all employers. Unlike Title VII, FEHA prohibits discrimination and harassment based on sexual orientation and marital status.

In some cases, for example sexual orientation cases, an employee will have no choice but to file a claim under FEHA with DFEH. In other cases, an employee may have missed the deadline for filing a complaint with EEOC but still have time to file with DFEH. Under an agreement between EEOC and DFEH, the agency that receives a complaint promptly notifies the other agency so that overlapping and simultaneous investigations do not commence. When complaints immediately seek a RTS letter, no investigation commences, so that these cases are not reported to the other agency. During our study period, 63% of the remaining cases filed with DFEH were dual-filed with EEOC. We obtained data from the EEOC for the period 2005-2008. During the same period, 89% of charges filed with EEOC were dual-filed with DFEH, indicating both the broader scope of state employment discrimination law, as well as differences in procedures in issuing RTS letters. Comparing the data for the DFEH and EEOC during this period reveals the pattern of overlapping jurisdiction in Table 1.

Table 1
DFEH Complaints and EEOC Charges
Average Annual Filings, 2005-2008
(Excluding Immediate RTS DFEH Cases)

Jurisdiction	Annual Filings	% Dual Filed	% All Cases
DFEH only	5,013	60.6%	
DFEH dual filed with EEOC	3,265	39.4%	
Total DFEH	8,278	100.0%	60.7%
EEOC only	578	10.8%	
EEOC dual filed with DFEH	4,791	89.2%	
Total EEOC	5,369	100.0%	39.3%
Total Cases	13,647		100.0%

These overall numbers do not tell the whole story, of course. Complainants (and their attorneys, if any) have a choice when the jurisdictions of EEOC and DFEH overlap. The choice may be a result of differences in available remedies, the ease with which a RTS letter can be obtained, or other factors. Table 2 provides the number of complaints alleging the same bases of discrimination that might have been filed with either EEOC or DFEH, and the percentage of complaints in each category that were, in fact, filed with each agency.[67]

Table 2
Complaints by Basis: Agency Choice
Dual-Filed Claims, 2005-2009
Percentage of Total Claims Filed with Each Agency

Basis	Total Claims	EEOC	DFEH
Age	7,947	56.7%	43.3%
Disability	11,424	30.0%	70.0%
Race	12,333	52.7%	47.3%
Race or National Origin	14,576	44.6%	55.4%
Religion	1,359	57.0%	43.0%
Retaliation	20,227	66.3%	33.7%
Sex	11,661	42.1%	57.9%

In order to better understand which complainants and which complaints are more likely to be filed with DFEH or the EEOC, we ran a logistic regression to compute the odds that a particular complaint would be filed with the EEOC, based on the race, sex and age of the complainant and the basis of the complaint. We limited our analysis to complaints that might have been filed with either agency, as determined by the fact that the agency receiving the complaint had itself determined that a complaint was within the jurisdiction of the other agency.[68] The results are presented in Table 3.

Table 3
Odds of Filing Complaint with EEOC vs. DFEH
Common Jurisdiction Cases Only
2003-2008 Complaints

Complainant Variable	Compared to	Odds Ratio	95% low	95% high
African American	Caucasian	1.55	1.45	1.65
Asian PI	Caucasian	1.28	1.18	1.40
Native American	Caucasian	1.09	0.88	1.35
Female	Male	0.84	0.80	0.88
Over 40	Under 40	2.13	2.03	2.23
Basis - National Origin	Age	2.32	2.16	2.48
Basis - Other	Age	0.83	0.71	0.97
Basis - Disability	Age	0.77	0.73	0.82
Basis - Race or Color	Age	1.54	1.44	1.64
Basis - Religion	Age	1.70	1.50	1.92
Basis - Retaliation	Age	3.77	3.58	3.97
Basis - Sex	Age	1.22	1.15	1.30

By way of explanation, the "odds ratio" of 1.55 as to African American complainant means that, controlling for the other factors listed, African Americans were 55% more likely than Caucasians to file with EEOC rather than with DFEH. Controlling for the same factors, women were about 16% less likely than men to file with the EEOC. The "95% low" and "95% high" numbers define the range within which we can be highly confident that the "true" odds lie.

67 These data reflect the fact that a single EEOC charge or DFEH complaint can be based on more than one basis. The numbers here reflect distinct bases of claims, rather than numbers of charges or complaints.

68 There are some limitations to this approach which may affect the results of the regression. If a complaint is filed with DFEH and the complainant immediately requests a right to sue letter, DFEH makes no determination as to whether the complaint is also with the jurisdiction of the EEOC, since DFEH will not be conducting an investigation in any event. We removed these cases from the analysis, as we could not determine that they might have been filed with the EEOC. The other limitation comes from the different ways in which the state and federal government classify "Hispanic" complainants. This is a classification in the DFEH data, but not the EEOC data. We thus do not include "Hispanic" as an independent variable in the regression, but these cases are nonetheless otherwise in the data being processed. The major effect of removing cases of "Hispanic" cases (all of which are in the DFEH comparison data) is that the odds of non-Caucasian complainants filing with EEOC drop to essentially even odds (0.97) with Caucasians. The other odds remain generally the same.

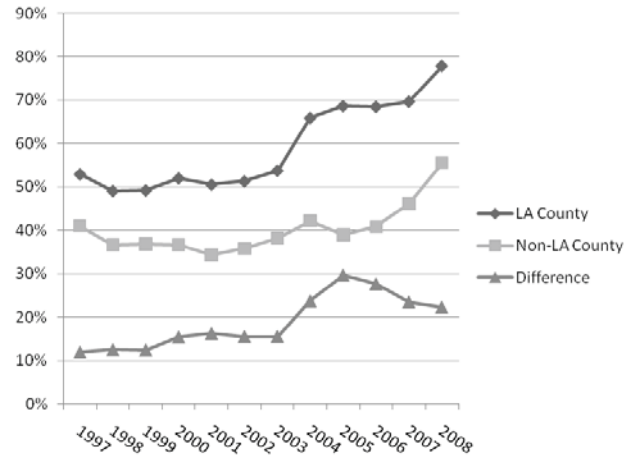
B. The Procedural Requirements of the FEHA and the "Base" of the DFEH and Civil Litigation Pyramids

Under the FEHA an employee can elect to have his or her complaint processed by DFEH. The employee can also decide at any time to take his or her complaint directly to the legal system. In order to do this, however, the employee must first obtain a "right to sue" (hereafter RTS) letter from DFEH. Although this once required some time and attention from DFEH, currently an employee or his representative can obtain a RTS letter automatically and without human intervention on the part of DFEH, by means of a website.[69] On receiving a request for a RTS letter, DFEH will take no further action on the complaint. The employee has one year from the receipt of the RTS letter within which to file a lawsuit.

The great majority (79%) of RTS letters are requested either within the first seven days of the filing of a complaint or the last 30 days of the one-year period in which DFEH has to complete its investigation (9.6%). In the former case, the fact that an employee has obtained a RTS letter within a few days of filing a complaint is a strong indicator that the employee has already obtained advice from an attorney to both file the complaint and to seek a RTS letter. This number may be under inclusive of those complainants with lawyers, inasmuch as some lawyers told us that they "park" cases with DFEH when they do not have time to work on them, or to take advantage of the investigatory efforts of DFEH.

The percentage of people choosing lawyers (as indicated by the issuance of an immediate RTS letter) has risen somewhat, from 43.8% in 1997 to 52.9% in 2008. There is a considerable regional difference, possibly the result of differences in the market for legal services in different areas of the state. The percentage of complaints resulting in immediate RTS letters was significantly higher (66.7%) in Los Angeles County than in any other county, and the gap between Los Angeles County and the other parts of the state rose during the study period, as indicated in Figure 2. As we suggest in Section VI, this may be because of the relatively high availability of attorneys for complainants in Los Angeles County.

Figure 2[70]
Percentage of Complaints Resulting in Immediate RTS Letter
Los Angeles vs. Other Counties - 1997-2007



Overall, during our study period, 117,748 complaints began at the bottom of the DFEH administrative dispute pyramid, compared to 94,396 in the bottom of the lawyer and court system dispute pyramid.

IV. COMPLAINTS AND COMPLAINT RATES

In this section, we focus on the 212,144 complaints for employment discrimination filed with DFEH between January 1, 1997 and December 31, 2008. The total number of complaints filed each year during this period ranged between a minimum 15,312 in 2006 and a maximum of 19,059 in 1998, with a mean of 17,679 complaints per year. The mean number of Californians in the labor force during the same period was about 17.2 million. Thus, during the period, the odds that a randomly chosen employee would file an employment discrimination complaint with DFEH during a given year were 1 in 973, or a complaint rate of 1.03 per 1000 employees. The California complaint rate is comparable to that in other large states. Table 4 below provides the number of complaints reported in the most recent published report of the relevant state agency, the size of the labor force from the 2006-2008 American Community Survey conducted by the U.S. Census, and the associated complaint rates per 1,000 employees per year.

Table 4
California and Other State Employment Discrimination Complaints
Most Recent Data

State	Agency	Exhaustion required?	Annual Complaints	Labor Force	Annual Complaints per 1,000
New York	Division of Human Rights	no	5,838	9,858,485	0.59
Washington	Human Rights Commission	no	763	3,391,636	0.22
Texas	Commission on Human Rights	no	1,913	11,819,368	0.16
Pennsylvania	Human Relations Commission	yes	3,337	6,315,780	0.53
Ohio	Civil Rights Commission	no	5,192	5,916,716	0.88
Michigan	Department of Civil Rights	no	1,887	5,042,854	0.37
Illinois	Department of Human Rights	no	3,522	6,704,699	0.53
California - Admin Only	DFEH (Admin Only)	no	8,288	18,228,215	0.45
California -Total	DFEH (Admin + Court)	yes	17,958	18,228,215	0.99

Those states without an administrative exhaustion requirement do not capture those complaints analogous to those filed in California that are immediately removed from the administrative process. Hence, the appropriate comparison California complaint rate for those states is the "Admin Only" rate of .45 per 1,000 people in the workforce per year. The appropriate comparison for Pennsylvania,

69 The website is located at http://www.dfeh.ca.gov/onlinerts/

70 We did not include 2008 cases because many of these were still open, so those that closed in the first 7 days would be unrepresentative of the year.

the only state in the table with an exhaustion requirement, is the overall California complaint rate during this period of 0.99.[71]

A. Overview: Bases of Alleged Discrimination

Each complaint can allege discrimination on the basis of up to four identified categories, which can be quite specific (for example: "Physical Disability - Hearing," "Retaliation for Protesting Patient Abuse" or "National Origin Ancestry -Azerbaijan"). We condensed the 179 possible bases into 13 basic categories, consistent with those listed in the FEHA. The 212,144 complaints we examined included 350,913 different alleged bases of discrimination, on average 1.65 bases per complaint. Table 5 sets out the number of specific allegations of discrimination on the specified bases that were contained in complaints filed with DFEH.[72]

Table 5
Allegations by Basis or Protected Category - 1997-2008

Basis or Protected Category	Total Allegations	% of Allegations
Sex	81,219	23.1
Disability	54,379	15.5
Retaliation	53,077	15.1
Race or Color	50,969	14.5
Age	38,280	10.9
National Origin	25,803	7.4
Other	13,815	3.9
Family Medical Care Leave	7,504	2.1
Medical Condition	6,457	1.8
Sexual Orientation	6,317	1.8
Religion	6,031	1.7
Marital Status	3,939	1.1
Association	3,123	0.9
Total Alleged Bases	350,913	100.0

Another way of looking at the same issue is to look not at allegations, but at complaints that contain those allegations. The percentage of complaints that contain an allegation of discrimination on these bases over the study period is set out in Table 6.

Table 6
Percentage of Complaints Containing
Specified Alleged Bases of Discrimination - 1997-2008

Basis or Protected Category	%
Sex	38.2
Disability	25.9
Retaliation	25.2
Race or Color	24.0
Age	18.1
National Origin	12.1
Other	6.7
Family Medical Care Leave	3.6
Medical Condition	3.1
Sexual Orientation	3.0
Religion	2.8
Marital Status	1.9
Association	1.5

For reasons noted earlier, these percentages sum to 165%, because a complaint can include more than one alleged base of discrimination.

As Table 6 makes clear, when looking at complaints containing allegations of discrimination on different bases over the study period, 38% of complaints alleged sex discrimination, and about a fourth alleged discrimination on the bases of race or disability. Although considered a "basis" for data purposes, "retaliation," which appeared in 25% of complaints, is more logically if not legally an act than a protected category. In addition, the degree of overlap in the allegations can be significant. For example, 42% of the complaints with race or color allegations filed by Hispanic/Latino complainants also alleged national origin discrimination, as did 46.4% of complaints by Asian/Pacific Islanders.

The nature of allegations of discrimination changed substantially over the study period. If we combine for analytic purposes the bases of disability and medical condition, and combine national origin with race or color, those bases together with age and sex discrimination account for 86% of the allegations during the study period, leaving retaliation claims aside. Figure 3 illustrates the changes in allegations over the study period. The number of allegations of sex discrimination fell, as did allegations of race, color or national origin discrimination, although both sets of allegations rose from 2006 to 2008. Age discrimination allegations were essentially constant over the period, but also rose in 2006. Allegations of disability discrimination, on the other hand, rose about 69% over the period.

71 Complaint data are from the most recent available annual reports of the agencies indicated: New York (2007-2008, http://www.dhr.state.ny.us/publications_annual_reports.html); Washington (2005-2007 biennial report – average of two years reported, http://www.hum.wa.gov/Commission/BienniumReports.html); Texas (2007-2008, http://www.twc.state.tx.us/crd/arcrd_08.pdf); Pennsylvania (2006-2007, http://sites.state.pa.us/PA_Exec/PHRC/publications/literature/annualreport0708.pdf); Ohio (2006-2007, http://crc.ohio.gov/pdf/2007%20Annual%20Report.pdf); Michigan (2006, http://www.michigan.gov/documents/mdcr/CR_ann_rpt06_223398_7.pdf); Illinois (2007-2008, http://www.state.il.us/dhr/Publications/Annual%20Report%20FY2008.pdf). California data are derived from DFEH administrative data, averaging the complaints filed in calendar 2007-2008. "Admin Only" cases are those that were not immediately removed from the DFEH process to pursue alternatives.

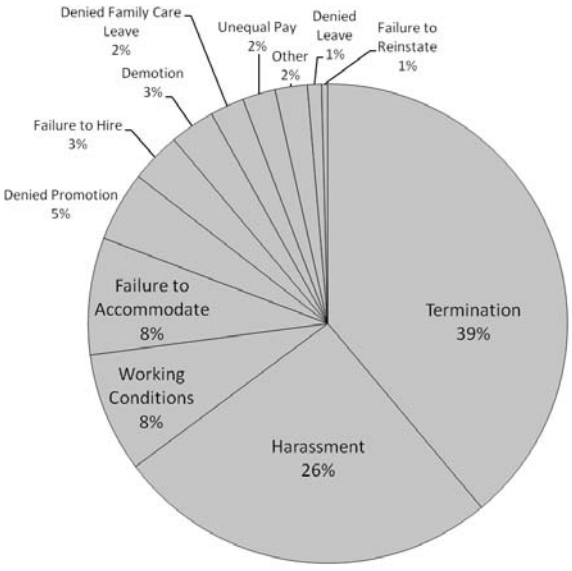
72 We previously reported preliminary data on the "primary" alleged bases, namely that allegation captured in the first field of the database for alleged bases. Our preliminary analysis indicated that this was generally the "main" basis alleged. This analysis here, however, reflects all of the allegations, regardless of how they were captured in the database.

Figure 3
Most Frequent Allegations
1997-2008

B. Overview: Alleged Discriminatory Acts

As with alleged bases of discrimination, complainants may allege up to four acts constituting discrimination. The 212,144 complainants in our study period alleged 350,913 discrete acts of discrimination, an average of 1.65 acts per complaint. As appears from Figure 4, two categories of acts, termination and harassment, comprise the great majority (65%) of acts alleged. Also notable is the overwhelming degree to which the alleged discriminatory acts are those generally associated with "disparate treatment" discrimination (termination, harassment, working conditions, failure to accommodate) rather those potentially associated with "disparate impact" discrimination (failure to hire, denied promotion, unequal pay).

Figure 4
Alleged Discriminatory Acts - 1997-2008



The second most common alleged act is harassment. The proportion of complaints alleging harassment remained stable, within the range of 38-45% over the course of the study period. Sexual harassment may be the kind of harassment most people associate with the term, and sexual harassment is the most commonly alleged kind of harassment. DFEH codes "Sex Harassment" as a distinct basis of discrimination, in addition to coding "harassment" as one of the kinds of the possible alleged acts. During the study period, 45% of the cases that included an allegation of harassment were specifically coded as sexual harassment cases. Similarly, in 57% of cases claiming discrimination on the basis of sex, harassment was among the discriminatory acts alleged. Of protected categories other than sex, harassment was alleged in more than 5% of complaints only as to the following: race or color (26%), national origin (14%), age (14%), and disability (19%).

C. Overview: Complaint Rates

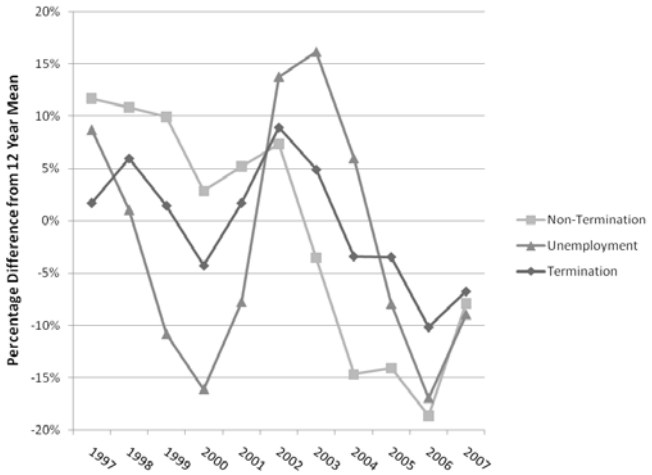
For purposes of this study, we defined a complaint rate as the number of complaints of a certain type filed by people who might file such complaints during a given time period, typically the people in the relevant workforce. We use the convention of complaints per year per 1,000. For example, we know that approximately 1,000 people in the workforce will generate about one complaint to DFEH each year. Complaint rates are a function of (1) the true prevalence of discrimination or discriminatory acts or practices in the workplaces or labor markets at issue; (2) the probability that those subjected to discrimination are aware of the discrimination; (3) the probability people who are aware of discrimination will file a complaint; and (4) the probability that people who incorrectly perceive discrimination or who have other motives for filing a complaint will do so. In most cases we have good data only on the resulting complaint rate and either no or only circumstantial evidence of the contributing factors. At least as to some kinds of discrimination, we do have some evidence of the prevalence of attitudes and stereotypes that may contribute to discrimination.

One finding in the literature which we also found in our study is that the complaint rate varies with economic conditions and the unemployment rate. One of the reasons is almost tautological: as layoffs and terminations increase, so too do the occasions for filing claims for discriminatory terminations. But other types of complaints also vary with the unemployment rate. Figure 5 provides time series data on the changes in the number of complaints, for termination and for other alleged discriminatory acts, filed during the study period, along with the unemployment rate. The lines represent the deviation from the 12-year average. As can be seen, both termination complaints and other complaints appear to move in tandem with the unemployment rate. As other scholars have suggested in the context of Title VII complaints, this may well be explained as follows: "When unemployment rates are low and labor markets are tight, workers probably encounter less discrimination and are certainly better positioned to seek remedies outside the litigation process for any discrimination they do encounter."[73] Whether or not discrimination is reduced, when jobs are plentiful, an employee experiencing discrimination can change jobs; a terminated employee can find another job. In addition, as periods of individual unemployment are extended, so too does the potential economic value of discrimination claim for lost wage and the individual cost/benefit calculation tilted in favor of filing a complaint. Finally, many

73 John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 Stan. L. Rev. 983, 999 (1991).

studies have shown that high unemployment rates are also associated with higher levels of psychological distress.[74]

Figure 5
Unemployment Rate and Complaints (Termination and Other) Annual Average (Differences from 12 Year Mean)



We now turn to a closer examination of particular types of complaints and the characteristics of complainants.

D. Race and Color and National Origin Complaints

As noted earlier, discrimination on the basis of race, color or national origin constitutes the second most frequent alleged basis of discrimination after allegations of sex discrimination. Given the proportions of working populations at risk of discrimination, we would not expect anything different. However, there are very significant differences in the proportion of allegations of such discrimination among different demographic groups, including a significant gender gap among all groups in the proportion of complaints alleging race discrimination. The highest rates of such alleged discrimination are in complaints filed by African Americans (65% of all complaints are filed by African American complainants), Asian-Pacific Islanders (50%), Hispanics (35%) and Native Americans (29%). Removing cases also alleging sex discrimination allows us to look at gender gaps without that confound. Table 7 illustrates the proportion of complainants alleging race, color or national origin discrimination, as well as a significant gender gap between men and women in such allegations, even after removing complaints that also involved sex discrimination.

Table 7
Percent of Complaints Alleging Race, Color or National Origin Discrimination (Excluding Complaints Also Alleging Sex Discrimination) 1997-2008

Complainant Group	%	Gender Gap
Male African American	77%	
Female African American	63%	14%
Male Hispanic	49%	
Female Hispanic	31%	18%
Male Caucasian	17%	
Female Caucasian	11%	6%
Male Native American	40%	
Female Native American	27%	13%
Male Asian P.I.	63%	
Female Asian P.I.	48%	15%

1. Particular ethnic/racial groups

a) African Americans

Racial discrimination allegations are much more frequently alleged by African American men, who include such allegations in over three quarters of all complaints. Of those African Americans asserting race, color or national origin discrimination, 56% are based at least in part on terminations and 40% on harassment.

b) Hispanic or Latina/o

During the study period, 21% of complaints were filed by persons categorized by DFEH as "Hispanic." As noted above, of all complaints filed by Hispanics, 35% allege discrimination based on race, color or national origin. Since 2003, DFEH has recorded ethnicity for "Hispanics" in subcategories reflected in Table 8, which provides the percentages of complaints filed by Hispanics during the period 2003-2008, for which an identifiable subcategory was provided.[75]

Table 8
Composition of "Hispanic" Category of Complainants

Subgroup	Percentage of complaints
Mexican-American	52.1%
Mexican National	35.1%
Central American	7.8%
Puerto Rican	1.5%
South American	1.2%
Cuban	1.1%
Dominican	0.8%
Spanish European	0.4%
Total identifiable	100.0%

National origin and "race or colors" are separate potential bases of discrimination under the FEHA, with significant overlap. Of those complaints filed 2003-2008 by Mexican-Americans (presumably U.S.-born employees of Mexican ancestry) alleging race or color

74 See, e.g., Frances M. McKee-Ryan, et al, *Psychological and Physical Well-Being During Unemployment: A Meta-Analytic Study*, 90 Journal of Applied Psychology 53 (2005) [summarizing 104 empirical studies]. This, and most other studies, focuses on unemployed persons, but there is every reason to believe that those at increased risk of unemployment will also experience distress.

75 22% of the claims during this period were categorized as "Hispanic-Other" and 9% were categorized under a designation officially abandoned in 2002, "Hispanic (other than Mexican American)."

discrimination, 40% also alleged national origin discrimination. For Mexican nationals, the percentage of overlapping national origin complaints was 55%.

c) Asian-Pacific Islanders

As noted earlier, about half of all complaints by Asian Pacific Islanders allege discrimination based on race, color or national origin, second only to African Americans. As with "Hispanics," since 2002 DFEH has collected more specific data on ethnicity. Table 9 provides the percentages of complaints filed by identifiable subgroups 2003-2008.

Table 9
Subcategories of Asian-Pacific Islander Complainants, Percentage of Identified Subgroups, 2003-2009

Subgroup	%
Filipino	38.32%
Asian Indian	22.30%
Chinese	17.81%
Vietnamese	7.57%
Korean	6.53%
Japanese	5.02%
Native Hawaiian	1.08%
Samoan	0.94%
Polynesian	0.42%
Total Identified Subgroups	100.00%

As is apparent, employees of Filipino and Indian descent account for 60% of employment discrimination complaints filed by Asian-Pacific Islanders during this period. The proportions of race and national origin complaints were not markedly different among these groups, however. Table 10 describes the composition of complaints filed by subgroups accounting for more than 150 complaints over the study period.

Table 10
Race and National Origin Complaints by Asian Pacific Islander Subgroups and Overall 1997-2008

	Basis of Complaint			
Subgroup	Race Only	Race + National Origin	National Origin Only	Neither Race nor National Origin
Filipino	16%	15%	17%	52%
Chinese	19%	19%	16%	46%
Japanese	19%	14%	11%	56%
Korean	8%	13%	17%	62%
Asian Indian	18%	16%	17%	49%
Vietnamese	16%	19%	20%	44%
All Asian and P.I. Groups	18%	16%	16%	50%

d) Native Americans

The number of complaints filed by Native American complainants remained fairly stable over the study period, averaging 158 per year. The most frequent alleged basis of discrimination was sex (38%), followed by race/color/national origin (31%) and disability (26%). Nearly two thirds (62%) of the complaints involved terminations. The numbers of complaints filed by Native Americans do not permit as much detailed analysis as is possible with respect to other ethnicities.

e) Caucasians

Of the study period, 7,216 (9%) of Whites who filed complaints included allegations of race or color discrimination. These complaints are somewhat more likely to be filed by White men (12.2% of complaints) than White women (10.4%) among complaints that do not also allege sex discrimination.

2. Complaint Rates

Looking at the composition of complaints alleging discrimination based on race, color or national origin is, of course, only one perspective. Another view is the complaint rate, the rate at which people in particular categories file particular kinds of complaints. In order to determine this rate, of course, one must know the number of persons in the work force in the particular category. We utilized the data from the U.S. Census Bureau American Community Survey, 2005-2007 to derive the number of people in the civilian work force (both employed and unemployed) to compare to the number of complaints received by DFEH. The number and composition of the civilian work force changed in various ways, of course, between 1997 and 2008, but not likely to such an extent as to have a meaningful impact on our estimates of complaint rates. We took the average number of complaints filed per year during the study period, and compared it to the number of persons in the civilian work force who were employed. We utilized the employed sector of the workforce as the denominator because the overwhelming proportion of complaints are filed by current or terminated employees, as opposed to those looking for work. The overall complaint rate across all sectors of the workforce during the study period was 1.07 complaints per year per 1,000 employed workers[76]

Table 11
Complaint Rate per 1,000 Employed in Workforce
Race, Color or National Origin Complaints Only
1997-2008

Complainant's Race/Ethnicity	Male	Female	Total
Caucasian	0.08	0.08	0.08
African American	2.54	2.15	2.34
Native American	0.44	0.44	0.44
Asian Pacific Islander	0.26	0.25	0.26
Hispanic (see text)	0.13	0.10	0.12

Plainly, African Americans file race discrimination complaints at a much greater rate than other groups. While high in comparison to race discrimination complaints from members of other ethnic groups, the complaint rates for African Americans are somewhat less than the complaint rate for disability discrimination from persons with disabilities, as we discuss in the next section. Finally,regarding the ethnic category "Hispanic," it is important to note that the

76 For consistency, we utilize the same 2005-2007 census data, which yields a civilian employed workforce during the period of 16,574,085. For comparison, the mean overall employed workforce for the period 1997-2008 reported by the California Employment Development Department was 16,193,329. Data available at www.labormarketinfo.edd.ca.gov. There were 212,144 complaints filed during the 12 year study period, or an average of 17679. Dividing the annual number of complaints by the employed workforce yields the complaint rate per employee per year.

Census Bureau and DFEH categorize race or ethnicity differently. The Census treats the "Hispanic" category separately from race, whereas DFEH uses an exclusive categorization system as above, plus Native American and Other/Unknown. This means that the numbers for Hispanic employees and complaints by Hispanics are not strictly comparable. We nevertheless present the numbers above, along with this caveat.

3. Data on Prevalence

As noted earlier, complaint rates are a function not only of the "true" rate of discrimination, but also of the propensity of particular groups to seek redress from federal or state agencies. We have no evidence regarding the latter, but we do have considerable evidence on the prevalence of biases and stereotypes that may be likely to lead to discrimination on the basis of race or ethnicity. Obviously, these biases, stereotypes or prejudices do not automatically lead to discriminatory behavior or decisions. But over large numbers of individuals and situations, we would be surprised to discover that the patterns of relative prevalence of discrimination are widely divergent from the patterns of biases and stereotypes.

There is an enormous amount of data bearing on the prevalence of discrimination in labor markets and workplaces. We do not summarize it here. Rather, we report data from two sources: (1) the General Social Survey conducted for many years by the National Opinion Research Center; and (2) data collected from more than 2 million subjects through an on-line research project at Harvard University. People of any perceived race can be the subject of both prejudice and discrimination on the basis of race by people of any other race. Table 12[77] below summarizes data from the General Social Survey regarding attitudes of White respondents regarding persons of other racial and ethnic groups. The samples of respondents of other races in the survey data were too small to permit similar analysis as to the attitudes of members of these groups.

Table 12
White Attitudes Toward Ethnicities

Question	Negative re Whites	Negative re Blacks	Negative re Hispanics	Negative re Asians
"Do people in [group] tend to be hard-working or lazy?" [1-7 scale, 5-7 (lazy) coded as negative]	12.1% (+/- 1.04)	32.4% (+/- 1.50)	22.9% (+/- 1.32)	10.8% (+/- 0.99)
"Do people in [group] tend to be intelligent or unintelligent?" [1-7 scale, 5-7 (unintelligent) coded as negative]	7.9% (+/- 0.92)	14.8% (+/- 1.14)	23.3% (+/- 1.33)	9.3% (+/- 0.92)
"How close/warm do you feel toward [group]?" [1-7 scale, 5-7 (not close at all) coded as negative]	2.1% (+/- 0.45)	11.1% (+/- 0.98)	8.4% (+/- 0.60)	7.4% (+/- 0.57)

77 Data reported are for the most recent sample in which the question was asked. Some might argue that Californians are different from the national average. However, combining data from all GSS samples since 1999, and comparing the Pacific Region (California is not separated) to the rest of the country, including the South, attitudes are significantly different (at the .05 level) as to only three questions. In each case, White Californians are (1) slightly less negative as to Blacks regarding the hardworking/lazy question (30% of Californians negative vs. 34.4% of the remainder of the country); (2) slightly less negative as to Blacks regarding the intelligence of Blacks (14.4% of Californians negative vs. 18% of the remainder of the country; (3) significantly less negative than the rest of the country as to the intelligence of Asians (4.7% vs. 10.1%).

As noted earlier, the great majority of scientists believe that under many conditions discriminatory behavior will be the product of both explicit and implicit attitudes and stereotypes. A national collaboration of scientists has for several years collected Implicit Association Test (IAT) data on both explicit and implicit attitudes by means of an interactive web site. Between 2000 and 2006, they administered 2,575,535 such tests, 85% of them from Americans.[78] All groups except Blacks express a general explicit preference for Whites over Blacks when asked to describe their attitude on a 5 point scale from "I strongly prefer European Americans to African Americans" to "I strongly prefer African Americans to European Americans." Whites vs. Black implicit preferences are much stronger.

A standard measure of the size of an effect, rather than just its statistical significance, is the "Cohen's *d*" statistic or score. The convention in the social sciences is to regard a Cohen's *d* score of .2 as *weak*, a score of .5 as *moderate*, and a score of .8 as *strong.* As indicated below (Table 13[79]), the degree of implicit preference for Whites is much stronger for all groups, and "strong" for *all* groups except Black and Multiracial.

Table 13
Explicit and Implicit Attitudes toward Whites and Blacks
Project Implicit Data

Subjects	Explicit Preference for White over Black (5 point scale)	Implicit Preference for White over Black (IAT)
All subjects	.36	.86
All U.S. subjects	.36	.86
American Indian	.30	.79
Asian	.44	.88
Black	-.93	-.05
Hispanic	.22	.79
White	.55	1.00
Multiracial	.07	.56
Other	.16	.70
People in 20's	.34	.88
People 60+	.60	.98
Men	.48	.93
Women	.26	.79

These data on explicit and implicit attitudes do not by themselves establish anything about a "true" prevalence of discrimination. But the relatively high rates of negative attitudes toward African Americans, in particular, are certainly consistent with the significantly higher complaint rate among African Americans alleging racial discrimination.

E. Disability

1. Specific Disabilities

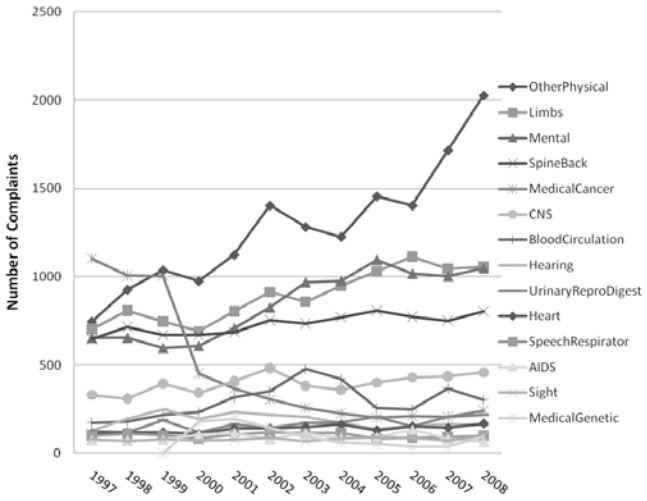
Within the allegations of discrimination based on disability, the largest single fraction (22%) was identified as "other" disabilities. Leaving these allegations aside, the allegations based on mental

78 Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 European Review of Social Psychology 36 (2007).

79 *Id.*, Table 4, p.13

disability accounted for 19% of the allegations, with disabilities related to limb problems and spinal/back problems accounting for 20% and 16%, respectively. Figure 6 describes the numbers of allegations regarding discrimination on the basis of specific disabilities.

Figure 6
Allegations Regarding Specific Types of Disabilities
1997-2008



The largest increases over the study period (aside from the dramatic 171% increase in allegations regarding "other" disabilities) were in allegations of discrimination on the basis of mental disability (up 60%), disabilities involving limbs or heart (each up 50%), blood or circulatory problems (up 75%), and the urinary, reproductive or digestive systems (up 74%). The most dramatic decline was in allegations of discrimination associated with cancer (down 78%), but these accounted for only 10% of the disability discrimination allegations (not including "other").

2. Nature of Alleged Discrimination

The DFEH data contains one category of alleged act (failure to accommodate), which is used only in relation to disability discrimination complaints. However, only 22% of complaints alleging disability discrimination make this specific allegation. The other categories of alleged discriminatory acts are quite similar to those in complaints on other bases, with allegations regarding terminations (37%) and harassment (22%) being the most frequent other allegations.

3. Complaint Rates

The Census Bureau's survey of the population includes a question about disability and attachment to the labor force. By the Census Bureau's definition[80], there were 974,149 Californians with a disability who were in the labor force (employed or unemployed). Whether they were disabled (or perceived as such) under the provisions of the FEHA is probably impossible to assess. During the 12 year study period, DFEH received 54,379 complaints alleging discrimination on the basis of mental or physical disability. Using the same method of exposition as above, and assuming the comparability of disability for Census and FEHA purposes, the complaint rate for people with disabilities during the study period was 12-year average of the odds that a given person with a disability complaint will file a disability discrimination complaint in an average year was 4.65 per 1,000 people in the workforce per year.

4. Data on Prevalence

As noted, the complaint rates estimated above are sensitive to differences in the definitions of disability and thus difficult to compare with, for example, race discrimination complaint rates. By any measure, however, the complaint rate is significant. And, as with race discrimination, it parallels to some extent the prevalence of attitudes and stereotypes regarding people with disabilities that may play out in the labor market or the workplace. There is evidence from a wide variety of studies of the prevalence of negative attitudes and unfavorable stereotypes regarding people with disabilities.[81] In addition, the same large scale study by scholars associated with Project Implicit at Harvard revealed very strong implicit preferences and moderate to strong explicit preferences disfavoring people with disabilities. Indeed, Professor Nosek and his co-authors observe that:

> Preference for people without disabilities compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains: 76% of the sample showed a pro-abled implicit preference, while 9% showed a pro-disabled preference. Implicit and explicit responses were weakly positively related. The relative negativity towards disabled people was evident across genders, ethnicities, age groups, and political orientations.[82]

If discrimination is highly correlated with explicit and implicit preferences, then we expect a very high complaint rate from persons with disabilities, all other factors being equal.

F. Sex Discrimination

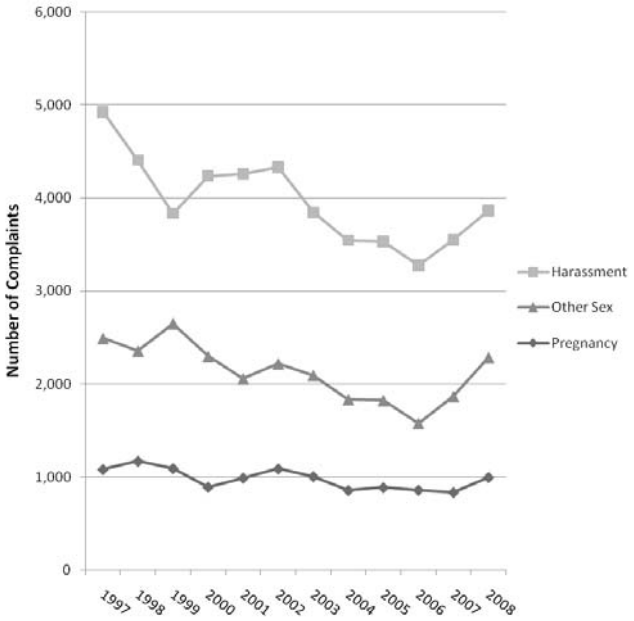
As noted earlier, the most common basis of discrimination during the study period was discrimination based on sex, although such allegations declined significantly over the study period and by 2008 were similar in number to allegations based on disability and race or color. The percentage of complaints alleging sex discrimination fell from 44% in 1997 to 35% in 2008. As noted earlier, sex discrimination is coded by DFEH into three categories: sexual harassment, pregnancy discrimination, and "other". Sexual harassment cases accounted for 56% of the total, pregnancy discrimination 14% and the 30% remaining classified as "other." Of the general, "other" category of sex discrimination complaints, the alleged acts complained of were similar to other bases of discrimination, with 57% involving terminations. These proportions remained remarkably constant over the study period. The decline in the number of sex discrimination complaints over the study period did not include a significant decline in pregnancy discrimination complaints, as indicated in Figure 7.

80 The ACS survey asks: "Because of a physical, mental, or emotional condition lasting 6 months or more, does this person have any difficulty in doing any of the following activities: a. Going outside the home alone to shop or visit a doctor's office? b. Working at a job or business?" American Community Survey questionnaire, available at http://www.census.gov/acs/www/SBasics/SQuest/SQuest1.htm.

81 See, for example, studies summarized at H. L. Brostrand, *Tilting at Windmills: Changing Attitudes toward People with Disabilities*, 72 Journal of Rehabilitation 4, 4-5 (2006) and those referenced by Nosek et al, note 81, at 18.

82 Nosek et al., note 78, at 19.

Figure 7
Sex Discrimination Cases by Type
1997-2008



Of all complaints alleging some form of discrimination based on sex, 18% were filed by men. As between men and women, the proportions of sex discrimination complaints specifically alleging sexual harassment were quite similar (57% for men, 59% for women). There were also significant racial differences in allegations of sex discrimination and differences in the gender mix with those filing sex discrimination allegations, as indicated in Table 14.

Table 14
Percentages of Complainants Including Sex Discrimination Allegations, by Ethnicity 1997-2008

Complainant's Race/ Ethnicity	All	Men	Women	Ratio (F/M)
African American	25.9	13.8	36.6	2.6
Hispanic	38.1	14.7	57.0	3.9
Caucasian	44.1	19.4	59.1	3.0
Native American	39.2	15.5	54.4	3.5
Asian P.I.	32.6	11.6	48.5	4.2

The differences among sex discrimination complaints within ethnic groups may be affected by many things, including occupational and industry distributions of employees.

1. Sex Discrimination Complaint Rates

Sex discrimination complaints constitute a significant fraction of all complaints filed with DFEH. The primary reason, of course, is that the proportion of the workforce that is likely to be subjected to sex discrimination is much higher: women, and much less commonly, men. Table 15 provides the annual complaint rate for men and women in the various ethnic groups over the course of the study period.

Table 15
Complaint Rate per 1,000 Employed in Workforce, Sex Discrimination Complaints Only 1997-2008

Complainant's Race/Ethnicity	Male	Female	Total
White	0.09	0.56	0.30
African American	0.48	1.35	0.93
Native American	0.15	0.89	0.50
Asian Pacific Islander	0.05	0.29	0.17
Hispanic*	0.14	0.95	0.47

As expected, the rate of sex discrimination complaints is dramatically higher among women, but also varies significantly by race.

2. Data on Prevalence

"It is much better for everyone involved if the man is the achiever outside the home and the woman takes care of the home and family." As late as 2006, 40.8 % of respondents in the General Social Survey either strongly agreed (9%) or agreed (31.8%) with this statement. Evidence from studies of workplace attitudes and performance evaluations indicate that the role preferences also extend to the workplace, with women being seen as less suitable for management positions.[83] Discrimination-relevant attitudes toward gender appear to be less a matter of general preference than a preference for "role congruity"[84]. As in many other cases, implicit attitudes can be even stronger than those revealed in surveys, as indicated in Table 16.[85]

Table 16
Explicit and Implicit Attitudes toward Women, Family and Career Project Implicit Data

Subjects	Explicitly associate women with family, men with career (7 point scale)	Implicitly associate women with family, men with career (IAT)
All subjects	.89	1.10
All U.S. subjects	.90	1.13
American Indian	.76	1.06
Asian	.88	.97
Black	.87	1.19
Hispanic	.84	1.06
White	.91	1.14
Multiracial	.80	1.06
Other	.78	1.03
People in 20's	.93	1.14
People 60+	.79	1.36
Men	.95	.94
Women	.87	1.19

Discrimination on the basis of sex can take a form analogous to discrimination based on other personal characteristics – discriminatory failures to hire or promote, unwarranted terminations,

83 See, e.g., Karen L. Lyness & Madeline E. Heilman, *When Fit is Fundamental: Performance Evaluations and Promotions of Upper-Level Female and Male Managers*, 91 Journal of Applied Psychology 777 (2006).

84 Alice Eagly and Steven J. Karau, *Role Congruity Theory of Prejudice towards Women Leaders*, 109 Psychological Review 584 (2002).

85 Explicit question: How strongly do you associate career and family with males and females? (Participants respond separately to career and family) 1 Strongly female, 2 Moderately female, 3 Slightly female, 4 Neither female nor male, 5 Slightly male, 6 Moderately male, 7 Strongly Male

and the like. It can also take the form of sexual harassment, which may share with the harassment of members of other protected categories a motive to oppress or denigrate as well as a sexual motive. In the General Social Surveys of 2002 and 2006, 2.1% of men and 5.2% of women reported that they had been sexually harassed in the past 12 months.[86] Assuming these were the experience rates in California during the same period, if all of those reporting having experienced sexual harassment had filed a claim with DFEH, the result would have been more than 200,000 complaints from men and more than 400,000 complaints from women,[87] in each case, more than 300 times the number who actually did file sexual harassment complaints with DFEH.[88]

G. Sexual Orientation

During the study period, DFEH received 6080 complaints alleging discrimination on the basis of sexual orientation, a protected category that was added to the FEHA effective at the beginning of 2000. The number of complaints, though a small proportion (under 3%) of the complaints received by DFEH, has grown fairly steadily since 2000, rising from 457 complaints in 2000 to 820 complaints in 2008. 65% of these claims were filed by men and 48% by Whites. In 73% of sexual orientation complaints, the complainant also alleged discrimination on the basis of sex. We do not have consistently reliable data about sexual orientation of persons in the workforce and thus cannot reliably estimate a complaint rate.

V. RESPONDENTS: WHO IS ALLEGED TO HAVE DISCRIMINATED?

There are many reasons to believe that employment discrimination is not evenly distributed across employers, regardless of location, industry, or size, or that employees in these FEHA-protected categories will not be equally likely to complain.

A. Industries and Types of Businesses

Employers in different industries receive widely varying numbers of complaints. DFEH collects information regarding the industry in categories from a detailed but now little-used categorization system, the Standard Industrial Classification (SIC) system. In order to examine the number of complaints regarding employers in particular industries, we converted the DFEH codes to a now more standard coding system, the North American Industry Classification (NAICS) system, which is utilized by the Census, from which we can derive the number of employees in various categories by industry.

Unfortunately, it appears that DFEH personnel use one code, "Miscellaneous Business Services," as a kind of catch-all, perhaps because these data are never used for any operational purpose. During the study period more than half of the complaints were so categorized, leading to a dramatic overstatement of the complaint rate (more than 10 per 1000 employees) for the industries in this SIC/NAICS classification, and a concomitant understatement of the complaint rate in the industries as to which respondents should have properly been coded. Nevertheless, there may be significant information in the complaint rate information for other industries if we assume that the complainants in all industries were misclassified at the same rates. Because we have no way of verifying this assumption, these data should be relied upon with caution. Moreover, because of the very large number of misclassified respondents, information about complaint rates by industry should be regarded in relative terms only, and not as an estimate of the actual complaint rate (the overall average of which is, as noted above, approximately 1 complaint per 1,000 employees per year). Subject to these caveats, Table 17 provides the reported complaint rates for industries other than "Miscellaneous Business Services" both for the industry as a whole and for particular kinds of complaints from groups of employees who might be considered "at risk" of particular kinds of discrimination.

Subject to the caveats above, some patterns in this data merit comment. First, government ("Public Administration") consistently has the highest complaint rate. Again, this may be an artifact of the ease with which respondents in this category can be identified as other than "Miscellaneous Business Services." The complaint rates for "Utilities" and "Educational Services" are also among the highest in several categories, perhaps as the result of the same phenomenon. Of the industries dominated by the private sector, "Retail Trade" and the relatively small "Mining" industry have the highest overall complaint rate. "Mining" reports lower complaint rates in the specific areas tabulated because the kinds of discrimination tabulated here are less common (disability discrimination is the most common basis in that industry). Among other private sector industries, "Manufacturing" has a very high complaint rate for African Americans filing race discrimination complaints.

Although the existing administrative data, even when combined with census data, is not terribly informative as to the distribution of discrimination among industries, DFEH has access to privileged information that would enable it to examine patterns of employment for "outlier" firms and industries. Our understanding is that DFEH does receive information from the EEOC regarding the composition of the workforces of employers in California with 100 or more employees, which the EEOC collects by means of the mandatory EEO-1 form that such employers are required to file with the federal government. This information is confidential and not available to either the public or researchers, but is available to both the EEOC and to DFEH. Some researchers have advocated utilizing the EEO-1 data on the demographics of firm workforces to determine whether some firms are "outliers" with regard to the hiring or promotion of members of protected categories, after controlling for such things as industry and region.[89] Indeed, just such a study was done for DFEH in November, 2001, identifying locations and industries suggested for investigation.[90] DFEH could also utilize the information in its administrative enforcement database to determine whether there are some firms or some industries generating an unexpectedly large number of complaints, which might lead DFEH to prioritize some of its resources where they seem to be the most needed. This would require DFEH, however, to be able to identify firms with precision, by means of a unique identifier of some kind for the firm.

86 The 95% confidence intervals are 1.4%-2.8% for men and 4.3%-6.1% for women.

87 According to Census Bureau data, the mean numbers of men and women employed in California in 2003 and 2006 was 9,622,000 men and 7,802,000 women.

88 The average number of men and women filing complaints with sexual harassment as the first or primary basis in 2002 and 2006 was 435 (men) and 1612 (women).

89 Alfred W. Blumrosen, et al, Likely Investigative Subjects Identified Through "Outlier" Analysis of EEO-1 Data, Preliminary Report to the EEOC, January 13, 2000, on file with author.

90 Mark Bendick, Jr. & John J. Miller, Likely Investigative Subjects Identified Through Analysis Of EE0-1 Data: A Report to the California Department of Fair Employment and Housing under Contract 00-3020, November, 2001. On file with authors.

Table 17
Complaints per 1,000 Employed in Industry Overall and Specific Bases and Complainants, 2003-2007

NAICS Code and Industry Group	Overall Rate	Employees	Women: Sex Discrimination Complaints	African American: Race/Color Complaints	Asian P.I.: Race/Color Complaints	Caucasian: Race/Color Complaints	Hispanic: Race/Color Complaints	Over 40: Age Complaints
11 Agriculture	0.40	309,410	0.34	0.00	0.04	0.04	0.07	0.21
21 Mining	1.29	21,073	0.00	0.00	0.00	0.08	0.00	0.35
22 Utilites	0.48	110,359	0.49	1.78	0.74	0.01	0.22	0.14
23 Construction	0.11	1,393,402	0.25	0.51	0.01	0.01	0.04	0.03
31-33 Manufacturing	0.42	1,912,447	0.29	1.26	0.11	0.04	0.12	0.16
42 Wholesale Trade	0.13	602,806	0.09	0.60	0.02	0.01	0.03	0.05
44-45 Retail Trade	0.72	1,980,492	0.53	1.29	0.14	0.06	0.17	0.28
48-49 Transport	0.43	658,718	0.34	0.89	0.08	0.04	0.09	0.12
51 Information	0.37	534,528	0.22	0.61	0.09	0.03	0.07	0.12
52 Finance and Insurance	0.37	797,586	0.21	0.72	0.10	0.02	0.09	0.15
53 Real Estate	0.22	507,914	0.17	0.70	0.06	0.01	0.07	0.06
54 Professional	0.04	1,310,917	0.03	0.14	0.01	0.00	0.02	0.01
61 Educational	0.39	1,467,322	0.12	0.99	0.15	0.03	0.16	0.15
62 Healthcare	0.47	1,805,604	0.17	0.65	0.13	0.04	0.13	0.12
71 Art, Entertainment	0.31	419,477	0.20	0.50	0.08	0.02	0.14	0.13
72 Accomodation	0.17	1,153,860	0.11	0.55	0.07	0.02	0.04	0.12
81 Other Services	0.36	908,134	0.21	0.79	0.07	0.04	0.09	0.11
92 Public Administration	1.40	750,878	0.63	2.01	0.36	0.12	0.68	0.37

B. Repeat Respondents

Firms vary individually, as well as by industry, workforce composition, and size. Extracting data at the firm level from the DFEH administrative data is not easy, for reasons explained above. Once we recoded all of the respondents by hand for complaints filed during the five year period, 2003-2007, we could determine the number of complaints filed against each respondent. Not surprisingly, as a general matter, more complaints are filed against larger employers. Accurate determination of complaint rates as to particular employers requires knowing the number of employees employed in California, which we were not able to determine for the relevant time period from official sources (the California Employment Development Department). Data on the largest employers at the county level is somewhat easier to acquire because it is published occasionally by EDD. By comparing these numbers to the number of complaints made by employees of these firms in the county, we could calculate a firm level complaint rate for a particular county. Using the data for Los Angeles County, we found that the complaint rate during the period 2003-2007 varied dramatically across firms. No doubt some of these differences flow from different workforce compositions. Among large employers in the county, the lowest complaint rate was for a large university, the highest for a large city government. One employer, a restaurant/entertainment chain with 5 locations in the county, received as many complaints as companies with 12-15,000 employees.

Our purpose here is not to draw attention to any particular employer, but to the fact that the enforcement system apparently ignores important and readily available data on complaint rates.

Although DFEH is the repository of data on complaints filed with the agency and its sister department, the Employee Development Department (EDD) has data on firm employment numbers, the state has never utilized the available data to examine whether particular employers are, at least by allegation, "repeat offenders." For the same reason that other law enforcement agencies track such data for the sake of efficiently allocating resources and developing efforts at prevention, DFEH should do the same thing. Doing so would require improving the identification of respondents in the DFEH administrative data and making the necessary arrangements with EDD, and, of course, having the resources to analyze the data.

VI. WHICH PYRAMID? WHO GETS A LAWYER?

As we explained at the outset, enforcement of the FEHA takes place through two, almost entirely separate, claims processing systems: the administrative system, including DFEH and the Fair Employment and Housing Commission, and the legal and civil litigation system. What happens to complaints for violation of the FEHA depends critically on through which of these two dispute resolution pyramids a claim proceeds.

Procedurally, the choice is made by the complainant, who can opt out of the DFEH administrative system at any point by requesting a RTS letter, upon receipt of which the DFEH immediately stops investigating or trying to resolve the complaint. The overwhelming majority of these decisions are made immediately, with the RTS letter being requested within a week of the filing of the complaint. In theory, the decision is made by the complainant. For the overwhelming majority of complainants who wish to utilize the civil litigation process and are unwilling or unable to proceed on their own, however, the ultimate decision is made by lawyers and the market for legal services. Respondents, of course, may also decide to proceed with or without counsel, but their choice has no effect on which system will process the complaint. We discuss issues related to counsel for respondents in Section IX, below, in the context of the civil litigation system, where they are much more likely to be involved.

A. Determining Which Complainants Obtain Assistance of Counsel

For purposes of our analysis we used the issuance of a RTS letter within 7 days of the filing of the complaint as a likely, if imperfect, indicator of the involvement of an attorney. While it is possible that complainants seek a RTS letter immediately upon filing a complaint, either in the general hope that they will be able to interest an attorney, or with plans to represent themselves, we believe these are sufficiently rare occurrences to make the issuance of an immediate RTS letter a reasonable indicator of attorney involvement. First, a review of current data on outcomes of initial intake interviews (July through December, 2009) shows that of 4546 complainants who were interviewed, the interview concluded with immediate issuance of an RTS letter in only 22 cases.[91] Second, both before and after DFEH automated the issuance of RTS letters, DFEH policy, procedures and publications strongly discouraged complainants from seeking RTS letters without the advice of an attorney.[92] Third, DFEH consultants we interviewed reported that complainants very rarely requested RTS letters at the initial interview.[93] Fourth, it is possible that some consultants might issue RTS letters as a kind of "consolation prize" for cases they would otherwise reject, but we doubt this occurs very often. Consultants do not appear particularly reticent to reject cases for investigation and to close them on that basis. During the study period, of the cases opened and closed in the first week, 18% were rejected for investigation. Of cases opened and closed on the same day, the ratio of those closed by issuance of an RTS letter and those simply rejected for investigation has not changed significantly, even after the issuance of RTS letters was automated and put on the web.[94] Finally, our examination of events subsequent to the issuance of a sample of 400 immediate RTS letters found no case in which a complainant was self-represented. For all these reasons, we believe that the issuance of an immediate RTS letter is a valid indication of the involvement of an attorney at the inception of a complaint.

91 DFEH management report "Timeslot Statistics" for July, 2009 through December, 2009.

92 For example, the DFEH website and notices given to complainants advise as follows: "The decision to request such an authorization is a critical one. If you choose to request a "right-to-sue notice" now, the Department will not investigate your complaint. Obtaining a "right-to-sue" and waiving the Department's investigation is only advisable if you have been instructed to do so by an attorney."

93 Consultant 5793 estimated that this happened about 5 times per year. Consultant 4013 put the number at once in 2 months.

94 E.g., the ratio of RTS to simple administrative rejection closings was 85:15 in 1997. In 2008, it was 86:14.

B. Basic Economics of Employment Discrimination Plaintiffs' Practice

Whether a complainant obtains the help of a lawyer and enters the bottom of the legal dispute pyramid depends both on the complainant and on the market for legal services. The market for legal services varies by region and is itself segmented in various ways. Lawyers decide which cases to accept based on a number of factors, the relative importance of which will vary by lawyer. These factors may include any or all of the following: the possible damages that may be obtained, the factual strength of the case, the degree to which the lawyer perceives the client as a "good" client, and so on. The potential settlement or verdict value of a case, which bears directly on the lawyer's anticipated fee, is in turn related to how jurors in the jurisdiction may respond to different kinds of cases. Although the great majority of cases settle, jury verdicts in similar cases help establish the framework for settlements

The overwhelming majority of lawyers representing employees in discrimination matters are private attorneys whose practical ability to do so depends entirely on attorney fees contingent on their either settling or winning cases for clients.[95] Although the FEHA contains a provision for the award of attorneys' fees for successful plaintiffs, as in all civil cases the overwhelming majority of FEHA cases settle, and settle for a fixed sum, to be allocated between the plaintiff and his or her attorney pursuant whatever agreement they have made. The responses to our survey of attorneys, as well as our structured interviews with attorneys, indicated that there is a fairly standard "market rate" percentage, between 33% and 45% of the employee's recovery, depending on the stage at which the case is resolved.

We also asked both our interviewees and our survey respondents[96] about the minimum size of a case that they would consider accepting for representation and the percentage of potential cases that they accepted for representation.[97] The median minimum case size these respondents said they would accept was $50,000 and the median percentages of cases accepted that was reported was 10%. We also asked about their opinion as to the minimum size of a matter below which an employee would be unlikely to obtain *any* attorney on a non-*pro bono* basis. Here again, the median response was $50,000. These numbers are entirely consistent with what we learned from our structured interviews with plaintiffs' lawyers.

There appear to be several "tiers" in the legal market for employment discrimination cases, with a handful of elite plaintiffs' firms accepting non-*pro bono* cases only if the expected recovery exceeds $250,000 and rejecting more than 95% of potential client. There are also lawyers who accept smaller cases and a larger percentage of potential clients. Our survey sample size is neither large enough nor randomly drawn and thus cannot support conclusions about the contours of this distribution. However, we did interview lawyers at various points along this spectrum.

95 Although an exhaustive search was beyond our resources, we were able to identify only 89 complaints in which the complainant was represented by a legal aid or similar agency. Complaints as to which these agencies rendered only pro per assistance and did not record their identities as representatives for the complainant would not be included.

96 The survey question was: "With regard to FEHA claims, with the exception of pro bono or unusual cases, what is the approximate minimal size of matter (based on total damages or potential settlement value) that YOUR FIRM is likely to accept for representation?"

97 The survey question was "Approximately what percentage of the potential clients with employment discrimination claims who contact you do you accept for representation?"

C. Factors Affecting Attorney Acceptance of Cases

Our statistical analysis of the determinants of the circumstances associated with whether complainants enter the legal or administrative "pyramids" examines all cases, without regard to any information about particular lawyers or tier of practice. What we did find are fairly dramatic differences in the types of complainants and complainants whose disputes are resolved primarily through DFEH and those resolved through the legal system. For example, 68% of white women who brought complaints primarily based on sexual harassment during our study period were able to obtain lawyers, using the indicator of a RTS letter being issued within a week of the filing of the complaint. By contrast, only 25% of African-American men who brought complaints primarily alleging that they were terminated because of race or color were able to obtain lawyers, using the same indicator. Of course there are many possible interactions among the various factors that might account for whether employment discrimination complainants are able to obtain the assistance of a lawyer. In order to address the effects one factor, one must control for the effects of others. Fortunately, we have enough data and the statistical tools to be able to do this.

We utilized a statistical technique called sequential logistic regression to examine the effects on complaint outcomes of various characteristics of the complaint, the complainant, the respondent and region. We examined complaints at each level of the dispute pyramid, starting with those complaints in which the complainant opted out of the DFEH administrative system immediately, by seeking a RTS letter. Based on our interviews, we believe that this is a useful approximation to knowing whether in most cases the complainant has either retained an attorney or been advised by an attorney both to file the complaint and immediately seek a RTS letter, thereby both cutting off the DFEH investigation and allowing the case to be pursued through civil litigation.

We present the results of our logistic regression in terms of odds ratios, in this case the odds that a particular complaint will be followed within 7 days by a RTS letter (under our assumption, the odds that the complainant has a lawyer, Table 18[98]). These odds are calculated controlling for the effects of all of the other variables in the regression.

These include the sex and race of the complainant, the complainant's occupation, and the industry in which the respondent operates, the protected category involved, the nature of the acts alleged to constitute discrimination, the region in which the complaint was filed, and a few characteristics of the census tract in which the complainant resided. In each case, the odds are calculated to control for the possible influence of the other variables listed.

Our statistical analysis revealed several striking things about the availability of legal counsel for particular complaints and complainants, extracted from the complete logit model. Controlling for a wide range of possible confounding variables, when it comes to obtaining an attorney for an employment discrimination case:

- African Americans have half the chance of Whites.
- All other ethnic groups also have a much lower chance than Whites.
- Women have 80% the chance of men.
- Laborers and technicians have one-half to two-thirds the chance of clerical workers.
- Compared to government workers, workers in the construction and wholesale trade industries have only 16% the chance of obtaining a lawyer.
- Compared to termination cases, complaints regarding discriminatory working conditions have only 28% the chance, while demotion, employee and family care, harassment and failure to reinstate cases have more than twice the chance.
- Compared to age discrimination cases, sex and marital status discrimination have an 80% and 75% greater chance, respectively.

Table 18
Odds of Obtaining at Attorney (Selected Variables)
(As Indicated by Immediate Right to Sue Letter)

Variable	Comparison	Odds Ratio	95% Low	95% High
Female	Male	0.83	0.85	0.80
African Other Complainant	Caucasian	0.40	0.49	0.33
African American Complainant	Caucasian	0.49	0.51	0.47
Asian Pacific Islander Complainant	Caucasian	0.57	0.60	0.54
Hispanic Complainant	Caucasian	0.62	0.64	0.60
Native American Complainant	Caucasian	0.67	0.76	0.58
Laborer	Clerical	0.54	0.57	0.52
Technician	Clerical	0.68	0.73	0.64
medium msa region	small msa	0.81	0.87	0.75
large msa region	small msa	1.21	1.30	1.13
Construction	Government	0.16	0.21	0.12
Wholesale Trade	Government	0.16	0.21	0.12
Work Conditions	Termination	0.28	0.30	0.27
Unequal Pay	Termination	0.94	1.00	0.87
Failure to Hire	Termination	1.24	1.31	1.17
Denied Leave	Termination	1.49	1.66	1.33
Denied Promotion	Termination	1.49	1.57	1.42
Refusal to Accommodate	Termination	1.77	1.85	1.69
Failure to Reinstate	Termination	1.89	2.21	1.61
Employer Harassment	Termination	2.17	2.23	2.11
Denied Family Care	Termination	2.66	2.89	2.44
Demotion	Termination	3.17	3.39	2.97
Basis - Family Medical Care Leave	Basis-Age	0.48	0.52	0.44
Basis - Religion	Basis-Age	1.01	1.09	0.94
Basis - Sexual Orientation	Basis-Age	1.17	1.26	1.08
Basis - Disability	Basis-Age	1.45	1.50	1.40
Basis - Race/Color	Basis-Age	1.57	1.63	1.52
Basis - National Origin	Basis-Age	1.68	1.75	1.61
Basis- Marital Status	Basis-Age	1.75	1.93	1.59
Basis - Sex	Basis-Age	1.82	1.89	1.77

98 Our sequential logistic regression calculates the odds of remaining within the DFEH system and progressing to the next step in the sequence. The odds of obtaining a lawyer are thus the inverse of the odds presented in our model.

In order to separate out so-called "reverse" discrimination in the case of race and sex discrimination claims, we examined in separate sequential logistic regressions the effect of complainant gender in sex discrimination cases and the effect of being White in race discrimination cases, controlling for the same other factors. We found that Whites with race discrimination claims were less likely (odds ratio, 0.84), while men with sex discrimination cases (which include male-male discrimination) were more likely than women to obtain counsel (odds ratio, 1.14).

In the sections that follow, we examine in greater detail some of the factors that seem to have a significant impact on whether a complainant obtains a lawyer.

1. Assessing the Effects of Multiple Causes

In interpreting the logistic regression model it is important to keep in mind that the model identifies the isolated effects of particular variables. But most people tend to think about cases in terms of prototypical cases, which necessarily involve more factors about a particular complaint. It is difficult to think about a race discrimination case without some notion of the race of the complainant, for example. We tend not to think of race discrimination cases as being filed by Whites,[99] even though there were 7,216 such complaints during our study period. Similarly, there were 14,521 sex discrimination complaints filed by men.

This difference, between the isolated effects of a single variable and conventional thinking about complainants may explain what would otherwise be contradictory findings in the odds ratios in Table 19. The regression model indicates that race discrimination cases are less likely to involve attorneys than sex or marital status cases, but significantly more likely than age discrimination cases. At the same time, the odds of non-Whites having a lawyer are significantly lower than Whites. We conjectured that this might be explained by the interaction between the nature of the claim and the race of the complainant. African Americans file nearly half (49%) of all race discrimination complaints. Of all racial and ethnic groups who file race discrimination claims, however, only 33% of African Americans are likely to have a lawyer, compared to 45% - 55% for other identified groups. Similarly, women file 82% of all sex discrimination cases, which are among the types of cases most likely to attract lawyers, but complaints filed by women are less likely to attract lawyers, other factors being equal. The apparent inconsistency might be explained, in part, by the fact that in sex discrimination cases men are almost as likely as women to have lawyers. The odds of women obtaining lawyers is thus likely affected by how they fare in this respect in cases not involving sex discrimination, and the odds of African Americans obtaining lawyers affected by cases not involving race discrimination. We looked at these issues in greater detail with a more focused logistic regression.

2. The Effect of Complainant Race on Obtaining Counsel

The apparent racial disparity in access to counsel is striking, especially since the origins of FEHA lie in seeking to end racial discrimination in employment. To explore the reasons for this disparity we hypothesize two confounding factors that might explain the difference. The first hypothesis is that a racial differential in the types of complaints that are filed accounts for differences in access to counsel. If employees of ethnicities other than Caucasian are more likely to file complaints for discrimination based on race, color or national origin, and if these cases are less likely to attract counsel no matter who files them, then we would expect to see an overall racial disparity in access to counsel. The second hypothesis is that non-Caucasian complainants bring cases that are systematically weaker on the facts, and racial disparities in access to counsel can be explained as a function of the case quality. Both of these hypotheses are contrary to the results of the sequential logistic regression, in which national origin and race cases have somewhat higher odds of resulting in an immediate RTS letter than age, religion, CFRA or disability cases. But that analysis is not necessarily dispositive, as it does not test the interaction of race/ethnicity and complaint type. To clarify those findings we examine more directly the response of the legal market to race and national origin cases by exploring the interaction between race and whether claims were made on these bases. and by drawing inferences about case quality (potential merit, assessed early) through a study of how the DFEH processes cases that do not attract counsel.

a) Complainant Race vs. Complaint Alleging Racial Discrimination

The first hypothesis states that the racial disparity in obtaining counsel is due to differential complaint rates, and that the disparity will be minimized when we compare ethnicities filing the same type of complaint. To test this hypothesis we conducted a separate analysis (logistic regression) in which the dependent variable is whether a RTS Letter was issued in 7 days (RTSin7). The key independent variables are the complainant's race/ethnicity and whether the complainant alleged discrimination based upon race, color or national origin. These were modeled in the regression as interactions, in order to account for each combination of race/ethnicity and complaint type. As with the sequential regressions, we controlled for the full set of possibly confounding variables (occupation, industry, sex, region). From the regression we calculated the probability of obtaining a lawyer.

We find no evidence to support the first hypothesis. There is no overall pattern that suggests race or national origin complaints are less likely to attract private counsel than other complaints. Instead we find some variation within groups. African American complainants were more likely to obtain counsel if they filed a discrimination complaint (41%) than if they filed any other complaint (37%) (Table 19 following). The same is not true for any other race/ethnicity. Caucasian complainants were somewhat less likely (42% vs 45%) to obtain counsel[100], as were Asian Pacific Islander complainants (37% vs 41%). For Hispanic and Native American complainants the differences were not significant. This suggests that the difference between race and national origin complaints and other complaints does not account for the very significant racial difference in whether people of color, particularly African-Americans, are able to obtain lawyers.

99 Limiting the logistic regression analysis to claims alleging race, color or national origin discrimination, we found that Whites are 12% less likely than non-Whites to have requested an immediate RTS letter.

100 This pattern persisted in a separate sequential logistic regression study, examining the effect of White/non-White status on obtaining an immediate RTS letter in complaints based on race, color or national origin. Controlling for other factors, Whites were less likely (odds ratio, 0.84) to have done so.

Table 19
Effect of Making Race or National Origin Discrimination Allegation On Probability of Obtaining Lawyer (RTSin7)
By Race/Ethnicity of Complainant 1997-2008

Complainant Race/Ethnicity	Race or National Origin Discrimination Allegations	Other Bases	Net Effect of Race or National Origin Allegations
African American	41%	37%	+4%
African Other	33%	38%	-5%
Hispanic	39%	40%	-1%
Caucasian	42%	45%	-3%
Native American	40%	41%	-1%
Asian Pacific Islander	37%	41%	-4%

b) Effect of Case Quality

The second hypothesis states that the racial disparity in obtaining counsel is due to case quality, that Caucasian complainants bring complaints that are more meritorious or easier to prove than complainants of other ethnicities. We cannot directly measure the intrinsic validity or ease of proof of the cases in the dataset. We do, however, have some indirect measures of what professionals in the field thought about the complaints presented to them at various steps in the process. If lawyers are taking all of the "good" cases at the outset, then – all things being equal -- those that remain for processing in the administrative system should have a uniform early rejection rate. As we explain in greater detail in the next section, the DFEH complaint determination process has an early screening stage. Cases can be accepted for filing but be deemed not to be worthy of investigation, based on the initial interview and evaluation.

Of course, employment discrimination lawyers and DFEH consultants may have quite different standards for what constitutes an "acceptable" case. DFEH accepted for investigation 81% of the complaints it received, compared to the median rate of acceptance of 10% reported by attorney respondents in our on-line survey. But if lawyers and DFEH consultants were applying the same criteria, we should see inconsequential differences in their acceptance rate across many different characteristics of complaints, complainants and respondents. To the degree that we do see differences, we can infer that access to lawyers is driven in part by factors other than case quality. It is important to keep in mind that the two sets of decision makers are not reviewing the exact same set of cases. Those complainants who have obtained counsel and requested RTS letters are, by operational definition, excluded from the population of complaints that reach DFEH for initial review. The subset of cases that the DFEH reviews probably includes those rejected by lawyers, as well as cases in which the complainant did not seek an attorney.

Using our previously discussed sequential logistic regression model, we compared how the two sets of case evaluators—lawyers and DFEH consultants—evaluate relative case quality, controlling for the effects of all the variables in the model. If case quality is a significant factor in the racial disparity of obtaining counsel, we should see no difference in the rates of dismissal by the DFEH. Instead we find significant differences (Table 20). As before, the numbers in the first column represent the odds that a complainant or complaint with that characteristic will be "accepted" by a lawyer. The second column represents the odds that a complaint will be accepted for filing, minus those cases that received RTS letters in the first 7 days. The likelihood that the complaint of an African-American will be accepted for investigation by the DFEH is much higher than a similarly situated Caucasian (1.33:1), just as an African-American complainant is significantly less likely than a Caucasian complainant to obtain counsel (0.49:1). Comparing their chances, we can say that compared to Caucasians, African Americans are 2.73 times more likely to have their cases accepted by DFEH than by a lawyer. This is indirect evidence that case quality does not explain the racial disparity in obtaining a lawyer.

Table 20
Relative Odds of Acceptance by Race:
Lawyers vs. DFEH All Complaint Types,
Full Sequential Logistic Regression, 1997-2008

Complainant Race/ Ethnicity	Compared to	Odds of Lawyer Acceptance (RTSin7)	Odds of DFEH Acceptance for Investigation	Ratio of DFEH to Lawyer Acceptance
African-Other	Caucasian	0.40	1.22	3.04
African-American	Caucasian	0.49	1.33	2.73
Asian Pacific Islander	Caucasian	0.57	1.04	1.84
Hispanic	Caucasian	0.62	1.09	1.76
Native American	Caucasian	0.67	1.10	1.65

c) Other Explanations

Contingency fee lawyers are concerned about the odds of winning. About a third of the employee side attorneys with whom we spoke indicated that they believed that race discrimination cases were harder to win. One lawyer[101] with 44 years of experience in employment discrimination litigation told us that race cases are more difficult "because juries no longer think racism exists." Another lawyer[102] with 25 years of experience who had tried 50 cases to juries offered the opinion that race is the most challenging protected category to litigate, because "people are fed up with people making racial allegations." He went on to say that cases involving discrimination against African American women are the most challenging for plaintiff attorneys, a fact he attributed to the composition of juries. Another attorney[103] attributed the relatively higher difficulty of race discrimination cases because direct evidence like hostile comments is less common: employers are more willing to admit to negative comments in sexual orientation cases because of a general belief that they are not offensive or discriminatory, whereas employer may be less likely to do so in a race discrimination case.

101 Subject 4408

102 Subject 7995

103 Subject 2998

In contrast to our interviewees, of the 31 employee-side attorneys who responded to the question, only one indicated that the fact that a case involved racial discrimination would negatively affect retention of a case, other factors being equal, compared to 17 who said that it would have a positive or very positive effect.[104] On the other hand, these respondents did not generally indicate that *any* basis of the claim would have a negative impact, except in the case of mental disability, as to which 9 attorneys indicated that the nature of the claim would make it less likely for them to accept the case.

It is, of course, possible that employment discrimination lawyers themselves discriminate on the basis of race or national origin in deciding which clients to assist. We have no way of directly testing that proposition.

3. The Role of Occupation and Wage Rates

If we assume that in order to attract counsel a complainant must have expected recoverable damages of at least $15,000 (the amount estimated by the lowest 10% of our survey sample), the implications are straightforward. By a wide margin, the most common basis of a complaint, in both the legal and DFEH complaint pyramids, is termination. While other kinds of damages, including emotional distress damages, are potentially recoverable in FEHA cases, lost wages are the only category of damages that are potentially at issue in every termination case. Lost wage damages are calculated based on what the employee would have earned had he or she not been terminated, minus the wages that the employee received from other post-termination employment. An employee working 40 hours per week at the average minimum wage during the study period of approximately $6.48 per hour[105] would have to lose more than 57 weeks of income to reach $15,000 in lost wage damages. We therefore expect that lower wage employees with employment discrimination claims will have more difficulty attracting counsel. This prediction is borne out, to some extent and with complications, in our model. Table 21 provides the odds that employees in various occupations coded by DFEH will obtain an immediate RTS letter, as compared to clerical workers.

Table 21
Odds of Obtaining Immediate Right to Sue Letter by Occupation
1997-2008

Occupation	Comparison	RTSin7	95% low	95% high
Laborer	Clerical	0.54	0.52	0.57
Government	Clerical	0.66	0.60	0.73
Service	Clerical	0.66	0.64	0.69
Technician	Clerical	0.68	0.64	0.73
Paraprofessional	Clerical	0.84	0.79	0.91
Craft	Clerical	0.86	0.77	0.96
Manager	Clerical	0.89	0.85	0.94
Supervisor	Clerical	0.93	0.86	1.01
Professional	Clerical	0.95	0.92	1.00
Sales	Clerical	1.00	0.95	1.06
Equipment Operator	Clerical	1.03	0.95	1.11

In general, Table 21 is consistent with the proposition that occupation matters to a complainant's ability to obtain counsel. The categories used by DFEH do not easily map onto any set of data about the incomes of employees in these categories, but we certainly expect laborers to have lower wages than equipment operators or professionals, for example. On the other hand, we found that neighborhood variables generally associated with the incomes at the census tract level (median household income, the percentage of residents in the tract with college educations, and the percentage of renters in the tract) did not provide additional explanatory power.

The wages of government employees have a wide distribution. With specific regard to government employees, some of the plaintiffs' counsel we interviewed expressed some reluctance to oppose government in discrimination cases because governmental defendants were less likely to settle, in part because the economics of providing a defense are quite different from those facing private employers. DFEH managers and consultants, on the other hand, expressed no such hesitation in accepting complaints against governmental employers.

4. Region and Urbanization

The DFEH dataset and our sequential logistic regression model permit examination of the effects of many other factors on the ability of complainants to obtain counsel, as indicated by their obtaining an immediate RTS letter. Looking at regional variation tells us something about both the legal market and, perhaps, about differences in practices by plaintiffs counsel in different regions.

First, controlling for all the other factors, being in a large urban area increases the odds that a complainant will obtain counsel. We constructed a variable based on the population of the census-defined "Metropolitan Statistical Area," or MSA, and then determined the appropriate MSA for the complainant. In the model, "large MSA region" means Los Angeles-Riverside-Orange County, San Francisco-Oakland-San Jose, Sacramento-Yolo, and San Diego. Complaints originating from all other MSA's in the state were put in the "medium msa region" variable.[106] The variable "small MSA" actually includes all complainants who did not live in an MSA. Controlling for all the variables in the model, we found that complainants in the most urbanized (large MSA) regions were 21% more likely than residents of non-metropolitan ("small MSA") areas. This is consistent with expectations, given our understanding of the distribution of attorneys specializing in employment discrimination plaintiffs' work.

On the other hand, we found that complainants in the middle range were actually 19% less likely than their counterparts in the less urban parts of the state to obtain an immediate RTS letter. In these areas of the state, our equating the lack of an immediate RTS letter with the absence of counsel may break down. For example, if we compare cases in Los Angeles County to those in Fresno County (without controlling for any other variables), we see a significant disparity in the proportion of complaints in which a RTS letter is issued in the first week. Of the cases closed during our study period, 59% of complaints in Los Angeles County were closed by issuance of a RTS letter in the first week, compared to 21% in Fresno County. The difference may reflect both differences in access to lawyers and regional differences in practice styles. We interviewed some

104 The question was "How would each of the factors below influence the likelihood that you or your firm would accept a FEHA case for representation (assuming the other factors were equal)?" The possible responses were on a 5 point scale from "very positively" to "very negatively."

105 Approximate calculations from California Department of Industrial Relations, Industrial Welfare Commission, "History of California Minimum Wage," available at http://www.dir.ca.gov/Iwc/MinimumWageHistory.htm. Assumes minimum wage for calendar year in which minimum wage was enacted.

106 These were: Bakersfield, Chico-Paradise, Fresno, Merced, Modesto, Redding, Salinas, San Luis Obispo-Atascadero-Paso Robles, Santa Barbara-Santa Maria-Lompoc, Stockton-Lodi, Visalia-Tulare-Porterville, and Yuba City.

plaintiffs' lawyers in non-urban areas who indicated a preference for working within the DFEH administrative system, at least for some period of time, rather than seeking an immediate RTS letter.

As noted, the proportion of complainants obtaining legal assistance at the complaint stage is no doubt dependent to some extent on the availability of counsel. While we do not have complete information as to the distribution of lawyers who accept employment discrimination cases for representation, we did obtain useful surrogate data. The California Employment Lawyers Association (CELA) is a "statewide organization of attorneys representing employees in termination, discrimination and other employment cases,"[107] with approximately 800 members, certainly the largest if not the only such organization in California. CELA was kind enough to provide data as to the cities and zip codes of their membership as of December, 2009. Table 22, below, summarizes the geography of CELA membership.

Table 22
Geographic Distribution of Employee Side Attorneys CELA Membership, December, 2009

Area	Members	%
Los Angeles	319	40.0%
Bay Area / Silicon Valley	250	31.3%
San Diego	60	7.5%
Orange County	58	7.3%
Sacramento Area	34	4.3%
Santa Barbara / Ventura	30	3.8%
Central California	20	2.5%
Inland Empire	15	1.9%
Northern California	12	1.5%
Total	798	100.0%

It is possible, of course, that employment discrimination plaintiffs' lawyers in some areas are less likely to belong to CELA. However, in rough terms, the distribution reflected in Table 22 is consistent with what we learned in interviews with employer side attorneys and insurance counsel. As is obvious from Table 22, employment discrimination plaintiffs' lawyers are heavily concentrated in the urban centers of California.

Bakersfield, which has a workforce of more than 150,000[108] and generated 3727 complaints during our study period, provides a useful contrast. A complainant in Bakersfield would not find a single CELA lawyer in his or her city on the CELA website.[109] Not surprisingly, then, only 20% of those complaints from Bakersfield residents resulted in an immediate RTS letter. Those complainants who stayed in the DFEH administrative process prevailed 22% of the time (somewhat more than the statewide average), and those who obtained monetary benefits received a median of $2,000 (50% less than the statewide median).

107 http://www.cela.org/

108 The American Community Survey in 2006-2008 estimated that there were 151,889 persons over age 16 and in the labor force in Bakersfield.

109 http://www.cela.org/

VII. THE PROCESSING AND RESOLUTION OF COMPLAINTS BY THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

Since 2005, 49% of complaints that did not result in an immediate request for a RTS letter were handled through the DFEH administrative process. Of these, about 9% requested a RTS letter sometime later during the administrative process. In this section, we examine in detail how the complaints that remain with DFEH are processed, and with what results.

A. Overview of the Department of Fair Employment and Housing

Primary responsibility and authority for enforcing FEHA is given to the Department of Fair Employment and Housing (DFEH).[110] DFEH is a located within the State and Consumer Services Agency, and managed by a Director of Fair Employment and Housing who is appointed by the Governor and subject to confirmation by the Senate.[111] DFEH enforces both the employment and housing discrimination provisions of FEHA. In addition, the department is given responsibility to enforce the Unruh Civil Rights Act,[112] the Ralph Civil Rights Act[113] and the Moore-Brown-Roberti Family Rights Act (CFRA), incorporated into the FEHA.[114] The great proportion of the Department's work, however, is devoted to enforcing FEHA, which includes CFRA, both by processing complaints and through other activities such as working to inform employers. Table 23 shows the types of complaints received by DFEH during our study period.

As noted earlier, DFEH works to reduce employment discrimination by means other than responding to complaints. First, the director herself can issue complaints. The current director has increased use of this tool to focus on high impact or seldom prosecuted cases.[115] In addition, DFEH has established a Special Investigations Unit to focus on systemic patterns of discrimination, including those that might not be revealed by patterns of complaints received.[116]

110 Cal. Gov. Code § 12930.

111 Cal. Gov. Code § 12901.

112 Cal. Gov. Code § 12930 (f)(2). The Unruh Civil Rights Act prohibits discrimination by business establishments on the basis of race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. Cal. Civ. Code §51.

113 The Cal. Civ. Ralph Civil Rights Act provides protection from hate crimes on any of those bases protected by the Unruh Civil Rights Act. Code §51.7.

114 The Family Rights Act provides employees right to family care or medical leave under certain circumstances and protection from adverse action by employers on the basis of exercising such rights. Cal. Gov. Code §§ 12945.1; 12945.2; 19702.3.

115 Phyllis Cheng, Director of Fair Employment and Housing, *DFEH Summary of Goals & Achievements* (*August 30, 2009)* at 3.

116 These numbers include complaints in cases that were still open as of the date of the preparation of the administrative dataset we were provided.

Table 23
Types of Complaints Received by DFEH, 1997-2008[7]

Year Filed	Employ-ment	Housing	Ralph Act	Unruh Act	Yearly Total
1997	18,647	796	8	144	19,595
1998	19,059	683	11	150	19,903
1999	18,503	991	32	113	19,639
2000	17,396	910	50	131	18,487
2001	18,214	811	51	167	19,243
2002	19,151	815	55	209	20,230
2003	17,984	852	38	115	18,989
2004	16,325	884	29	107	17,345
2005	16,358	1,037	31	91	17,517
2006	15,312	1,226	39	143	16,720
2007	16,408	1,160	45	130	17,743
2008	18,787	1,131	34	123	20,075
Total	212,144	11,296	423	1,623	225,486
Percent	94.08%	5.01%	0.19%	0.72%	100.00%

1. Structure and Organization

To provide appropriate context, we describe here the organization that processed the great majority of the complaints during our study period, before 2009. During most of the study period, DFEH processed complaints for employment discrimination in District Offices located in nine California cities: Bakersfield, Fresno, Los Angeles, Oakland, Sacramento/Elk Grove, San Diego, San Francisco, San Jose, and Santa Ana. Complaints for housing discrimination were processed in Los Angeles, Oakland and Sacramento. Each District Office was overseen by a District Administrator, who supervises both an administrative staff and a staff of "consultants" who investigate and attempt to resolve complaints. The District Administrators were overseen by the Deputy Director of the Employment Division. Because of prior reorganizations resulting from budget cuts, even before the recent retrenchment, DFEH was (and still is) a very "flat" organization: there is only one management position (District Administrator) between the consultants who investigate claims and the Deputy Director, who is responsible for overseeing all DFEH employment discrimination enforcement in California. At present, the Deputy Director is responsible not only for overseeing the conduct of investigations and settlements, but is also responsible for dealing with personnel and other issues that arise in any organization of comparable size, including responding to complaints from citizens who believe that they have not been treated fairly by DFEH.

The Legal Division of DFEH prosecutes accusations before the FEHC or complaints in civil court and provides legal assistance and advice to district offices, including the occasional enforcement of discovery requests. The Legal Division is also responsible for the processing of requests from the DFEH administrative apparatus for the issuance of accusations or civil legal actions when other means of resolving a complaint have failed. The Legal Division operates as a small law firm staffed by 16 attorneys (including vacant positions). It also houses a Special Investigations Unit, consisting of a District Administrator and 2 consultants.

At present, the Employment Division is staffed by 10 District Administrators and 74 consultants (including currently vacant positions). Given California's civilian labor force of 18.4 million employees, this works out to one consultant to handle the complaints that might arise from approximately a quarter of a million employees.[117] The Director of the Department of Fair Employment and Housing is responsible for overseeing all of the operations of the Department, with the assistance of a 5-person management team consisting of a Chief Deputy Director, Chief Counsel, Associate Chief Deputy/Special Projects Counsel and the Deputy Directors of the Employment and Housing Units in the Enforcement Division.

a) Staffing

(1) Consultants

The work of processing and resolving complaints is done by consultants, under varying levels of supervision by more experienced consultants and District Administrators. Under an employment specification series adopted in 1971, consultants are required to have six months of experience in the fair employment or civil rights field and a college degree or experience deemed to be the equivalent of a college degree.[118] This means in practice that many consultants lack a college degree but have some years of qualifying experience in state service. A great many DFEH consultants have transferred to DFEH from administrative positions in other state government agencies. We interviewed a random sample of 11 consultants, all of whom had transferred into DFEH from other state employment in departments having nothing to do with civil rights or employment discrimination. Consultants carry an average active caseload of 75 cases at any one time, with individual caseloads based on the experience level of the consultant.

The Fair Employment and Housing Consultant series has three levels: I, II, and III. There are two types of Consultants III: Specialists who work on more difficult cases and Supervisors who oversee the work of other consultants in addition to carrying their own caseload.[119] The median annual salaries of consultants in 2009 were as follows: Consultants I, $46,911; Consultants II, $62,455; and Consultants III, $70,302.[120]

The expected caseload for consultants depends on experience, with most consultants expected to carry a caseload of 75 active cases. Under long standing policy, cases are transferred between offices to balance the workload among consultants throughout the state.[121] As some consultants explained to us, this system of standard caseload and the "caseload balancing" policy meant that at least in some respects, consultants had no incentive to close cases, since any closed case would be immediately replaced with another case, leading at least some consultants to view the one year statutory deadline for processing a complaint and management monitoring for violations of this deadline as the primary constraint on their work.
At present, all consultant training is "on the job," generally provided by the District Administrator or other more senior consultants, supplemented by occasional trainings provided by Legal Division attorneys, primarily on developments in the law. Some consultants with whom we spoke believed consultants needed more training, in such areas as interviewing, case development, investigation

117 The California civilian labor force as of August, 2009 was 18,390,500. California Employment Development Department, "Quick Statistics," available at http://www.edd.ca.gov/About_EDD/Quick_Statistics.htm#LaborMarketInformation (visited 9-23-09).

118 FAIR EMPLOYMENT AND HOUSING CONSULTANT/ADMINISTRATOR Series Specification (Established September 1, 1971), available at http://www.dpa.ca.gov/textdocs/specs/s9/s9513.txt.

119 FAIR EMPLOYMENT AND HOUSING CONSULTANT/ADMINISTRATOR Series Specification (Established September 1, 1971), available at http://www.dpa.ca.gov/textdocs/specs/s9/s9513.txt

120 Data compiled in September, 2009 from state employee salary information available at http://www.sacbee.com/statepay/, based on consultants listed on organizational charts provided by DFEH in early 2009.

121 DFEH Enforcement Division Directive 231, October 1, 1998, and Memorandum from Chief Deputy Director dated October 11, 2006.

techniques, or settlement techniques.[122] DFEH once had a two-week "training academy" for consultants, which was cut to one week in 2007, and then eliminated altogether. DFEH managers are aware of the need for more training than consultants currently receive. As one explained, consultants "often move up from clerical positions and have little to no college and little to no analysis experience."[123]

(2) District Administrators

District Administrators are in the same state personnel board series as consultants. The minimum qualifications for a District Administrator are one year performing the duties as a Consultant III or two years as a Consultant II and the equivalent of graduation from college. As with consultants, one year of qualifying experience can substitute for one year of college on a year-for-year basis.

(3) Deputy Director and Central Management

The Deputy Director of the Employment Division supervises the work of all of the staff in the Division, reporting through the District Administrators. She also supervises the Department's Communication Center, generally the first point of contact with the Department, which is staffed with a District Administrator, one consultant and seven administrative staff.

b) Budgets

The annual state contribution to the DFEH budget for FY 2009-2010 is 81 cents for each person in the California workforce.[124] The current (FY 2009-10) DFEH budget, for all of its operations, including work in the areas of housing, civil rights and hate crimes, is $19,717,000, of which $4,904,000 (24.9%) is from federal funds.[125] The federal contribution to the DFEH budget declined 10% between FY 2004-05 and FY 2009-10, and the state general fund contribution fell 12% short of keeping pace with inflation.[126] The largest fraction of the budget pays, of course, for salary and benefits. Over the past five fiscal years ending in FY 2007-08, wage, salaries and benefits have consumed approximately 80% of the DFEH budget, during which time the total personnel costs per funded position have risen from $75,422 to $86,269, just keeping pace with the rate of inflation.

It is worth placing these numbers in historical context. In 2008 DFEH received 34% more complaints than in 1985-86, but had 7% fewer staff members to handle them. Not surprisingly then, consultant caseloads have increased dramatically. In 1985-86, the average consultant caseload was 46 cases, compared to the current standard of 75 cases.[127] The situation has only gotten worse since 2008.

For reasons explained elsewhere in this report, the number of complaints for employment discrimination tends to rise with unemployment rates, which are now at historic levels. In response to budget pressures brought on by California's most recent economic and budget problems, the total DFEH budget was cut by 13% in the current fiscal year. DFEH has managed to maintain staffing levels by undertaking many cost-saving measures in other areas, particularly in reducing space costs by consolidating and closing district offices and leaving staff positions unfilled. This has been made possible in part by changing procedures to conduct all interviews with complainants by telephone. The entire organization currently has only one state pool automobile for use by staff in the Elk Grove headquarters.

B. Processing Complaints: Brief Overview

DFEH engages in several activities intended to make the public aware of the protections offered by FEHA and other laws, both by means of public speaking and engagement with civic organizations and by means of "new media," including a video, "Equal Rights 101," available both on the DFEH website (at http://www.dfeh.ca.gov/equalrights101/) and on www.YouTube.com. Employees seeking to file a complaint to vindicate their rights under FEHA can do so by one of two means. They can file a complaint and seek an immediate RTS letter, most easily by means of an automated process at the DFEH website. In that case DFEH will take no further action with regard to their complaint and the complainant must pursue his rights in the legal system. If the complainant wishes DFEH to investigate a complaint he or she can obtain either by telephone or online an appointment for a telephone intake interview with a consultant.

The consultant conducts an intake interview to determine whether the complainant has a complaint that falls within the jurisdiction of DFEH and arguably constitutes a violation of FEHA or other laws the DFEH enforces. If a complaint is rejected for investigation the complainant is notified so that he or she can pursue alternatives. If a complaint is accepted for investigation, the matter is assigned to a consultant (who may or may not have conducted the intake interview) for further investigation. A copy of the complaint is sent to the respondent or respondents, who are requested to provide a response in writing and may also be requested to provide certain other information or documents. A consultant can also conduct other interviews with witnesses or take other steps to investigate the merits of a complaint.

Prior to making a determination of the merit of the complaint (and, by policy, within a month after the filing of the complaint), the consultant is to attempt to achieve a "pre-determination settlement" of the complaint.[128] When the department determines after investigation that a complaint has merit and constitutes a violation of the FEHA, DFEH is mandated to "immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion."[129] Consultants are given an informal target of settling 20% of their cases. Settlement agreements are required to be in writing and the Department is required by statute to conduct a compliance review within one year "to determine whether the agreement has been fully obeyed and implemented."[130]

If settlement or conciliation efforts are unsuccessful, a consultant can prepare a "Progress Memo" for submission to the DFEH Legal Division, requesting issuance of an accusation. Many cases are closed before this stage for a variety of reasons unconnected with the merits of the claim, including such things as the loss of contact with the complainant or the bankruptcy of the respondent.

The Legal Division can accept or reject a request that an accusation be issued. If the accusation is issued it becomes the initial pleading in a case before the Fair Employment and Housing Commission

122 DFEH Consultants 6790, 5793

123 DFEH Manager 8989

124 In October, 2009, there were 18,356,400 persons in the California workforce, as reported at www.labormarketinfo.edd.ca.gov The General Fund budget for DFEH for 2009/10 is $14,813,000.

125 All budget data from California Department of Finance website or from DFEH administrative staff.

126 The FY 2004/05 General Fund portion of the budget was $13,619,000. An annual CPI adjustment would have brought this to $16,951,985 (U.S. Bureau of Labor Statistics inflation calculator at http://data.bls.gov/cgi-bin/cpicalc.pl) The 2009/10 General Fund budget is $14,813,000.

127 Historical data from California Auditor General, A Review of the Department of Fair Employment and Housing, report P-636, October, 1986, pp. 21, 32. Current complaint data from DFEH administrative data. 2008 budget and staffing data from DFEH management.

128 *Consultant I Basic Training Manual*, "Negotiating Settlements"

129 Cal. Gov. Code § 12963.7

130 Cal. Gov. Code § 12964.

(FEHC). The Legal Division can also attempt to settle the matter, either before or after issuance of an accusation.

As the above brief summary indicates, a complaint can be dismissed or resolved (favorably or unfavorably) at several stops along the way. Consistent with the "dispute pyramid" metaphor discussed in Section II(E), above, we examined the course of complaints of various kinds through the processes by which they are resolved. Stepping back from these details of how complaints are resolved, however, we can look at the ultimate outcomes of complaints. Over the course of the first 11 years[131] of the study period, about half of the complainants opted out of the DFEH administrative process to pursue their claims in the legal system. Of those that remained in the DFEH administrative process, about 9.75% of complainants obtained any kind of relief from DFEH, with about 83% of those obtaining a monetary benefit. Between 1997 and 2007, the percentage of complainants receiving some remedy declined somewhat, from 13.9% in 1997 to 9.8% in 2007. When complainants received a monetary benefit in settlements obtained in the administrative process, the median amount received by successful complainants was $3,000 (25th percentile, $1,237, 75th percentile, $9,845).

Of complaints filed in each of the 11 years, the median peaked in 2005 at $4,500. Complainants who were referred to the DFEH Legal Division did better during the same period, with 41% receiving some kind of benefit, 95% of whom received a monetary benefit. The median benefit obtained in the Legal Division was $10,000 (25th percentile $4,500, 75th percentile $25,000).

C. Determinants of Outcomes in DFEH Administrative Process

In the sections that follow, we examine variations in the kinds of complaints that are decided at various stages in the DFEH administrative process. We also created a simplified sequential logistic regression that treats the complaint process in two steps: those who opted out by seeking a RTS letter and those who stayed in the DFEH system, which allows us to examine the combined consequences of all the various stages of decision.

1. Intake and Acceptance or Rejection for Investigation

As noted, about half of the complaints received by DFEH result in the immediate issuance of a RTS letter. The issuance of a RTS letter is automatic, and can be accomplished directly by the respondent or his or her representative by means of website provided by DFEH (http://www.dfeh.ca.gov/onlinerts/). This website collects the same basic data regarding a complaint that would be collected by means of an interview, which can then be integrated with the DFEH data system. But DFEH takes no further steps regarding such on-line complaints requesting an RTS letter. These complaints are, effectively, diverted to another dispute resolution pyramid involving lawyers and courts but no longer involving DFEH. We consider the legal system dispute pyramid in Section IX, below.

a) Process

Complainants seeking anything other than an immediate RTS letter obtain an appointment for a telephone interview with one of the DFEH consultants, who typically spend about 20% of their time on intake duties. The interview can be scheduled by phone via a toll free number (including a TTY number for the hearing impaired), or by means of an on-line appointment system (http://www.dfeh.ca.gov/onlineAppt/). On-line complainants can self-select an available appointment. The time lag to an appointment depends on demand and staffing, which can vary by region or District Office. As of September 22, 2009, the first available appointments in English through the website ranged from two weeks to more than four months, depending on the District Office, as follows: Santa Ana, October 6; Los Angeles, November 10; Sacramento, January 12, 2010.

Persons with interview appointments are sent a "Pre-Complaint Questionnaire-Employment" to complete and return.[132] At or near the appointed hour, a DFEH consultant assigned to intake duties then calls the number provided by the complainant and interviews the complainant by telephone. The purposes of the interview are to (1) obtain the information necessary to make the correct decision about whether to accept the case for investigation, (2) to create an accurate record as a basis for further investigation, and (3) to "convey a proper image of the Department and engender public trust."[133]

Interviews are conducted by consultants, generally by rotation. Consultants typically spend about 20% of their time performing intake duties, including the interview.[134] According to the consultants we interviewed, in-person interviews take about 45 minutes[135] and telephone interviews about 20-25 minutes.[136] With rare exceptions, all intake interviews are now conducted over the telephone, following completion of a pilot project begun in 2008.[137] The general standard has generally been that the interview, decision to investigate, and write up should take no more than one hour.[138] At the close of the interview, the matter can be rejected, accepted "for filing purposes only," or accepted for investigation. Those cases that are simply rejected are counted and their numbers reported to DFEH management, but are not otherwise captured in the management information system data. Accordingly, we have not analyzed the data on these cases. In the last six months of 2009, almost half (47%) of all matters brought to the DFEH initial interview were rejected with no other action or information taken.[139] DFEH policy is to maintain some basic data on these rejections on paper for review by the District Administrator. We believe that at least some basic data (demographics, nature of wrong alleged) about these rejected matters be maintained in a manner that would permit more systematic review and evaluation.

The decision whether or not to accept a complaint for investigation is guided by a Case Analysis Manual, which is also now available to the public via the DFEH website (at http://www.dfeh.ca.gov/DFEH/Publications/caseAnalysisManual.aspx). In some instances, complaints not accepted for investigation are accepted "for filing purposes only."[140] A copy is given to the complainant and the original filed. A short form complaint is prepared and given to the complainant for signature. The case is immediately opened, served on the respondent if the complainant wants this done, and closed. The case is not dual filed with EEOC and DFEH takes no further action on the complaint. Such cases are closed with "Closing Code 40-Administrative Decision."[141] A case can be rejected for investigation for any one of a number of reasons, including:

131 We did not include the data from 2008 because as of the date we received the DFEH data, many complaints were still open.

132 The form (DFEH 600-3) is available in English and Spanish at http://www.dfeh.ca.gov/DFEH/Publications/publications.aspx.

133 DFEH Consultant I Basic Training Manual, July 1, 1993 at "Intake-1"

134 Interview with DFEH Manager 8988

135 IV 874, Consultant in Los Angeles, at 1; IV 6790, Consultant in Bakersfield, at 1, IV 5793, Consultant in Oakland, at 1. IV 4013, Consultant in Fresno, at 1.

136 IV 5793, Consultant in San Jose, at 1; IV 2215, Consultant in San Jose, at 1

137 Memorandum from Jennifer Harlan to Employment District Administrators, "Telephone Intake Pilot Project," November 6, 2008.

138 Id.

139 DFEH management reports, "Timeslot Statistics," for July-December, 2009.

140 Directive 500, May 26, 2006, p. 18.

141 Id.

- A lack of substantive jurisdiction because of the nature of the employer (for example, an employer with fewer than five employees in most cases, employers in federal enclaves such as military bases, national parks, etc.).[142]
- Expiration of the statute of limitations for filing a complaint (in most cases, one year after the date on which the alleged unlawful practice occurred).
- The consultant determines that the complaint lacks potential merit for some other reason (for example, alleges facts that would, even if proven true, not constitute a violation of the FEHA).

b) Data on Rejection for Investigation

During the study period, of those cases that were not rejected completely at the intake interview, about one case in five was "accepted for filing purposes only," and the complainant was told that no further investigation would be conducted. The percentage of cases closed that were rejected for investigation increased over the study period, but declined slightly since peaking in 2003 (at 23%) as indicated in Figure 8.

Figure 8
Cases Rejected for Investigation
Non Right to Sue Letter Cases, 1997-2007

Our sequential logistic regression model examines the factors that are associated with whether or not a complaint is accepted for investigation, as we explored in comparing the response of the legal market and the initial decisions by the DFEH in Section VII(C), above. The DFEH is never presented with the opportunity to accept or reject a case for investigation if the complainant requests a RTS letter at the outset. Presumably, those cases accepted by attorneys would have been likely, at least in principle, to have been accepted for investigation by DFEH. This context is important for the interpretation of the logistic regression model as it pertains to the decision to accept or reject a complaint at the outset. Table 24 presents the odds that a complaint would be accepted for investigation.

Table 24
Odds of Complaint Being Accepted for Investigation,
All Cases Not Seeking Immediate RTS letter, 1997-2008

Variable	Compared to	Odds	95% Low	95% High
SEX				
Female	Male	1.14	1.09	1.19
ETHNICITY				
African American	Caucasian	1.33	1.25	1.40
African Other	Caucasian	1.22	0.93	1.60
Native American	Caucasian	1.10	0.90	1.33
Hispanic	Caucasian	1.09	1.04	1.15
Asian Pacific Islander	Caucasian	1.04	0.97	1.13
COMPLAINT BASIS				
Family Medical Care Leave	Basis-Age	1.73	1.51	1.98
Association	Basis-Age	1.40	0.98	1.99
Retaliation	Basis-Age	1.31	1.24	1.39
Sex	Basis-Age	1.12	1.06	1.18
National Origin	Basis-Age	0.70	0.65	0.74
Sexual Orientation	Basis-Age	0.67	0.60	0.75
Disability	Basis-Age	0.55	0.52	0.58
Religion	Basis-Age	0.52	0.47	0.57
Race/Color	Basis-Age	0.42	0.40	0.44
Medical Condition	Basis-Age	0.36	0.32	0.42
Marital Status	Basis-Age	0.28	0.25	0.33
Other	Basis-Age	0.00	0.00	0.00
ALLEGED ACT				
Failure to Hire	Termination	2.40	2.18	2.65
Failure to Reinstate	Termination	2.33	1.67	3.24
Refusal to Accommodate	Termination	2.10	1.94	2.27
Work Conditions	Termination	1.72	1.63	1.81
Union	Termination	1.66	0.62	4.48
Demotion	Termination	1.23	1.07	1.41
Denied Leave	Termination	1.08	0.92	1.28
Denied Promotion	Termination	1.06	0.98	1.14
Denied Family Care	Termination	0.99	0.84	1.16
Unequal Pay	Termination	0.81	0.73	0.89
Employer Harassment	Termination	0.53	0.51	0.55
Other	Termination	0.02	0.02	0.03
Variable	Compared to	Odds	95% Low	95% High
OCCUPATION				
Sales	Clerical	1.59	1.45	1.73
Technician	Clerical	1.53	1.39	1.68
Craft	Clerical	1.48	1.26	1.74
Manager	Clerical	1.45	1.34	1.58
Laborer	Clerical	1.42	1.32	1.52
Equipment Operator	Clerical	1.37	1.22	1.55
Service	Clerical	1.31	1.23	1.40
Government	Clerical	1.25	1.09	1.43
Supervisor	Clerical	1.24	1.10	1.40
Paraprofessional	Clerical	1.21	1.08	1.35
Professional	Clerical	1.05	0.99	1.12
INDUSTRY				
Mining	Government	2.42	1.52	3.85
Professional	Government	2.02	1.45	2.81
Agriculture	Government	1.95	1.48	2.57
Construction	Government	1.91	1.52	2.39
Real Estate	Government	1.86	1.46	2.38
Information	Government	1.79	1.49	2.15
Other Services	Government	1.76	1.50	2.07
Manufacturing	Government	1.74	1.54	1.98
Utilities	Government	1.73	1.26	2.37
Entertainment	Government	1.73	1.36	2.20

142 Case Analysis Manual, 2008 Update, Jurisdiction-28

Table 24 (continued) Odds of Complaint Being Accepted for Investigation, All Cases Not Seeking Immediate RTS letter, 1997-2008				
Retail Trade	Government	1.70	1.50	1.92
Hospitality	Government	1.65	1.38	1.97
Health	Government	1.60	1.41	1.82
Finance & Insurance	Government	1.59	1.35	1.86
Transportation	Government	1.54	1.31	1.80
Wholesale Trade	Government	1.52	1.21	1.92
Education	Government	1.49	1.28	1.73
Public School	Government	0.86	0.75	0.97
Other	Government	0.65	0.48	0.89
Administration	Government	0.60	0.54	0.67
EMPLOYER SIZE				
Medium Firm Size	Small Firm	0.93	0.87	0.98
Large Firm Size	Small Firm	0.68	0.64	0.73
REGION				
medium msa region	small msa	1.50	1.35	1.67
large msa region	small msa	0.98	0.89	1.09
District Office in So. California	Other Areas	0.85	0.81	0.90
District Office in No. California	Other Areas	0.73	0.69	0.77

No doubt partly because of the interaction of the prior effects of the legal market, many of the odds in Table 24 are the opposite of the odds of obtaining an attorney, as indicated by immediate issuance of a RTS letter. Being a woman is a slight advantage, and African Americans have a better chance of surviving the screening than all other ethnic groups. CFRA cases, apparently highly disfavored by lawyers, have the best chance of all types of claims of being accepted for investigation. Similarly, failure to hire cases, which are apparently disfavored by lawyers, have higher odds of being accepted by DFEH. In terms of respondents, complaints against government and public school employers have among the highest rejection rates, and complaints against large employers survive at significantly lower rates than complaints against small or medium employers.

Again, these odds reflect both patterns of decision making in judgment by DFEH personnel, in reviewing cases that have in many cases been rejected by attorneys. We know of no way to separate out these effects through analysis of the available data. We also cannot assess the accuracy or reliability of DFEH's decisions of whether to accept or reject a complaint at the outset, without independent information about the merits of the underlying claims. For example, while the odds of African Americans having their cases accepted by DFEH (1.33, compared to Whites) are dramatically better than their odds of obtaining an attorney (0.49), there is nothing in the data to indicate that a system operating perfectly would not accept these cases at either a higher or lower rate.

2. Investigation and Discovery

a) Process and Policy

The investigation of the allegations may include interviews, informal requests for information or documents, or formal discovery paralleling that available to litigants in civil litigation. According to DFEH policy:

> An investigation must be sufficient to demonstrate that the Department has completed a thorough inquiry into the allegations in the complaint. The investigation must demonstrate that further inquiry into the matter is unlikely to uncover any substantial evidence of discrimination OR that there is enough evidence to support a finding of discrimination.[143]

Investigation and discovery is conducted by consultants. During our study period, the target caseload for consultants was 75 cases at any one time -- somewhat higher for Consultants III and somewhat lower for less experienced Consultants I.[144] During 2008, of those cases accepted for investigation, consultants were able to close a median of about 50 cases during the year.[145]

(1) Investigations

The investigation process used by consultants begins with the interview. Where the existing caseload permits, consultants continue the investigation of a case they handled on intake. Complainants are asked to provide the names of corroborating witnesses. In the usual course, however, the next step in the investigative process entails sending a copy of the complaint to the respondent employer, asking for a response and, in many cases, asking fairly informally for additional information relevant to the complaint. On receipt of the employer's response, the consultant contacts the complainant to review the information provided in response and obtain any additional information from the complainant. The complainant is given 15 days to produce additional evidence.[146] The consultant is also directed by DFEH policy to prepare an Investigation Work Plan,[147] describing the issues in the case, summarizing the evidence provided by the complainant, respondent and any witnesses interviewed. If the evidence to that point indicates that further investigation is warranted, the Investigative Work Plan summarizes the nature of relevant potential evidence and the means by which it is to be sought.

In a significant number of cases, the information provided by the respondent, together with the complainant's explanations or other evidence, is deemed sufficient for the consultant to close the case as "Insufficient Evidence to Prove a Violation of the Act" (closing code 05). Pursuant to DFEH policy, "Cases suitable for this type of closure are those where information from the respondent and the complainant's response to the respondent's defense clearly indicate the allegations cannot be proven and that further investigation would not disclose a violation of the Fair Employment and Housing Act (FEHA)."[148] In such cases, the consultant telephones the complainant to inform him or her of the outcome and the reasons therefore.[149] According to DFEH policy as of 2006, cases are to be closed in this manner only if 180 days or more remains before the one year statute of limitations will run, to allow adequate time for

143 Procedures for Processing Investigated Cases, Memorandum of May 26, 2006, at 1.

144 IV 8988 DFEH Manager.

145 Based on case closings by consultant, restricting median to those (50 of 106) consultants who closed more than 30 cases in 2008, in order to account for partial year employment. The overall median was 32 cases, but this included 27 consultants who closed fewer than 10 cases, almost certainly an indication that they were not working as consultants throughout the year. Administrative decisions not to investigate (closing code 40) cases are not included.

146 Case Grading System, DFEH Memorandum of March 20, 2009. The Case Grading System is being revised after several months of experience and will be incorporated into regulations that DFEH is in the process of drafting.

147 Enforcement Division Directive 304, October 1, 1998.

148 Procedures for Processing Investigated Cases, Memorandum of May 26, 2006.

149 Case Grading System, DFEH Memorandum of March 20, 2009, at 1.

further investigation and possible action by the Legal Division if the complainant produces additional evidence.[150] In the two years after 2006, about one third of such closures occurred after 180 days.

During our study period, of those cases in which complainants had not opted out of the DFEH administrative process by seeking an RTS letter, such closings averaged 12.9% of all case closings, but this percentage declined dramatically over the study period, from 19.4% in 1997 to 4.7% in 2008. However, when added to cases closed for insufficient evidence after further investigation ("No Probable Cause" or Closing Code 20) cases, described below, such closings accounted for a very stable half of all case closings from 1997 to 2007.

For those cases in which investigation and discovery continue, this generally entails telephone interviews with witnesses identified either by the complainant or the respondent, and occasionally with others identified by the initial set of witnesses. Because of resource and time constraints, field interviews are fairly rare, except in larger cases involving multiple complainants.[151]

During our study period, investigation beyond the initial interview and the response of the employer did not begin until several months later – in order for the consultant to focus on cases closer to the one year deadline for making a determination.[152] This was a consequence of the "first in, first out" case management system in place for many years. Under the Case Grading System adopted in 2009, all cases which have been given priority status based on the likelihood of merit are to be given priority in investigation over all other cases, and the investigation in all priority cases is to be reviewed with an assigned attorney within six months of filing.[153] Assuming this leads to a refocus of investigative time, then we can expect that investigation will be more expeditiously pursued. It is more likely that the non-priority cases will close more expeditiously in that the instructions are to review the response with the complainant within the first 180 days and to immediately close the case if the complainant has nothing more to offer. It is no longer the "first in, first out" theory of processing cases. Over the course of our study period, consultants have had a target caseload of about 75 cases, with more experienced consultants having somewhat higher caseloads.

(2) Discovery

The Fair Employment and Housing Act gives the DFEH broad authority to conduct investigations and specific authority to use many of the discovery tools available in civil litigation, including interrogatories, requests for inspection and copying, subpoenas, and depositions.[154] With rare exceptions, consultants use only the first two of these in investigating cases.[155] Consultants are guided by a substantial Pre-Accusation Discovery (PAD) Manual,[156] which provides not only general guidance but a series of forms of discovery to be used, with possible modification, in different kinds of cases. The Pre-Accusation Discovery Manual counsels that:

> It is hard to imagine an investigation which would not benefit from a set of Interrogatories and/or a Request for Inspection and Copying documents. These two are often coordinated and sent as one package. They should be sent as early in the investigation as possible so that there is time for enforcement if necessary. They will also be useful in focusing the remainder of the investigation on the relevant issues.[157]

The complaint is typically served with "Supplemental Questions" that the respondent is asked to answer. If the response provided is insufficient, consultants may also send document requests and interrogatories. Form documents are utilized for this purpose, but a few tailored questions or requests may be added.[158] A response is generally required within 30 days. Because of the caseload and deadline pressures, however, serious attention to discovery was, at the time of our interviews, typically delayed for several months after the initial notice and requests for information are submitted.

All consultants with whom we spoke indicated that they obtained some useful information from informal or formal discovery, and that the vast majority of employers produced at least some responsive information. If there is no adequate response to discovery, however, a consultant can ask the Legal Division to enforce the discovery request through the courts. Consultants made 559 such requests during our study period, about one per week, or about 0.6% of cases accepted for investigation. Enforcement of discovery requires filing an original petition in the Superior Court.[159] The Legal Division filed 209 petitions to compel during the same period, or about 20 per year.

As noted, by both policy and practice at least some discovery, informal or formal, is conducted in every case accepted for investigation, ranging from merely serving the complaint and asking for a response, to much more elaborate discovery. The CMIS data we reviewed does not contain reliable information about the investigation and discovery process. Ostensibly, consultants record the time they spend on investigation on the CMIS system, but this information is not used for any management purpose and is, according to many consultants we interviewed, simply an estimate filled in when the case is closed. During our study period, only about half of the cases accepted for investigation (43,615 of 95,741) reported any time at all spent on investigation. For those that did report any time, the mean and median investigation times were 7.89 hours and 6.25 hours, respectively. This compares with estimates of more than twice that made by the consultants with whom we spoke, who estimated an investigation to require an average of 20 hours,[160] 22-27 hours,[161] 17 hours,[162] 10-26 hours,[163] and 20-25 hours.[164] These latter estimates are probably better estimates, at least as to cases that are fully investigated, than the data recorded after the fact in the CMIS system.

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150 *Id.* at 3.

151 Consultant interviews.

152 Interviews with consultants; see e.g. IV 2218.

153 Case Grading System, memorandum of 3-19-09.

154 Cal. Gov. Code §§ 12963.1 through 12963.5

155 Interviews with consultants in San Jose, Fresno, Oakland, Los Angeles and Bakersfield. Subpoenas are used when consultants are aware of specific documents and that the employer refuses to produce them.

156 The version we reviewed was issued in May 2006.

157 PAD Manual at 1-1.

158 Interviews with consultants from San Jose, Fresno, Los Angeles, and Oakland. According to a consultant in Bakersfield, that office's policy is not to send formal discovery requests unless respondents have not provided a response to the complaint within 90 days after service of the complaint.

159 Cal. Gov. Code § 12963.5.

160 Consultant 2215

161 Consultant 5793

162 Consultant 4264

163 Consultant 6790

164 Consultant 874

Of all the complaints raised by employer-side lawyers with whom we spoke, the quality of discovery and the resources expended to comply was near the top of the list. For example, one attorney at a larger firm in Los Angeles described the investigation and discovery process as "just really, really terrible." She indicated that she receives "canned requests for information that often bear no relationship whatsoever to the actual complaint," and then doesn't hear anything for up to ten months after she has sent in a position statement. According to this attorney, when DFEH does finally respond, it's usually with "frantic requests for additional information that needs to be provided immediately." She did indicate that the situation had improved in the past 18 months.[165] Another attorney, who works primarily on disability discrimination issues, claimed that about 80% of the time, DFEH asks for irrelevant information. She makes it her practice to call DFEH and ask why they requested irrelevant information, or to simply ignore the request. She gave an example of a case in which the complaint indicated that the claimant claimed discrimination based on disability but provided no other information. DFEH requested a response and asked for supplemental information with fourteen different questions, some of which – for example, a question about sexual harassment training – had nothing to do with disability discrimination.[166] The attorneys' fees for responding to the complaint and discovery can range significantly upwards from $5,000.[167]

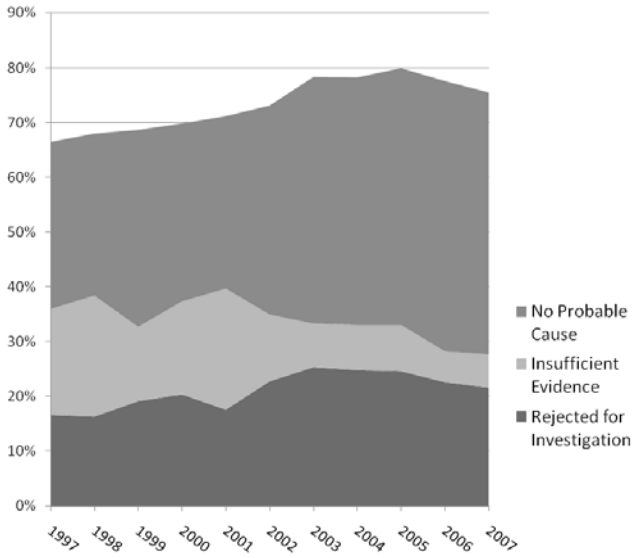
It seems likely that the problems of poorly focused and ill-timed discovery will be reduced under the Case Grading System adopted in 2009. For the higher priority cases, if the respondent does not respond within 90 days, interrogatories and requests for production are to be served within 14 days thereafter, and all discovery is to be reviewed by the offices' assigned attorney. More time should be available to consultants to work on discovery in the higher priority cases by reducing the number of instances in which discovery is done in lower priority cases. The lower priority cases may also include discovery, but only after the respondent who has not responded in 90 days is given another 10 day warning that discovery will be forthcoming if no response is received. When the 10 days expires, DFEH will contact the respondent two additional times, seeking a response to the complaint. Only if these three contacts do not produce a response will discovery issue.[168]

b) Case Closure after Investigation

As indicated, there are two points at which DFEH staff make a negative merits determination once a case has been accepted for investigation. The first of these, closings for "insufficient evidence," are made upon receipt of the response from the employer, but generally before any other investigation is conducted. The second category, case closing for "no probable cause," are made after the investigation is complete (the timing of this decision has been modified by the 2009 Case Grading System). Policy regarding which closing code to utilize changed during the course of the study period. Figure 9 charts the percentages of case closings "on the merits" from 1997 through 2007, whether by immediate rejection, an insufficient evidence finding, or a finding of no probable cause.[169] As is apparent, the percentage of "insufficient evidence" closings declined and the percentage of "no probable cause" closings increased by similar amounts, with the total percentage of "merits" dismissals rising from 66% in 1997 to peak at 80% in 2005, before going back down slightly to 76% in 2007.

Although "no evidence" closings happen earlier in the process than "no probable cause" closings, they did not by any means happen quickly. During the study period, the median time between complaint filing and case closings was 229 days for "insufficient evidence" closing and 344 days for "no probable cause" findings, reflecting the 365 day deadline for closing a case. Indeed 10,541 complaints were closed for "no probable cause" on the 364th or 365th day after the complaint was filed. This constituted 14% of all such closings in 2003, falling to 2% by 2007.

Figure 9
Percent of Closings on Merits, 1997-2007
Non Right to Sue Letter Cases



The factors that lead to no-merits findings are, by definition, a function both of the "objective" merits of the case (the determination that would be made by the most expert decision makers who have unlimited time and resources) and factors related to the process and the people who operate it. The objective merits of the population of cases that reach DFEH for decision is in turn, as noted earlier, a function of the objective merits of the complaint and factors related to lawyers and the legal system. As before, our sequential logistic regression model casts light on the interaction of factors across these levels.

165 Consultant 6028.

166 Consultant 56. Apparently a question about sexual harassment training was added to the investigations protocol after the FEHA was amended to require such training, but is no longer asked in all cases, according to DFEH management.

167 $5,000 was the median response to our on-line survey asking employer side attorneys to a question about their usual fees for responding to a complaint in the administrative stage. Employer side attorney 5200, generally representing public agencies, estimated the cost at $7-10,000. Attorney 56 put the cost at $10,000. The fees actually billed by a large employer side firm in a sample of five randomly selected (by us) and fairly typical (race/termination) cases had a both a mean and a median of about $18,000.

168 Case Grading System memorandum dated March 20, 2009. As noted earlier, the Case Grading System is undergoing revisions as part of the DFEH's efforts to issue administrative regulations and is subject to change from this description going forward.

169 We do not present case closing for 2008 because many of these cases were still open at the time we obtained our last data from DFEH. Because some kinds of closings occur much earlier than others, including these would distort the percentages of types of closings.

Table 25
Odds of Surviving Merits Determinations "Insufficient Evidence" and "No Probable Cause"1997-2008

		Insufficient Evidence			No Probable Cause		
Variable	**Comparison**	**Odds**	**95% Low**	**95% High**	**Odds**	**95% Low**	**95% High**
SEX							
Female	Male	1.12	1.07	1.18	1.20	1.14	1.26
ETHNICITY							
African American	Caucasian	1.09	1.02	1.16	0.81	0.76	0.87
African Other	Caucasian	1.64	1.09	2.47	0.52	0.34	0.79
Asian Pacific Islander	Caucasian	1.15	1.05	1.25	0.92	0.84	1.01
Hispanic	Caucasian	1.16	1.09	1.22	0.89	0.85	0.94
Native American	Caucasian	1.17	0.93	1.46	0.95	0.78	1.17
BASIS							
Association	Age	0.84	0.58	1.21	0.90	0.61	1.35
Family Medical Care Leave	Age	0.97	0.87	1.09	1.39	1.24	1.55
Marital Status	Age	0.86	0.70	1.06	1.03	0.83	1.28
Medical Condition	Age	1.20	0.97	1.50	0.98	0.80	1.20
National Origin	Age	0.98	0.91	1.05	0.79	0.73	0.85
Disability	Age	1.42	1.33	1.52	1.10	1.03	1.17
Race/Color	Age	0.96	0.90	1.03	0.85	0.79	0.90
Religion	Age	1.25	1.08	1.46	1.00	0.87	1.15
Retaliation	Age	1.12	1.04	1.19	0.89	0.84	0.94
Sex	Age	1.33	1.25	1.41	1.41	1.33	1.49
Sexual Orientation	Age	1.46	1.23	1.74	0.74	0.64	0.86
Other	Age	0.39	0.03	4.39	2.35	0.15	37.98
ALLEGED ACT							
Demotion	Termination	1.17	1.01	1.35	1.25	1.09	1.43
Denied Leave	Termination	1.30	1.09	1.54	1.32	1.14	1.53
Denied Promotion	Termination	1.06	0.97	1.16	0.86	0.79	0.95
Employer Harassment	Termination	1.84	1.74	1.95	1.11	1.06	1.17
Failure to Reinstate	Termination	1.11	0.87	1.41	0.76	0.59	0.98
Failure to Hire	Termination	0.89	0.82	0.96	1.03	0.95	1.13
Refusal to Accommodate	Termination	1.37	1.26	1.49	1.19	1.11	1.28
Unequal Pay	Termination	1.04	0.93	1.17	0.99	0.88	1.11
Union	Termination	4.71	1.11	19.92	1.29	0.60	2.78
Work Conditions	Termination	1.14	1.08	1.21	1.02	0.96	1.07
Denied Family Care	Termination	1.06	0.92	1.24	1.21	1.05	1.39
Other	Termination	2.12	0.96	4.70	0.84	0.44	1.58
Medium Firm Size	Small Firm	0.89	0.82	0.96	0.93	0.12	0.16
Large Firm Size	Small Firm	1.11	0.87	1.41	1.04	0.29	0.34
INDUSTRY							
Agriculture	Government	1.05	0.84	1.32	1.20	0.96	1.51
Mining	Gov't	1.56	1.06	2.32	1.13	0.81	1.59
Utilities	Gov't	1.07	0.77	1.49	1.24	0.90	1.72
Construction	Gov't	1.25	0.99	1.57	1.38	1.12	1.72
Manufacturing	Gov't	0.89	0.78	1.02	1.48	1.29	1.71
Wholesale Trade	Gov't	0.76	0.61	0.95	1.79	1.43	2.23
Retail Trade	Gov't	0.88	0.77	1.01	1.61	1.40	1.86
Transportation	Gov't	0.91	0.77	1.08	1.24	1.04	1.47
Information	Gov't	0.92	0.76	1.10	1.56	1.30	1.88
Finance & Insurance	Gov't	0.82	0.69	0.97	1.33	1.11	1.58
Real Estate	Gov't	1.00	0.79	1.27	1.37	1.10	1.72
Professional	Gov't	0.84	0.61	1.15	1.45	1.06	1.96
Administration	Gov't	1.08	0.95	1.24	1.21	1.05	1.38
Education	Gov't	1.05	0.88	1.25	1.14	0.96	1.36
Public School	Gov't	0.98	0.83	1.15	0.97	0.83	1.14
Health	Gov't	0.90	0.78	1.04	1.33	1.15	1.54
Entertainment	Gov't	0.99	0.78	1.26	1.34	1.07	1.67
Hospitality	Gov't	0.91	0.76	1.10	1.39	1.16	1.67
Other Services	Gov't	0.87	0.74	1.03	1.32	1.12	1.57
Other	Gov't	1.75	1.11	2.78	1.26	0.88	1.80
OCCUPATION							
Craft	Clerical	1.15	0.97	1.37	0.81	0.69	0.95
Equipment Operator	Clerical	1.08	0.95	1.23	0.78	0.68	0.89
Government	Clerical	0.98	0.83	1.15	0.98	0.83	1.16
Laborer	Clerical	1.01	0.94	1.10	0.90	0.84	0.97
Manager	Clerical	1.04	0.95	1.14	0.86	0.79	0.93
Paraprofessional	Clerical	0.99	0.87	1.13	0.74	0.66	0.84
Professional	Clerical	1.08	1.00	1.17	0.79	0.73	0.85
Sales	Clerical	1.09	0.99	1.20	0.81	0.74	0.89
Service	Clerical	1.05	0.98	1.13	0.90	0.84	0.97
Supervisor	Clerical	1.05	0.92	1.20	0.82	0.72	0.94
Technician	Clerical	1.02	0.93	1.13	0.78	0.71	0.86
REGION							
medium msa	small msa	0.88	0.79	0.99	1.10	0.99	1.24
large msa	small msa	1.04	0.93	1.16	1.06	0.95	1.18
S. California	Other CA	0.59	0.56	0.62	0.91	0.87	0.96
N. California	Other CA	0.76	0.71	0.80	0.83	0.79	0.87
Tract Household Income	0	1.00	1.00	1.00	1.00	1.00	1.00
Tract % College Educated	0	1.00	0.99	1.00	1.00	1.00	1.00
Tract % Renters	0	1.00	1.00	1.01	1.00	1.00	1.00

3. Conciliation, Mediation and Settlement

a) Policy and Process

The Consultant Basic Training Manual sets the "Department's Philosophy of Negotiating Settlements" as follows:

1. The consultant's role is to be an advocate of the Fair Employment and Housing Act, not an advocate for the complainant or respondent.

2. The Department's policy is to encourage voluntary settlement.

3. Voluntary settlement is designed in the best interest of all the parties involved: the respondent, the complainant, and the taxpayers of the state of California.[170]

In furtherance of this policy consultants are to attempt "Pre-Determination Settlements" within 30 days of filing of the complaint, before any effort has been made regarding the merits of the complaint (beyond that it has been accepted for investigation).[171] Under long standing policy, once the employer has responded and the consultant has determined that at least one of the issues in the complaint has merit, but before any final finding has been made, consultants also attempt a "Mid Determination Settlement." Finally, once the consultant has decided that a "cause finding" is warranted and submitted that recommendation to the District Administrator for approval, a "conciliation conference" under the auspices of the District Administrator is attempted, prior to submission of the cause finding to the Legal Division for preparation of an accusation. Although DFEH policy has been to try to achieve prompt settlements, the median time to a settlement in the administrative process has been 151 days (25th percentile, 78 days; 75th percentile, 309 days).

DFEH once had an active and separately funded mediation program that, when fully operational, settled 397 cases per year (in 2002). With the end of the funding for the program, however, DFEH now operates a small scale (approximately 20 cases per month at the time of our interviews with DFEH managers) mediation program using volunteer mediators.[172] Some offices also have small mediation programs specific to their locations.[173] Many of the attorneys and DFEH personnel with whom we spoke regretted the lack of a larger mediation program, having viewed the earlier program as a great success in resolving disputes in a problem-solving and less adversarial and less costly manner, one that is particularly appropriate to complaints filed by employees who are still employed.[174]

b) Data and Comparisons

During the first 11 years of the period, of the cases that stayed in the administrative system (the complainant did not immediately request a RTS letter and the complaint was not sent to the Legal Division), DFEH closed 14,967 of 107,393 (13.9%) of cases with a code indicating that a settlement was reached, either with or without the help of DFEH. In many of these cases, there is no indication in the data as to what benefit, if any, was obtained by the complainant as a result of the settlement. Our analysis here reflects the remaining cases, in which a benefit of some kind was recorded. Of the 7,763 administrative settlements reflecting a monetary benefit, the median amount was $3,000 during the period, increasing from $2,500 in 1997 to $4,524 in 2004.[175]

We also obtained data on outcomes in EEOC charges for 2005-2008. We compared those to outcomes in DFEH complaints during the same period. We limited our examination to cases that were "dual filed," meaning that they could have been filed with either agency and that the administrative data for the agency so indicates. Table 26 summarizes the outcomes for all EEOC charges and all DFEH complaints that were closed during 2005-2008 in cases in which monetary benefits were obtained.

Table 26
Administrative Outcomes in EEOC Charges and DFEH Complaints
2005-2008 Dual-Filed, Closed Cases

Agency	Cases Closed	Cases with Monetary Benefit	%	Median	25th %ile	75th %ile
DFEH	17,583	1,569	8.9%	$3,833	$1,587	$10,000
EEOC	14,655	2,858	19.5%	$7,500	$2,500	$20,322

Several factors may account for the differences in results obtained by EEOC and DFEH. First, compared to the DFEH, EEOC devotes many more resources and staff time to efforts to settle charges, efforts that received favorable reviews from attorneys with whom we spoke representing both employers and employees. The discontinued DFEH mediation program, now replaced by a very small effort to use pro bono volunteers to mediate about 20 cases per month, also received generally positive reviews.

Second, one important difference between the DFEH and the EEOC is that except in rare cases, the DFEH cannot file a case in Superior Court but must litigate the case before the Fair Employment and Housing Commission. The amounts awarded by the FEHC (a median of $38,805) are about one-fifth the median jury verdict of about $200,000. Although most cases settle in both systems, settlements in both cases take place "in the shadow of the law," in that both parties must consider what may happen if settlement fails.

Third, in assessing these data, it is important to keep in mind that DFEH consultants do not see themselves as advocates. As a senior DFEH manager put it, "during the pre-accusation settlement phase, settlement benefits are pretty much what the complainant and respondent come to an agreement on." In other words, in DFEH settlements, complainants are representing themselves, nearly all of them for the first time, whereas many respondents have either prior experience dealing with the DFEH, or are represented by people, sometimes attorneys, who have considerable experience. Both in policy and practice, DFEH consultants do not function as advocates in the settlement process. The consultants we interviewed varied somewhat as to how much information they might share with a

170 Consultant I Basic Training Manual, "Negotiation Settlement," p. 2 (July 1, 1993).

171 Tim Muscat and Jennifer Harlan, "Case Grading System" memorandum, March 20, 2009.

172 DFEH manager 5509.

173 For example, the San Jose office has operated a mediation program for parties in Santa Clara County in cases that meet certain criteria (including being within the jurisdiction of EEOC as well as DFEH). DFEH consultant 5793.

174 DFEH Manager 7412.

175 These numbers may be slightly elevated by the fact that in some cases with monetary benefit was achieved in cases in which there were multiple beneficiaries. It is not possible, however, to determine the extent to which those beneficiaries shared in the monetary benefit, or were benefited by policy changes or other benefits achieved at the same time.

complainant as to the reasonableness of a settlement amount, but the only consultants who said they ventured an opinion said that they might tell a complainant that his or her demands were too high, or would in any event be rejected by the employer.[176] We were not able as part of this review to interview a sample of complainants, but it is not difficult to see that many might tend to have expectations of the consultants as being more than neutrals. We also did not interview a comparable set of EEOC investigators, but our interviews with both attorneys and EEOC managers suggested that EEOC investigators may generally take a more active role in providing the complainant's position.

Fourth, one of the major differences between the overlapping federal and state systems is the degree to which complainants rely on the administrative agency to resolve their complaints, or opt out of that system to pursue litigation. Looking only at complaints or charges that were closed between 2005-2008, people who filed charges with the EEOC opted to close the administrative case and obtain a RTS letter in only 19% of the cases. Put another way, 81% of these employees relied upon the EEOC to resolve their claim through the administrative process or settlement. Generally speaking, of course, about half of all DFEH complainants opt out of the administrative process at the outset.

Thus to some degree, outcomes are determined by whether the complaint first approaches a lawyer, DFEH or the EEOC. Virtually all of the plaintiffs' lawyers with whom we spoke indicated that they would counsel a complainant to file with DFEH rather than the EEOC because of the relative benefits of the FEHA compared to Title VII. To the degree that complainants consult lawyers before filing a complaint and accept either their advice or their representation, then, the complaints filed with EEOC are less likely to have been filtered by lawyers. Assuming lawyers have reasonable judgment about case quality and settlement values, the cases that reach the EEOC may be of higher average "quality" and can therefore be expected to have higher average settlement rates and settlement values. We lack sufficient data to determine how much this factor might account for DFEH-EEOC differences.

Nor are we able to compare settlements obtained by DFEH and those that might have been obtained in the legal system with the assistance of counsel. We do report jury verdict information later in this report, but very few cases involving lower damage amounts ever reach a jury trial. Many, if not most, settlements in employment discrimination cases contain confidentiality provisions such that, even if we were able to find a way of sampling settlements, obtaining verifiable information would be very difficult. Insurance carriers that offer Employment Practices Liability (EPL) insurance do have claims experience information, but our limited efforts to obtain such information met with the expected, and reasonable, response that this is proprietary information (which we probably could not, in any event, independently verify).

We do have one, albeit extremely limited, source of data regarding the appropriateness of settlements achieved by DFEH: the responses of attorneys to our on-line survey. The survey asked employee-side attorneys (n=24) the following question: "Based on your knowledge of settlements reached by DFEH in FEHA cases, how would you compare those settlements to settlements you would expect to see in the same matter if it were handled by a competent private attorney, as to the three areas listed below?" When it came to "net compensation to the complainant, if any," 75% of employee-side attorneys believed DFEH settlements were less, and 50% "much less" than comparable settlements with lawyers in comparable cases. Of course, employee side lawyers have a very limited base of information about the cases that DFEH handles through settlement. Employer-side attorneys (n=29) were less negative toward DFEH, with 31% saying DFEH settlements were lower than comparable attorney settlements and 17% "about the same".

Non-monetary outcomes are not so easily compared and we do not compare non-monetary benefits as between the DFEH and the EEOC. Table 27 following provides a summary of the type of benefits obtained through settlement in the DFEH administrative process, excluding monetary and back pay benefits. Note that the unit of analysis here is discrete benefits rather than cases. Each case record can include up to 4 codes indicating the type of benefit received. We have not attempted to estimate a monetary value, either to the complainant or to other employees and society, of these non-monetary benefits.

Leaving aside the catch-all codes for "Other" and "Remedial" relief, it is clear that by far the most common remedies obtained through settlement are agreements to display posters or to provide instruction or information regarding nondiscrimination.

To put these numbers in perspective, during the study period, the DFEH accepted for investigation and resolved through the administrative process (not including cases sent to the Legal Division) an average of 6,626 cases each year.

176 Consultants 4264, 5793, 4013, 874, 2215. In this, consultants are following their manual, which counsels them to be "advocates for the law" rather than advocates for the complainant.

Table 27
Non-Monetary Benefits Obtained Through DFEH Administrative Settlement
1997-2008 (Annualized)

Non Monetary Benefit	Number	Non Monetary Benefit	Number
Other	172	Harassment stopped	8
Instruction/dissemination of notice	161	Leave	6
DFEH poster displayed	118	Work duties changed	6
Remedial relief	84	Job training program establish	6
Reinstatement	65	Disability policy changed	5
Neutral reference promised	51	Promised next opening	5
Letter of reference	45	Personnel records maintained	4
Severance pay	31	Internal grievance procedure established	4
Adverse material removed from file	29	Promotion policies/procedures	3
Sexual harassment policy changed	17	Promised referral	3
Reason for separation changed	17	Legal Fees	3
Maternity policy changed	16	Recruitment/advertising practices	3
Offered training	15	Promised consideration for promotion	2
Transferred	13	Tested for hire/promotion	2
Insurance	13	Hours guaranteed	2
Promotion (with raise)	11	Termination policy/rules changed	2
Seniority retained	11	Job referral - employment agency	2
New hire	11	Interviewed	2
Pay increase	11	Placed on pension/retirement plan	2
Disability accommodation	10	Religious accommodation	2
Promised reinstatement	9	Reinstated to membership in union	2
Hours adjusted	9	Promised interview	2
Hiring policies/procedures changed	9	Other (<2)	5
Penalties imposed on supervisor	8		

D. Summarizing Outcomes in DFEH Administrative Process

Stepping back from the details of the administrative process, and situating that process in the overall enforcement and remediation ecology that includes the legal system, we can utilize a simplified sequential logistic regression with two steps: (1) obtaining or not obtaining a lawyer, as indicated by immediate issuance of the RTS letter; and (2) obtaining a benefit of some kind as a result of the complaint. Table 28, next page, illustrates the combined effects of the various steps in the DFEH administrative process on ultimate outcomes, measured in terms of whether the complainant did or did not receive some benefit, monetary or otherwise, as a consequence of having filed the complaint, and comparing those odds to the odds of complaints with those same characteristics having resulted in an immediate RTS letter (inferentially, obtaining the assistance of a lawyer).

The odds in Table 28 speak for themselves, but a few merit comment, particularly those in which the effects of particular characteristics have such different effects in the legal market and the DFEH administrative process. Women do significantly better in DFEH than in the legal market, as do non-Whites. The differences in the two systems are particularly dramatic in the case of industry, particularly comparing government to private employers, with government employees having much better outcomes in the DFEH process than in the legal market. One explanation for the latter point was provided by several employee-side lawyers, who told us that they preferred not to litigate against government, because governmental defendants were more likely to litigate cases further because the costs of defense are not born by the clients, but by the public.

Table 28
Overall Odds of Obtaining Immediate RTS Letters and Achieving a Benefit Through DFEH Administrative Process, 1997-2008

Variable	Comparison Group	Odd of RTSin7 (Lawyer)	RTSin7 95%low	RTSin7 95%high	DFEH Remedy	DFEH Remedy 95%low	DFEH Remedy 95%high	Ratio DFEH/ RTSin7
Female	Male	0.86	0.83	0.88	1.34	1.27	1.42	1.57
African American Complainant	Caucasian	0.60	0.57	0.62	0.90	0.83	0.96	1.50
African Other Complainant	Caucasian	0.53	0.43	0.64	0.74	0.45	1.19	1.40
Asian Pacific Islander Complainant	Caucasian	0.61	0.58	0.64	0.91	0.82	1.01	1.50
Hispanic Complainant	Caucasian	0.66	0.64	0.68	0.97	0.92	1.03	1.48
Native American Complainant	Caucasian	0.69	0.61	0.78	0.88	0.69	1.12	1.28
Craft	Clerical	0.86	0.77	0.95	0.87	0.72	1.06	1.02
Equipment Operator	Clerical	1.03	0.96	1.11	0.94	0.81	1.09	0.91
Government	Clerical	0.75	0.69	0.82	1.07	0.86	1.34	1.43
Laborer	Clerical	0.62	0.59	0.65	0.99	0.92	1.08	1.61
Manager	Clerical	1.05	1.00	1.10	0.85	0.77	0.94	0.81
Paraprofessional	Clerical	0.88	0.82	0.94	0.81	0.70	0.93	0.92
Professional	Clerical	1.04	1.00	1.08	0.72	0.66	0.79	0.70
Sales	Clerical	1.06	1.01	1.11	0.88	0.79	0.97	0.83
Service	Clerical	0.72	0.69	0.75	0.95	0.88	1.03	1.33
Supervisor	Clerical	0.99	0.92	1.06	0.88	0.75	1.02	0.89
Technician	Clerical	0.78	0.74	0.83	0.86	0.77	0.96	1.10
medium msa region	small msa	0.90	0.84	0.97	1.18	1.04	1.34	1.31
large msa region	small msa	1.16	1.08	1.23	0.99	0.88	1.12	0.86
Medium Firm Size	Small Firm	0.93	0.90	0.96	0.87	0.82	0.93	0.94
Large Firm Size	Small Firm	0.87	0.83	0.90	0.68	0.63	0.74	0.78
Agriculture, Forestry, etc.	Public Admin	0.70	0.59	0.84	1.51	1.15	1.97	2.14
Mining	Public Admin	0.37	0.27	0.51	1.89	1.28	2.77	5.14
Utilites	Public Admin	0.63	0.51	0.78	1.48	0.98	2.23	2.35
Construction	Public Admin	0.32	0.27	0.39	2.19	1.69	2.82	6.76
Manufacturing	Public Admin	0.57	0.52	0.62	1.87	1.55	2.25	3.28
Wholesale Trade	Public Admin	0.36	0.30	0.43	2.14	1.65	2.78	5.97
Retail Trade	Public Admin	0.60	0.55	0.65	2.15	1.79	2.58	3.59
Transportation and Warehousing	Public Admin	0.46	0.41	0.52	1.52	1.22	1.89	3.28
Information	Public Admin	0.47	0.41	0.53	1.91	1.51	2.41	4.10
Finance and Insurance	Public Admin	0.52	0.47	0.58	1.72	1.38	2.14	3.31
Real Estate and Rental and Leasing	Public Admin	0.69	0.60	0.80	1.72	1.31	2.27	2.48
Professional, Scientific & Technical	Public Admin	0.43	0.34	0.53	1.68	1.16	2.43	3.95
Administration and Support	Public Admin	2.77	2.59	2.98	1.35	1.13	1.62	0.49
Educational Services	Public Admin	0.59	0.54	0.66	1.33	1.06	1.67	2.23
Public School	Public Admin	0.97	0.89	1.06	0.85	0.70	1.03	0.87
Healthcare and Social Assistance	Public Admin	0.53	0.48	0.57	1.81	1.50	2.19	3.45
Art, Entertainment, and Recreation	Public Admin	0.63	0.55	0.73	1.83	1.40	2.40	2.90
Accommodation and Food Services	Public Admin	0.46	0.40	0.52	1.99	1.59	2.49	4.35
Other Services	Public Admin	0.36	0.32	0.41	1.77	1.43	2.19	4.89
Other	Public Admin	5.00	4.28	5.85	1.41	0.93	2.15	0.28

Table 28 (Continued)
Overall Odds of Obtaining Immediate RTS Letters and Achieving a Benefit Through DFEH Administrative Process, 1997-2008

Variable	Comparison Group	Odd of RTSin7 (Lawyer)	RTSin7 95%low	RTSin7 95%high	DFEH Remedy	DFEH Remedy 95%low	DFEH Remedy 95%high	Ratio DFEH/ RTSin7
Demotion	Termination	2.74	2.56	2.92	1.27	1.10	1.47	0.46
Denied Leave	Termination	1.36	1.23	1.51	1.55	1.33	1.81	1.14
Denied Promotion	Termination	1.41	1.34	1.47	0.88	0.79	0.98	0.62
Employer Harassment	Termination	1.96	1.91	2.01	0.74	0.70	0.78	0.38
Failure to Reinstate	Termination	1.63	1.41	1.88	0.97	0.74	1.28	0.60
Failure to Hire	Termination	1.12	1.06	1.18	1.11	1.01	1.23	0.99
Refusal to Accommodate	Termination	1.77	1.69	1.84	1.26	1.16	1.37	0.71
Unequal Pay	Termination	0.91	0.85	0.97	0.95	0.84	1.09	1.05
Union	Termination	2.11	1.31	3.41	1.66	0.73	3.77	0.78
Work Conditions	Termination	0.45	0.43	0.47	1.08	1.02	1.15	2.41
Denied Family Care	Termination	2.25	2.08	2.44	1.14	0.98	1.33	0.51
Other	Termination	2.11	1.96	2.27	0.12	0.06	0.24	0.06
Basis - Association	Basis-Age	6.41	5.52	7.44	0.92	0.58	1.47	0.14
Basis - Family Medical Care Leave	Basis-Age	0.63	0.59	0.68	1.40	1.24	1.57	2.20
Basis- Marital Status	Basis-Age	1.43	1.30	1.57	0.70	0.54	0.89	0.49
Basis - Medical Condition	Basis-Age	4.47	4.13	4.85	0.79	0.63	1.00	0.18
Basis - National Origin	Basis-Age	1.52	1.47	1.59	0.73	0.66	0.79	0.48
Basis - Disability	Basis-Age	1.36	1.31	1.40	0.99	0.92	1.06	0.73
Basis - Race/Color	Basis-Age	1.39	1.34	1.44	0.71	0.65	0.76	0.51
Basis - Religion	Basis-Age	0.96	0.90	1.04	0.83	0.71	0.98	0.86
Basis - Retaliation	Basis-Age	2.69	2.61	2.77	0.82	0.76	0.88	0.31
Basis - Sex	Basis-Age	1.74	1.68	1.79	1.29	1.21	1.38	0.74
Basis - Sexual Orientation	Basis-Age	1.19	1.11	1.28	0.69	0.57	0.84	0.58
Other - Other	Basis-Age	3.31	3.12	3.51	0.01	0.00	0.04	0.00
District Office in Southern California	Other CA District Office	1.06	1.03	1.10	0.66	0.63	0.70	0.62
District Office in Northern California	Other CA District Office	0.87	0.85	0.90	0.69	0.65	0.73	0.79
Tract Median Household Income	0	1.00	1.00	1.00	1.00	1.00	1.00	1.00
Tract % College Educated	0	1.02	1.02	1.02	1.00	1.00	1.00	0.98
Tract % Renters	0	1.00	1.00	1.01	1.00	1.00	1.00	1.00

Table 29
Case Closing Codes and Outcomes by District Office, Cases Closed 2004-2008

District Office	Cases Closed	RTS Immediate	RTS Later	Rejected for Investigation	Other Admin. Dismissals	Insufficient Evidence	No Probable Cause	Admin Settlement	Median Settlement	Sent to Legal Division	% Retained Cases Sent to Legal
San Francisco	6,952	47.0%	5.0%	13.3%	2.9%	3.2%	21.9%	6.1%	7,549	41	1.5%
Fresno	6,373	26.0%	7.7%	17.2%	6.9%	13.5%	18.3%	9.8%	3,500	39	1.1%
San Diego	8,191	62.2%	4.2%	3.8%	3.3%	4.4%	17.3%	4.7%	3,275	9	0.3%
Sacramento	8,294	45.0%	5.6%	11.7%	4.6%	3.2%	24.0%	5.6%	5,000	18	0.5%
San Jose	5,823	51.8%	3.5%	8.6%	4.9%	2.5%	23.4%	4.6%	4,364	42	1.8%
Bakersfield	6,692	52.6%	4.4%	4.9%	5.0%	0.6%	24.5%	7.7%	2,285	11	0.4%
Oakland	8,773	41.7%	4.0%	17.9%	4.0%	3.9%	22.9%	5.5%	5,000	16	0.5%
Los Angeles R	3,988	68.9%	3.6%	9.6%	3.2%	2.1%	9.5%	3.1%	4,500	4	0.5%
Los Angeles S	9,518	61.2%	3.7%	9.8%	4.1%	0.7%	16.5%	3.8%	4,000	15	0.5%
Los Angeles T	6,641	54.4%	5.4%	14.0%	2.5%	0.5%	18.7%	4.4%	5,000	11	0.5%

E. Variations Across DFEH in Case Handling and Outcomes

The data presented thus describes the processing and outcomes of DFEH complaints across the state. There is, however, significant variation across offices in different parts of the state, as reflected in Table 29.

A great many factors can, and probably have, contributed to these differences. First, complainants are more likely to pursue the legal system alternative to DFEH in those areas where there are more lawyers willing to accept such cases. This might contribute, for example, to the low number of immediate RTS letters issued in Fresno compared to Los Angeles. As a result of interactions with the legal market, the characteristics of the cases that have not been accepted by lawyers will also affect the composition of the caseload being processed by DFEH. Differences in local labor market conditions may affect the the potential settlement value of cases by changing the calculation of lost wages damages. Finally, different offices may simply develop a different "culture" as to how cases should be handled or what constitutes a reasonable settlement. All these factors deserve further investigation.

Also deserving more attention is the degree to which DFEH insures the uniform application of the FEHA across California. DFEH management utilizes the CMIS system to produce reports from which such variations can be seen. However, DFEH has insufficient management and monitoring resources to assure that the standards for handling and resolving cases are uniform across offices. Prior to earlier budget cutbacks, the Department had managers specifically tasked with quality assurance across the state. In 1996-1998 this function was performed by a Special Assistant to the Deputy Director. Later two Regional Administrators, one for the northern and one for the southern parts of the state, performed these functions. A Regional Administrator for Quality Assurance position ended in budget cuts in 2008. At present, the Enforcement Division is a remarkably "flat" organization, with all District Administrators in the state reporting directly to a single Deputy Director, who must attend not only to quality assurance, but also to every other facet of the Division's operations across the state.

We also noted wide variation in the handling of cases by consultants even within the same District Office. Some of this variation can be explained by differing responsibilities within the office and to some extent by random variations in caseloads, but the variations were sufficiently extreme to suggest the need for additional resources devoted to assuring that complaints are being resolved accurately and those that are settled, settled appropriately. Within offices, District Administrators are charged with conducting routine reviews of cases, but there is no longer the same level of supervision of District Administrators to see that these reviews are sufficiently thorough.

F. Transfer to the Legal Division

1. Policy and Process

Cases that are not resolved in the administrative process are sent to the Legal Division by means of a "Progress Memo" that accompanies the consultant file.[177] The Progress Memo summarizes the allegations and evidence in the case and the basis for the recommendation that an accusation before the FEHC be prepared. Cases are assigned by the Chief Counsel to a Staff Counsel for review and possible preparation of an accusation.[178] The consultants we interviewed described the preparation of a Progress Memo as a substantial and time consuming undertaking. At the same time, some of the staff counsel with whom we spoke indicated that they never relied on the Progress Memo, preferring instead to review the underlying evidence and do an independent evaluation. It is likely with the adoption of the Case Grading System and increased cooperation between consultants and staff counsel earlier in the preparation of an accusation, some of what appeared to be wasted effort will be reduced. As part of these reforms, the DFEH has changed the format and procedure for Progress Memos, in some cases entirely eliminating the need to prepare one.

177 Enforcement Division Directive 312, "Progress Memos," October 1, 1998.

178 DFEH Legal Operations Manual, Chapter 4, p. 29, July 1, 2005.

As a formal matter, whatever complainants understand, both consultants and Legal Division attorneys are representing the agency and not the complainant. One consequence of this is that not all of the protections afforded to materials prepared by attorneys representing clients under the work product doctrine or attorney client privilege are in place here. Routinely, defense counsel request and obtain much of the investigative file prepared by consultants, although some material can be and is redacted. As with consultants, the Legal Division attorneys are representing the agency and not the complainant.

2. Preparation of Accusations

During the study period, 1,458 employment discrimination cases were transmitted by the Enforcement Division to the Legal Division for possible preparation of an accusation or lawsuit. Both the number of such transmittals and the number of accusations dropped dramatically after 2000-2001, as reflected in Table 30. We were not able to ascertain a reason for this decline, although one knowledgeable insider attributed change to management changes at DFEH that occurred with the inception Governor Davis' administration in 2000.

Table 30
Accusations Requested and Issues Closed Cases 1998-2008

Year	Cases Accepted for Investigation Closed	Progress Memos		Accusations	
		Progress Memos Received	% of Cases Closed	Accusations Issued	% of Cases Closed
1998	10,226	202	2.0%	195	1.9%
1999	9,523	192	2.0%	166	1.7%
2000	8,915	229	2.6%	210	2.4%
2001	8,374	229	2.7%	186	2.2%
2002	9,117	203	2.2%	152	1.7%
2003	8,737	109	1.2%	84	1.0%
2004	7,688	99	1.3%	88	1.1%
2005	6,486	77	1.2%	65	1.0%
2006	6,614	55	0.8%	42	0.6%
2007	6,518	89	1.4%	74	1.1%
2008	6,368	59	0.9%	41	0.6%

Over the study period, the median time from the date of filing of the complaint to the date of referral to the Legal Division was 345 days.

While employment cases comprise the majority of the caseload referred to the Legal Division, employment cases are referred at a much lower rate than housing discrimination cases. Table 31 following compares the number of cases referred to the Legal Division with the number of non-RTS complaints filed in the previous year (in order to account for the approximate one year time lag from complaint filing to referral for accusation).

Table 31
Accusations Filed as Percentage of non-RTS Complaints Filed in Previous Year, by Type of Complaint 1997-2007

Year	Employment	Housing	Other	Total
1998	1.9%	4.5%	2.2%	2.1%
1999	2.2%	7.8%	3.4%	2.5%
2000	1.9%	5.8%	9.0%	2.3%
2001	1.2%	3.7%	1.1%	1.4%
2002	0.7%	3.1%	2.3%	0.9%
2003	0.7%	4.0%	3.8%	1.0%
2004	0.6%	6.1%	2.6%	1.0%
2005	0.9%	5.1%	0.7%	1.3%
2006	1.0%	5.9%	5.7%	1.5%
2007	1.0%	3.8%	2.2%	1.4%

The rate at which complaints are referred to the Legal Division is a product of several factors, including those affecting how complaints are processed at all the prior steps elaborated above, the merits of the non-settled cases, the relative emphasis placed on different case types by DFEH management, and the costs of pursuing different kinds of cases. For example, among housing discrimination cases, we have found preliminarily that discrimination on the basis of family status and failure to accommodate disabilities are referred at a higher rate than other types of housing cases, perhaps because the evidence required to prove these cases (advertisements, physical conditions of housing) are not as expensive or difficult to prove.

3. Dispositions after Referral to the Legal Division

In order to obtain a fair sample of case closings, we limit our analysis here to cases that were referred for possible filing of an accusation through 2007. During this period, the Legal Division issued 881 accusations, 62% of the 1,430 cases referred to it for this purpose.

Table 32 summarizes the disposition of cases in which accusations were issued between 1997 and 2007, separated into the two periods 1997-2001 and 2002-2007.

In terms of the locus of disposition, over the 1997-2007 period 67% of the accusations were resolved without a hearing and prior to any transfer to court. 26% were transferred to court, on the initiative of the respondent. Of the employment cases closed by the Legal Division during our study period following their transfer from the Enforcement Division, only 6% (49 cases) were resolved at or after a public hearing on the accusation before the FEHC.[179]

179 These numbers are slightly different from those reflected in FEHC decisions because of differences in timing of closing cases and issuance of FEHC decisions, some of which are the subjects of further litigation in the court system, and thus not closed by DFEH.

Table 32
Disposition of Cases in Which Accusations Issued
(Complaints Filed 1997-2007)

	1997-2001		2002-2007	
Case Closing Code	Cases	%	Cases	%
06 Complainant elected court action	4	0.7%		0.0%
20 No probable cause to prove a violation of the statute	1	0.2%		0.0%
16 Negotiated settlement/field resolution		0.0%	1	0.4%
22 Accusation withdrawn; settlement signed	274	48.3%	154	54.8%
23 Accusation withdrawn; no probable cause	12	2.1%	8	2.8%
24 Accusation withdrawn; remedy refused by complainant	2	0.4%	1	0.4%
25 Accusation withdrawn; complainant elected court action	63	11.1%	20	7.1%
26 Accusation withdrawn; administrative dismissal	26	4.6%	4	1.4%
27 Accusation withdrawn; cwithdraws without settlement	6	1.1%		0.0%
28 Accusation withdrawn; prosecution restrained	1	0.2%		0.0%
30 Public hearing held; no appeal filed	26	4.6%	11	3.9%
31 Public hearing held; appeal filed; Commission order upheld	3	0.5%	1	0.4%
33 Public hearing held; settlement signed	5	0.9%	1	0.4%
34 Public hearing held; appeal filed; settlement signed	2	0.4%		0.0%
50 Transferred to court; pre-trial settlement	110	19.4%	67	23.8%
51 Transferred to court; case dismissed	21	3.7%	9	3.2%
52 Transferred to court; post-trial settlement	7	1.2%	1	0.4%
53 Transferred to court; final trial court decision	4	0.7%	3	1.1%
Total	**567**	**100.0%**	**281**	**100.0%**

As is apparent from Table 32, most cases in which accusations are brought by the Legal Division are settled. The median settlement during the 1997-2007 period was $14,842 (25th percentile, $6,000; 75th percentile, $30,000; 623 cases for which data was available). Although fewer cases were referred to the Legal Division or settled after 2001, the median amount of the settlement rose for the period 2002-2007 to $20,000.

Cases in which accusations have been filed can be removed to the Superior Court on the motion of the respondent. For cases in which complaints were filed during our study period and in which accusations issued, 214 were transferred to Superior Court, compared to 523 that were resolved by DFEH in the FEHC process. Outcomes in cases resolved in one forum or the other were not significantly different in terms of whether the complainant received any benefit.[180] However, the amount obtained in settlement was somewhat higher in cases that had been transferred to court.

Table 33
Settlements in Post-Accusation Stage by Forum
1997-2008 Complaints

Forum	25th %ile	Median	75th %ile	Cases
DFEH/FEHC	$5,778	$15,000	$33,000	365
Superior Court	$8,623	$20,000	$45,000	169

As noted earlier, DFEH Legal Division settlements are conducted "in the shadow" of the FEHC and its median award of about $39,000, whereas settlements in litigation are reached in the much longer shadow of the median jury verdict of about $200,000. Another important factor accounting for differences in settlements in the two systems is that the DFEH cannot seek or obtain attorneys fees, which are often an important bargaining chip in the settlement of private litigation. And finally, of course, the two systems are processing cases that were often funneled into one "pyramid" or the other as a consequence of decisions of plaintiffs' lawyers making judgments about the expected value of cases.

4. Proactive and Systemic Litigation by the Legal Division

As noted earlier, the lawyers in the Legal Division also work closely with investigators in a small Special Investigations Unit (SIU), focusing on cases that are selected for their possible impact. For example, DFEH recently settled before filing a potential class action against a major hospital that screened out applicants for employment based on their health, obtaining more than $259,853 for 10 applicants and an agreement to discontinue the practice. As of January 15, 2010, DFEH had 5 SIU investigations underway. The expanded use of class actions and Directors' complaints is a relatively new development at DFEH that has not had enough time to generate sufficient data for any systematic evaluation. Based on enforcement efforts by other agencies, however, there is good reason to see promise in targeting at least some legal resources based on their potential impact, rather than devoting all resources to processing routine cases forwarded by the Enforcement Division.

VIII. THE FAIR EMPLOYMENT AND HOUSING COMMISSION

The predecessor of the Fair Employment and Housing Commission, the Fair Employment Practices Commission, was created in the original Fair Employment Act. The Commission has 7 members, who are appointed by the Governor and confirmed by the Senate for terms of four years.[181] The Commission is empowered to issue regulations, adjudicate accusations brought by the DFEH, conduct mediations, and provide technical assistance. The Commission appoints administrative law judges who conduct hearings on accusations, and review proposed decisions prepared by them. As of this writing, the FEHC has only one active administrative law judge, who also serves as its Executive and Legal Affairs Secretary, as well as chief (and only) administrative law judge.

A. Issuance of Regulations

Under the authority of the FEHA, the FEHC is authorized to issue "rules, regulations and standards … to interpret, implement, and apply all provisions" of the FEHA.[182] Under California law, courts are required to apply "great weight" to the FEHC's interpretations of the FEHA.[183] The results of FEHC's regulatory activities are found in the California Code of Regulations.[184] The Commission has issued detailed procedural regulations and substantive regulations regarding discrimination on the basis of national origin, sex, marital status, religion, disability, age and family care and medical leave.[185] It

180 Pearson chi2(1)=.0308, Pr.=.0.861.

181 Cal. Gov. Code § 12903

182 Cal. Gov. Code § 12935(a).

183 *Bradley v. California Dept. of Corrections and Rehabilitation*, 158 Cal. App. 4th 1612, 1625 (2008); *Robinson v. Fair Employment and Housing Commission*, 2 Cal. 4th 226, 234 (1992), fn. 6.

184 Title 2, Division 4, Sections 7286-7467.

185 Subchapters 4, 6, 6A, 7, 8, 9, 11 and 12, respectively.

has "reserved" a subchapter[186] for substantive regulations regarding race and color discrimination, but has not issued any regulations regarding race or color discrimination.

B. Analysis of FEHC Decisions

The decisions of the Commission are published on *Westlaw*. We downloaded and coded the 83 employment discrimination decisions issued by the Commission from January 1, 1997 to June 19, 2009. The number of decisions issued by the Commission declined sharply between 1999 and 2000. In 1997-1999, the commission issued 35 decisions, or 11.66 decisions per year. From 2000-2008 the Commission averaged less than half that rate, issuing a total of 46 decisions, for an annual rate of 5.11 decisions per year.

The nature of the claims that reached and were decided by the Commission varied significantly from the general distribution of complaints processed by DFEH. We coded the bases of discrimination alleged in the dispute resolved by the Commission. The 124 distinct bases of alleged discrimination in the 83 disputes were distributed as described in Table 34 below.

Table 34
Bases of Discrimination in FEHC Decisions,
1997 – 2009 (partial year)

Bases Alleged	Claims	%
Sex	45	36.3%
Disability	27	21.8%
Retaliation	20	16.1%
Medical Condition	9	7.3%
Race / Color	5	4.0%
Age	4	3.2%
Religion	4	3.2%
Other	3	2.4%
National Origin	2	1.6%
Association	2	1.6%
Denial of Family Leave	1	0.8%
Marital Status	1	0.8%
Sexual Orientation	1	0.8%
Total	124	100.0%

As might be expected, disputes involving alleged discrimination on the basis of sex and disability constitute the bulk of the workload of the Commission. Cases involving race discrimination and age discrimination, which comprised 14.5% and 10.9% respectively of allegations in complaints received, are dramatically underrepresented in the docket of the Commission. It bears noting that an agency born out of the civil rights movement for racial justice heard less than 1 case involving allegations of race discrimination every 2 years.

Of the 83 cases we examined, 56 decided cases in which the underlying complaint with DFEH had been filed within our study period. We restrict our analysis here to these 56 FEHC decisions. Of those 56 cases, 17 (30.4%) were dismissed. Of the 39 cases resolved in favor of the Department (technically, the complainant is the "real party in interest"), the great majority were based on accusations of sex discrimination (21 cases) or disability or medical condition discrimination (18 cases). The Commission issued relief in the form of monetary awards, fines, or penalties in 36 cases. Of these cases, the median amount of penalties, fines, and awards to the complainant(s) was $38,805 (25th percentile, $25,000; 75th percentile $73,422).

While the decisions of the Commission may not play a significant role in adjudicating particular disputes, issuing 56 decisions during a time period when complainants filed more than 200,000 complaints, including more than 100,000 resolved through the system of which the FEHC is a part, the Commission's influence may extend further than these data would suggest, by way of the precedential decisions and regulations it issues. Finally, the FEHC also defends its decisions in court. Since 1997 there have been 13 appellate cases involving employment discrimination issues in which the FEHC was a party. Three of these were published and are therefore citable decisions.[187]

IX. THE PROCESSING AND RESOLUTION OF DISPUTES THROUGH THE LEGAL SYSTEM

During our study period, a total of 106,232 complainants opted out of the DFEH administrative process and took the first step toward having their complaint resolved through civil litigation: requesting a RTS letter. As noted, this was slightly more than half of all the cases closed during the study period. As also explained in Section VI, complainants had varying degrees of difficulty in obtaining lawyers to assist them. In order to develop some sense of what happens to complaints that enter the civil litigation system, in addition to interviewing lawyers involved on both sides of the litigation process, we also developed two additional sources of data. First, we drew a sample of 400 cases in which RTS letters had issued, and conducted as exhaustive a search as possible of court records to determine if a civil case had been filed on the same claim. Second, we conducted a thorough search of reported jury verdicts in employment discrimination cases reported in 2007 and 2008. Professor David B. Oppenheimer of the U.C. Berkeley School of Law graciously provided us with a similar set of data regarding jury verdicts reached in 1998-99 that he had assembled in connection with prior research.[188] Finally, we learned a great deal from our interviews with lawyers representing both employers and employees, and our online survey of lawyers.

A. Lawyers for the Defense

We reported in Section VI above in significant detail on what we learned about lawyers for employees who file FEHA complaints. In order to understand the nature of employment discrimination litigation, it is of course essential also to understand the market for legal services for employers against whom such allegations are brought, both in the DFEH administrative process and in litigation. As with many other kinds of litigation, the cost, coverage and availability of insurance play an important role.

1. Costs of Defense

Nine of the employer-side attorneys with whom we spoke provided estimates of the costs of defense, as did 14 employer-side attorneys who responded to our survey. While these are small samples, to the extent that they report on prices set in a market, they can still yield

186 Subchapter 3. Race and Color Discrimination.

187 *Sasco Elec. v. California Fair Employment and Housing Com'n*, 176 Cal.App.4th 532 (2009); *California Fair Employment and Housing Com'n v. Gemini Aluminum Corp*., 122 Cal.App.4th 1004 (2004); and *Department of Fair Employment & Housing v. Verizon Cal., Inc.*, 108 Cal.App.4th 160 (2003).

useful information, for the same reason that we do not need a very large sample of gasoline or milk prices to get a reasonable sense of the range of the costs of those items. The surveys produced the estimates of the costs of defense in Table 35, in a "typical" case, through various stages of the process. These numbers were entirely consistent with what our interview subjects told us, as well as information we obtained from interviews with insurance company officials. These are of course only estimates. The costs of defense of particular cases may vary widely from the "typical" case and there is a significant spread in the rates charged by defense lawyers.

Table 35
Estimated Costs of Defense,
On-Line Survey of 14 Employer Side Attorneys

Stage of Proceeding	Median Costs of Defense
Prepare response to DFEH complaint	$5,000
Prepare response and negotiate settlement with DFEH	$6,750
Represent employer before FEHC	$15,000
Defend litigation by private counsel until summary judgment motion	$50,000
Defend litigation by private counsel through summary judgment motion	$75,000
Defend litigation by private counsel through trial	$150,000

2. EPL Insurance

About 30 insurance carriers provide "employment practices liability" (EPL) insurance to employers in California. Most claims under FEHA are insurable. Indeed, as one insurance company executive told us, EPL insurance in California is often marketed as "FEHA and Title VII insurance." The coverage exclusions are primarily those mandated by California Insurance Code § 533, which provide that "[a]n insurer is not liable for a loss caused by the willful act of the insured…" As a practical matter, exclusions are primarily limited to punitive damages and to intentional acts (for example, sexual harassment) on the part of the named insured. Intentional discrimination or harassment on the part of lower level employees or managers is, however, typically covered. The most common coverage provides cost of defense through all stages of a FEHA claim, from responding to the initial complaint through jury trial and appeal, if necessary. Although we found no data on the percentage of employers who are covered by EPL insurance, our interviewees explained that coverage was much less common among smaller employers – those with fewer than 100 to 150 employees.

As with all insurance, EPL insurance premiums are determined primarily by risk. Among the underwriting criteria insurance industry officials mentioned were: the industry of the employer (with retail and manufacturing being higher risk industries), the experience of the insured, the sophistication of the insured in human resources issues (as evidenced, for example, by appropriate personnel policies and procedures), the proportion of permanent to temporary workers, employer size (including whether the employer is above the 100 employee threshold required to file workforce composition reports with the EEOC via the EEO-1 report), and geography. Some venues, particularly the greater Los Angeles/Orange County area, the Bay Area, and Sacramento and environs are regarded as higher risk, higher cost areas. The risk associated with FEHA claims is driven not only by the risk of awards to plaintiffs, but also the risk of attorney fees awards, which can in some cases surpass the award to the plaintiff.

The insurance company officials with whom we spoke provided estimates of the costs of defense that were consistent with what we learned from defense counsel: $3,500-7,500 to respond to a complaint in the DFEH administrative process, $75,000 - $100,000 to provide a defense in litigation, through a summary judgment motion, and substantially more for litigation beyond summary judgment.

B. How Much Litigation? Converting Right to Sue Letters to Lawsuits

In order to estimate the course of complaints in which the complainant opted out of the DFEH administrative process at an early stage, we drew a sample of 400 complaints in which a RTS letter had issued within a week of the filing of the complaint (an indicator, in our judgment, that the complainant was acting with the assistance of or on the advice of counsel). We selected the sample from the complaints filed in those counties and during that time period that would maximize the likelihood that we would be able to locate records of cases actually filed, with enough time for a large percentage of cases to have reached a conclusion. This resulted in drawing the sample complaints filed with DFEH between April 1, 2005 and April 1, 2006 in counties for which we could be reasonably certain that available data is complete,[188] specifically the counties of Los Angeles, Orange, San Diego, Alameda, Sacramento, Santa Clara, San Bernardino, San Francisco, Riverside, Contra Costa, Ventura, Fresno and San Joaquin. These counties accounted for 96% of all RTS letters issued during this period.

Of the 400 sample, we were able to locate 176 cases filed in California superior courts. A supplemental search of the federal PACER system located one additional federal case, for a total of 177, thus yielding a RTS letter to lawsuit "conversion rate" of 44.3%. More accurately, within the margin of sampling error this number is a lower bound on the percentage of cases filed, given that nearly all the potential for error in the search process is on the side of *not* finding a case (a false negative) that was filed rather than erroneously identifying a case as filed when it was not (a false positive). We had no means of estimating the outcomes in those cases that did not result in a court filing. It is likely that a substantial fraction of these cases were settled prior to the time litigation was commenced. Others may have simply been abandoned, perhaps because complainants were unable to secure the continued assistance of counsel through the initial stages of the litigation process. In any event, the very common practice of entering into confidentiality agreements as to the contents of any settlement would have precluded our obtaining information about settlement outcomes, even were we able to obtain the initial cooperation of the attorneys involved.

1. Correlates of the RTS-to-Litigation Conversion Rate

Among the significant determinants of the rate at which RTS letters become litigated cases appears to be geography, primarily driven by the very high conversion rate in Los Angeles County (55.8%) compared to the rest of the counties in the sample (44.2%). This

188 Of unlimited jurisdiction civil cases in California in FY 2006-2007, 68% were resolved in 12 months, 85% in 18 months, and 92% in 24 months. We can add an additional year to capture cases that may be more complex and take longer to get to trial, or are in courts where the statewide averages are not obtained. We thus drew a sample of complaints in which complaints were filed and RTS letters issued between 4/1/05 and 3/31/06 (since our final dataset included complaints through the middle of April, 2009). Because the likely eventual venue for a civil case is not always apparent from the DFEH data, we focused on counties in which coverage was available on a statewide basis. We tested both the LEXIS databases and those available through the BLOOMBERG legal databases and determined that LEXIS was more inclusive. Counties were selected based on the complainant's address. We supplemented these searches with separate searches of the online docket systems available through the courts themselves in these counties.

is consistent with Los Angeles County's high rate of involvement of lawyers and the prevalence of litigation. During the one year period from which our sample was drawn, Los Angeles accounted for 38% of all cases closed but 49.5% of all RTS letters issued during the period. During this period, 62.6% of all cases closed in Los Angeles were closed with a RTS letter.

2. Outcomes in Litigated Cases

We also reviewed the dockets of the 177 cases we were able to locate to determine what we could about the disposition of these cases. The dockets in 137 of these cases had sufficient information to determine the likely manner of their disposition, as reflected in Table 36. Because of the small sample size and the limits of the information available from court dockets, generalizations to the full universe of civil litigation in such cases should be drawn with a good deal of caution. Given what we know of the disposition of civil cases generally, we should expect that the rates of settlements are higher than stated in Table 36, although there may be emotional and other non-economic factors involved in employment discrimination cases that would produce somewhat different settlement rates from those involving purely economic losses. During the time period at issue, the percentage of cases disposed of by jury trial among all civil cases in the civil unlimited jurisdiction courts was well under 2%, lower than the rate we found in our sample of employment discrimination cases, [189] although the difference may well be the result of random sampling error.

Table 36
Apparent Dispositions of Cases Resulting from Right to Sue Letters, 4/1/05 – 3/31/06 Sample, Where Disposition Available

Settled or Probably Settled	70.1%
Removed, Other Non Merits Dispositions	12.4%
Summary Judgment or Other Dismissal for Defendant	8.0%
Arbitrated	5.1%
Tried	4.4%

C. Jury Verdicts in Employment Discrimination Cases

In most sociolegal studies framed using the "dispute pyramid" metaphor, the pinnacle of the pyramid is the jury trial. These are the cases that were not resolved at any earlier stage, including settlement during the litigation process. We conducted a search of all available sources of jury verdicts reached in California state courts in 2007-2008, after determining that utilizing the databases available on WESTLAW, supplemented with searches of the *Daily Journal* verdict reports would obtain maximum coverage. We were fortunate also to obtain from Professor David B. Oppenheimer of the U.C. Berkeley Law School similar data that he had assembled regarding wrongful discharge and employment discrimination verdicts in 1998-1999. The data for the two periods includes verdicts in 360 cases, brought by 417 plaintiffs. Because jury verdicts are rendered as to individual plaintiffs, and the consolidation of individual claims for trial may result from any number of factors, we report here on individual plaintiff data.

Comparing the two, two-year time periods, the number of reported jury verdicts declined from 233 to 184. The composition of cases filed also changed in some areas. Table 37 below provides the number of claims reaching jury verdict in each period by the alleged basis of discrimination.

Table 37
Alleged Basis of Discrimination Claims Reaching Jury Verdict, 1998-1999 and 2007-2008

Basis	1998-99	2007-08
Sex	117	70
Race or Color	53	50
Retaliation	47	47
Disability	32	42
Age	30	20
National Origin	9	15
Medical Condition	7	14
Religion	3	7
Marital Status	2	1
FMLA	0	1

Consistent with the overall changes in the composition of claims filed, the number of reported jury verdicts also rose in disability cases and declined in sex discrimination cases, the only areas in which the difference was statistically significant at the .05 level. We also examined sexual harassment cases separately from other kinds of sex discrimination. The change in sexual harassment cases between the two periods is particularly striking. In 1998-1999, these cases accounted for 33% of all verdicts. By 2007-2008, the proportion had dropped to 11.5%, a result that is statistically significant at the .001 level.

Another significant difference between the two periods was one of geography. In 1998-1999, Los Angeles County accounted for 31.8% of reported verdicts in the state. By 2007-2008, that percentage had nearly doubled to 57.6%, a difference significant at the .001 level. Table 38 provides the distribution of counties in which verdicts were reported. Some of the difference may be differences in reporting. Although we have good theoretical reasons to believe that the verdicts are not significantly affected by whether the verdict was for the plaintiff or the defendant, the degree to which lawyers are likely to report jury verdicts may vary by county. In larger legal markets like Los Angeles, lawyers are perhaps more reliant on such public information to attract clients than in smaller counties where personal contacts may be more common.

1. Outcomes in Jury Verdicts

According to standard economic theory,[190] we should expect that over large numbers of cases plaintiffs and defendants should prevail in about equal numbers, because these are the cases where each side believes they have a good chance of prevailing. We find additional support for this theory in our data. Over all the claims litigated to verdict and reported, plaintiffs prevailed in 49.8% and defendants in 50.2%. This percentage did not change in any statistically significant way between the two periods. Both facts gives us additional comfort that the verdicts that were reported were not skewed, for example, by a differential in how likely the prevailing lawyers are to report their verdicts to one of the reporting services.

189 Judicial Council of California, 2009 Court Statistics Report, Statewide Caseload Trends, 1998-1999 through 2007-2008, at p. 46.

190 George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation* 13 J. Legal Studies 1 (1984).

Table 38 Employment Discrimination Jury Verdicts By County and Time Period			
County	**1998-1999**	**2007-2008**	**Total**
Los Angeles	73	106	180
Orange	26	9	35
Alameda	18	16	34
San Diego	24	4	28
Sacramento	15	11	26
San Francisco	8	13	21
Riverside	13	1	14
Fresno	5	5	10
Santa Clara	8	2	10
San Mateo	5	2	7
Ventura	7	0	7
Napa	6	0	6
Tulare	5	0	5
Placer	1	3	4
Sonoma	4	0	4
Contra Costa	3	0	3
San Bernardino	2	1	3
Butte	2	0	2
San Joaquin	0	2	2
Shasta	2	0	2
Solano	1	1	2
Yolo	2	0	2
El Dorado	1	0	1
Humboldt	0	1	1
Imperial	0	1	1
Kern	0	1	1
Marin	0	1	1
Monterey	0	2	2
San Fernando	1	0	1
Santa Barbara	0	1	1
Santa Cruz	1	0	1
Stanislaus	0	1	1

a) Plaintiff Demographics

Although overall plaintiffs and defendants each prevailed about half the time, the outcomes were dramatically different in some kinds of cases. Over both periods, in cases in which the race of the plaintiff was identified, African American plaintiffs prevailed only 29.4% of the time, compared to all other groups (including unknown race) at 52.6%. This difference was highly statistically significant[191] during both periods. This racial difference in jury verdict outcomes was one of the major findings of Professor Oppenheimer's earlier report on the same data.[192] The percentage of wins by African Americans declined from the earlier to the later period, from 33% to 24%.

This may be accounted for by the fact that 50 of the 51 jury verdicts involving African American plaintiffs included race discrimination claims, and race discrimination cases fared less well than other claims, particularly when the "reverse discrimination" cases brought by White plaintiffs (who won 7 out of 10 verdicts) are excluded. Over both periods, women won 51.5% of 169 sex discrimination cases, while men won 11 of 16 (68.8%) of so called "reverse" sex discrimination cases. Perhaps the most striking finding in the jury verdicts we compiled for the 2007-2008 period was this: while a woman won only 1 of the 21 jury verdicts in cases in which sexual harassment was alleged, at the same time women were winning 58.5% of other cases.

b) Alleged Bases of Discrimination

Table 39 below sets forth the number of verdicts in which particular bases were alleged and the percentage of verdicts for plaintiffs in each of these categories.

Table 39 Alleged Bases of Discrimination Numbers of Verdicts and Outcome Percentages, 1998-99 and 2007-08		
Basis	**Verdicts**	**Plaintiff %**
Sexual Orientation	10	70.0%
Medical Condition	21	57.1%
Disability	74	54.1%
Sex	186	53.2%
Retaliation	94	50.0%
Religion	10	50.0%
Age	50	44.0%
Race	103	38.8%
National Origin	24	37.5%

There was no statistically significant difference in the percentage of outcomes for plaintiff by basis as between the two periods. Again, however, if we look at sexual harassment cases separately, the difference is truly remarkable. In 1998-1999, the plaintiffs in sexual harassment cases won in 54 of 77 (70%) of such cases. In 2007-2008, plaintiffs won in 1 of 21 (5%) of sexual harassment cases.[193] We simply have no substantiated explanation for this change. As with other indicators of how complainants fare, plaintiffs in cases involving race or national origin discrimination continue to fare poorly in jury trials.

2. Amounts of Awards

Plaintiffs were awarded monetary damages in 207 cases over both periods.[194] Overall, the amounts of jury verdicts in the two periods were statistically significantly different. Those plaintiffs who did prevail in the later period recovered a median $205,000 vs. $200,000 in the earlier period. As with winning or losing, the nature of the case made a substantial difference. Table 40 next page sets out the median award, and the 25th and 75th percentile award for verdicts in which any damages were awarded. The number of cases is greater than 207 because some cases included multiple bases.

191 Pearson chi2, 9.6267, Pr=.002 for both periods. The corresponding Pr for the earlier period was .037 and .018 for the later period.

192 David Benjamin Oppenheimer, Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities, 37 U.C. Davis L. Rev. 511 (2003).

193 A supplemental search of 2009 verdicts found a slight increase in verdicts for plaintiffs in sexual harassment cases.

194 Our data for both periods lacks information on attorneys' fee awards, because jury verdicts are typically reported before any motion for attorneys' fees has been submitted or ruled upon. If attorneys' fees were added to the numbers we report below, the costs to employers (and, in many cases, their insurance carriers) would be significantly greater that reported in the jury verdict reports or summarized here.

Table 40 Jury Awards by Nature of Claim, 1998-99 and 2007-08				
Basis	**Median**	**25th percentile**	**75th percentile**	**Cases**
Medical Condition	$602,668	$79,520	$1,676,710	12
Sexual Orientation	$420,000	$58,994	$859,716	7
Disability	$233,288	$54,000	$615,000	40
Marital Status	$193,000	$698	$625,000	3
Age	$180,597	$45,000	$854,000	22
Sex	$177,000	$54,000	$556,722	99
Religion	$153,590	$58,994	$1,730,848	5
Race	$105,000	$40,000	$804,858	40
National Origin	$70,000	$47,638	$350,000	9

As appears from Table 40, median awards in race and national origin discrimination cases were substantially less than awards in cases alleging discrimination on other bases.

3. Geographical Effects

One of the most striking differences between the two samples of reported jury verdicts, particularly in view of the fact that the same underlying verdict reporters were utilized as sources, is the dramatic difference in the proportion of cases litigated in Los Angeles County. The proportion of jury verdicts reported from Los Angeles County rose from 41% in 1988-199 to 59% in 2007-2008. Over both periods, plaintiffs fared somewhat better in Los Angeles, wining 52.2% of the time in 2007-2008, compared to 47.8% in the earlier period, a difference that was not statistically significant. Plaintiffs in Los Angeles fared even better in the later period, winning 55.7% of cases, compared to 37.7% in the remainder of the state.

These differences are likely yet another indication of differences in outcomes associated with differences in access to attorneys and to the differences between the systems through which we respond to allegations of employment discrimination.

X. CONCLUSIONS AND RECOMMENDATIONS

We hope the findings and data here provide a basis for a re-examination of how California responds to the problem of discrimination in the labor markets and in the workplace. We have not taken the space here to document all the harms, direct and indirect, that flow from employment discrimination. They include harms not only to the direct victims of discrimination, but also to their families and their neighborhoods and communities. Employment discrimination also reduces the efficiency of our businesses, which are deprived of the efforts of some of our most productive and promising residents.

Instead, we have attempted to carefully review the manner in which our primary civil rights law, the Fair Employment and Housing Act, is operating in practice a half century after it was passed. We found sufficient reasons to be concerned that our antidiscrimination system may itself discriminate, perhaps against people in the very groups that it was designed to protect. The FEHA in operation has evolved to become not one but two antidiscrimination systems, separate and unequal. More research will be required to assess all the possible explanations for these disparities. Our contribution to that effort begins with this report, and will continue by our making available to other researchers (and to DFEH itself) the data we have collected in a form that they can easily utilize.

Based on our empirical findings, and in consideration of the suggestions received from scores of individuals representing a vast amount of experience in working within the current enforcement regime, we offer the following recommendations:

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

1. Expand Efforts to Target Resources

An efficient enforcement system -- whether it is responding to street crime, financial fraud, unsafe workplace conditions, or discrimination -- allocates resources according to risks. DFEH has in the past year dramatically increased the number of enforcement efforts targeting particular practices. More can be done in this area:

- Expand current efforts to pursue some complaints and accusations on a class or group basis, based on a strategy of maximizing impact developed on the basis of existing information, to include:
- Work with the EEOC to implement a recommendation provided to DFEH in 2000 that it analyze data from employers regarding the composition of their workforces to identify "outliers," after controlling for region and industry.
- Maintain DFEH's remarkably complete CMIS data system, but make a few technical changes:
  - Include a unique identifier for employers so that DFEH can review patterns of complaints
  - Work with the Employment Development Department to include in the CMIS data system accurate information on the number of employees per employer rather than relying on complainant estimates
  - Improve accuracy of identification of industry codes by consultants.

2. Improve Effectiveness and Efficiency of DFEH Enforcement Operations

A number of approaches could improve both the effectiveness and efficiency of DFEH's enforcement efforts. These include:

- Expand efforts to achieve early, informal resolution of smaller cases through informal means that are both quicker and impose fewer transaction costs on employers and utilize scarce DFEH resources.
- Add to the CMIS system basic information about the claims of the roughly half of the people who come to DFEH whose claims are rejected at the intitial interview. This would permit analysis of patterns of rejection that might inform not only better early screening decisions but areas of need to provide better public information about the jurisdiction of DFEH and the limits of the law.
- Monitor the results of the Case Grading System to include systematic evaluation of early "triage" decisions of potential case merit to assure accuracy of these decisions.
- Evaluate the effectiveness of the recent change to telephone interviews in all cases, particularly in light of their importance to making both rejection and triage decisions
- Upgrade consultant qualifications. At present, entry into the consultant series requires little more than a high school diploma and four years of experience working for another state agency in a capacity that may have virtually nothing to do with the requirements of the consultant position. Although many consultants do develop expertise over time, the FEHA

and other laws enforced by DFEH are complex and changing. It is unreasonable to expect the burdens of their enforcement to fall so heavily on people who lack adequate preparation.

- Improve training. Budget cuts have led to the elimination of any systematic training of consultants, which is now done entirely "on the job" by District Administrators who have many other responsibilities. It is simply not reasonable to expect people without any sort of legal training to become experts in this area by working under the supervision of a former consultant who is now a District Administrator.
- Reevaluate the impact of the caseload assignment system on consultant efficiency. Consultants typically carry a caseload of 75 cases. DFEH operates a caseload balancing system that moves cases from districts with heavier caseloads to other districts. The incentives to close cases more quickly are diminished when every closed case is immediately replaced by another case, particularly if the focus is insuring that cases do not reach the 365 day statutory deadline before they are resolved.
- Monitor case outcomes to assure consistency of practices. There are significant disparities in case outcomes across the various district offices. Some of these differences are no doubt accounted for by differences in the local legal market and other factors. However, at present DFEH lacks the resources to assure consistency in decision making across districts that might arise within DFEH itself.
- Evaluate on a periodic basis the appropriateness of settlement outcomes and amounts. Many factors may explain the dramatic differences in outcomes between complaints that might have been filed with either DFEH or EEOC, depending on which agency actually processed them. Other explanations may account for what may be an even greater disparity between outcomes in similar cases through the DFEH/FEHC administrative process and outcomes in civil litigation (access to which is not equal across groups). While settlements in civil litigation are constrained by expectations of results if a case goes to trial, the FEHC decides so few cases that it cannot provide an equivalent function for the DFEH. DFEH might begin an evaluation by having a systematic evaluation of a sample of closed files conducted by a panel of experts, incuding attorneys from both the plaintiff and defense bar and persons experienced in mediation and arbitration of employment discrimination cases.
- Minimize unnecessary costs to employers. While many employers are able to respond to DFEH complaints without lawyers, those that do typically spend substantially more in the administrative process (around $5,000) than the typical successful complainant receives (about $4,000). Given that 6 out of 7 complainants receive no monetary benefit, it is important to minimize the burdens on employers that are not essential to a fair disposition of the claim. Many of our interviewees and survey respondents who represent employers complained that they often receive "boilerplate" document requests having nothing to do with the actual complaint at issue. Assembling and reviewing documents are time-consuming and potentially costly activities. Some interviewees suggested that many cases would be resolved through an early discussion of the case, before these transaction-heavy activities begin, a recommendation we make above.
- Reinstate an effective mediation program. One of the major differences between the EEOC and the DFEH is that the EEOC operates a highly successful mediation program. The last significant DFEH mediation program was terminated in budget cuts, now replaced with a very small effort staffed by volunteer mediators.
- Continue education efforts, particulary with regard to smaller employers. To its credit, particularly given the lack of resources, DFEH and its staff and management spend a considerable amount of time in helping educate the community and practitioners about the FEHA and about discrimination. Many of these efforts are targeted at informing the victims of discrimination of their rights, with some aimed at employers. Virtually everyone with whom we spoke identified the lack of knowledge of the law as a serious problem for smaller employers. Increasing these efforts may prove to be more effective in reducing discrimination than efforts at deterrence through punishment after the fact.
- Restore the intermediate level of management in the Employment Enforcement Division. At present, one Deputy Director directly supervises all the DFEH district offices in the state, responsible not only for enforcement but operations of other kinds. The position for Regional Administrators, who provided training and quality control across district offices, was eliminated in an earlier round of budget cuts. Absent resources to provide an adequate level of management, many of the reforms we suggest will be impossible to implement.

Some of the recommendations suggest reliance on DFEH's CMIS data system to analyze performance in ways that would be difficult to do with the current technology available to DFEH. Our research team has spent 1,000's of hours developing the computer codes necessary to translate the CMIS data into a useable research database that we are happy to provide to DFEH. We have done so in a manner that will allow DFEH to easily update the research database.

3. Reconsider the Location of the Department of Fair Employment and Housing within the State and Consumer Services Agency

Other administrative enforcement agencies responsible for labor market and workplace issues, notably the Department of Industrial Relations, Labor Commissioner, Unemployment Insurance Appeals Board and the Employment Development Department are located in the Labor and Workplace Development Agency. Locating the DFEH and FEHC within the Labor and Workplace Development Agency would place them under a Secretary whose responsibilities already include overseeing organizations that enforce laws impacting both employees and employers, facilitate collaboration and data sharing between agencies with overlapping interests (for example the DFEH and the Employment Development Department), and permit sharing of innovations in management and enforcement strategy.

4. Provide an Appropriate Level of Resources for Education and Administrative Enforcement of the FEHA

The funding we allocate to different government functions signals – more accurately than any proclamation – the relative importance we place on those functions. The current funding for administrative enforcement of the FEHA – the only enforcement available to *half* of the individuals who seek enforcement – suggests that laws prohibiting discrimination in the labor market or the workplace do not, at least for some people, are not very important. At the same time, policymakers and the public will (and should) be reluctant to increase funding for an activity that appears only marginally effective. For that reason, consideration of increased funding should accompany the adoption of reforms in administrative enforcement. Consideration should also be given to funding at least some DFEH functions through a regulatory fee imposed on both employees and employees rather than through the general fund. As noted in the introduction, a fee of 10 cents per month would triple the amount of resources currently available to DFEH for all purposes.

B. Improve Fair Access to the Legal System

At present, we have two antidiscrimination systems – separate and unequal. Those with lawyers operating on contingency fees have access to a civil justice system. Others depend on the alternative provided by the DFEH and the FEHC. Access to those two systems appears to vary systematically by race, by occupation, and by sex.

The barrier to private counsel has been raised even higher very recently. The California Supreme Court held in *Chavez v. City of Los Angeles* (2010 WL 114941, January 14, 2010) that in FEHA cases that might have been brought in a limited jurisdiction Superior Court but were litigated to a verdict of less than the $25,000 in a general jurisdiction Superior Court, the court may deny attorneys' fees to the prevailing plaintiff. Thus any attorney who considers accepting a case that may result in a verdict under that jurisdictional amount risks being paid nothing at all, even if he or she prevails at trial, based on his or her inability to predict a jury verdict. Although most plaintiffs' lawyers were already reluctant to accept smaller cases, their disincentive to do so is now increased.

We suggest consideration of two alternatives that would maintain the separate enforcement systems but decrease the extent to which they are unequal.

First, DFEH might be given direct access to the civil justice system, and be empowered to bypass the FEHC and proceed to court on behalf of complainants who have been unable to secure private counsel, not because of the weakness of their case but because their damages are insufficient to attract a contingency fee lawyer. Only those cases determined to be highly meritorious that DFEH has been unable to settle or mediate would be appropriate for this route. Second, the efforts of DFEH might be augmented by encouraging formation of nonprofit organizations able to provide legal services to individuals with meritorious cases who are unable to secure private counsel. Some organizations enforce the housing discrimination provisions of the FEHA by this means and provide a model. In order to provide the resources necessary to either expanded enforcement either by DFEH or nonprofits, both would need to be given the same right to obtain attorneys' fees as private counsel, and legislation adopted to exempt them in appropriate cases, from operation of the courts' ruling in *Chavez, supra.*

C. Create a Broad-Based Task Force or Commission to Examine Alternative Methods of Reducing and Responding to Employment Discrimination

Our final recommendation is more foundational, and responds to the fact that the current FEHA enforcement regime depends on deterrence and is based on assumptions that current science now knows to be faulty. While intentional, conscious discrimination may have been common in 1959 and while such discrimination still occurs, it is clear that many discriminatory outcomes are not the product of conscious intention. A discussion about the various means by which California might respond to current knowledge about discrimination has been beyond our scope here. What we do know is that the hundreds of careful studies indicate that an antidiscrimination law based on deterrence and aimed solely at intentional discrimination may no longer be addressing the most common forms of discrimination, including subtle forms of discrimination that produce results no less harmful.

A fair consideration of alternatives is long overdue. In this, California could once again lead the nation toward a more effective and efficient means of reducing discrimination. A commission or other body comprised of representatives from every group of stakeholders and provided with the best available research from our universities, human resources professionals and others would be better situated to engage this task. Charged with the task of going beyond our evaluation of the FEHA on its own terms to a consideration of alternatives that might be both more effective and efficient, such an entity could provide the governor, legislature and people of the state with the information they need to shape how we respond to employment discrimination, over the next 50 years, or until such time as it no longer represents a problem for thousands of Californians.

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