SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 03/13/2014 TIME: 02:00:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown
CLERK: E. Brown
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2013-00151153-CU-CR-GDS** CASE INIT.DATE: 09/09/2013
CASE TITLE: **Department of Fair Employment and Housing vs. American Pacific Corporation**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Ruling on Submitted Matter (Hearing on Demurrer) taken under submission on 3/11/2014

TENTATIVE RULING

Defendant American Pacific Corp.'s ("AMPAC") Demurrer to Plaintiff Dept. of Fair Employment and Housing's ("DFEH") Complaint is OVERRULED.

Plaintiff DFEH's complaint alleges three causes of action against defendant AMPAC: the 1st for Discrimination based on Sex, Gender, Gender Identity, and Gender Expression (Gov. Code § 12940(a)), the 2nd for failure to prevent Discrimination based on Sex, Gender, Gender Identity, and Gender Expression (Gov. Code § 12940 (k)) and the 3rd for Failure to Take All Reasonable Steps to Prevent Discrimination based on Sex, Gender, Gender Identity, and Gender Expression (Gov. Code, § 12940(k).

It is alleged that Plaintiff DFEH is the state agency charged with enforcing the Fair Employment and Housing Act ("FEHA") (Gov. Code, § 12900 et seq.) and is authorized by Govemment Code section 12965 to file civil complaints in its own name and on behalf of real parties in interest aggrieved by discriminatory employment practices. DFEH's enforcement of the FEHA implements the public policy of the State of Califomia, to protect the civil rights of all Californians to seek, obtain, and hold employment without discrimination because of sex, gender, gender identity or gender expression. (Gov. Code, § 12920). (Compl., para. 2)

Real Party in Interest Lozano is a transgender female to male. Lozano presented as male to AMPAC and received an employment offer as an Operations Technician from AMPAC. After accepting the position, he was required to complete background check forms and he disclosed to AMPAC's Human Resources department that he was in transition to male from his assigned gender birth identity (female). He did not have any legal or medical documentation to reflect his gender change.

AMPAC expressed concern about Lozano's use of the men's locker room and restroom, since he had not had sex reassignment surgery. AMPAC asked Lozano about delaying his employment start date until after he had completed sex reassignment surgery.

Lozano explained that as a trained firefighter, he had successfully worked in similar situations in the past, and had never been questioned about his use of the men's restroom or shower.

As alleged, AMPAC required that Lozano use the female locker room and restroom facilities until his gender transition to male was "complete" after sex reassignment surgery.

Demurrer to the 1st for Discrimination based on Sex, Gender, Gender Identity, and Gender Expression (Gov. Code § 12940(a)) is OVERRULED.

FEHA makes it an unlawful employment practice for an employer, because of the sex, gender, gender identity or gender expression, to discriminate against any person in terms, conditions, or privileges of employment. Govt. Code § 12940(a).

In construing statutes, the court's "fundamental task is 'to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' We begin by examining the statutory language because it generally is the most reliable indicator of legislative intent. We give the language its usual and ordinary meaning, and '[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. If, however, the statutory language is ambiguous, 'we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.' Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Mays v. City of Los Angeles* (2008) 43 Cal. 4th 313, 321.) Moreover, courts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature. (*Estate of Horman* (1971) 5 Cal.3d 62, 77).

Moving party Defendant AMPAC asserts that the demurrer to the discrimination claim should be sustained because the FEHA does not prohibit restroom and locker room use based on biological gender. The parties agree that there is no published California case law addressing these facts, thus this is a case of first impression in California.

Moving party cites to out of state statutes and case law in support of its position. Defendant cites to the Minnesota's Human Rights Act ("MHRA") prohibits discrimination with "respect to conditions, facilities, or privileges employment" on the basis of "sexual orientation." (Minn. Stat. § 363A.08, subd. 2(3) and *Goins v. West Group* (Minn. 2001) 635 N.W.2d 717, in which the Minnesota Supreme Court concluded that an employer did not violate the MHRA's protection of gender "self- image or identity" by designating employee restroom use based on biological gender. Additionally, defendant cites to New York State law in *Hispanic AIDS Forum v. Estate of Bruno* (N.Y. App. Div. 2005) 16 A.D.3d 294, where a non-profit tenant claimed its landlord violated the New York State Human Rights Act and the New York City Human Rights Act because the landlord refused to execute a lease renewal because the tenant's transgender clients were using the common area restrooms that did not coincide with their biological gender.

In opposition, plaintiff DFEH asserts that this Court need not look to out-of-state law, as the language of Govt. Code § 12940(a) is clear and unambiguous on its face. Of course, in interpreting statutes, the court begins with the plain, commonsense meaning of the language used by the Legislature; if the language is unambiguous, the plain meaning controls. *Surfrider Foundation v. California Regional Water Quality Control Board, San Diego Region*, (2012) 211 Cal. App. 4th 557; *Polster v. Sacramento County Office of Education*, (2009) 180 Cal. App. 4th 649, 663.

The relevant language reads: "It is an *unlawful employment practice*, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (a) *For an employer, because of* the . . . sex, *gender, gender*

identity, gender expression, age, sexual orientation . . . of any person, to refuse to hire or employ the person or . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." Govt. Code § 12940.

The Legislature amended the FEHA in 2003 and 2011 to clarify and expand the definition of gender. It specifically added "gender identity" and "gender expression" as protected classes in 2011. (Assembly Bill 887 (2011-2012 Reg. Sess.); Defs. Request for Judicial Notice, Exh. 9.) The author of AB 887 noted "[n]early 70% of transgender Californians have experienced discrimination or harassment at work." (Assem. Com. on Judiciary, Rep. on Assem. Bill. No. 887 (2011-2012 Reg. Sess.) Mar. 29, 2011, p.3, DFEH RJN at Exh. B.) A legislator's statement is entitled to consideration when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal. 3d 692, 699-701; *In re Marriage of Bouquet* (1976) 16 Cal. 3d 583, 589-590.) Nonetheless, at the end of the day, the ultimate interpretation of a statute is an exercise of the judicial power conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. *Yamaha Corp. of Am. v. State Bd Of Equalization* (1998) 19 Cal. 4th 1, 7.
AB 887 was introduced to "reduce confusion among those who bear the responsibility of ensuring that current anti-discrimination laws are enforced." (*Id.* at 2.) AB 887 clarified the definition of gender in numerous anti-discrimination laws, including the FEHA and Education Code sections 200 and 220, to expressly include the terms "gender identity" and "gender expression" where only the term "gender" previously appeared. (*Ibid*.)

Gender identity "refers to a person's deeply felt internal sense of being male or female." (*Id.* at 3.) Gender expression "refers to one's behavior, mannerisms, appearance, and other characteristics that are perceived to be masculine or feminine." (*Ibid*.)

Because many schools did not understand their obligations to transgender students, the Education Code, sec. 221(f) was amended to require that "a pupil be permitted to participate in sex-segregated school programs, activities, and facilities including athletic teams and competitions, consistent with his/her gender identity, regardless of the gender listed on the pupil's records."

Defendant contends that the Legislature's amendment of the Education Code, through AB 1266, to allow transgender students to use facilities corresponding to their gender identity must be understood to exclude this requirement from FEHA, which was not amended in the same manner. When a statute contains a particular provision, the omission of that provision from similar statutes on the same or a related subject reveals a different intent. *City of Dublin v. County of Alameda* (1993) 14 Cal. App. 4th 264, 280.

As plaintiff and amici explain, the AB 1266 amendment to the Education Code restates and clarifies existing nondiscrimination law, to provide guidance to school districts to ensure their compliance with existing law; *it did not change the existing anti-discrimination laws.*

Where more than one statutory construction is arguably possible, California's policy has long been to favor the construction that leads to the more reasonable result, considering the consequences that will flow from a particular interpretation and avoiding a construction that would lead to unreasonable, impractical or arbitrary results. *Bernard v. City of Oakland* (2012) 202 Cal. App. 4th 1553, 1567.

Here, defendant contends that the more reasonable interpretation of FEHA is, absent a regulation or legislation specifically stating otherwise, that restrooms and locker rooms can be separated by biological gender.

The DFEH asserts that the California non-discrimination statutes must be construed together to achieve

a uniform legislative purpose. If discrimination based on gender identity and gender expression is interpreted differently in the FEHA than in the Education Code, a female to male transgender high school student could be faced with a situation where he uses the male restroom/locker room at school, but must use the female restroom/locker room at his after-school job. Such inconsistent results are not compatible with the Legislature's intent.

Plaintiff DFEH further asserts that this Court must accord great respect to its interpretation of the statute, as it is the administrative agency charged with enforcing the FEHA statutes. "While the ultimate interpretation of a statute is an exercise of the judicial power, when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous." *Giles v. Horn* (2002) 100 Cal. App. 4th 206, 220.

Plaintiff DFEH asserts that although the Court need look no further than California law, other jurisdictions in other states have found that denying transgender people the right to use gender identity appropriate facilities violates nondiscrimination laws (citing Iowa, Washington, Colorado, District of Columbia, New York City and Federal agency authorities.)

The *Goins* case from Minnesota relied upon by moving party is distinguishable, as there the employer did not require the employee to use the restroom of her assigned birth sex, but to use a single occupancy restroom.

Defendant's hypothetical assertions of emotional discomfort about sharing facilities with transgender individuals are no different than similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation in housing, education, and access to public facilities like restrooms, locker rooms, swimming pools, eating facilities and drinking fountains. (See, e.g., *Wyatt v. Adair* (Ala. 1926) 110 So. 801, 803-04.)

Defendant speculates that under the DFEH's interpretation of the FEHA, "a male employee need only claim a female gender identity and the employer must permit him to shower, disrobe, and perform bodily functions with female coworkers." These claims are not currently before the Court. Individuals who claim a different gender from day to day, or who do so simply to be disruptive or to sexually harass other employees, do not meet the definition of transgender.

The Court is satisfied that the plaintiff has pled sufficient facts to state a cause of action for employment discrimination.

Demurrer to the 2nd and the 3rd for failure to prevent discrimination based on sex, gender, gender identity, and gender expression (Gov. Code, § 12940(k) are OVERRULED.

As the demurrer to these causes of action depends upon the sustaining of the demurrer to the 1st cause of action, the Court must overrule the demurrers on the same basis.

Defendant shall file and serve its Answer to the Complaint not later than Friday, March 21, 2014.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING
The matter was argued and submitted. The matter was taken under submission

Having taken the matter under submission on 3/11/2014, the Court now rules as follows:

SUBMITTED MATTER RULING

The Court affirms the Tentative Ruling with the following additional comment:

Defendant AMPAC has submitted to the Court a request pursuant to Code of Civil Procedure 166.1. The request is denied. AMPAC is not, of course, precluded from seeking interlocutory appellate review if it desires to do so.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of the 3/12/14 minute order in a sealed envelope with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: March 13, 2014

E. Brown, Deputy Clerk _____s/ E. Brown_____

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