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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,
 	
    Plaintiff,
 	
    vs.
 	
ALEX M. AZAR II, et al.,
 	
    Defendants.
	No. C 19-02405 WHA
	No. C 19-02769 WHA
	No. C 19-02916 WHA
	
	DECLARATION OF KEVIN KISH IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,
 	
    Plaintiff,
 	
    vs.
 	
ALEX M. AZAR, et al.,
 	
    Defendants.
	Date: October 30, 2019
	Time: 8:00 AM
	Courtroom: 12
	Judge: Hon. William H. Alsup
	Action Filed: 5/2/2019

COUNTY OF SANTA CLARA et al,
 	
    Plaintiffs,
 	
    vs.
 	
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
 	
    Defendants.	

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1   I, Kevin Kish, declare:

2   1.   I am the Director of the California Department of Fair Employment and Housing

3   (DFEH). I was appointed in December 2014 to lead DFEH.

4   2.   DFEH is the state agency charged by the California Legislature with enforcing

5   California's civil rights laws. The mission of DFEH is to protect the people of California from

6   unlawful discrimination in employment, housing, and public accommodations and from hate

7   violence and human trafficking. Cal. Gov't Code § 12930.

8   3.   DFEH is responsible for enforcing state laws that make it illegal to discriminate

9   against an employee because of certain protected categories that include religion, sex and gender

10   (e.g. pregnancy, childbirth, breastfeeding, or related medical conditions), gender identity and

11   gender expression, and sexual orientation, among many other bases. Among other laws, DFEH

12   enforces the California Fair Employment and Housing Act (FEHA) (Cal. Gov't Code § 12900 et

13   seq.), the Unruh Civil Rights Act (Cal. Civil Code § 51), and Cal. Gov't Code § 11135.

14   4.   FEHA applies to public and private employers, labor organizations, and employment

15   agencies. Under FEHA, it is illegal for employers of five or more employees to discriminate

16   against employees because of a protected category, or to retaliate against them because they have

17   asserted their rights under the law.

18   5.   The Unruh Civil Rights Act prohibits discrimination by business establishments and

19   is incorporated into the FEHA. Cal. Gov't Code § 12948. Unruh is violated by denying the full

20   and equal accommodations, advantages, facilities, privileges, or services of a business

21   establishment.

22   6.   Under Cal. Gov't Code § 11135, no person in the State of California shall be denied

23   full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any

24   program or activity that is conducted, operated, or administered by the state or by any state

25   agency, is funded directly by the state, or receives any financial assistance from the state.

26   7.   To carry out its responsibilities, DFEH facilitates a complaint process, whereby

27   individuals who believe that they were the victim of discrimination, may file a complaint with

28   DFEH, which is called an intake form. The submission of the intake form initiates an intake

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1   interview with a department representative to determine whether a formal complaint will be

2   accepted for investigation. The DFEH investigator contacts the individual complainant and the

3   investigator seeks specific facts and any records about the incident(s) and copies of any

4   documents supporting the complaint. DFEH then evaluates the facts and decides whether the case

5   alleges facts within DFEH's jurisdiction. DFEH does not have discretion to decline to investigate

6   cases within its jurisdiction. If a case is within its jurisdiction, DFEH will prepare a complaint

7   form for the individual's signature under penalty of perjury and when the individual returns the

8   complaint, it is delivered to the person or entity that the person believes discriminated against

9   him/her/them, who is the respondent.

10   8.   After a complaint is signed and issued, the respondent is required to answer the

11   complaint. DFEH reviews the answer with the complainant. It conducts an investigation by

12   obtaining documents and interviewing witnesses. Cases are evaluated for complexity and merit at

13   every stage of the investigation.

14   9.   DFEH offers free dispute resolution services to encourage parties to resolve the

15   complaint, when appropriate. For many less complex cases, a voluntary resolution can be

16   negotiated at any time during the complaint process. When parties cannot resolve a complaint or

17   DFEH determines that a case is not appropriate for voluntary resolution, DFEH continues an

18   investigation to determine if a violation of California law occurred. If it did not, the case is

19   closed. If DFEH finds there were probable violations of the law, there is a cause finding and the

20   case moves into DFEH's Legal Division. At that time, the parties are required to go to mediation.

21   DFEH represents the interests of the State, and the complainant is a witness to the discrimination.

22   At mediation, the parties have the opportunity to reach an agreement to resolve the dispute and

23   close the case. If mediation fails, DFEH may file a lawsuit in court.

24   10. If an individual prefers not to use the DFEH investigation process, the individual may

25   instead file their own lawsuit. In the context of employment discrimination, a complainant must

26   first obtain a Right-to-Sue notice from DFEH before filing a lawsuit in court.

27   11. DFEH conducts an independent investigation when a complaint is filed. DFEH

28   investigates the facts and encourages the parties to resolve the dispute in appropriate cases.

1   DFEH considers taking legal action if evidence supports a finding of discrimination and the

2   dispute is not resolved.

3   12. In addition to individual complaints, the Director may also initiate a Director's

4   Complaint pursuant to 2 C.C.R. § 10012 on behalf of a group or class of persons adversely

5   affected in a similar manner by an unlawful practice under FEHA.

6   13. I have reviewed and am familiar with the content of the final rule Protecting Statutory

7   Conscience Rights in Health Care; Delegations of Authority that the U.S. Health and Human

8   Services Department published on May 21, 2019 (the Rule).

9   14. Under state laws, DFEH has jurisdiction over complaints filed by employees alleging

10   that their employers have not reasonably accommodated their religious beliefs or that their

11   employers have otherwise discriminated against or harassed them on a protected basis. DFEH

12   also has jurisdiction over complaints filed by patients, consumers, and contractors alleging that

13   they have been denied full and equal accommodations, advantages, facilities, privileges, or

14   services. DFEH similarly has jurisdiction over complaints of discrimination under—and unequal

15   access to—government-funded programs and activities.

16   15. After considering the Rule, I believe that it will impact the analysis that DFEH must

17   engage in to carry out its required responsibilities under these laws, including analysis of the

18   scope and application of California's own religion-based exemptions from anti-discrimination

19   principles of general applicability. *See, e.g.*, Cal. Gov't Code § 12926.2. It will impact the

20   analysis that DFEH must engage in to enforce the Unruh Civil Rights Act and Cal. Gov't Code §

21   11135.

22   I declare under penalty of perjury under the laws of the United States and the State of

23   California that the foregoing is true and correct to the best of my knowledge.

24   Executed on August 16, 2019 in Los Angeles, California.

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27   Kevin Kish
     Director

28   Department of Fair Employment and Housing

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