



The  
**Legal Aid Society** –  
Employment Law  
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June 25, 2012

The Honorable Edward M. Chen  
United States District Court  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, CA 94102

RE: *Department of Fair Employment and Housing v. Law School Admission  
Council, Inc.*, Case No. CV 12-1830-EMC  
Amicus Curiae Letter

Dear Judge Chen:

The Legal Aid Society – Employment Law Center is a public interest legal organization dedicated to advancing and protecting the civil rights of persons with disabilities. The LAS-ELC is recognized for its expertise in the interpretation of state and federal disability rights statutes. The LAS-ELC has expertise with respect to the disability rights portions of the California's Unruh Civil Rights Act at issue in this motion, and is familiar with the corresponding legislative history associated with AB 1077 (1992) and AB 2222 (2000). The LAS-ELC has represented individual in disability discrimination claims brought under the Unruh Act, including in *Goldman v. Standard Insurance Company*, 341 F.3d 1023 (2003). The LAS-ELC was the sponsor of the 2000 legislation. As well, the LAS-ELC participated in the drafting of the ADA Amendments Act of 2008.

The LAS-ELC has a particular interest in combating disability-based discrimination against law students, law school applicants, lawyers, and other legal professionals. The integration of the legal profession to include qualified individuals with disabilities, and the elimination of disability bias within the profession and at entry points to law school and to bar membership are key equality goals. As well, they are long-term strategies for bringing disability awareness and competency to all members of our legal system, including decision-makers. Related, the LAS-ELC served as *amicus* counsel on behalf of disability organizations in *Turner v. Association of American Medical Colleges*, Case No. RG 04166148 (Alameda Cty. Super.).

As such, the LAS-ELC has represented numerous individuals with disabilities seeking accommodations and fair treatment on the LSAT, in law school, and from the California State Bar, and has served in an advisory capacity with respect to the National Association of Law Students with Disabilities. These and similar efforts are shared by several disability rights

organizations and advocates across the county, and have coincided with a slow but steady increase in the numbers of practicing lawyers with disabilities.

Despite such progress, too few people with disabilities are practicing law. The ABA reports that approximately seven percent of its members identify themselves as having a disability. See ABA Commission on Mental and Physical Disability Law, ABA Disability Statistics Report (2011), at [http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314\\_aba\\_disability\\_statistics\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/20110314_aba_disability_statistics_report.authcheckdam.pdf). This percentage is far lower than one would expect given the national statistics on the percentage of Americans with disabilities. *Id.* Among other reasons for this disparity, "there is a pipeline problem." Individuals with disabilities are less likely to apply and be admitted to law school. *Id.*

With respect to the *DFEH v. LSAC* litigation, we represent two of the claimants, Andrew Quan and Nicholas Jones. We are preparing a motion for intervention and the relevant papers for filing shortly. However, our motion to intervene will not be determined prior to the hearing on the LSAC's motion to dismiss.

We respectfully request that this amicus letter be filed in this matter on behalf of Mr. Quan, Mr. Jones, and the Legal Aid Society – Employment Law Center.

## LEGAL ARGUMENT

### I. **The State Law Rights Granted by the California Legislature in Enacting and Amending the Unruh Civil Rights Act Are Independent of Federal Rights Created Under the Americans with Disabilities Act, and Are Enforceable by the Department of Fair Employment and Housing.**

The State of California has a long and independent history of enacting laws designed to ensure and promote the integration of persons with disabilities into all institutions of public life, and to provide effective remedies against disability discrimination. While at times referencing and incorporating the standards of federal law as a minimum floor of protection for Californians with disabilities, these enactments create independent state law rights and are statements of California's law and public policy.

#### A. *The Plain Language of the Statutory Scheme Grants the DFEH the Power and Duty to Enforce Violations of California Civil Code Section 51 Such as Those Alleged Here.*

More than fifteen years before the enactment of the federal ADA, the Legislature in 1973 amended the Fair Employment Practices Act to include physical handicap as a prohibited basis for discrimination. In 1977, the Legislature declared: "It is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state." Stats. 1977, ch. 1196, § 2 (adding Cal. Gov't Code § 19230); see also *In Re Marriage of Carney*, 24 Cal. 3d 725, 740 (1979) ("Both the state and federal governments now pursue the commendable goal of total integration of handicapped persons into the mainstream of society," and quoting California Government Code section 19230).

In 1980, the Legislature moved various civil rights provisions into a section of the California Government Code titled the Fair Employment and Housing Act, and created the Department of Fair Employment and Housing (DFEH) as a state law enforcement agency. Stats. 1980, ch. 992, § 4. This legislation granted the DFEH the "power and duty" to, *inter alia*, "receive, investigate, and conciliate

complaints alleging a violation of Section 51 ... of the Civil Code," emphasizing that: "The remedies and procedures of this part *shall be independent* of any other remedy or procedure that might apply." Stats. 1980, ch. 992, § 4, p. 3145 (adding Cal. Gov't Code § 12930) (emphasis added); *see also id.* at p. 3154 (adding Cal. Gov't Code § 12948 ["It shall be an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51 ... of the Civil Code."])).

The legislation further granted the DFEH the authority to enforce – via an accusation or at the respondent's discretion a civil action – various rights, including "the rights created by Section 51 ... of the [California] Civil Code." Stats. 1980, ch. 992, § 4, pp. 3154, 3155-3157 (adding Cal. Gov't Code §§ 12948, 12960, 12965). The right of the DFEH to pursue a group or class action in court was specifically delineated. *Id.* at pp. 3155-56 (adding Cal. Gov't Code § 12961).

In 1987, the Legislature amended the Unruh Civil Rights Act – first adopted in its modern form in 1959 – to add "blindness or other physical disability" to the list of protected classifications. Stats. 1987, ch. 159, § 1; *see also Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 1153 (1991) (describing Act's history); *Goldman v. Standard Insurance Company*, 341 F.3d at 1029-30 (same).

In 1992, responding to the enactment of the federal ADA, the Legislature amended the Unruh Act as part of omnibus legislation designed to "strengthen California law where it is weaker than the ADA and to retain California law when it provides more protection than the ADA." Stats. 1992, ch. 913, § 1 (AB 1077); *see also* Assembly Judiciary Committee, AB 1077 (Jan. 22, 1992), at 2. The 1992 law amends the Unruh Act to prohibit discrimination on the basis of "disability," and provides that, "A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section." Stats. 1992, ch. 913, § 3; Cal. Gov't Code § 51(f); *Goldman*, 341 F.3d at 1030.

In 2000, in response to a trio of U.S. Supreme Court cases narrowing the federal definition of "disability" under the ADA, the Legislature adopted clarifying changes to the definitions of mental disability and physical disability found in California's civil rights statutes, and incorporated these definitions into the Unruh Act. Stats. 2000, ch. 1049, §§ 2, 5, pp. 2-8 (AB 2222) (amending Cal. Civ. Code § 51 and Cal. Gov't Code § 12926). The Legislature adopted a codified statement of legislative intent reaffirming the independent nature of California's disability discrimination jurisprudence:

The Legislature finds and declares as follows: ... The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

Stats. 2000, ch. 1049,

Throughout, and over nearly 40 years, the Legislature has acted to create rights and remedies under state law for Californians with disabilities. While these laws make reference federal law standards as delineating a minimum floor of protection, the rights themselves are, of course, creatures of state law. Indeed, the California Code includes literally hundreds of references to various federal laws, including anti-

discrimination laws;<sup>1</sup> these references do not convert claims arising under these state law provisions into “rights created by federal law.”

Thus, when the legislature granted the DFEH the right to pursue “the denial of rights created by Section 51,” see Cal. Gov’t Code §§ 12948, 12960, it meant just that. Whether the claim arises under subsection (b) or subsection (f), it is a “right created by Section 51.” The LSAC’s argument that a claim arising under subsection (f) of Civil Code section 51 is somehow “created by” federal law, such that the designated state law enforcement agency does not have the authority to prosecute the claim, cannot be considered seriously. *Cf.* Motion to Dismiss, at 8 (quoting selectively from section 51).

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<sup>1</sup> See, e.g., Cal. Civ. Code § 54(c) (“A violation of the right of an individual under the Americans with Disabilities Act ... also constitutes a violation of this section.”); Cal. Civ. Code § 54.1(d) (“A violation of the right of an individual under the Americans with Disabilities Act ... also constitutes a violation of this section”); Cal. Civ. Code § 54.8(k) (“In no case shall this section be construed to prescribe a lesser standard of accessibility or usability than that provided by Title II of the Americans with Disabilities Act of 1990 ... and federal regulations adopted pursuant to that act.”); Cal. Gov’t Code § 4450(c) (“in no case shall the State Architect’s regulations ... prescribe a lesser standard of accessibility or usability than [federal guidelines adopted] to implement the Americans with Disabilities Act of 1990”); Cal. Gov’t Code § 4451(d) (provisions “shall meet or exceed the requirements of Title III ... of the Americans with Disabilities Act of 1990”); Cal. Gov’t Code § 4500(b) (“[I]f the laws of this state ... prescribe higher standards than the Americans with Disabilities Act of 1990 ... and federal regulations adopted pursuant thereto, then those public transit facilities and operations shall meet the higher standards.”); Cal. Gov’t Code § 7260.5(5)(c)(4) (“The policies and procedures of this chapter shall be administered in a manner which is consistent with ... Title VI of the Civil Rights Act of 1964.”); Cal. Gov’t Code § 11135(b) (programs “shall meet the protections and prohibitions contained in ... the Americans with Disabilities Act of 1990 ... and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs ... shall be subject to the stronger protections and prohibitions.”); Cal. Gov’t Code § 12926(m) (“if the definition of ‘disability’ used in the federal Americans with Disabilities Act ... would result in broader protection of the civil rights of individuals ... then that broader protection or coverage shall be deemed incorporated by reference ... and shall prevail”); Cal. Gov’t Code § 12945.2(s) (“Leave taken by an employee pursuant to this section shall run concurrently with leave taken pursuant to the FMLA ...”); Cal. Health & Safety Code § 19952(d) (“In no case shall this section be construed to prescribe a lesser standard of accessibility or usability than provided by the [federal guidelines] to implement the Americans with Disabilities Act of 1990 ...”); Cal. Ins. Code § 790.03(f)(4) (“sex based differentials ... shall not be required for [insurance] which may be considered terms, conditions, or privileges of employment as these terms are used in Title VII of the Civil Rights Act of 1964”); Cal. Pen. Code § 365.5(d) (“guide dog” includes any dog “that meets the definitional criteria under federal regulations adopted to implement Title III of the Americans with Disabilities Act of 1990 ...”); Cal. Pen. Code § 1347.5(k) (“This section shall not be construed ... [to] prescribe a lesser standard of accessibility or usability for persons with disabilities than that provided by Title II of the Americans with Disabilities Act ...”); Cal. Rev. & Tax Code § 74.6(f) (describing state tax deduction for construction “to meet or exceed the accessibility standards of the 1990 Americans with Disabilities Act”); Cal. Veh. Code § 11202(a)(9) (school must provide written compliance with ADA); Cal. Veh. Code § 11216.2(a) (licenses issued to traffic schools “shall be automatically suspended for 30 days ... [if] more than one final determination has been made that the traffic violator school has violated a student’s rights under the federal Americans with Disabilities Act”); Cal. Wel. & Inst. Code § 19000(c) (state “vocational rehabilitation and independent living programs shall be consistent with the national policy toward people with disabilities articulated in the Americans with Disabilities Act ...”); Cal. Wel. & Inst. Code § 19151(b) (“The term ‘Individual with a severe disability’ shall have the same meaning as specified in the federal Rehabilitation Act ...”).

**B. Caselaw Cited by the LSAC Does Not Alter the Analysis.**

The LSAC's argument that the California Court of Appeals decision in *Turner* supports its position must also be rejected. In *Turner*, the state appellate court reasoned that, because the "ADA requires reasonable accommodations on standardized tests for those with qualifying disabilities[,] ... [a]ny violation of this ADA requirement would also be a violation of the Unruh Act[.]" *Turner v. Association of American Medical Colleges*, 167 Cal.App.4th 1401, 1410 (2008); accord *Bass v. County of Butte*, 458 F.3d 978, 981 (9th Cir. 2006) ("The state purpose of Bill 1077 was to 'conform state anti-discrimination law with the provisions of the Americans with Disabilities Act.'"). The DFEH's action is consistent with *Turner*.

The remaining cases cited by the LSAC are inapposite. Two stand for the long-standing proposition that discrimination claims brought by employees against employers are not actionable under California Civil Code section 51. See *Rojo v. Kliger*, 52 Cal.3d 65, 77 (1990); *Bass*, 458 F.3d at 982. A third case found that the Siskiyou County Jail is not a "business establishment" for purposes of the Unruh act, but is a "public entity" covered by Title II of the ADA. *Anderson v. County of Siskiyou*, No. C10-01428 SBA, 2010 WL 3619821 (N.D. Cal. Sept. 13, 2010), at \*\*5-6.

Collectively, these cases indicate that the ADA violations that are actionable under California Civil Code section 51(f), and are thus enforceable by the DFEH (including via a class or group complaint) under California Government Code sections 12948, 12960, 12961, and 12965, are those claims that arise under Title III of the ADA. Title III of the ADA is the section of the federal disability legislation that addresses discrimination by public accommodations, see 42 USC § 12182 ("Prohibition of discrimination by public accommodations") – the very topic of the Unruh Civil Rights Act. See, e.g., *Anderson, supra*, at \* 6 ("The Unruh Act 'firmly established the right of all persons to nondiscriminatory treatment by establishments that engage in business transactions with the public.'") (citing and quoting from *Warfield v. Peninsula Golf & Country Club*, 10 Cal.4th 594 (1995)).

Here, this litigation is brought on behalf of disabled Californians seeking to access services provided by the LSAC in exchange for fees charged. Unlike the employers in *Rojo* and *Bass*, or the public entity in *Anderson*, the LSAC is a private business entity that is engaging in business transactions with the public. It is a "public accommodation" covered generally by Title III, see 42 U.S.C. §§ 12181(7)(F) ("public accommodation" include service providers), and is also an entity offering "examinations or courses related to applications" covered specifically by Title III, see 42 U.S.C. § 12189. The LSAC also falls squarely within the category "all business establishments of every kind whatsoever." See Cal. Civ. Code § 51(b).

The LSAC's motion is without merit. It should be denied in its entirety.

**II. The Parties' Joint Motion for Relief From General Order No. 56 Should Be Granted.**

The LAS-ELC is familiar with judicial and legislative efforts to manage physical access litigation brought under Title III of the ADA and under Section 51, *et seq.* of the California Civil Code. For example, the LAS-ELC participated in a working group including disability rights organizations and business representatives convened by lawmakers in 2005 to draft legislation to address concerns raised regarding such litigation while ensuring continued compliance. (The legislation was not enacted.) The LAS-ELC is aware of the requirements of California Civil Code section 55.51, *et seq.*, which was added by the Legislature in 2008. Stats. 2008, ch. 549 (SB 1608). The LAS-ELC is familiar with General Order No. 56.

The Honorable Edward M. Chen  
June 25, 2012  
Page 6

The characteristics of physical access litigation that have generated such procedures are not present in this dispute. As well, the parties have had an ample opportunity for conciliation and settlement prior to the initiation of litigation. The parties' joint motion for relief from General Order No. 56 should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Claudia Center". The signature is fluid and cursive, with a large initial "C" and a long, sweeping tail.

Claudia Center

1 **PROOF OF SERVICE**

2 I, Djuna Gray, declare:

3 I am a citizen of the United States, over 18 years of age, employed in the County of  
4 San Francisco, and not a party to or interested in the within entitled action. I am an  
5 employee of The LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, and my  
6 business address 180 Montgomery Street, Suite 600, San Francisco, California 94104. On  
7 June 25, 2012 I served the within:

8  
9 **Amicus Curiae Letter**

10 X by serving by mail delivery to:

11  
12 Nelson Chan  
13 Susan Saylor  
14 Department of Fair Employment and Housing  
15 Oakland Legal Unit  
16 39141 Civic Center Drive, Suite 250  
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18 Robert E. Darby  
19 Julie Capell  
20 Fulbright & Jaworski, LLP  
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22 Los Angeles, CA 90071

23 Robert Burgoyne  
24 Caroline Mew  
25 Fulbright & Jaworski, LLP  
26 801 Pennsylvania Avenue, NW  
27 Washington, D.C. 20004

28 I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct. Executed on June 25, 2012 at San Francisco, California.

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