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OPINION	:	No. 80-301
	:	
of	:	<u>May 29, 1980</u>
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SUBJECT: VIOLATION OF CALIFORNIA LABOR CODE—A district attorney may bring an action under section 17204 or 17206 of the Business and Professions Code for a pattern or practice of conduct proscribed under section 1420, subdivision (a), 1420.1, or 1420.35 of the California Labor Code.

The Honorable John K. Van De Kamp, District Attorney, County of Los Angeles, has requested an opinion on the following question:

May a district attorney bring an action under section 17204 or 17206 of the Business and Professions Code for violation of section 1420, subdivision (a), 1420.1, or 1420.35 of the California Labor Code?

CONCLUSION

A district attorney may bring an action under section 17204 or 17206 of the Business and Professions Code for a pattern or practice of conduct proscribed under section 1420, subdivision (a), 1420.1, or 1420.35 of the California Labor Code.

ANALYSIS

Generally, it is an unlawful employment practice for an employer to discriminate against any person in compensation, terms, conditions, or privileges of employment on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of such person. (Lab. Code, § 1420, subd. (a).)¹ Further, it is an unlawful employment practice for an employer to discriminate against an individual over the age of 40 on the ground of age, except as provided by law (Lab. Code, § 1420.1), or against a female employee because of pregnancy, childbirth, or related medical condition. (Lab. Code, § 1420.35.)

The Division of Fair Employment Practices is empowered to prevent such unlawful practices, to receive and investigate complaints alleging such practices, to receive and investigate complaints alleging such practices, to eliminate such practices by conference, conciliation and persuasion, and to issue accusations based on such complaints and to prosecute such accusations before the Fair Employment Practice Commission. (Lab. Code, §§ 1419, 1421, 1422, 1422.2, 1425.5.) The Commission is empowered to conduct hearings and to determine the issues raised therein, and to issue its order requiring such action as in its judgment would effectuate the purposes of the Fair Employment Practice Act. (Lab. Code, §§ 1415, 1424, 1426.) The proceedings of the Commission are governed by the Administrative Procedure Act, section 11500 *et seq.* of the Government Code. (Lab. Code, § 1427.) The willful violation of an order of the Commission is a misdemeanor. (Lab. Code, § 1430.) The Division of Fair Employment Practices is authorized to bring an action in the Superior Court to enjoin a continuing violation of any final order of the Commission. (Lab. Code, § 1429.) Finally, section 1432 of the Labor Code provides:

“(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination on the bases enumerated in

¹ The Governor’s Reorganization Plan No. 1 of June 22, 1979, abolished the division of Fair Employment Practices within the Department of Industrial Relations and established a Department of Fair Employment and Housing within the State and Consumer Services Agency and a Fair Employment and Housing Commission within the department, which entitles succeeded to the former functions and responsibilities of the Division of Fair Employment Practices and of the Fair Employment Practice Commission respectively. Concomitantly, the provisions of the California Fair Employment Practice Act were deleted from the Labor Code and added to the Government Code, section 12900 *et seq.*, as part of the California Fair Employment and Housing Act, subject to the approval of the Legislature pursuant to the Government Code section 12081. Enabling legislation effecting such statutory changes has not been enacted as of this writing. Consequently, the pertinent statutory provisions cited herein are to the Labor Code.

this part.

“.....

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code.”

The question presented is whether a district attorney may bring an action under section 17204 or 17206 of the Business and Professions Code for violation of section 1420, subdivision (a), 1420.1, or 1420.35 of the Labor Code. Section 17200 of the Business and Professions Code provides:

“As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.”

Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. (Bus. & Prof. Code, § 17203.)² Section 17204 of the Business and Professions Code provides:

“Actions for injunction pursuant to this chapter may be prosecuted by the Attorney General or any district attorney or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the ‘general public.’”

Section 17206, subdivision (a), of the Business and Professions Code provides:

² Notwithstanding section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition. (Bus. & Prof. Code, § 17202.)

“Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each Violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor in any court of competent jurisdiction.”

Finally, section 17205 of said code provides:

“Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.”

For the reasons hereinafter set forth, it is concluded that a district attorney may bring an action under section 17204 or 17206 of the Business and Professions Code for violation of section 1420, subdivision (a), 1420.1, or 1420.35 of the Labor Code. In our view, the principal issue is whether employment discrimination constitutes an act of “unfair competition” within the meaning of section 17203 of the Business and Professions Code, and specifically, whether such conduct is an “unlawful, unfair or fraudulent business practice” as set forth in section 17200 of said code.

It is beyond dispute that it is the public policy of this state to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination on account of race, national origin, sex, or any other criterion set forth in the Fair Employment Practice Act. (Lab. Code, §§ 1411, 1412; unpub. opn. of the Attorney General, No. IL 78–32 (1978); and *Cf.* Cal. Const., art. I, § 8; *James v. Marinship Corp.* (1944) 25 Cal. 2d 721, 739–740.) Clearly, the practices proscribed by sections 1420, 1420.1 and 1420.35 of the Labor Code are, in terms of the American ethic, fundamentally *unfair*. Indeed, such practices are expressly declared *unlawful*.

Two decisions of the California Supreme Court are pertinent to this analysis. In *Barquis v. Merchants Collection Association* (1972) 7 Cal. 3d 94, six individual plaintiffs on behalf of themselves and others brought an action under former Civil Code section 3369³ against a licensed collection agency to enjoin its alleged practice of knowingly and willfully filing actions in improper counties, pursuant to statutorily inadequate complaints, for the purpose of impairing its adversaries’ ability to defend these actions, and with the intent and effect of obtaining an increased number of default judgments. Having

³ See *nom.*, Business and Professions Code sections 17200, 17201, 17203 and 17204.

determined that the repeated statutory violations had established a “pattern” or “practice” of conduct (*id.*, at p. 108), the court held that such conduct may be enjoined as an “unlawful . . . business practice.” (*Id.*, at p. 109.)

“Although in a common law context, competitive injury originally composed an essential element of the tort of ‘unfair competition,’ the Legislature, by adopting section 3369, broadened the scope of legal protection against wrongful business practices generally, and in so doing extended to the entire consuming public the protection once afforded only to business competitors. Thus, section 3369 indicates that ‘unfair competition’ as used in the section cannot be equated with the common law definition of ‘unfair competition,’ but instead specifies that, for the purposes of its provisions, unfair competition ‘shall mean and include unlawful, unfair or fraudulent business practice’ (*Italics added.*)” (*Id.*)

The court further stated that the language of former section 3369 of the Civil Code,

“ . . . does not limit its coverage to such ‘deceptive’ practices, but instead explicitly extends to any ‘unlawful, unfair or deceptive business practice’; the Legislature, in our view, intended by this sweeping language to permit tribunals to enjoin on-going wrongful business *conduct in whatever context such activity might occur.* . . . ”

“In permitting the restraining of all ‘unfair’ business practices, section 3369 undeniably establishes only a wide standard to guide courts of equity; as noted above, given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate. In the instant case, however, we need not undertake the task of determining the ‘fairness’ of defendant’s alleged conduct in light of contemporary standards, because insofar as defendant’s alleged practice involves the repeated violation of specific venue statutes, the practice is enjoinable under section 3369 as an ‘unlawful business practice, totally apart from its inherent ‘fairness.’ As originally enacted in 1933, section 3369 defined ‘unfair competition’ only in terms of ‘unfair or fraudulent business practice[s]’; most of the reported cases, dealing in deceptive conduct, arose under the statute as so worded. In 1963, however, the Legislature amended section 3369 to add the word ‘unlawful’ to the types of wrongful business conduct that could be enjoined. Although the legislative history of this amendment is not particularly instructive, nevertheless, as one commentator has noted ‘it is difficult to see any other purpose than to extend the meaning of unfair competition *to anything that can properly be called a business*

practice and that at the same time is forbidden by law.’ (Note, Unlawful Agricultural Working Condition’s as Nuisance or Unfair Competition (1968) 19 Hastings L.J. 398, 408–409.)” (Id., at pp. 111–113; emphasis added; fns. omitted.)

In *People v. McKale* (1979) 25 Cal. 3d 626, the district attorney commenced an action under Business and Professions Code section 17200 *et seq.* against a mobile home park to enjoin alleged violations of the Mobilehome Parks Act and related provisions of the Administrative Code, including failure to maintain proper mechanical, electrical, sanitary, safety and other installations within the park, and to enforce licensing, registration and other requirements for vehicles within the park. The court reiterated the principles expounded in *Barquis*, that an “unlawful business activity” includes any on-going wrongful business conduct in whatever context such activity might occur, that can properly be called a business practice and that at the same time is forbidden by law. (*Id.*, at pp. 632, 634; and *Cf. Hobby Industry Assn. of Am., Inc. v. Younger* (1980) 101 Cal. App. 3d 358, 371.) As in the case of the Fair Employment Practice Act, however, the authority to enforce the Mobilehome Parks Act was expressly vested in an independent commission. The court stated (*Id.*, at pp. 631–633):

“The central issue presented is whether the district attorney has power to proceed against defendants for the claimed violations. While he has no express authority to enforce the Mobilehome Parks Act—such authority being expressly vested in the Commission on Housing and Community Development—does have standing to sue for acts of unfair competition prescribed by provisions of the Business and Professions Code. Section 17204 expressly empowers a district attorney to prosecute actions for an injunction to halt acts of unfair competition, and section 17206 authorizes a district attorney to prosecute actions for collection of civil penalties assessed for such acts.

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“Defendants contend maintenance of a cause of action in unfair competition for violations of the Mobilehome Parks Act circumvents the specific statutory enforcement scheme provided by the act. The act calls for enforcement by the Department of Housing and Community Development or any city or county which has assumed responsibility under Health and Safety Code section 18300. (Health & Saf. Code, § 18207.) While a district attorney may bring an action to abate a nuisance occurring on property controlled by the act (Health & Saf. Code, § 18402), the People do not purport to prosecute this action pursuant to such authority.

“The People contend that even though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the Business and Professions Code. We have so held in an analogous situation. (*Barguis v. Merchants Collection Assn.*, *supra*, 7 Cal. 3d 94.) The Collection Agency Act (Bus. & Prof. Code, § 6850 *et seq.*) provides for a regulatory scheme, including an enforcement agency. Admittedly the issue of standing to challenge alleged unlawful practices was not directly raised in that case. However, we held persons not vested with specific authority by the act—in that case a class of prejudicially-affected persons—could, if properly alleged, bring a cause of action for unfair competition. (*Id.*, at p. 113.) In an action in which a similar question of standing was raised, it was held a savings and loan association could maintain an action for unfair competition in doing business under a particular name even though the Savings and Loan Commissioner had approved the use of such name. (*Coast and Southern Fed. S. & L. Assn. v. Trans-Coast S. & L. Assn.* (1971) 16 Cal. App. 3d 205 [93 Cal. Rptr. 791].)

“In similar situations our courts have arrived at consistent conclusions. The Accountancy Act (Bus. & Prof. Code, §§ 5000–5157) establishes the Board of Accountancy with authority to seek injunctive relief against violators of the act. (Bus. & Prof. Code, § 5122.) As with the Mobilehome Parks Act, the district attorney is not expressly authorized to enforce the statute. While the issue has not been directly faced, it appears a concerned district attorney may prosecute an action for unfair competition predicated on violations of the Accountancy Act notwithstanding provisions for a special enforcement agency. (See *People v. Hill* (1977) 66 Cal. App. 3d 320 [136 Cal. Rptr. 30].)

“In *People v. Sakai Co.* (1976) 56 Cal. App. 3d 531 [128 Cal. Rptr. 536], a district attorney filed an action alleging defendants had committed acts of unfair competition by violating Penal Code sections prohibiting sale of whale meat. Even though the Penal Code provides: only criminal sanctions, the court held the district attorney could pursue an action in unfair competition for such violations.

“We conclude that lack of express authorization for a district attorney to prosecute violations of the Mobilehome Parks Act does not preclude prosecution of an action pursuant to applicable Business and Professions Code sections for unfair competition. *Safer v. Superior Court* (1975) 15 Cal. 3d 230 [124 Cal. Rptr. 174, 540 P. 2d 14] is not inconsistent as contended by

defendants. While we held a district attorney may prosecute civil actions only when the Legislature has specifically authorized, specific power exists in the instant case. The district attorney is expressly authorized to maintain a civil action for either injunctive relief or civil penalties for acts of unfair competition. (Bus. & Prof. Code, §§ 17204, 17206.) Business and Professions Code section 17205 also provides that remedies and penalties available in an unfair competition action are cumulative to remedies and penalties available under other state laws, unless otherwise expressly provided. Neither the Mobilehome Parks Act nor other statute expressly provides that violations of the Mobilehome Parks Act may not be prosecuted as acts of unfair competition.”

Similarly, neither section 1432⁴ of the Labor Code, *supra*, nor any other provision of the Fair Employment Practice Act, nor any other statute expressly provides: that unlawful employment practices as defined therein may not be prosecuted as acts of unfair competition. The People, acting by and through the district attorney in an action under section 17204⁵ or 17206 of the Business and Professions Code do not assert causes of action in such a case under the Fair Employment Practices Act. “They merely borrow from those causes of action allegations of violations, and assert a different cause of action for unfair competition.” (*Id.*, at p. 638.)

Thus far, we have established that discriminatory employment practices are unfair and unlawful. There can be no doubt that a pattern or practice of sub conduct would constitute an unfair or unlawful business practice within the meaning of section 17200 of the Business and Professions Code.⁶ In *McKale* it was held that discrimination in housing and business establishments on the basis of religion or ancestry is clearly unlawful and constitutes unfair competition within the purview of that section. (*Id.*, at p. 637.) Nor may discriminatory employment practices be distinguished on the basis that such practices are wholly internal to a particular business enterprise and do not affect or impact upon the rights and interests of the public at large. Nothing in section 17200 of the Business and Professions Code purports to exclude employment practices. (*Cf. Diaz v. Kay-Dix Ranch*

⁴ While subdivision (c) of section 1432 precludes the enactment of local ordinances respecting employment discrimination, it does not purport to restrict enforcement of state law by local agencies.

⁵ An action under section 17204 may, by its express terms, be brought by “any person” on behalf of the general public. (*Hernandez v. Atlantic Finance Co. etc.* (April 24, 1980) — Cal. App. 3d —.)

⁶ We neither consider nor deny whether conduct not amounting to a pattern, scheme, or design would constitute a “business practice” under section 17200 of the Business and Professions Code. (*Cf. People v. McKale, supra*, 25 Cal. 3d at p. 638, fn. 4.)

(1970) 9 Cal. App. 3d 588.) Employees are members of the public. Discrimination against an employee because of his membership in a group is directed inevitably toward the group as a whole, which is “a component part of the people for whose welfare and happiness government is ordained” (Civil Rights Cases (1883) 109 U.S. 3, Harlan, J., dissenting.)

In *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, the Supreme Court of the United States observed that every consumer has an overriding interest in employment practices:

“There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”

In our view, the consumer has a further interest in knowing that the product or services acquired or consumed were not rendered or provided in furtherance of discriminatory employment practices and of the maintenance and perpetuation of social conditions which are the object of remedial legislation.

The Legislature has expressly indicated its perception that discriminatory employment practices affect the basic interests of the public in general (Lab. Code, § 1411):

“It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general.”
