

Testimony of Kevin Kish, Director, California Department of Fair Employment and Housing

Little Hoover Commission Public Hearing on Labor Trafficking, May 28, 2020

*Prosecuting Labor Trafficking Cases*

Little Hoover Commission  
925 L Street, Suite 805  
Sacramento, CA 95814

Good morning, Chairman Nava and members of the Little Hoover Commission. Thank you for the opportunity to speak today. My name is Kevin Kish, and I am the Director of the California Department of Fair Employment and Housing, or DFEH.

DFEH Background

The mission of the DFEH is to protect the people of California from unlawful discrimination in employment, housing, public accommodations (businesses), and state-funded activities and programs, and from hate violence and human trafficking. We are charged with the civil enforcement of a broad array of civil rights laws, including the Fair Employment and Housing Act (FEHA), Unruh Civil Rights Act, Disabled Persons Act, Ralph Civil Rights Act, California Trafficking Victims Protection Act, and Government Code section 11135.

DFEH occupies a unique role in state government. We receive complaints directly from members of the public or their advocates, we have the authority to initiate complaints or charges in our own name, and we are required by statute to investigate all allegations that fall within our jurisdiction. Each year we investigate thousands of complaints of discrimination and other civil rights violations. If we find that a violation has occurred, our lawyers have the authority to file civil lawsuits in state or federal court to seek damages for those harmed and to vindicate the interests of the state. We also employ a team of professional mediators whose exclusive role at DFEH is to mediate complaints of civil rights violations.

DFEH houses the Fair Employment and Housing Council, which promulgates regulations that implement the statutes that DFEH enforces and holds hearings on related issues such as hate violence trends. DFEH provides extensive educational programs and materials to help teach Californians about their rights and obligations in order to, ultimately, prevent discrimination and other civil rights violations from happening in the first place.

The Civil Remedy for Human Trafficking and DFEH's Enforcement Role

In your first public hearing on labor trafficking in November 2019, you received testimony about the California Trafficking Victims Protection Act, passed by a bipartisan majority and enacted into law in 2005, providing both criminal and civil penalties for sex and labor trafficking as well as other victim protections. In 2016, AB 1684 (Stone) (Stats. 2016, ch. 63) gave DFEH authority to receive, investigate, conciliate, mediate, and prosecute civil complaints alleging human trafficking under Civil Code § 52.5.

The civil cause of action is a crucial tool in combatting trafficking, alongside or instead of criminal prosecution and other legal interventions. The burden of proof in civil cases (preponderance-of-the-evidence standard) allows cases to be brought and won that would be more difficult to prove in a criminal proceeding (with its higher beyond-a-reasonable-doubt standard). Compensatory and punitive damages in civil proceedings can dwarf restitution awards in criminal proceedings, where courts may

not award non-economic damages. And depending on the facts, civil litigation sometimes permits parties other than the individual trafficker(s) to be sued for damages under various theories of liability, striking a blow at the networks that perpetuate trafficking and the interests that profit from it.<sup>1</sup> In addition, as a law enforcement agency, DFEH may certify that an immigrant has been a victim of trafficking or certain other crimes, such as sexual exploitation or rape, so that they may qualify for a U or T visa from the U.S. government.

#### Barriers to Civil Enforcement by the State

Very few human trafficking complaints have been filed with DFEH for investigation. In 2018 and 2019, DFEH received a total of 31 human trafficking complaints from the public (out of a total of 56,579 complaints received in those two calendar years). Of those, all but three have been closed after finding that the facts alleged, if true, would not meet the elements of human trafficking under California law.

In other words, the people who have filed complaints with DFEH to date have typically not been victims of human trafficking, while survivors of trafficking have not filed with the state.

My personal experience as an advocate sheds some light on why this may be so. Prior to my appointment to DFEH, I served as director of the Employment Rights Project at Bet Tzedek Legal Services, the Los Angeles public interest law firm. In that role, I litigated multiple cases involving human trafficking for forced labor, and I provided legal services to many dozens of survivors of sex and labor trafficking through a partnership with the Coalition to Abolish Slavery and Trafficking. In 2009, along with co-counsel, I tried (and prevailed in) the first civil case to reach a jury verdict under the California Trafficking Victims Protection Act, upheld on appeal in *Yusuf v. Tija*, 2010 WL 4012145 (Cal. App. 2d Dist. Oct. 14, 2010).

In that case, my client felt - and has spoken publicly about - a strong desire to hold her traffickers personally accountable and to see justice done in the courts. And her case illustrates the advantages of civil litigation: the restitution awarded to my client in a parallel criminal case totalled around \$13,000, while the civil jury awarded her more than \$750,000 for two months of domestic servitude. But she was relatively unique in her decision to pursue civil legal remedies. After consultation and reflection, very few of the survivors I represented chose to file a civil action against their traffickers.

My clients had varied and complex reasons for deciding not to move forward with civil actions. But whether to move forward was their choice, and this exertion of control over the legal process has a dignitary power. "The most important advantage of civil litigation for a trafficked person is that the trafficked person is the one to bring the suit and control the essential decisions shaping the case, in contrast to criminal cases, which are brought by the state and controlled by the prosecutor."<sup>2</sup>

As with criminal cases, a survivor loses some power to control the civil case when it is brought by the state. Complainants have a statutory right to intervene in a lawsuit filed by the DFEH to protect their own interests, but they cannot dictate the state agency's decisions. In the context of one of our federal counterparts, the Equal Employment Opportunity Commission, the United States Supreme Court has

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<sup>1</sup> For a detailed discussion of the advantages available in civil litigation for combatting trafficking, see Kathleen Kim & Kusia Hreshchychshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 *Hastings Women's L.J.* 1 (2004).

<sup>2</sup> *Id.* at 17.

held that the EEOC is “the master of its own case,” with “the authority to evaluate the strength of the public interest at stake,” and the power “to determine whether public resources should be committed to the recovery of victim-specific relief” even without a complainant’s consent.<sup>3</sup>

Most survivors of labor trafficking never choose to move forward with a civil action. For those who do, many attorneys in private practice are willing to represent trafficking survivors pro bono, often with the support and assistance of non-profit organizations that provide services to survivors. There is a robust national effort to train and support private litigators in these cases. It is no surprise that survivors who make the choice to file suit would typically not choose to hand some control over their case – and their story – to a government agency.

#### Advantages of Civil Enforcement by the State

Despite these considerations, some trafficking survivors may choose in the future to file complaints with DFEH. This may be so especially in geographic areas where pro bono legal networks are less robust, making it more difficult to find representation. The department stands ready to accept and investigate those complaints.

But DFEH also has the power to initiate complaints in its own name on behalf of a group or class of individuals.<sup>4</sup> Using this tool, we conduct systemic investigations into potential legal violations affecting an entire workplace and involving many individuals, some or all of whom would never have filed a complaint on their own behalf. These investigations may be triggered by an individual complaint alleging widespread violations, but they can also result from referrals from other government agencies or other sources.

DFEH may investigate broadly, similar to a grand jury, and its investigations “can therefore be initiated merely on suspicion that the law is being violated, or even just because it [the department] wants assurance that it [the law] is not [being violated].”<sup>5</sup> DFEH is also uniquely equipped to represent the interests of a group or class of victims in civil litigation. Cases brought by DFEH on behalf of a group or class of victims are not class actions, so class certification is not required.<sup>6</sup> Private litigants must meet class certification requirements in labor trafficking cases in order to obtain class-wide remedies.

In its current structure, DFEH does not employ peace officers or a field enforcement team equipped to affirmatively identify potential trafficking situations absent a complaint or referral. Other state entities do have such resources. A referral mechanism identifying potential labor trafficking situations between and among these entities would allow DFEH to initiate civil investigations in appropriate cases. These investigations could result in liability for traffickers – and damages for victims – even where individual victims would never have otherwise come forward.

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<sup>3</sup> *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 291-292.

<sup>4</sup> California Government Code §§ 12960, 12961, 12965.

<sup>5</sup> *Dep’t of Fair Emp’t & Hous. v. Superior Court*, 99 Cal. App. 4th 896, 901 (Cal. Ct. App. 2002) (internal citations omitted).

<sup>6</sup> *Dep’t of Fair Emp’t & Hous. v. Law School Admission Council, Inc.*, 941 F.Supp.2d 1159, 1168-1170 (N.D. Cal. 2013).

Thank you again for the opportunity to speak, and I look forward to your questions and comments.

Sincerely,

A handwritten signature in black ink that reads "Kevin Kish". The signature is written in a cursive, flowing style.

Kevin Kish, Director

Department of Fair Employment and Housing