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PERSPECTIVE

What would Clara Shortridge Foltz think?

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A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.
Cal. Const., art. 1, § 8

California enacts nearly 1,000 new laws per year. Most begin with great purpose, promise, and fanfare. Some fulfill their intended mission, while others are relegated to the basement of legislative history. Article 1, section 8 of the California Constitution is a case in point. This 145-year-old provision that first opened professions to women deserves to be dusted off and put into service.

The history of article 1, section 8, is worthy of note. In its original form, as article XX, section 18, of the Constitution of 1879, the measure read: "No person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

Clara Shortridge Foltz (1849-1934), California's first female lawyer, was the impetus behind this language adopted at California's Constitutional Convention forty-one years before women were granted the right to vote under the 19th Amendment. (*See* Barbara Babcock, "*Clara Shortridge Foltz: Constitution-Maker*," 66 Ind.L.J. 849 (1991).) A suffragist, Foltz simultaneously sued the University of California, Hastings Law College, winning the right for women to be admitted into law school. (*Foltz v. Hodge*, 54 Cal. 28 (1879).) In addition, Foltz's lobbying led to the enactment of the Women's Lawyer Bill under the Statutes of 1878 of the Twenty-Second Session of the Legislature, which made California one of the first states that permitted women to enter the legal profession. These early triumphs culminated in the constitutional provision that opened the door to women in all businesses, professions, vocations, or employment.

Amended, ratified, and renumbered by California voters in 1974, article 1, section 8 extended the protection previously provided by its predecessor to those discriminated against because of "race, creed, color, or national or ethnic origin." The constitutional amendment also extended the protection to "employment." The 1974 constitutional amendment further added the disjunctive "or employment" to article 1-section 8, clarifying that "employment" is different from or in addition to "business, profession [or] vocation." Thus, article 1, section 8, sets forth a fundamental public policy against discrimination affecting a person's pursuit of business, professional, vocational, or employment opportunities.

Article 1, section 8 is seldom cited in California case law. While

"declaratory of this state's fundamental public policy against sex discrimination. …" (*Rojo v. Kliger*, 52 Cal.3d 65, 90 (1990)), California cases have narrowly applied this section in the context of an employer-employee relationship or entry into a previously excluded business or profession. (*See, e.g., Blom v. N.G.K. Spark Plugs (U.S.A.) Inc.*, 3 Cal. App.4th 382 (1992) [sex discrimination of employee contravenes article 1, section 8]; *Badih v. Myers*, 36 Cal.App.4th 1289 (1995) [pregnancy discrimination against employee prohibited by article 1, section 8]; *Sistare-Meyer v. Young Men's Christian Assn.*, 58 Cal.App.4th 10 (1997) [non-employee contractor are not protected under article 1, section 8], *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1 (1971) [females may tend bars under article 1, section 8]; *In re Maki*, 56 Cal.App.2d 635 (1943) [member of opposite sex may be masseur under article 1, section 8].) However, some courts have affirmed the broad application of article 1, section 8. (*Merrell v. All Seasons Resorts, Inc.*, 720 F.Supp. 815 (C.D.Cal. 1989) [private right of action for sex discrimination in employment exists under California Constitution]; *Scott v. Solano County Health and Social Services Dept.*, 459 F.Supp.2d 959 (E.D.Cal. 2006) [claim could be made through state tort law mechanism in order to bring private cause of action under California constitutional amendment]; *Grinzi v. San Diego Hospice Corp.*, 120 Cal.App.4th 72 (2004) [state constitutional prohibition against sex discrimination applies to private as well as state action and reflects a fundamental public policy against discrimination so as to support a claim of wrongful termination in violation of public policy]).

Reviving the use of article 1, section 8 could have a profound public policy impact on greater diversity in the composition, hierarchy, and earning structure of California's businesses, professions, vocations, and jobs.

Unlike the Fair Employment and Housing Act, which jurisdictionally limits protection to "employee[s]," "applicant[s]," and "contract[ors]," "unpaid intern[s]," or "volunteer[s]," article 1, section 8 provides protection for "person[s]." Thus, the constitutional provision's plain meaning signifies that, in addition to "employment," persons still fall within the protection of the constitutional provision when denied entry into a "business," "profession," or "vocation," such as a corporate officer, board member, or partner. Further, unlike the FEHA, nothing under the section exempts religious associations or corporations not organized for private profit. Thus, arguably, clergy, teachers, and staff under the ministerial exception who encounter sex or race discrimination could be covered under article 1, section 8.

In addition, article 1, section 8 does not require an exhaustion of administrative remedies with a state agency. Unlike the five-employee threshold for asserting employment discrimination under the FEHA, article 1, section 8 has no such similar limitation. Further, potential remedies are not circumscribed under the provision.

The FEHA will continue to remain the preeminent California statute for resolving employment discrimination, harassment, and retaliation. However, the application of article 1, section 8 could lead to different outcomes for persons who fall through the cracks because they are not FEHA beneficiaries. In the case of Senate Bill 826 (Jackson, Statutes of 2018), which aimed for greater diversity on corporate boards, its legislative analyses did not reference article 1, section 8. Had the bill been tethered to and more closely adhered to this provision in California's Constitution, perhaps it could have survived the eventual finding of its unconstitutionality.

Reviving the use of article 1, section 8 could have a profound public policy impact on greater diversity in the composition, hierarchy, and earning structure of California's businesses, professions, vocations, and jobs. Clara Shortridge Foltz envisioned its potential more than a century ago. Isn't it time to restore article 1, section 8 to its rightful place?

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