

Appeal No. B186224

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

DANNA HALL, et al.,
Plaintiffs and Appellants,

v.

THE COUNTY OF LOS ANGELES, CALIFORNIA, et al.,
Defendants and Respondents.

Appeal From the Los Angeles Superior Court
Case No. BC208583
Honorable Carl J. West, Judge

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INTRODUCTION

From their legal theory, to their presentation of the record, to their discussion of the controlling legal principles, Appellants consistently fail to provide the Court with a complete or accurate picture. When Appellants' *true* theory for relief is measured against the complete record and controlling authorities, however, it becomes manifest that the trial court properly entered summary judgment, and should be affirmed.

Appellants' Misleading Legal Theory. This lawsuit challenges a pay differential between attorney occupations with two different employers: (i) Auxiliary Legal Services, Inc. ("ALS"), who provided one level of pay and benefits to all of its attorneys; and (ii) the County of Los Angeles, who, through the Office of Los Angeles County Counsel ("LACC"), provided a different level of pay and benefits to all of its attorneys. Although (i) both occupations were gender integrated; (ii) males and females within each occupation were treated the same; and (iii) there were no gender-based barriers to entry into either occupation, Appellants (the female ALS attorneys) complain that because ALS attorneys were paid less than LACC attorneys, that differential somehow is actionable gender discrimination under the state and federal Equal Pay Acts ("EPA") and California's Fair Employment and Housing Act ("FEHA").

To create an illusion of discrimination, Appellants paint a picture that is both incomplete and false. The picture is *incomplete* because it pretends as if: (i) rather than both groups being gender-integrated, the lower paying ALS position was almost exclusively female, and the higher paying LACC position was almost exclusively male; and (ii) only female ALS attorneys—as opposed to all ALS attorneys (male and female alike)—received lower pay than the LACC attorneys. In effect, Appellants ask the Court to ignore two pieces of a four-piece puzzle—namely, the existence of a significant population of male ALS attorneys being treated precisely the

same way as female ALS attorneys, and a significant population of female LACC attorneys making more than either male or female ALS attorneys. The picture is *false* because it suggests that there was a single applicant pool for both occupations, rather than separate applicant pools for each occupation from which gender-neutral hiring decisions were made.

In contrast, here is the actual, complete picture:

1. There were separate applicant pools for each position;
2. The hires for each position were based on merit, rather than gender;
3. Although the gender composition of the two positions was different (with a higher percentage of ALS attorneys being female), both groups were gender-integrated;
4. There were no gender-based barriers to entry into either position; and
5. Similarly situated males and females within each group were treated precisely the same in terms of pay and benefits.

These facts, established by the undisputed record evidence, show that: (i) the pay differential between ALS attorneys and LACC attorneys had nothing to do with gender and everything to do with legitimate gender-neutral factors, such as job title; and (ii) as the Fourth District Court of Appeal recently put it, Appellants' claims of gender discrimination are nothing more than "a diversionary tactic to conceal the real complaint—an adverse employment action taken against a very limited subset of the protected group [of women employees]—not because of their status as members of the protected group, but because of their status as members of the limited subset [i.e., the occupation]." (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1325-1326 ("*Carter*").) As if to underscore

the point, the same day they filed this action, these same Appellants joined forces with male ALS attorneys in a companion lawsuit complaining that *all ALS employees, male and female alike*, received lower salary and benefits than their male and female counterparts at LACC. (See 5 RA 1190-1232 [*Shiell* Complaint].)¹ Plainly, Appellants' grievances have nothing to do with gender.

Appellants' Misleading and Incomplete Record. The record presented by Appellants is at once both over-inclusive and under-inclusive. It is over-inclusive because Appellants argue their case almost exclusively from the testimony of two witnesses (named plaintiff Danna Hall and statistician James Lackritz). Yet that testimony properly was stricken by the court below in an evidentiary ruling that Appellants do not challenge and, indeed, do not even include in their Appendix. It is under-inclusive because Appellants have neglected to provide virtually the entire evidentiary record presented by Respondents to obtain summary judgment. In and of itself, Appellants' failure to provide this Court with a complete and proper record on appeal would justify affirmance.²

Appellants' Incomplete Procedural History. Appellants ignore much more than the fact that the evidence upon which they rely was

¹ References to “__ RA __” are to the volume and page numbers, respectively, of Respondents' Appendix filed concurrently. References to “__ AA __” are to the volume and page numbers, respectively, of Appellants' Appendix.

² (See Cal. R. Ct., rule 5.1(b)(1)(B) [appellant's obligation to provide all documents “necessary for the proper consideration of the issues, including [] any item that the appellant should reasonably assume the respondent will rely on”]; *id.*, rule 5.1(g) [sanctions can be imposed for failure to comply with rule]; *Hernandez v. Cal. Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [affirming trial court ruling due to incomplete and inadequate appendix submitted by appellant]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1296 [ruling against appellants based on their failure to provide an adequate record for review].)

stricken in a trial court ruling they do not appeal. Appellants also fail to mention that, as a result of yet another trial court ruling they do not challenge, a host of dispositive facts were established adversely to them before summary judgment, including that: (i) “any difference in pay and benefits received by male and female attorneys who received paychecks from ALS were not the result of gender discrimination”; and (ii) “any difference in pay and benefits received by male and female attorneys who were recognized as members of the County’s classified Civil Service at County Counsel’s Office were not the result of gender discrimination.”³

Appellants’ Incomplete Legal Analysis. Appellants’ “response” to the authorities compelling a grant of summary judgment against them is the same “response” they made below—they ignore them. To this day, Appellants neglect to even cite, much less try to distinguish, fully 66 of the 87 authorities cited by Respondents below. For example, one of the many important cases Appellants neglect to mention is *Lang v. Kohl’s Food Stores, Inc.* (7th Cir. 2000) 217 F.3d 919, which teaches that the discrimination statutes do “not require equal wages for comparable work, [] or even for identical work. Identical jobs with different wages do not violate [the discrimination statutes], provided that all employees may freely select which job to perform.” (*Id.* at p. 923.)

* * *

The flaws in this appeal are that obvious, and the proper outcome (affirmance) is that clear. No reported decision confronted with the facts present here, including the undisputed levels of gender integration in these two occupations, has failed to grant summary judgment.

³ The record on that previous trial court order already is in the Court’s files. Appellants previously brought a writ petition to challenge the ruling, which this Court summarily denied. (See *Hall v. Superior Court*, Appeal No. B175398, filed May 21, 2004.)

ACTUAL ISSUES ON APPEAL

It is basic that public employment is purely a creature of statute (*Miller v. State of Cal.* (1977) 18 Cal.3d 808, 813), and even Appellants concede that the only employees this County lawfully can have are those who have secured appointments through compliance with civil service. Nevertheless, Appellants maintain they should be considered County employees because they supposedly qualify as "common law" employees. (Appellants' Opening Brief ["AOB"] at pp. 2-3.) With that assumption in place, Appellants then claim that, because they did substantially the same work as LACC attorneys, their lower pay must have been the result of gender discrimination (notwithstanding that male and female ALS attorneys were treated the same).

Respondents confined their summary judgment motion to establishing why Appellants' discrimination claims failed as a matter of law, even if one were to indulge in the assumptions that Appellants were common law employees and that they performed the same work as LACC attorneys. The trial court endorsed all of Respondents' arguments in granting summary judgment, thus presenting the following issues on appeal:

1. Did the trial court err in concluding that Appellants had chosen the wrong male comparator for their gender discrimination claims when it was *undisputed* that: (i) the two groups of ALS and LACC attorneys both were gender integrated; (ii) males and females within each group were treated the same in terms of salary and benefits; and (iii) there were different applicant pools for, and no gender-based

barriers to entry into, the two groups (only hirings based on merit)?⁴

2. Did the trial court err in concluding that pay differentials between ALS attorneys and LACC attorneys were due to legitimate “factors other than sex” when it was *undisputed* that any pay differentials were the result of both: (i) the County’s bona fide civil service system; and (ii) legitimate cost saving goals mandated by the County’s electorate and the County’s own Charter?
3. Did the trial court err in concluding, *like every other California case to consider the issue*, that Appellants were attempting to misuse discrimination statutes to create civil service entitlements that they had not earned?
4. Did the trial court err in concluding that Appellants had failed to demonstrate a disparate treatment (i.e., intentional discrimination) claim under the FEHA when: (i) the *undisputed* record failed to establish any causal link between gender and the compensation decisions of which Appellants complain; (ii) Appellants’ own expert conceded that, given his limited statistical analysis, no legitimate inference of gender discrimination could be drawn from the facts; and (iii) Appellants’ other expert conceded that the compensation decisions in issue were not gender based?

⁴ Although Appellants claim otherwise (AOB at p. 4), Respondents never argued below, and the trial court never ruled, that “complete gender diversity” between groups is required for these statutes to come into play. Respondents simply have argued (and the trial court ruled) that, where a higher paid group possesses a *sufficient* level of gender integration, it cannot be an appropriate comparator as a matter of law. Far from being controversial, the point is established by Appellants’ own cases.

5. Did the trial court err in concluding that Appellants had failed to establish a disparate impact discrimination claim under the FEHA when, on the *undisputed record*: (i) Appellants failed to identify any facially neutral policy against them; (ii) the group Appellants truly claimed was adversely affected (ALS attorneys) is not a protected group under the FEHA; and (iii) in any event, there was no single practice susceptible to a disparate impact analysis?

Appellants do not even try to answer all these questions. (See, e.g., *Title Guarantee & Trust Co. v. Fraternal Finance Co.* (1934) 220 Cal. 362, 363 [failure to challenge independent ground for summary judgment is concession that ruling was well-taken].) Nor do they resolve even one, much less all, of these questions in their favor.

STATEMENT OF THE CASE

Appellants fail to provide a record discussion that is either complete or accurate. Accordingly, Respondents briefly recap the complete, undisputed record.⁵

A. ALS Is Formed to Realize Cost Savings Under Prop. A.

In 1978, the County's electorate approved Proposition A, which amended the County Charter and gave the County a way to reduce costs while maintaining basic governmental services. (2 RA 0581-0588 [County Charter, art. IX, § 44.7] ("Nothing in this Article shall prevent the County, when the Board of Supervisors finds that work can more economically or feasibly be performed by independent contractors, from entering into contracts for the performance of such work.").)

⁵ Respondents will not correct every mischaracterization of the record in Appellants' Opening Brief but, instead, will focus only upon the material facts establishing Respondents' entitlement to summary judgment.

On June 7, 1989, then County Counsel, Dewitt W. Clinton, requested that the Los Angeles County Board of Supervisors form ALS to provide “legal and other related services” to the County as a mechanism to save costs in delivering needed legal services to the County and its taxpayers, as permitted under Prop. A. (2 RA 0536-0538.) That request indicated that “[t]he proposed agreement [with ALS] will result in substantial savings over the cost of providing the services with County employees[.]” (*Id.* at 0538; see also 3 RA 065:13-15.)

On June 20, 1989, the County Board of Supervisors publicly adopted the County’s Prop. A contract with ALS, which recited the County’s need to “develop an economical and cost effective way to provide... supplemental legal services and representation for its officers and employees and for minors in dependency court proceedings[.]” (2 RA 541.) The Executive Summary to Mr. Clinton’s Board request noted that the “fiscal impact” of contracting with ALS is “none” because the “[p]rogram is *more cost effective* than providing services with County employees[.]” (*Id.*, emphasis added; see also 3 RA 0653:3-5.)

Likewise, the County’s contract with ALS stated its intent was “to develop an economical and cost effective way to provide such supplemental legal services and representation for its officers and employees and for minors in dependency court proceedings[.]” (2 RA 0541.) And, the County’s Auditor Controller opined that this contract would result in “substantial savings”—an “[a]most two million dollars in annual cost savings” to the taxpayers of the County. (3 RA 0652:17-19.)

Appellants have not challenged section 44.7, the Prop. A contracting program, or the County’s legitimate ability to enter into a Prop. A contract with ALS to obtain legal services. At bottom, as the undisputed evidence shows (and Appellants concede), ALS attorneys were paid less than LACC

attorneys, not because of gender, but because of cost-savings lawfully permitted under Prop. A. (*Id.*; see also AOB at p. 9.)

B. ALS and LACC Both Were Gender Integrated.

Appellants alleged that, on average: (i) ALS consisted of 65% to 75% female attorneys and 25% to 35% male attorneys; and (ii) LACC consisted of 33% to 40% female attorneys and 60% to 67% male attorneys. (1 AA 0052:16-22 [*Hall* Second Amended Complaint].) The undisputed evidence shows that ALS and LACC were even more gender balanced. (1 AA 0141:9-23 [*Mendoza* Decl.]; 1 RA 0017:12-0018:18 [*Hayward* Decl.].) And contrasting the gender composition of the Children's Services Division of LACC with the gender composition of ALS (whose attorneys predominantly worked in that area), the groups were still more gender balanced. (*Id.*; see also AOB at p. 12.) Thus, at all material times, *both ALS and LACC were significantly integrated with men and women.*

C. The County Has a Bona Fide Civil Service System.

Although Appellants ignore it, the hiring process for LACC is a competitive civil service examination mandated by law. (See, e.g., 3 RA 0589-0611 [Civil Service Rules 1.01, 7.04].) From 1989 through 1999, there were 35 separate examinations open to outside applicants for four positions at LACC: Associate County Counsel, Senior Associate County Counsel, Deputy County Counsel, and Senior Deputy County Counsel. (1 RA 0009:6-0017:10 [*Hayward* Decl.].)⁶ Anyone (including any ALS attorney) who was a U.S. citizen, a member of the California Bar, and met the minimum qualifications for the particular classified civil service position, was allowed to apply in writing to take the examination. (1 RA 0009:6-0010:20, 0011:23-0012:7, 0015:23-0017:10 [*Hayward* Decl.].)

⁶ One of the exams—Exam No. U 9206-G, posted on June 1, 1990—ultimately was cancelled. (1 RA 0015:23-0016 [*Hayward* Decl., ¶ 24, Table at pp. 7-8].)

Each of the separate examinations for attorney positions at LACC was open to both men and women, was publicly announced, and was administered in a gender-neutral fashion that complied with the rules and procedures set forth in the County Code. (1 RA 0009:6-0017:10 [Hayward Decl].)

Having neglected to put Ms. Hayward's Declaration in their Appendix, Appellants grossly misstate the record concerning civil service hires during the relevant time period. For instance, three separate times—each, without a record cite—Appellants claim that only 34 civil service positions were filled during the relevant time frame. (AOB at pp. 3, 13 & 29, fn. 21.) Yet, as Ms. Hayward's missing Declaration establishes, there were **34 exams** that filled **180 positions**. (1 RA 0016.) Likewise, Appellants suggest that new attorney hires for LACC positions were predominantly male in the relevant time frame—supposedly 14 males and 7 females.⁷ But, again, the record evidence shows that the 34 completed exams resulted in the hiring of many more females than males (104 to 76, or 58% to 42%). (*Ibid.*) Even excluding all hires from all exams posted in 1999, as Appellants do, hiring still would be perfectly balanced (53 females to 53 males). (*Ibid.*)⁸

Although Appellants' brief would suggest otherwise, Appellants' statistical expert (Dr. Lackritz) did not contest any of this, admitting that: (i) he does not dispute the numbers provided by the County; and (ii) his

⁷ Note that, in this iteration of Appellants' version of the facts, the number of new hires has shrunk from 34 to 21 (i.e., 14 males and 7 females). Of course, both numbers are wrong. New LACC hires in the relevant time period eclipsed 21 after June 1994 examinations were completed, with 13 females and 13 males being hired. (1 RA 0016.) Through November 1996, new hires at LACC had risen to 23 females and 24 males. (*Ibid.*)

⁸ Ironically, when confronted with these true statistics, Appellants "equity theory" expert, Dr. Singh, freely conceded that "there would be no gender discrimination" claim. (4 RA 1097:3-23.)

statistical presentation simply excluded many hires on the instruction of counsel. (3 RA 0741, 0751-0752, 0767-0776, 0790, 0803-0807, 0847; 1 RA 0016 [Hayward Decl].)⁹

D. Female ALS Attorneys Had the Same Access to Civil Service As Everyone Else.

ALS employees applying for LACC positions were treated no differently than other applicants. (1 RA 0014:22-0015:4 [Hayward Decl].) Indeed, one of Appellants' own *male* witnesses conceded that, during this time period, the County hired *female* ALS attorneys over him into competitive LACC attorney positions filled under civil service:

Q. Going back to the '88, '89 first application, was the person that was hired a male or female?

A. I think that one – that that one was a male.

Q. And the second one?

A. And the second one I think was a female. . . .

Q. Was that lady an ALS attorney?

A. I believe so, yeah.

(2 AA 0284:11-0285:3.)

The fact that compliance with civil service was the only route to employment with LACC was not lost on Appellants at the time:

Q. . . . Did you understand to become official County Counsel at the time you had to comply with the Civil Service requirements?

A. Yes.

⁹ No decision supports such twisted machinations and, in fact, both California and federal courts have rejected them. (*Carter, supra*, 122 Cal.App.4th 1313, 1321-1326 [rejecting analytically indistinguishable discrimination theory based on compensation decision affecting occupation]; *Seville v. Martin Marietta Corp.* (D. Md. 1986) 638 F.Supp. 590, 595 [“[T]hey attempt to prove discrimination by dividing the workforce to suit their own purposes Such an awkward manipulation of statistics does not establish discrimination.”].)

(2 AA 0311:20-23.)¹⁰ Yet Appellants admit that their claims are not based on such compliance, and instead turn on the belief that they can use discrimination statutes to create civil service entitlements they chose not to pursue. (See discussion, *infra*, Section C at pp. 34-35; see also 2 AA 0327:24-26, 0328:18-0329:4 [County's discovery requests]; 2 RA 0576-0580 [trial court order on evidentiary sanctions].)

E. Appellants Admit, and the Trial Court Properly Found, That Gender Played No Role In the Hiring, Promotion, and Compensation of ALS and LACC Attorneys.

In an earlier evidentiary ruling Appellants continue to ignore, the trial court established a number of facts fatal to Appellants' claims, including that, "from 1989 to the present": (i) "any difference in pay and benefits received by male and female attorneys who received paychecks from ALS *were not the result of gender discrimination*"; and (ii) "any difference in pay and benefits received by male and female attorneys who were recognized as members of the County's classified Civil Service at County Counsel's Office *were not the result of gender discrimination*" (2 AA 0327:24-26, 0328:18-0329:4 [County's discovery requests]; 2 RA 0576-0580 [trial court order imposing evidentiary sanctions]; see also 5 RA 1483, fn. 7 [summary judgment ruling].)¹¹

¹⁰ Appellants could hardly feign ignorance on this point. Former ALS Executive Director Marie Flanagan—who was at one time a putative class member in the related *Shiell* case—advised named plaintiff Danna Hall of that fact in writing. (2 AA 0247.) Other ALS attorneys were similarly advised. (2 AA 0247-0248, 0252-0253.)

¹¹ The discovery sanctions order also established that: (i) similarly situated male and female ALS attorneys were not treated differently with respect to salary or benefits; and (ii) similarly situated male and female attorneys who were recognized as members of the County's classified civil service at LACC were not treated differently with respect to salary or benefits. (2 AA 325-326 [County's Requests for Admissions]; 2 RA 0579-0580 [evidentiary sanctions ruling].)

Although these established facts are sufficient to end the inquiry, Appellants, their witnesses, and their documents cement the point:

- Jeanette Smalley-Oberli: “I worked very hard to make doubly sure that people were *hired based on their qualifications and only that.*” (2 AA 0277:5-7, emphasis added.)
- Patricia Jenkins: “Q. . . . Now, as you sit here today can you *identify any person hired as an attorney to work at ALS that was hired based on their gender* . . . as opposed to their qualifications? A. *No.*” (2 AA 0296:12-16, emphasis added.)
- Chester “Chet” Zager: “Q. Did you ever get the impression that the panel members were interested in hiring women only or recommending women only? A. No. But the only impression I do recall is that I seem to recall – and this is my own recollection – that – that a lot more women applied for the positions. . . . Q. Mr. Zager, for any period of time are you aware of *any plan, policy, practice or procedure to hire just women attorneys at ALS?* A. *No.* I was not aware of any. . . . Q. For the ones you interviewed, they would have been the best qualified candidates? A. Well, I certainly did not consider gender in making my recommendations. . . . Q. . . . Would you have participated in this hiring process for ALS attorneys if there was a policy of only hiring female attorneys? A. No. If I were forced to adhere to such a policy I would have refused to participate, but *that never happened* and I *never was pressured to do anything or make recommendations based on gender.*” (2 AA 0283:18-24, 286:7-0289:8, emphasis added.)

- Marie Flanagan: “Q. . . . [A]re you aware of any plan to discriminate against women in hiring attorneys at ALS? A. Actual plan. Not that I can think of at this time. . . . Q. *Are you aware of any practice to discriminate against women in hiring attorneys at ALS? A. Not that I can think of.*” (2 AA 0211:24-0213:1, emphasis added.)

In short, even putting aside the evidentiary sanctions ruling (2 RA 0576-0580)—which Appellants do not challenge—Appellants do not (and cannot) dispute that gender played *no role* in the hiring and compensation decisions at LACC and ALS.

F. Appellants Ignore the Actual Summary Judgment Record.

At the end of the day, Appellants’ task on appeal is to convince this Court that, *based upon the competent evidence of record*, there was a genuine issue of material fact precluding summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855-856.) But Appellants do not even try to make that showing, choosing, inexplicably, to: (i) ignore the competent evidence of record submitted by the County; and (ii) submit a brief bottomed almost entirely upon “evidence” stricken pursuant to evidentiary rulings Appellants do not challenge.¹²

The evidence Appellants ignore is summarized above. The non-evidence that Appellants rely upon is summarized below:

The Hall Declaration. Appellants cite Danna Hall’s declaration for the proposition that, at least as concerns LACC, the County’s civil service

¹² Because Appellants fail to challenge those rulings, it is too late to complain of them now. (See *Beane v. Paulsen* (1993) 21 Cal.App.4th 89, 92-93 [where appellant fails to challenge evidentiary rulings in opening brief, subsequent attempts to challenge them are improper]; *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322 [courts do not entertain issues, including evidentiary issues, raised for the first time in reply].)

system may not have been bona fide because positions, on a handful of occasions, supposedly were “filled through a ‘pre-selection’ process whereby candidates were chosen by senior LACC attorneys and told they would be selected if they submitted applications when the new position was posted to the public.” (AOB at pp. 15, 29-30 & fn. 22.) Although that testimony ultimately would not have been material even if accepted,¹³ the fact remains that the trial court properly sustained objections to virtually the entire Hall declaration, including paragraphs 3-4 in their entirety, paragraph 8, line 7, and paragraphs 9-13 in their entirety, because the witness had no foundation for any of the statements in her self-serving declaration. (5 RA 1404-1415 [County’s evidentiary objections]; 5 RA 1490 [trial court rulings on objections]; see also *infra*, pp. 29-30 [summarizing Ms. Hall’s deposition testimony establishing her lack of foundation].)

The Lackritz Declaration. Appellants cite the declaration of their statistician (Dr. James Lackritz) for the proposition that, “[b]ecause ALS and LACC drew job applicants from the same general pool of attorneys . . . a statistical significant difference in hire rates would reflect that the difference . . . was non-random and shows bias toward one gender or another.” (E.g., AOB at pp. 3, 12.) Not only was Dr. Lackritz himself unwilling to endorse that hopeful reading, but his “conclusions” concerning applicant pools and “non-randomness” were excluded in any event, along with many other portions of his declaration. (5 RA 1416-1446 [County’s objections]; 5 RA 1490-1491 [trial court rulings].)

¹³ According to Ms. Hall, this supposed “pre-selection” was designed to *favor females* in general, and female ALS attorneys in particular. (3 AA 412-414 at ¶ 12, B-E.) Needless to say, that proposition hardly supports the notion that the County was discriminating *against females*.

Although Appellants have not challenged the trial court's evidentiary rulings, it merits some emphasis that they were correct. For example, Dr. Lackritz conceded at his deposition that he had no basis for assuming that there was a single applicant pool for the two positions, and Appellants never established the validity of that assumption (for good reason, as the pools were different). (3 RA 0788:13-17.) And, as for randomness, gender discrimination and the like, Dr. Lackritz made crystal clear that, on the instruction of Appellants' counsel, he deliberately "stopped short" of doing the work necessary for his statistics to give rise to even a feeble inference of gender discrimination:

Q. And one of the things you do in a multiple regression analysis is to run tests to try and isolate variables that can explain a statistical anomaly; correct?

A. That's correct.

* * *

Q. You just crunched the numbers. "Here are the numbers. As to why those numbers are the way they are, that's for someone else."

A. That's correct.

Q. Okay. So you—I could just tick off any number of factors that could explain either gender composition or pay differential and your answer would be the same in each instance: "I have not tested to isolate whether those factors are or are not in play"; correct?

A. That's correct.

* * *

Q. Okay. You don't mean to suggest by that statement that there is an actionable reason for those statistical outcomes? And by actionable I mean something that's discriminatory based on gender.

A. I'm not suggesting there is or there isn't. . . .

Q. Correct. You're just crunching the numbers again?

A. That's correct.

Q. And so when you say it's non-random and had to be caused by one or more factors introducing such statistical bias, you don't know what those factors are?

A. I'm not making any attempt to identify those factors.

Q. So it could be something perfectly innocent, you just don't know?

A. I don't know.

(3 RA 0796:23-0801:18.)¹⁴

The Singh Declaration. Appellants' other "expert" witness declaration—from a Dr. Singh concerning the "equity theory"—is even more irrelevant. According to Dr. Singh, a possible explanation as to why the ALS applicant pool was predominantly female is that many women have lower self-esteem and thus are willing to apply for positions that may pay less. But even he recognized that his "equity theory" had nothing to do with gender discrimination. (4 RA 0991-0992, 1061-1062.) And, as the trial court summed it: "The Court finds the equity theory is of questionable relevance because the focus of this suit is *the County's* [justifications for its actions]—*not* the beliefs of female ALS attorneys[.]" (5 RA 1486.)¹⁵

* * *

¹⁴ These quoted examples are but a few of the many fatal admissions by Dr. Lackritz, confirming that his statistical presentation has no probative value at all. For a fuller picture of the cross-examination undermining all of Appellants' declarations—including Dr. Lackritz's—Respondents refer the Court to their Objections to Evidence submitted below. (5 RA 1404-1461.)

¹⁵ Ironically, the only relevant testimony Dr. Singh ever offered was elicited during his deposition, but it hardly helps Appellants. According to Dr. Singh: (i) based upon everything he had seen, the compensation decisions of which Appellants complain had nothing to do with gender and everything to do with legitimate factors other than sex; and (ii) based upon the female and male hires at LACC during the relevant time period, there could be no legitimate claim of gender discrimination. (4 RA 1097:3-1099:20.)

In sum, even if one were to indulge in the fiction that Appellants actually could be “common law” County employees, there is no dispute that (i) ALS was created to realize cost savings; (ii) ALS and LACC both were gender integrated; (iii) Appellants did not comply with civil service mandates necessary to obtain positions with LACC; (iv) ALS attorneys all were treated the same; (v) LACC attorneys all were treated the same; and (vi) hiring, compensation, and promotion decisions were not based on gender for either ALS or LACC. Summary judgment was proper.

ARGUMENT

A. Appellants Have Chosen the Wrong “Male Comparator.”

1. All Applicable Authorities Compel Affirmance.

It is basic that, to establish a prima facie claim for pay discrimination based upon gender—both under the EPA and the FEHA—Appellants first must show that an employer pays lower wages to its female employees as contrasted with comparable male employees. This requires, of course, that Appellants compare the *appropriate* male and female employees. (E.g., *Hofmister v. Miss. State Dept. of Health* (S.D. Miss. 1999) 53 F.Supp.2d 884, 890 (“*Hofmister*”).) As the trial court rightly concluded:

Neither the EPA nor FEHA will apply where the two comparator groups hold “significant numbers” of females. While the central allegation in this case is that the County set up this *artificial* two-tier employment system when, in fact, employees of ALS were *actually* common law employees of LACC, this does not excuse the requirement that Plaintiffs must demonstrate an appropriate comparator group.

(5 RA 1480:11-15.) All relevant authority on this point is in accord.

The Equal Pay Act.

Both the legislative history and case law under the EPA establish that Appellants’ State and federal EPA claims fail as a matter of law.¹⁶

¹⁶ The California EPA “is nearly identical to the federal Equal Pay Act of 1963.” (*Green v. Par Pools Inc.* (2003) 111 Cal.App.4th 620, 623.)

• **Legislative History.** Unmistakably, “[t]he legislative history of the EPA shows that differences in pay between groups or categories of employees that contain both men and women within each group or category are not covered by the EPA.” (*Hofmister, supra*, 53 F.Supp.2d at p. 891.) For example, as noted in *Hofmister*, “[t]he following colloquy is taken from the debate conducted on May 17, 1963 in the Senate, on May 23, 1963 in the House of Representatives, and on May 28, 1963 when the Senate accepted the House passed Bill establishing the EPA”:

Mr. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R.6060, the equal-pay-for-women bill: First. Differences in pay that exist between women alone are not covered by this act. Second. Differences in pay that exist between men alone are not covered by this act. Third. Differences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by this act. Fourth. Only those jobs that are the same and normally related shall be compared.

(*Hofmister, supra*, 53 F.Supp.2d at p. 892, fn. 13, citing Congressional Record, Vol. 109, Part 7 (88th Congress, 1st Session) pp. 8866, 8892, 8913-8917, 9194-9218, 9761-9762, 9854 & 9941, emphasis added; see 3 RA 0669-0697 [excerpts of Congressional Record, Vol. 109, Part 7].)¹⁷

Accordingly, “it is appropriate to rely on federal authorities construing the federal statute: ‘Although state and federal antidiscrimination laws’ differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute.” (*Id.*, citation omitted.)

¹⁷ As they did below, Appellants contend that Respondents’ male comparator argument “rests entirely on a short ambiguous statement selected from the legislative history of the EPA.” (AOB at p. 21.) Initially, there is nothing ambiguous about this legislative history, which courts also have relied upon. (E.g., *Hofmister, supra*, 53 F.Supp.2d at p. 892, fn. 13.) In any event, the legislative history is just the start, as there is not a single reported decision where a trial court has failed to grant summary judgment to the defense when confronted with the levels

• **Hofmister.** In *Hofmister*, female “records administrators” sued the Mississippi State Department of Health for gender discrimination. The plaintiffs claimed that “records administrators”—a predominantly female group of employees (90% female / 10% male)—performed the same work as “registered nurses”—a predominately male group of employees (47% female / 53% male)—but that “record administrators” were paid less. (*Hofmister, supra*, 53 F.Supp.2d at p. 892.) The district court entered judgment in favor of the employer defendant, noting that ““after a certain indefinable point, the integration within each of the classes compared becomes such that any wage differential is clearly based on a factor other than sex.”” (*Id.* at p. 892, citing *Peters v. City of Shreveport* (5th Cir. 1987) 818 F.2d 1148, 1164 (“*Peters*”).) The “indefinable point” in *Hofmister* thus was reached on less integrated classes of employees than at issue here.¹⁸

• **Arthur.** *Arthur*, which Appellants do not even try to distinguish, reached the same result. There, female faculty members of a private college (College of St. Benedict) that merged faculty with another private university (St. John’s University) brought an action claiming that both universities engaged in gender discrimination by offering enhanced “traveling tuition remission” benefits to male St. John’s faculty over female

of gender integration indisputably present here. (See, e.g., *Arthur v. College of St. Benedict* (D. Minn. 2001) 174 F.Supp.2d 968, 974-975 (“*Arthur*”); *Schulte v. State of New York* (E.D.N.Y. 1981) 533 F.Supp. 31, 39 (“*Schulte*”); *Hofmister, supra*, 53 F.Supp.2d at p. 891.)

¹⁸ Appellants’ attempted distinction of *Hofmister* is facile. According to Appellants, *Hofmister* should be confined to a holding “that the plaintiffs had not established [they performed] substantially equal work.” (AOB at 23.) But the decision expressly is not so limited. Instead, just as other courts have done, *Hofmister* recognizes that “[t]he legislative history of the EPA shows that differences in pay between groups or categories of employees that contain both men and women within each group or category are not covered by the EPA.” (53 F.Supp.2d at pp. 891-892.)

St. Benedict's faculty. After the merger, St. John's and St. Benedict's both preserved their own separate pre-merger benefits plans for all of their existing faculty, but St. John's plan was more lucrative than St. Benedict's. Once merged, the two schools employed 179 faculty members, and "62% of the combined colleges' male faculty (or 68 out of 110) received the traveling tuition remission benefit, while only 30% of the combined female faculty of the colleges (or 21 out of 69 females) received the benefit." (*Id.* at p. 974.)

Granting defendants' motion for summary judgment based on the plaintiffs' failure to establish a prima facie case, the *Arthur* court explained that, even though both groups of faculty performed "approximately equivalent work . . . [t]he EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects both male and female employees equally, there can be no EPA violation":

[Plaintiffs] want the Court to compare the St. John's faculty (76% male and 24% female during the relevant time period) to the St. Ben's faculty (47% male and 53% female during the relevant time period). But the Court finds these two classes were sufficiently integrated at the time of the amalgamation of the colleges, which consequently undermines any suggestion that the difference in benefits was based on sex.

(*Arthur, supra*, 174 F.Supp.2d at p. 976.) "Plaintiffs cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females." (*Id.*, citing *Hofmister, supra*, 53 F.Supp.2d at p. 890 ["noting the absence of legal authority to support comparison of class 'composed of men and

women with another class of employees also composed of men and women.”].)¹⁹

The FEHA.

Like their EPA claims, Appellants’ FEHA claims also fail as a matter of law because Appellants have not selected an appropriate comparator.

- **Schulte.** *Schulte* reached the same result as *Hofmister* and *Arthur*, and granted summary judgment to the employer both under the EPA and Title VII.²⁰ In granting summary judgment, the court held that the employer’s decision to pay social workers (who were 71% female) lower wages than psychologists (who were 69% male) did not establish discrimination as a matter of law, *even if the two groups of employees performed identical work:*

[E]ven if plaintiffs were to succeed on their claim that psychologists and social workers performed equal work for the New York State Office of Mental Health, the fact that wage differentials exist between the two classifications is not evidence of sex discrimination for purposes of Title VII or the

¹⁹ See also *Strag v. Board of Trustees* (4th Cir. 1995) 55 F.3d 943 (affirming summary judgment, explaining that plaintiff “did not put forth a sufficient *prima facie* case under the Equal Pay Act because she failed to identify an appropriate comparator in her own department against whom her starting salary could be properly compared”); *Soble v. Univ. of Maryland* (4th Cir. 1985) 778 F.2d 164, 167 (a plaintiff must show that the comparison she is making is an appropriate one, as mere salary differences are not themselves actionable as discrimination).

²⁰ See *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 463 (“Our courts frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 . . . for assistance in interpreting the FEHA and its prohibition against sexual harassment.”); *Reno v. Baird* (1998) 18 Cal.4th 640, 647 (“Because the antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964 . . . are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA.”) (citations omitted).

EPA. While it may be that the state is unwise in having two different job classifications if there is only one task to be performed (a proposition hotly contested by defendants), this decision cannot be attributed to sex discrimination when each job classification includes substantial numbers of each sex, and there is no claim that members of each sex are not treated equally within each job classification.

(*Id.* at p. 39.) There is no meaningful distinction between this case and *Schulte*.²¹

• ***Beall.*** Finally, in *Beall v. Curtis* (M.D. Ga. 1985) 603 F.Supp. 1563 ("*Beall*"), which Appellants also ignore, the plaintiffs (a group of female nurse practitioners) brought a gender discrimination claim under Title VII because they received lower wages than a predominantly male group of physician's assistants. (*Id.* at p. 1566.) In directing a verdict for the defendants, the court concluded that the plaintiffs did not choose a valid comparator for purposes of proving discrimination because, although the job classification of nurse practitioners was approximately 97% female, almost one-third of the physician's assistants were female as well. (*Id.* at p. 1581.) Because women and men were treated the same within the separate occupations, the female plaintiffs in the lower-paid group could not establish a prima facie case of intentional discrimination by artificially comparing themselves to men in the higher-paid group. (*Id.* at p. 1582.)

* * *

²¹ Appellants contend that *Schulte* is distinguishable because there were different hiring requirements present in that case. (AOB at p. 25.) But there were different hiring requirements in this case too, as only LACC employees ran the gauntlet of civil service. Regardless, *Schulte* expressly held that, even if plaintiffs could have proven that the two occupations did substantially equal work, their EPA claims would fail ***because the two groups were sufficiently integrated.*** (533 F.Supp. at pp. 38-39.)

Plainly, these authorities control on the undisputed facts present here. Indeed, Appellants' own complaint pleads a workforce composition that falls comfortably within the parameters of these cases, and precludes the use of male County Counsel as a comparator as a matter of law. (1 AA 0052:16-22 [Second Amended Complaint].) And, when measured against the appropriate male comparator—male ALS Attorneys—it is undisputed that, “from 1989 to the present, any difference in pay and benefits received by male and female attorneys who received paychecks from ALS were not the result of gender discrimination.” (2 AA 0325:22-24 [County discovery requests]; 2 RA 0576-0580 [evidentiary sanctions order].)

2. Appellants' Authorities Are Inapposite.

Unable to distinguish these authorities effectively, Appellants attempt to steer the Court to other cases they contend compel a different result. However, Appellants recklessly misread the authorities they cite.

For example, *Peters, supra*, does not, as Appellants contend, suggest that “an EPA claim exists whenever an employer pays lower wages to its female employees as compared to its male employees for equal work on jobs requiring skill and effort under similar working conditions.” (AOB at p. 21.) Rather, *Peters* suggests quite the opposite. Just like *Schulte, Arthur, and Hofmister*, *Peters* cites *the very same* legislative history Appellants denigrate and holds that, “after a certain indefinable point, the integration within each of the classes compared becomes such that any wage differential is clearly based on a factor other than sex.” (*Peters, supra*, at p. 1164).²²

²² Nor does *Peters* teach, as Appellants suggest, that gender integration always will present a question of fact. (See AOB at p. 22, fn. 15). Indeed, *Peters* expressly is to the contrary: “[i]n some instances, the degree of integration between the classes compared may be so advanced that, when viewed against the other facts of the case, *summary judgment may be appropriate*.” (818 F.2d at p. 1164, citing *Schulte*.)

Corning Glass Works v. Brennan (1974) 417 U.S. 188 is even more off-point. In *Corning Glass*, all of the night shift supervisors were male and were paid a higher base salary and a night differential. (*Id.* at pp. 191-192.) In contrast, the daytime inspectors were all female, and the pay disparity originally resulted from a gender-based statute that prohibited women from working nights. (*Ibid.*) Then, after the EPA was enacted, the company entered into a collective bargaining agreement that perpetuated the existing disparity between the two groups. (*Ibid.*) Plainly, none of those facts are present here.²³

Finally, Appellants' suggestion that "they were and are the common law employees of the County under the test articulated in *Metropolitan Water District v. Super. Ct.* 32 Cal.4th 491 (2004)" (AOB at p. 20) is beside the point, even if Appellants' reading of either that decision or *L.A. County Employees Assn. v. Super. Ct.* (2000) 81 Cal.App.4th 164 were

²³ Appellants' other cases are inapposite for the same reasons as *Corning Glass*, as each involved employers who: (i) had segregated classification systems that favored men and whose compensation was based on gender; and (ii) made only cosmetic changes—such as agreeing to allow women into the higher paying classifications as vacancies opened or placing a handful of men into the lower paying occupations—designed to circumvent liability but, in reality, perpetuated gender based wage differences. (E.g., *Hodgson v. Miller Brewing Co.* (7th Cir. 1972) 457 F.2d 221 [although women and men performed identical jobs, women all received lower pay than men; classifications originally were completely segregated by gender; after EPA, company made cosmetic changes in attempt to mask the discriminatory pay]; *Hodgson v. Square D Co.* (6th Cir. 1972) 459 F.2d 805 [same basic fact pattern]; *Schultz v. American Can Co. - Dixie Products* (8th Cir. 1970) 424 F.2d 356 [same basic fact pattern].) And, in *Hodgson v. American Bank of Commerce* (5th Cir. 1971) 447 F.2d 416, the employer sought to justify wage disparities between female and male bank tellers performing the same job primarily on the ground of a training program made available only to men.

remotely accurate.²⁴ Simply, even assuming that ALS attorneys would qualify as common law County employees, it does not follow that civil service LACC attorneys are an appropriate comparator, as the trial court noted below. (5 RA 1480.) Put differently, indulging in the fiction that Appellants' employer was the County, rather than ALS, does not answer the question of what an appropriate comparator might be.²⁵

* * *

In sum, the "comparator" cases cited by the parties both articulate the same rules of law, and the issue is quite simple: Even assuming such a thing as common law County employment, under the undisputed facts of this case, is Appellants' chosen comparator group sufficiently integrated such that it is an inappropriate comparator as a matter of law? Summary judgment was inappropriate in *Peters* because the higher paid group plainly was not integrated (it traditionally had been composed of *all* men and still was 90% male at the time of trial). (*Peters, supra*, 818 F.2d at pp. 1151-1152.) Nor was there sufficient integration in the other, factually inapposite cases upon which Appellants rely. Conversely, there was sufficient integration in *Schulte*, *Hofmister*, *Arthur*, and *Beall* to warrant

²⁴ Both of these cases address only statutory construction in limited contexts, and cannot be stretched to support the notion that Appellants can use common law principles to circumvent civil service and become *de facto* County employees. (See, e.g., *Heard v. Board of Admin.* (1940) 39 Cal.App.2d 685, 696 [despite qualifying as an employee as defined in workers compensation statute, public employment benefits were not available absent compliance with civil service requirements].)

²⁵ This is because, even though they might do the same work, all ALS attorneys (male and female alike) were treated and compensated separately from LACC attorneys. Thus, the issue remains: Is it appropriate for members of one gender-integrated group (ALS attorneys) to compare themselves to members of another gender-integrated group (LACC attorneys)? *Appellants never try to answer that question and, instead, simply assume the outcome they desire.*

summary judgment for the employers in those cases as a matter of law, and the undisputed facts here fall comfortably within the four corners of those cases:

- In *Arthur*, the higher paid classification was 76% male. (174 F.Supp.2d at p. 974.)
- In *Schulte*, the higher paid classification was 69% male, while the lower paid classification was 71% female. (533 F.Supp at p. 37.)
- And, in *Beall*, the higher paid classification was 67% male, while the lower paid classification was 97% female. (603 F.Supp. at p. 1581.)

B. The Pay Differential of Which Appellants Complain Was Due To Factors Other Than Sex.

Even if Appellants' artificial comparison between ALS females and LACC males were appropriate, their claims nevertheless fail for a second, independent reason. Specifically, even where there is a pay differential between appropriate comparators, the EPA permits such wage differentials if they are based on "any other factor other than sex." (*Girdis v. E.E.O.C.* (D. Mass. 1987) 688 F.Supp. 40, 45.) Both Congress and courts across the country recognize this affirmative defense as a broad general exception:

[A]s the Supreme Court has noted, the legislative history of the Equal Pay Act indicates that the fourth affirmative defense is a "'broad principle' which makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate the legislation. [Citations.]" Thus, many courts have characterized the exemption for pay differentials based on any factor other than sex as a "broad general exception."

(*Id.* at pp. 45-46, citations omitted, emphasis added; see also *Aldrich v. Randolph Central School Dist.* (2d Cir. 1992) 963 F.2d 520 ("*Aldrich*") [recognizing broad range of business-related factors other than sex].)

Here, as the County demonstrated below—and the trial court agreed—there were at least two separate “factors other than sex” sufficient to preclude a claim of pay discrimination based on gender: (i) the existence of a bona fide civil service system that only LACC attorneys followed; and (ii) a desire to achieve cost savings as permitted by Prop. A, enacted by the County’s electorate over 25 years ago.²⁶

1. The Pay Differential Between ALS Attorneys and LACC Attorneys Is Due to a Bona Fide Civil Service System.

As explained by the Ninth Circuit, “[a] primary purpose in adding this and other exceptions was to permit employers to utilize bona fide gender-neutral job evaluation and classification systems.” (*E.E.O.C. v. Maricopa County Community College Dist.* (9th Cir. 1984) 736 F.2d 510, 514.) Thus, the County’s civil service system properly is a “factor other than sex” justifying the pay differential between LACC and ALS attorneys:

In our view, use of the civil service examination and the job classification system keyed to examination results can provide a valid factor-other-than-sex defense if defendants prove that the system is bona fide. Specifically, the [employer] must prove that the exam for [the position] and the practice of filling the . . . position only from among the top three scorers on the exam is related to performance of [that] job.

(*Aldrich, supra*, 963 F.2d at p. 527.) The County’s civil service system similarly precludes liability to plaintiffs under the FEHA. (Gov. Code, § 12940 [the FEHA immunizes a pay differential “based upon a bona fide occupational qualification”].)

The evidence establishes that the County’s competitive civil service examination and the job classification system keyed to examination results

²⁶ This has to be so because similarly situated males and females within each group (ALS and LACC) were treated the same—thus confirming that pay differentials between two groups were the result of a factor, or factors, other than sex.

was administered to determine and hire the best possible persons to perform legal work as County Counsel; this examination was open at all times to men and women; and attorney positions were filled without regard to gender. (1 RA 0009-0018 [Hayward Decl.].) And, successful compliance with civil service is what resulted in higher salary and benefits for LACC attorneys, male and female alike—Appellants’ suggestion that they were just as worthy notwithstanding.

2. Appellants Have No Response to Civil Service.

Appellants have no meaningful response to this point, and instead offer only two meaningless diversions that can be summarily dismissed:

The “County’s Civil Service Process Was Not Bona Fide Because It Supposedly Favored Female ALS Attorneys” Diversion.

Appellants do not dispute that the civil service process mandated by the County’s civil service rules are the epitome of a bona fide civil service system giving rise to an absolute “factor other than sex.” Based upon a declaration submitted by named plaintiff Danna Hall, however, Appellants suggest that there is an issue as to whether the County’s bona fide system truly was followed in all instances or, on a handful of occasions over the relevant time period, there was preferential pre-selection instead. (AOB at pp. 28-29.)²⁷

First, as explained above, the County’s objections to Ms. Hall’s declaration were sustained, and Appellants have not challenged those rulings on appeal. (See discussion, *supra*, at pp. 14-15.) Thus, Appellants’ musings here about pre-selection are unsupported by competent evidence.

Second, and just as importantly, Ms. Hall’s declaration was at odds with her sworn deposition testimony, in which she candidly conceded, over

²⁷ Tellingly, although many of the anecdotal examples offered by Ms. Hall involved plaintiffs in these very cases, not one of those plaintiffs submitted a declaration attesting to Ms. Hall’s speculation.

and over again, that she had absolutely no foundation to support her speculation as to these supposed anecdotal instances of pre-selection: “That may not have happened.” “I don’t recall.” “It was many years ago. So other than that, I can’t recall.” “I don’t know that.” “I can’t recall if that occurred.” “I don’t recall any firsthand knowledge.” (4 RA 1135:5-18, 1135:22-1136:3, 1137:21-1139:14, 1141:11-19, 1145:15-20, 1146:15-20 [Hall Depo.]) It is well-established that plaintiffs may not defeat a summary judgment motion by contradicting their own sworn discovery responses or prior deposition testimony. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 [“Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment”]; *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 573 [“a party cannot rely on contradictions in his own testimony to create a triable issue of fact”]; *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 [same].)

Third, and ironically, Ms. Hall’s speculation about pre-selection only undermines Appellants’ claims. Simply, far from suggesting that the civil service process was rigged to impede the ability of qualified female attorneys to attain positions with LACC, Ms. Hall claims that the process was not scrupulously followed to make it easier for females in general—and female ALS attorneys in particular—to obtain positions with LACC. (3 AA 0412:19-0414:14.) Of course, the notion that the civil service process was *biased in favor of females* negates any suggestion that the County discriminated against females.

The “We Didn’t Go Through Civil Service So It Doesn’t Apply To Us” Diversion. Appellants also contend that a bona fide civil service defense does not apply to them because “ALS attorneys were not part of the County’s civil service system.” (AOB at p. 27.) They are wrong, again.

First, this contention unwittingly defeats Appellants' claim to County employment of any kind. Simply, Appellants always have recognized (correctly) that the only employees the County lawfully may have under Article IX, Section 33 of its Charter are civil servants. (See, e.g., 5 RA 1217:14-1220:16 [*Shiell* Complaint, ¶¶ 69-77]; 5 RA 1321:23-1322:4 [*Shiell* Class Certification Memo].) By admitting that they are "not part of the County's civil service system," Appellants are admitting that they are not County employees.

Second, and regardless, Appellants simply misperceive the nature of Respondents' defense. Respondents' defense is not that, under the County's merit-based civil service rules, ALS attorneys would rate lower on merit, and should be paid less for that reason. Rather, it is that: (i) compliance with the mandatory civil service hiring process and obtaining appointment to an LACC position was the gender-neutral vehicle for attorneys (male and female alike) to obtain higher pay and benefits; (ii) male and female ALS attorneys who chose not to pursue (or did not successfully obtain appointment through) civil service received lower pay, while male and female ALS attorneys who successfully complied with civil service and attained LACC positions all received higher pay; (iii) the civil service process was open to both men and women, and indisputably worked for female ALS attorneys; and (iv) hence, against the legal backdrop that a "factor other than sex" defense is a "broad general exception" to a pay discrimination claim, the civil service/non-civil service dichotomy is a legitimate gender-neutral factor other than sex.²⁸

²⁸ Notably, Appellants went to great lengths below to complain about the *differing treatment of two women*—Barbara Owens (an LACC attorney) and Jackie Louis (an ALS attorney). According to Appellants, although these two women performed the same job, Ms. Owens was paid more "*by virtue of [her] designation as County Counsel.*" (3 AA 412-413) Even if true, and even if admissible (instead of stricken from

Far from weakening the County's position, Appellants' opposition only illustrates its validity. For example, Appellants cite *E.E.O.C. v. Aetna Ins. Co.* (4th Cir. 1980) 616 F.2d 719, which held that the pay differential was due to a "factor other than sex" because "the differential was attributable to the existence of two distinct salary programs, neither of which had sex discrimination as a purpose or as an effect." (*Id.* at p. 726.) (footnote omitted.) Here, too, there were two distinct salary programs—one for ALS attorneys and one for LACC attorneys—and, as Appellants' own evidence and the trial court's discovery sanctions order both confirm, neither discriminated between males and females. In sum, *males and females were treated exactly the same under each system*, and the discrepancies in pay thus were due to factors other than sex.

3. The Pay Differential of Which Appellants Complain Also Was Due To Proposition A, Which Was Enacted To Realize Cost Savings.

Independently, Appellants do not (and cannot) dispute that the pay differential between ALS and LACC was the result of Prop. A. Indeed, they concede it. (AOB at p. 9.)

Nevertheless, Appellants dismiss Prop A and its mandate for cost savings with the throwaway suggestion that "county laws and regulations cannot override state and federal law." (See AOB at p. 25, fn. 16, citing the Supremacy Clause to the United States Constitution, *DeVita v. County of Napa* (1995) 9 Cal.4th 763 and *Yost v. Thomas* (1984) 36 Cal.3d 561.)²⁹

the record), this only proves Respondents' point, which is that the salary decisions of which Appellants complain were based on job title, not gender—and thus not actionable under the EPA or the FEHA.

²⁹ Appellants' citations to *Yost* and *DeVita* are puzzling. Both cases generally involved land use acts and general plans. (See *DeVita*, 9 Cal.4th at pp. 771-772; *Yost*, 36 Cal.3d at pp. 564-566.) Both cases upheld the challenged local voter initiative because land use elements of a general plan may be amended by local voter initiative. (See *DeVita*, 9

But this argument merely begs a question Appellants never even try to answer: “Does Prop. A conflict with these discrimination statutes or can it provide a defense?”³⁰

Appellants’ lead case (*Peters*) answers that question adversely to Appellants. (See *Peters, supra*, 818 F.2d at pp. 1162-1163 [pay differential required by a gender-neutral state statute, even though it resulted in a predominantly male classification receiving higher pay than a predominantly female classification, supported the court’s conclusion that “the Louisiana statute, qualifies, in our opinion, as a ‘factor other than sex’”].)³¹ As in *Peters*, the County here was operating under a gender-neutral mandate to achieve cost-savings through contracting with entities like ALS and, as Appellants have confirmed: (i) ALS hires were based on merit, rather than gender; and (ii) the only reason there were more women at ALS is because more women applied for the position. Thus, as in *Peters*, fulfilling this gender-neutral mandate is a legitimate defense. (Cf. *Cal. State Employees’ Assn. v. State of Cal.* (1988) 199 Cal.App.3d 840, 853 [“[T]he Legislature was entrusted to consider various alternatives with

Cal.4th at pp. 791-792; *Yost*, 36 Cal.3d at pp. 571-573.) Certainly, neither case suggests that Prop. A or statutes like it cannot provide a defense to claims of discrimination.

³⁰ Respondents’ position is not, as Appellants suggest, that “cost savings” always can be a defense to a pay discrimination claim. (AOB at p. 28.) But, when, as here, the pay discrepancy is gender-neutral and is the result of voter enacted legislation, it constitutes a “factor other than sex” that supports the defense.

³¹ *Peters* does not stand alone. (See *Prieto v. City of Miami Beach* (S.D.Fla. 2002) 190 F.Supp.2d 1340, 1354 [rejecting the notion that a two-tier wage and pension system that applied equally to all individuals could be discriminatory, even if there was “a strong showing of disparate impact”]; *Maxwell v. City of Tucson* (9th Cir. 1986) 803 F.2d 444, 447-448 [recognizing that “decreases in staff [or] budget” could be a legitimate factor other than sex].)

regard to civil service administration. In devising such alternatives . . . the Legislature. . . must [not] abdicate fiscal responsibility and forego opportunities to realize substantial savings to the taxpayers.”].³²

C. **The Anti-Discrimination Statutes Cannot “Create” Civil Service Entitlements.**

Below, the County also established, and the trial court agreed, that: (i) plaintiffs may not use state statutes like the FEHA (or state EPA) to create civil service entitlements, given the plenary authority vested in charter counties over such matters;³³ (ii) if statutes like the FEHA were read as permitting such relief, they would be unconstitutional under a long line of authorities emanating from our Supreme Court and would write out of existence the very first sentence of the FEHA itself;³⁴ and (iii) even if it

³² Regardless, even if Prop. A conflicted with the FEHA or state EPA, Appellants’ assumption that the state discrimination statutes would control is wrong. Although Appellants continue to entirely ignore the point, any state statute that would allow plaintiffs to use the courts to override the County’s authority over compensation decisions would be unconstitutional. (See note 34, *infra*.)

³³ 1 AA 0170-0172 (citing *Hastings v. Department of Corrections* (2003) 110 Cal. App.4th 963; *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472; *State Personnel Board v. Fair Employment & Housing Commission* (1985) 39 Cal.3d 422; *State of California Department of Rehabilitation v. Lauher* (2003) 30 Cal.4th 1281; *Almassy v. Los Angeles County Civil Service Comm.* (1949) 34 Cal.2d 387; Cal. Const., art. III, §§ 3-4).

³⁴ 1 AA 171-172 (citing *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296; *San Francisco Labor Council v. The Regents of the Univ. of California* (1980) 26 Cal.3d 785; *Bishop v. City of San Jose* (1969) 1 Cal.3d 56; *Ector v. City of Torrance* (1973) 10 Cal.3d 129; *Pearson v. Los Angeles County* (1957) 49 Cal.2d 523; *American Federation of State, County & Mun. Employees v. County of Los Angeles* (1983) 146 Cal.App.3d 879; Gov. Code, § 12940 [exempting from the reach of the statute employer actions “based upon a bona fide occupational qualification”]).

were established that the County created a two-tier workforce, whether employees in one group performed substantially similar, or even identical, work as employees in a separate, higher paid group is of no legal consequence.³⁵ (See 1 AA 0160, 0169-0172 [County's Motion for Summary Judgment]; 3 AA 0562-0564 [County's Reply Brief]; 5 RA 1483-1484 [summary judgment ruling endorsing this argument].)

Just as they did below, Appellants ignore this independent ground for summary judgment altogether, and do not even cite, much less discuss or attempt to distinguish, a single one of the authorities relied upon by Respondents or the trial court. Thus, any challenges to the point have been waived. (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529; *Cal. School Employees Assn v. Santee School Dist.* (1982) 129 Cal.App.3d 785, 787.) Accordingly, rather than repeat arguments and reasoning Appellants do not contest, Respondents simply note that, since summary judgment was granted in this case, at least two more published decisions from the Court of Appeal confirm that the discrimination statutes cannot be used to create civil service entitlements. (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1226; *Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 603.)

D. Appellants' Disparate Treatment Claim Is Legally Flawed.

1. Appellants Had a Complete Failure of Proof.

To prove disparate treatment, Appellants had to establish that the County *intentionally* engaged in unlawful discrimination. (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748.) Here, Appellants' disparate treatment theory consists solely of statistics showing

³⁵ 1 AA 172 (citing *Saal v. Workers' Compensation Appeals Board* (1975) 50 Cal.App.3d 291; *Holmes v. City of Los Angeles* (1981) 117 Cal.App.3d 212; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568; *Davis v. City of Sacramento* (1982) 138 Cal.App.3d 356; *McCourtney v. Cory* (1981) 123 Cal.App.3d 431).

that ALS attorneys were predominately female and LACC attorneys supposedly were predominately male. Based upon these benign facts, and the reasonable inference that the County knew about the gender composition of these two groups and how they were paid, Appellants leap to the conclusion that ALS attorneys were intentionally paid less because of their gender. (AOB at pp. 32-33.)

But intentional discrimination cannot be established merely by showing that the County “was aware that a given policy would lead to adverse consequences for a given group.” (*Forsberg v. Pacific Northwest Bell Telephone Co.* (9th Cir. 1988) 840 F.2d 1409, 1418 [citing *American Federation of State, County & Municipal Employees v. State of Washington* (9th Cir. 1985) 770 F.2d 1401, 1405 (“AFSCME”)]; see also *Personnel Admin. of Mass. v. Feeney* (1979) 442 U.S. 256, 279 [discriminatory purpose implies more than awareness of consequences].) Instead, plaintiffs must prove that the County “chose the particular policy *because of its effect on members of a protected class.*” (*Forsberg, supra*, 840 F.2d at p. 1418, emphasis added.) And, even if it had not already been conclusively established, before the County moved for summary judgment, that any pay differentials were not the result of gender discrimination (2 AA 327-329; 2 RA 0576-0580), Appellants did not meet that burden.

First, the undisputed record, including Appellants’ own testimony, confirms there were no barriers to entry into the higher paying LACC positions. Absent gender-based barriers, pay differences between two positions (even if one is predominantly female and the other is predominantly male) will not support an inference of discrimination. *Lang v. Kohl’s Food Stores, Inc.* (7th Cir. 2000) 217 F.3d 919 illustrates the point. There, the Eleventh Circuit upheld summary judgment, dismissing a claim by supermarket workers in the predominantly female bakery and deli departments that the higher pay received by members of the predominantly

male produce department was gender-based, because plaintiffs had not established any barriers to their entry into the higher-paid produce department. (*Id.*) As *Lang* summed it: “Title VII does not require equal wages for comparable work [] or even for identical work. Identical jobs with different wages do not violate Title VII, provided that all employees may freely select which job to perform.” (*Id.* at p. 923, citation omitted; see also *United Assn. of Black Landscapers v. City of Milwaukee* (E.D. Wis. 1990) 736 F.Supp. 206 [summary judgment appropriate where no evidence that plaintiffs were denied opportunity to apply and be hired].)³⁶

Second, Appellants cannot establish the causal link necessary to support an intentional discrimination claim—namely, proof that the compensation decisions were based on gender. In that regard, *Lindale v. Tokheim Corp.* (7th Cir. 1998) 145 F.3d 953 is instructive. There, the plaintiff, a female engineer, applied and was hired for an ME I position, the lowest paying mechanical engineer position at Tokheim, with the assurance that she would be promoted to an ME II position within a year. (*Id.* at p. 954.) After being employed with Tokheim for almost two years without receiving a promotion, Lindale quit and filed suit under Title VII and the Equal Pay Act (EPA). On appeal, the court overturned the jury verdict and directed the district court to enter judgment in favor of the employer and dismiss the suit with prejudice:

Superficially her claim is a strong one. There is plenty of evidence that she was doing the work described in Tokheim’s

³⁶ In truth, Appellants’ real complaint is that, although the County’s civil service system was open and available throughout the relevant time period, there were not enough civil service positions available for all ALS attorneys to obtain County employment. (AOB at pp. 28-29.) But the County does not have an obligation to hire everyone who wants to work for it, and a gender-neutral limit on the number of available civil service positions is not a gender-based barrier to entry, which is the only thing that would be relevant here.

job description of an ME II, yet she was paid less than the other ME II's and she was a woman and they were men. But there is something obviously wrong with the analysis. What is left out is the causal relation between sex and pay.

(*Id.* at p. 957.) The court found “no evidence that had [Lindale] been male, she would have received higher pay.” (*Id.* at p. 958 .)³⁷

Here, too, Appellants cannot show the necessary causal relationship. Indeed, their sworn discovery responses and deposition testimony—which show, among other things, that similarly-situated male and female ALS Attorneys were treated the same—affirmatively establish the absence of that required causal link. (See, e.g., 2 AA 0327-0329 at 4:24-26, 5:18-6:4 [County's discovery requests]; 2 RA 0576-0580 [trial court order on evidentiary sanctions].)

2. Appellants' Statistician Does Not Fill the Evidentiary Void.

Against all this, Appellants quixotically maintain that their statistician's inadmissible declaration creates a triable issue of material fact as to discriminatory intent. (AOB at p. 33.) Even had that “evidence” not been stricken, however, it would have been insufficient to create a triable issue of fact, as the trial court expressly held. (5 RA 1486:4-18 [calling expert report “dubious,” and noting that to read it as Appellants do would be to make an unsupported “leap of logic”].)

Even Appellants' own cases hold that “statistical evidence has an ‘inherently slippery nature,’ [citations], and ‘can be exaggerated, oversimplified, or distorted to create support for a position that is not

³⁷ See also *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1125 (statistics showing a gender imbalance did not create inference that facially gender-neutral screening process created a discriminatory barrier to entry; rather, plaintiffs had to come forward with additional evidence showing “causation between [the process] and the claimed gender disparity”).

otherwise supported by the evidence.” (*Spaulding v. University of Washington* (9th Cir. 1984) 740 F.2d 686, 703, citation omitted [affirming defense judgment].) For this reason, for a statistical analysis to be competent evidence: (i) it must properly account for innocent variables that could explain any statistical discrepancies; and (ii) the “statistical evidence . . . must be drawn from appropriate comparison pools”—which means the “group from which individuals will be chosen for the job action” complained of (here, ALS applicants). (*Hemmings v. Tidyman’s, Inc.* (9th Cir. 2002) 285 F.3d 1174, 1184-1185). A failure to adhere to these principles is fatal. (See *Paige v. State of Cal.* (9th Cir. 2002) 291 F.3d 1141 [reversing judgment based on flawed statistical analysis].) Appellants’ statistical analysis violates these principles in every conceivable way:

- At the direction of counsel, Dr. Lackritz treated the ranks of ALS and LACC attorneys as one fungible applicant pool, even though: (i) ALS and LACC had separate hiring processes; (ii) most ALS attorneys, by their own admission, never even tried to secure positions with LACC; and (iii) Lackritz conceded that he had no clue as to whether there was any overlap between the ALS and LACC applicant pools at any given point in time—an evidentiary gap Appellants never tried to fill. (3 RA 0749:15-0751:23, 0753:5-0754:6, 0799:5-0800:2, 0853:21-0854:17 [Lackritz Depo].)
- Dr. Lackritz made no effort to account or control for the host of non-discriminatory variables that could explain the payrolling differences and/or gender composition of the two groups. Indeed, at the direction of Appellants’ counsel, he deliberately “stopped short” of performing that required analysis. (3 RA 0796:17-0798:5.) For example, as Lackritz conceded, the gender composition of ALS could easily be explained by the undisputed

facts that the majority of applicants for ALS positions were female and that hirings were based on merit, not gender; yet, he did nothing to rule out those benign factors. (3 RA 0781:4-0784:23, 0788:5-0791:16, 0792:19-0798:5, 0840:15-0842:16 [Lackritz Depo.]; see also 4 RA 1017:6-1018:14, 1018:24-1017:10, 1019:24-1023:1., 1029:9-1030:8, 1031:15-1032:2, 1058:14-1059:12 [Singh Depo., citing these precise factors as the non-discriminatory reasons why the gender composition in his department was 70% female / 30% male]; compare 2 AA 0283:19, 02867-0288:5 [Zager Depo., confirming that gender played no role in the hiring process at ALS].)

- Likewise, Dr. Lackritz made no effort to account for the most obvious reasons for the pay differential—job position and cost savings. (3 RA 0796:17-0798:5 [Lackritz Depo.].) Instead, he just “crunched the numbers” and, by his own admission, had no clue whether any of the statistics he reported had anything to do with gender discrimination. (3 RA 0797:6-9.) Not surprisingly, courts consistently have found such superficial analyses to be incompetent, and thus inadmissible, as a matter of law. (See, e.g., *Stout, supra*, 276 F.3d at p.1125 [without competent evidence of causation, bare statistics are meaningless]; *Coward v. ADT Security Sys.* (D.C. Cir. 1998) 140 F.3d 271, 274 [rejecting statistical analysis that failed to test for impact of job title]; *Morgan v. United Parcel Service of America, Inc.* (8th Cir. 2004) 380 F.3d 459, 470 [criticizing indistinguishable analysis as “circular” and the “sort of bootstrapping [that] cannot create an inference of discrimination”].)
- Similarly, and again at Appellants’ counsel’s direction, Dr. Lackritz: (i) excluded appropriate male comparators (male

ALS attorneys) whose salaries did not fit Appellants' "men are paid more" theory (3 AA 0473-0475 [Lackritz Decl., Ex. 3]); and (ii) defined his measurement period in a fashion that allowed him to exclude a significant number of female attorneys admitted into higher paying LACC positions as a result of exams posted prior to 1999 (Compare *id.*, ¶ 7 with 1 RA 0016 [Hayward Decl.]; see also 3 RA 0767:19-21, 0768:10-21, 0769:19-0774:3, 0776:7-21, 0803:2-24, 0806:2-0807:21, 0847:10-14 [Lackritz Depo.].) Courts consistently have rejected this type of statistical manipulation as well. (See *Hein v. Oregon College of Education* (9th Cir. 1983) 718 F.2d 910, 916 [reversing plaintiffs' judgment because they had ignored the lower salaries of proper male comparators and chose to compare themselves only to males whose salaries fit their theory; "[w]e do not believe that the Equal Pay Act is subject to such manipulation."].)

Regardless, the conclusions Appellants would have the Court infer from their statistician's superficial analysis are foreclosed by the sworn testimony of Appellants themselves that: (i) ALS hires were based exclusively on merit, without regard to gender; (ii) if anything, entrance into LACC was easier for women in general, and female ALS attorneys in particular; and (iii) pay differentials were based entirely on occupation, such that female LACC attorneys made more than both male and female ALS attorneys.

E. Appellants' Disparate Impact Claim Also Is Riddled With Flaws.

To establish liability under a disparate impact theory, Appellants had to prove that the employer applied a *facially neutral* practice or policy to *all of its employees* that resulted in a disparate impact upon a protected group. (See *Carter, supra*, 122 Cal.App.4th at pp. 1321-1326 [rebuffing

same discrimination theory advanced here]; *City & County of San Francisco v. Fair Employment Housing Com.* (1987) 191 Cal.App.3d 976, 985 [plaintiff must show facially neutral practice or policy].) Appellants came forward with no evidence to establish any of these elements, however.

First, Appellants' characterization of the issue—paying “ALS employees” less than LACC employees (AOB at p. 2)—only confirms that Appellants' true complaint here is a non-actionable complaint about an adverse decision affecting an occupation staffed by males and females alike. (*Carter, supra*, 122 Cal.App.4th at pp. 1325-1326) [rejecting analytically indistinguishable claim as a complaint directed towards an occupation, rather than a protected group];³⁸ *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268, superseded by statute on other grounds as stated in *Alch v. Superior Court* (2004) 122 Cal.App.4th 339 [holding the FEHA only prohibits discrimination based upon criteria enumerated in section 12940].)

Second, as with a disparate treatment claim, the fact that one group of employees (which was predominantly female) was paid less than another

³⁸ Appellants concede that, if their complaint were about a decision impacting the position of ALS attorneys, their disparate impact claim would be as ill-fated as the one in *Carter*. Nevertheless, Appellants claim to have solved the problem by carving male ALS attorneys out of their class so that only women are suing. But there were no male plaintiffs in *Carter* either—only a complaint by a single female plaintiff that her employer had made a decision that adversely impacted an occupation that was almost exclusively female. (122 Cal.App.4th at p. 1317.) Regardless, the dispositive point is not the self-selected identity of the litigants, but rather, as *Carter* so aptly puts it, whether Appellants' focus on gender is “a diversionary tactic to conceal the real complaint—an adverse employment action taken against a very limited subset of the protected group [of women employees]—*not because of their status as members of the protected group, but because of their status as members of the limited subset [i.e., the occupation]*.” (*Id.* at pp. 1325-1326, emphasis added.)

group of employees (which was predominantly male) is insufficient to establish a disparate impact claim. (See *Wards Cove Packing Co. v. Antonio* (1989) 490 U.S. 642, 653, superseded in part on other grounds as stated in *Smith v. City of Jackson* (2005) 544 U.S. 228 [rejecting attempt to compare racial percentages in two occupations as “irrelevant to the question of a *prima facie* case of disparate impact”]; see also *AFSCME, supra*, 770 F.2d at p. 1405 [directing judgment for employer on both disparate treatment and disparate impact claims, even though it was undisputed that statistics showed employees in predominantly female jobs were paid less than employees in predominantly male jobs]; *New York State Office of Mental Health v. New York State Div. of Human Rights* (N.Y. App. Div. 1996) 223 A.D.2d 88, 91-92 [holding workforce imbalance statistics insufficient to establish a *prima facie* case of disparate impact where a group of predominantly African American and Hispanic employees at one unit of the state psychiatric hospital received less pay than a group of predominantly Caucasian employees performing the same duties at another unit].)

As *Wards Cove* explains, it is “nonsensical” and “irrelevant” to compare two integrated groups because such a comparison would: (i) include individuals (like many of these Appellants) who chose not to apply for the other position (490 U.S. at pp. 651, 653); and (ii) lead to the absurd result of forcing employers “to adopt [gender] quotas, insuring that no portion of their work forces deviated in [gender] composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.” (*Id.* at p. 652.)³⁹

³⁹ Quotas also are a result that: (i) our voters rejected in enacting article I, section 31 of the California Constitution; and (ii) would violate the merit principle underlying civil service.

Third, even if “ALS Attorneys” could be treated as a protected group under the FEHA, the County’s establishment of a higher salary for LACC than for ALS attorneys would not be a facially neutral practice that could be challenged under a disparate impact theory. Rather, the practice, on its face, treats two groups differently. A claim that such a practice is discriminatory is, by definition, a disparate treatment claim, not a disparate impact claim. (See *Ramos v. Baxter Healthcare Corp.* (D.P.R. 2003) 256 F.Supp.2d 127, 149; *Thomas v. Anchorage Telephone Utility* (Ala. 1987) 741 P.2d 618, 629.)

Fourth, the County’s complex compensation system does not constitute a single practice susceptible to disparate impact analysis. (See *AFSCME, supra*, 770 F.2d at p. 1405 [“Disparate impact analysis is confined to cases [that] challenge a specific, clearly delineated employment practice applied at a single point in the job selection process.”]; *Anderson v. Douglas & Lomason Co.* (5th Cir. 1994) 26 F.3d 1277, 1284-1285 [same].)

CONCLUSION

Even if Appellants were to be considered *de facto* County employees performing the same work as LACC attorneys, the fact that they (along with male ALS attorneys) received lower pay than the male and female LACC attorneys does not constitute gender discrimination. Instead, as the trial court below correctly concluded, it means only that pay and benefit differences were based on job positions (filled with separate applicant pools and separate but gender-neutral hiring processes) and a gender-neutral legislative mandate that the County achieve cost savings. The judgment below should be affirmed.

Dated: September 11, 2006

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