LCW LIEBERT CASSIDY WHITMORE

Preventing Workplace Harassment, Discrimination, and Retaliation

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ALL ABOUT THE AUTHORS

With offices in Los Angeles, San Francisco, Fresno, San Diego and Sacramento, the law firm of Liebert Cassidy Whitmore represents public agency management in all aspects of labor and employment law, labor relations, and education law. The Firm's representation of cities, counties, special districts, transit authorities, school districts, and colleges throughout California, encompasses all phases of counseling and representational services in negotiations, arbitrations, fact findings, and administrative proceedings before local, state and federal boards and commissions, including the Public Employment Relations Board, Fair Employment and Housing Commission, Equal Employment Opportunity Commission, Department of Labor and the Office for Civil Rights. The Firm regularly handles a wide variety of labor and employment litigation, from the inception of complaints through trial and appeal, in state and federal courts.

The Firm places a unique emphasis on preventive measures to ensure compliance with the law and to avoid costly litigation. For more than thirty years, the Firm has successfully developed and presented training workshops and speeches on all aspects of employment relations for numerous public agencies and state and federal public sector coalitions, including the National League of Cities, National Association of Counties, International Personnel Management Association, United States Government Finance Officers Association, National Employment Law Institute, National Public Employer Labor Relations Association, California Public Employer Labor Relations Association, County Counsels' Association of California, League of California Cities, California State Association of Counties, Public Agency Risk Management Authority, the Association of California School Administrators, the California School Boards Association, and the California Association of Independent Schools.

This workbook contains generalized legal information as it existed at the time the workbook was prepared. Changes in the law occur on an on going basis. For these reasons, the legal information cited in this workbook should not be acted upon in any particular situation without professional advice.

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Section 1 INTRODUCTION

Discrimination, harassment, or retaliation against a public agency employee or job applicant impedes employment opportunities, morale, job performance, and the provision of public services. Such conduct: (1) deters quality applicants from applying to your agency; (2) creates a poor public image; and (3) can result in hundreds of thousands of public dollars being spent on attorneys' fees and damage awards, rather than on public services.

This workbook and the accompanying seminar provide the training that California law requires supervisory employees receive on the prevention of harassment, discrimination, and retaliation.

Section 2 LAWS PROHIBITING HARASSMENT, DISCRIMINATION, AND RETALIATION

Title VII of the Civil Rights Act of 1964[1] (Title VII) is the federal law that prohibits discrimination, harassment, and retaliation in the workplace. In addition, the Age Discrimination in Employment Act of 1967[2] (ADEA) prohibits discrimination, harassment, and retaliation against employees or job applicants because of age. The Americans with Disabilities Act of 1990[3] (ADA) prohibits employers from discriminating, harassing, or retaliating against employees or job applicants because of physical or mental disability. The Genetic Information Nondiscrimination Act of 2008 (GINA), prohibits employers from discriminating, harassing, or retaliating against employees or job applicants because of their genetic information.[4]

The California Fair Employment and Housing Act[5] (FEHA) establishes the state prohibition against discrimination, harassment, and retaliation based on a protected status. It is more than merely the state equivalent of Title VII; the FEHA provides employees and job applicants with far greater rights than those available through Title VII in terms of scope of coverage and available remedies.

Section 3 PROTECTED STATUSES/CLASSIFICATIONS

It is illegal to discriminate or harass an employee or applicant because of or based on:

- Race or Color;
- National Origin or Ancestry;
- Religious Creed;
- Physical or Mental Disability;

- Medical Condition (including cancer, a record of cancer, genetic characteristics, diseases, disorders, or other inherited characteristics);
- Marital Status;
- Sex (including pregnancy, childbirth, medical conditions related to pregnancy or childbirth, gender, gender identity, transgender,[6] gender expression, and breastfeeding or a medical condition related to breastfeeding[7]);
- Age (40 and above);
- Sexual Orientation (including heterosexuality, homosexuality, and bisexuality);
- Genetic Information;
- Military and Veteran Status;[8]
- Opposition to Unlawful Harassment;
- Association with a person that has any of the protected characteristics; or
- Perception that a person has any of the protected characteristics.[9]

A. RACE AND NATIONAL ORIGIN

Courts have broadly defined what constitutes race or national origin for purposes of establishing a claim of harassment or discrimination. An employee is protected if he or she is a member of a group that is perceived as distinct when measured against other employees. While the group need not have a common birthplace, it should be ethnically and physiognomically distinct. Thus, a public employee who is African American, Native American, or Filipino American would be a member of a protected class, as would a public employee who describes himself as East Indian.[10]

In addition, harassment based on an individual's language can fall under the protected status of race or national origin. California law prohibits English-only rules unless: (a) there is no alternative practice available that would meet the employer's business need for the rule; and (b) the employer has notified its employees of the rule and the consequences of violating the rule.[11]

B. RELIGIOUS CREED

Religious creed includes all aspects of religious belief, observance, and practice, including religious dress and grooming practices.[12] More generally, it can include moral or ethical beliefs as to what is right and wrong, where the beliefs are sincerely held with the strength of traditional religious views.[13]

Case Study on Religious Discrimination

E.E.O.C. v. Abercrombie & Fitch Stores, Inc.[14]
Employer had a "Look Policy" that governed its employees' dress. The Look Policy prohibited "caps" – a term that the Policy did not define – as too informal for its desired image. Plaintiff was a practicing Muslim who, consistent with her religious beliefs, wore a headscarf. Plaintiff applied for a position with Employer and was otherwise qualified except that Employer determined her headscarf, which it suspected she wore for religious reasons, violated its Look Policy and did not hire her on those grounds. Employer argued it did not have actual knowledge of Plaintiff's religion and therefore did not discriminate against her by failing to accommodate her or refusing to hire her. The Court, however, found that an Employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.

C. PHYSICAL DISABILITY

Anti-discrimination laws broadly define what constitutes a physical disability.[15] A physical disability is any physical condition that makes achievement of a major life activity more difficult. The condition includes any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects a major body system. The disability could be related to any body system including: neurological, immunological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.[16]

Example: Obesity may be a physical disability if it is caused by a physiological, systemic disorder affecting one or more of the referenced body systems.

In California, to qualify as a physical disability, the physical condition need only limit the employee or applicant's ability to participate in major life activities.[17] Major life activities include: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Further, impairments which require special education or related services may also qualify as physical disabilities.[18] In fact, even if a person does not actually have a physical disability, that person could still state a discrimination or harassment claim based on physical disability if he or she was *regarded as* having a physical disability.[19] And while persons who are recovering drug abusers can claim a disability, those currently unlawfully using controlled substances or illegal drugs cannot.[20] Neither the ADA nor the FEHA protect sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or the current unlawful use of drugs.[21]

D. MENTAL DISABILITY

The prohibition against discrimination also protects employees and job applicants with *mental or psychological disorders*, including intellectual disabilities, organic brain syndrome, emotional or

mental illness, and learning disabilities. It does not, however, protect the unlawful use of drugs, compulsive gambling, sexual behavior disorders, kleptomania, or pyromania.[22]

E. MEDICAL CONDITION

The FEHA also prohibits discrimination or harassment of an employee or job applicant because of his or her medical condition. To qualify as a medical condition, the health impairment must either (1) be related to or associated with cancer, or a record or history of cancer; or (2) be caused by genetic characteristics which are known to cause a disease or disorder.[23]

F. SEX/GENDER

Discrimination based on sex includes sexual harassment, as well as gender harassment and harassment based on pregnancy, childbirth, medical conditions related to pregnancy or childbirth, or breastfeeding or a medical condition related to breastfeeding.[24] The term "sex" also includes a person's gender. Effective January 1, 2012, AB 887 amended the definition of "gender" in several California anti-discrimination laws to expressly include a person's gender identity and gender expression. The term "gender expression" is defined as "a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[25]

Employers may still require employees to adhere to reasonable workplace appearance, grooming, and dress standards as long as the employer allows the employee to appear or dress consistently with the employee's gender identity or gender expression.[26]

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Employers must allow employees to dress consistently with the employee's gender identity and protect them from harassment and discrimination on that basis.[27]

In addition, harassing conduct of a sexual nature, whether motivated by hostility or by sexual interest, is deemed based on sex, regardless of the gender of the victim or the sexual orientation of the harasser. Thus, same-sex harassment and harassment by a homosexual employee against an employee of the opposite sex are also unlawful.[28] Further, harassment does not need to be motivated by sexual desire to be considered sexual harassment. [29]

California also requires employers to provide reasonable accommodation for conditions related to pregnancy or childbirth if the employee so requests on the advice of her health care provider.[30]

G. AGE

The prohibition against discrimination and harassment based on age protects employees who are at least 40 years of age.[31]

H. SEXUAL ORIENTATION

California law prohibits discrimination and harassment based on sexual orientation.[32] This prohibition protects people who identify themselves as homosexual, heterosexual, or bisexual.

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Under the California Domestic Partner Rights and Responsibilities Act, ("Domestic Partnership Act"), domestic partners must generally be treated as spouses under California law.[33] For employers, this means that domestic partners are protected from discrimination in employment under the FEHA,[34]included within the California Family Rights Act provisions, and various labor code provisions. The Domestic Partnership Act specifically prohibits public agencies from discriminating against any person or couple on the grounds that the person "is a registered domestic partner rather than a spouse."[35]

I. GENETIC INFORMATION

Congress enacted Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") to protect job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information. GINA applies to employers with 15 or more employees as well as employment agencies, labor organizations, and joint labor-management committees involved in training programs.[36]

GINA imposes several different prohibitions on employers.[37] First, GINA prohibits employers from discriminating against employees in terms of hiring, promotion, firing, or any other terms and conditions of employment because of genetic information with respect to that employee or their family members.[38] Further, GINA prohibits retaliation against employees who oppose any act made unlawful by GINA, who file a charge of discrimination or assist another in doing so, or who provide testimony in connection with a charge.[39] GINA also prohibits employers from negatively limiting, segregating, or classifying employees because of their or their family members' genetic information.[40] Finally, with limited exceptions, GINA also prohibits employers from requesting, requiring, or purchasing genetic information about employees or employees' family members.[41]

Although GINA prohibits employers from requesting, requiring, or purchasing genetic information about employees or employees' family members, the following is a list of the six statutory exceptions to this general rule:

- The employer inadvertently requests or requires family medical history of the employee or family member of the employee;
- The employer collects such genetic information as a result of its offers of health or genetic services to the employee, e.g., information obtained as part of a bona fide wellness program, provided that certain confidentiality measures are followed

to protect disclosure of that information and the employee provides prior voluntary written authorization;

- The employer requests or requires family medical history from an employee to comply with the FMLA or the CFRA;
- The employer purchases commercially and publicly available documents that contain family medical histories of its employees;
- The employer seeks the information for genetic monitoring of the biological effects of toxic substances in the workplace; and
- The employer conducts DNA analysis for law enforcement purposes.[42]

In addition to proscribing the practices set forth above, GINA also seeks to enhance the confidentiality of the genetic information of employees. Specifically, GINA requires an employee's genetic information to be maintained on separate forms and in separate medical files.[43] GINA further requires employers to treat these documents as confidential medical records, disclosure of which is only permitted in a few specific instances.[44]

As of January 1, 2012, the FEHA and the Unruh Civil Rights Act also prohibit discrimination based on genetic information.[45] "Genetic information" is defined as: (1) the individual's genetic tests; (2) the genetic tests of family members of the individual; and (3) the manifestation of a disease or disorder in family members of the individual.[46]

Many genetic disorders are associated with particular racial, social, or ethnic groups. The law was amended to prevent the use of genetic information to stigmatize or unfairly discriminate against such groups. Although similar to GINA, FEHA and the Unruh Civil Rights Act now offer broader protections by prohibiting discrimination based on genetic information in the additional areas of housing, business services, emergency medical services, licensing qualifications, life insurance coverage, mortgage lending, and participation in state-funded or state-administered programs.

J. MILITARY AND VETERAN STATUS

Effective January 1, 2014, "Military and Veteran Status" is a new protected category for California's Fair Employment and Housing Act. The FEHA defines "Military and Veteran Status" to mean a member or veteran of the US Armed Forces, US Armed Forces Reserve, or United States or California National Guard.[47] Employers may still, however, allow an employer to inquire about Military and Veteran status in order to determine eligibility for Veterans' preference points in hiring.

K. OPPOSITION TO UNLAWFUL CONDUCT

Discrimination, harassment, or retaliation based on opposition to such conduct is itself unlawful retaliation. For these protections to apply, an employee need not say the word "harassment" when reporting the conduct.[48] Because it is difficult for a public employee to know if the

complained-of conduct is "unlawful," all that is legally required is a sincere, *good faith and reasonable belief* that the complained-of conduct is unlawful. Thus, even if no unlawful conduct occurred, a public employer may not retaliate against an employee for complaining about conduct which he or she sincerely and reasonably believes is unlawful.[49]

It is also unlawful to harass or take any adverse action against an employee who supports or associates with a co-worker who has complained about unlawful harassment or discrimination.[50]

Examples of Protected Activity:

- An employee complained about the sexually offensive conduct of an outside consultant whose seminar she had been required to attend. Although the employee might have been wrong as to whether the conduct was illegal, she had a good faith and reasonable belief that it was. As a result, her employer is prohibited from retaliating against her for complaining.
- An employee refused to follow the orders of her supervisor to fire a subordinate and replace the subordinate with "someone hot."[51]

L. ASSOCIATION/PERCEPTION

The anti-discrimination laws also prohibit discrimination and harassment of an employee or job applicant because of that individual's association with a person of a protected class, or because that individual is perceived as being a member of a protected class.[52]

Section 4 DISCRIMINATION

Unlawful discrimination means treating an employee or job applicant differently than others because of that person's actual or perceived protected status. The different treatment must relate to the terms and conditions of employment, and be reasonably likely to negatively affect an employee's job performance or prospects for advancement or promotion.[53] An employee or job applicant can claim discrimination if the different treatment deprives or tends to deprive the employee or job applicant of employment opportunities or employment status.[54] It is also discrimination to fail to provide reasonable accommodations to an employee or applicant with a disability.

In addition to harassment and retaliation claims, which are discussed more throughout these materials, a discrimination claim may also be based on the following grounds:

- Disparate Treatment: Treating an individual differently because of his/her protected status; and
- Disparate Impact: A facially neutral policy or practice that has a negative impact on a protected group of persons, such as older persons or a particular racial group.

A. DISPARATE TREATMENT

Intentional discrimination—or "disparate treatment"—occurs when an employer impermissibly considers characteristics such as race, religion, age, sex, etc., when making an employment decision that adversely affects an applicant or employee.[55] In other words, an employer intentionally discriminates against an applicant or employee when the employer treats the applicant or employee differently because of his or her protected status.

In order to establish a *prima facie* case of intentional discrimination, the applicant or employee must establish the following four factors:

- He or she is a member of a protected class;
- He or she was qualified for the position for which he or she applied, or was performing his or her job in a manner consistent with the employer's legitimate expectations;
- He or she suffered an adverse employment action; and
- A discriminatory motive.[56]

1. ADVERSE EMPLOYMENT ACTION – DEFINED

An "adverse employment action" encompasses far more than just a suspension, demotion, or termination. However, not all unwelcome employment actions constitute an adverse employment action. Generally, in order to constitute adverse employment action, the action must be reasonably likely to deter reasonable employees from engaging in protected activities, as is the standard used in evaluating claims for retaliation. Consequently, to be materially adverse, an employee's working conditions must be disrupted, and not just inconvenienced.[57] (See Section 6, part B for further discussion regarding adverse employment action.)

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Once the employee or applicant establishes a *prima facie* case of disparate treatment, the burden shifts to the employer who must:

- Articulate a legitimate, nondiscriminatory reason for the adverse employment action, i.e., give a business reason why it took or failed to take the action.

If the employer establishes a legitimate, nondiscriminatory reason, the burden shifts to the applicant or employee who must prove that:

- The employer's stated reason is not the real reason, i.e., it is pretextual and an excuse for the actual discrimination;[58]
- The real reason for the employer's action is discriminatory, (i.e., based on the employee or applicant's protected status).

2. "MIXED MOTIVE"

Unlawful discrimination also occurs when an employment decision is motivated, in part, by discriminatory considerations, even though other lawful and legitimate considerations may have also supported the employment decision.[59]An applicant or employee may prevail in a discrimination lawsuit if the individual can prove that discrimination was a *substantial* motivating reason for the employer's adverse employment action.[60]

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Up until March 2013, individuals only needed to prove that the discrimination was a motivating reason for the employer's adverse action. Now, employees must prove that the employer was substantially motivated by the employee's protected status in order succeed in a discrimination lawsuit. [61]

While an employer may be liable in a mixed-motive discrimination case, the remedies for an applicant or an employee are much more limited. For example, the court could award declaratory and/or injunctive relief, attorney's fees, and costs directly attributable to the pursuit of the claim, but may not award monetary damages or reinstatement.[62]

B. DISPARATE IMPACT

Disparate impact discrimination occurs when an employer's facially neutral policy or practice results in a disproportionate adverse impact on a protected group of persons, such as a particular racial or ethnic group. To prevail on a disparate impact claim, the applicant or employee must be able to prove either:

- That an employment policy or practice results in a disparate impact on a protected group of persons, and the employer cannot demonstrate that the policy or practice is job-related and consistent with business necessity; or
- A less discriminatory alternative practice is available but the employer refuses to adopt it.[63]

The two defenses available to an employer in a disparate impact discrimination claim are:

- Business necessity
- Bona fide occupational qualification

1. BUSINESS NECESSITY DEFENSE

An employer can defeat a claim of disparate impact by demonstrating that the challenged employment policy or practice is *job-related* and consistent with *business necessity*. However, the defense of business necessity is not a defense to a claim of disparate treatment.[64] To successfully demonstrate that an employment practice is job-related and a business necessity, the employer must show that the employment practice is necessary and bears a manifest relation to the employment at issue.[65]

2. BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

An employment policy or practice may also be justified if it qualifies as a bona fide occupational qualification (BFOQ).[66] To qualify as a valid BFOQ, the employment policy or practice must affect an employee's ability to perform the job and must relate to the essence or to the central mission of the employer's business.[67]

The BFOQ defense is a very narrowly drawn exception to discriminatory employment policies or practices. Courts have rejected BFOQ defenses based on sex where there is insufficient evidence that the excluded sex cannot adequately perform the work. For instance, a court held that being male was not a BFOQ for the job of truck driver where there was no evidence that women could not perform the job.[68]

Courts have also rejected the BFOQ defense based on third-party preference. For example, in *Lam v. University of Hawaii*, the court held that alleged "Japanese cultural preferences" for male authority figures did not qualify as a BFOQ for the position of Director of Pacific Asian Legal Studies at a law school. The court expressly rejected such third-party preferences as justification for discriminatory hiring practices.[69]

Section 5 HARASSMENT

There are two types of harassment: Hostile work environment and quid pro quo.

A. HOSTILE WORK ENVIRONMENT HARASSMENT

Anti-discrimination laws protect employees from discriminatory work environments.[70] But whether a work environment rises to the level of being unlawfully hostile or abusive requires a case-by-case analysis of the following:

- The frequency of the harassing conduct;
- The severity of the harassing conduct;
- Whether the harassing conduct is physically threatening or humiliating;
- Whether the harassing conduct is unwelcome;
- Whether the harassing conduct unreasonably interferes with an employee's work performance or alters other conditions of employment; and
- Whether a member of the protected class would consider the harassment hostile and offensive, i.e., the "reasonable victim" standard.[71]

Conduct amounting to harassment may include:

- Speech, such as epithets, derogatory comments, slurs, jokes, or lewd propositions;[72]
- Physical acts, such as offensive touching, impeding or blocking movement, offensive touching, or any physical interference with normal movement;
- Visual insults, such as derogatory posters, cartoons, or drawings;
- Intimidation, ridicule, and insult;[73]
- Unwanted sexual advances, requests for sexual favors, or other acts of a sexual nature where submission is made a term or condition of employment or where submission to or rejection of the conduct is used as a basis for employment decisions, or where the conduct is intended to or actually does unreasonably interfere with an individual's work performance or creates an intimidating, hostile, or offensive working environment;[74] or
- Widespread supervisor favoritism toward select subordinates that communicates a message that the only way to advance is to have close friendships or sex with supervisors.[75]

To establish a hostile work environment harassment claim, an individual must show that: (1) he or she was subjected to verbal, visual, or physical conduct of a harassing nature because of a protected status;[76] (2) the conduct was both subjectively *and* objectively unwelcome; and (3) the conduct was sufficiently severe *or* pervasive to alter the conditions of the employee's working environment so as to create an abusive working environment.[77]

A hostile work environment exists when there is a concerted pattern of harassment of a repeated, routine, or generalized nature. Anti-discrimination lawsare not intended to be civility codes; thus, occasional, isolated, sporadic, or trivial acts of harassment do not comprise a hostile environment.[78] For example, one offensive utterance is not likely render a work environment hostile.[79] Similarly, one isolated instance of favoritism on the part of a supervisor toward a subordinate with whom the supervisor is having a consensual affair ordinarily will not constitute sexual harassment.[80] While such acts would not rise to the level of unlawful harassment, employers should still promptly address and remedy any seemingly "minor" acts of harassment to avoid the development of an unlawfully hostile work environment.

In California, an employee does not have to be a direct victim of the harassment, or even personally observe the alleged harassment. Instead, the employee need only show that he or she learned about the harassment from a third party.[81] But if the alleged harassment is not directed at the employee and the employee has not demonstrated a loss of tangible job benefits, then the employee must show that the harassing conduct permeated his or her direct work environment.[82]

A work environment can also be unlawfully hostile even if no sexual advances are made.[83] Work environments, where an employee is having a sexual relationship with a supervisor and is receiving job benefits may create a hostile work environment for third party employees who are

not involved in the sexual relationship.[84] Of course, unwelcome sexual advances that are sufficiently pervasive so as to alter the conditions of employment can also comprise a hostile work environment.[85]

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The California Supreme Court held that the same conduct can be both harassment and discrimination. Although discrimination and harassment are separate wrongs, some official employment actions taken in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message.[86]

Case Study on Hostile Work Environment

Miller v. Department of Corrections[87]

Edna Miller worked at the California Department of Corrections. She learned that the Chief Deputy Warden was having sexual affairs with three different subordinates. Miller competed for promotion against one of the subordinates who was having an affair with the Chief Deputy Warden. Miller did not get the promotion, and watched the subordinate who was having the affair with the Chief Deputy Warden make an unprecedented rise in the ranks. Miller and others witnessed the boss and the subordinates engage in sexual touching during Department social events. Miller complained, but did not use the term "sexual harassment" or "sexual discrimination." The California Supreme Court determined that widespread sexual favoritism creates a hostile work environment even for third party employees. As explained by the Court, sexual favoritism communicates the demeaning message that female employees are viewed as sexual playthings and that the only way for women to get ahead in the workplace is to have sexual relations with management. If management could reasonably believe that an employee is complaining about sexual harassment, the employee is protected from retaliation and the employer has a duty to investigate.

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A 2013 workplace survey found that dating others from work is widespread. Approximately 39% of employees reported that they dated a coworker at least once during the course of their career. Of the employees that dated a coworker, 29% said that they dated someone above them in the company's hierarchy.[88] Employers can respond by maintaining appropriate standards of non-sexual conduct in the workplace. Employees should also train employees about the potential individual liability that can result from workplace romances.

Employers may potentially be liable for harassment committed against their workers by clients, customers, vendors, and other third parties if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment.[89] Thus, it is up to the agency and its supervisors to ensure that nobody in the work environment engages in harassing conduct, including customers and other non-employees.[90]

B. QUID PRO QUO

"Quid pro quo" is the other type of harassment. "Quid pro quo" is Latin for "this for that." In the context of sexual harassment, quid pro quo harassment occurs when submission to sexual conduct is explicitly or implicitly made a condition of a job, a job benefit, or the absence of a job detriment.[91] Thus, the accused harasser must be in a position to affect the accuser's employment (e.g., a supervisor). This form of harassment can include sexual propositions, unwarranted graphic discussion of sexual acts, or commentary on the employee's body.[92]

Implicit conditioning of job benefits on submission to sexual conduct is more common but harder to detect than explicit quid pro quo harassment. The factors to evaluate in determining whether quid pro quo harassment has occurred are:

- Whether the sexual conduct was unwelcome;
- Whether a reasonable person in the accuser's position, who is the same gender as the accuser and has the same fundamental characteristics as the accuser, would have believed he or she was the subject of quid pro quo harassment;
- Whether the accused harasser intended to subject the accuser to quid pro quo harassment; and
- Whether there was a close connection between a discussion about job benefits and a request for sexual favors.[93]

Case Study on Quid Pro Quo

Nichols v. Frank[94]
The Ninth Circuit found that a deaf-mute subordinate was subjected to quid pro quo harassment when her supervisor, who was the only employee who knew sign language, requested oral sex from her right after discussing her request for a leave of absence, her attendance record, and her continued employment.

A. INTRODUCTION

Workplace bullying has recently received greater media and legislative attention as a potentially growing area of concern in the workplace, state- and nationwide. Proponents of anti-bullying legislation and employee advocates for "healthy workplaces" point to the potential hidden costs to employers in low morale, higher rates of absenteeism, and lower productivity in the workplace.

Workplace bullying is not illegal, but effective January 1, 2015, California law requires that mandatory harassment prevention training for supervisors must also include a component on prevention of "abusive conduct.".[95] "Abusive conduct" is defined as conduct of an employee or employee in the workplace, undertaken with malice, that is unrelated to an employer's legitimate business interests, and that a reasonable person would find hostile or offensive.[96] Statutorily listed examples of abusive conduct include: repeated verbal abuse, derogatory remarks, insults, epithets, verbal or physical conduct that reasonably appears threatening, intimidating, or humiliating, or sabotage of another's work performance.[97]

B. WHAT IS WORKPLACE BULLYING/ABUSIVE CONDUCT AND WHO IS AFFECTED?

Workplace bullying/abusive conduct consists of repeated, unreasonable actions of a Perpetrator (or a group of Perpetrators) directed towards a "Target" employee (or a group of employees), which are intended to intimidate, degrade, humiliate, or undermine; or which create a risk to the health or safety of the employee(s). Workplace bullying may involve an abuse or misuse of power. Bullying behavior creates feelings of defenselessness and injustice in the target and may undermine a Target individual's sense of dignity at work.

Bullying and abusive conduct usually involves repeated attacks against the Target, creating a continuing pattern of behavior.

Bullying situations may involve employee-on-employee bullying as well as supervisor bullying a subordinate employee. "Mobbing" is another form of bullying, in which a group of co-workers target another worker or group of workers.

Importantly, a tough or demanding boss is not necessarily a bully. As long as the supervisor or manager is respectful, professional and fair, and the motivation behind the manager's conduct is legitimate (e.g., the supervisor or manager is simply seeking to obtain the best performance by setting high performance and safety standards), such conduct is acceptable. It is only where the supervisor or manager engages in personal attacks or other unprofessional conduct does the supervisor or manager cross the line into bullying/abusive conduct.

C. BULLYING/ABUSIVE CONDUCT IS NOT ILLEGAL HARASSMENT

It is important to understand the distinction between bullying/abusive conduct and illegal harassment. In order for an act by a Perpetrator toward a Target to be illegal and actionable harassment, the Perpetrator's bullying conduct must be "because of" the Target's protective status (i.e., the harassing behavior must be because of the Target's age, gender, religion, marital status, medical condition, disability, sexual orientation, etc.).

Though California law now requires that mandatory harassment prevention training for supervisors must include a component on "prevention of abusive conduct," abusive conduct in the workplace is not in itself illegal under Title VII or FEHA. All the law requires is the added component of supervisor education and training on the prevention of abusive conduct. It does not impose liability on the abuser, or on the employer for failing to stop acts of abusive conduct.

Bullying and abusive conduct, as opposed to illegal harassment, are not motivated by animus towards a protected class. Rather, bullying/abusive behavior happens when the harassing conduct is done for the purposes described above, and may occur between people of like protected statuses. Bullying can occur between workers of the same race, national origin and gender. In fact, according to some studies, as much as 61% of bullying involves same-gender harassment.

Therefore, bullying and abusive conduct themselves are not illegal in terms of employees' civil rights. However, once the conduct is identified, management should consider how to address it, because it can violate an agency's personnel rules (e.g., rules prohibiting "discourteous" treatment), it disrupts the workplace, and it may nonetheless lead to claims and complaints of illegal harassment because the Perpetrator's motivations are not always clear. Thus, in order to avoid costly investigations, administrative review and even litigation, an employer would be well served to make all reasonable efforts to eradicate bullying behavior in the workplace. Due to these and other negative consequences of failing to appropriately address workplace bullying, employers may want to consider adopting an Anti-Bullying Policy. (See Appendix F.)

D. EXAMPLES OF BULLYING/ABUSIVE CONDUCT

Bullying and abusive conduct can take many forms. Examples include:

- Swearing or shouting;
- Repeated derogatory remarks, insults or epithets;
- Exclusion or social isolation;
- Humiliation;
- Any form of physical threat or physical intimidation;
- Demeaning comments about a person's appearance;
- The use of patronizing titles or nicknames;
- Persistent, unwelcome teasing;

- Gratuitous sabotaging or undermining a person's work performance;
- Spreading malicious rumors or insulting someone; and
- Picking on someone or setting him or her up to fail.

E. How Bullying/Abusive Conduct Impacts The Workplace

Bullying and abusive conduct extracts a significant toll within an organization. It can lead to increased levels of stress among employees, high rates of absenteeism and increased turnover. Because supervisor-bullies can get results by getting more short-term production out of employees, they are often tolerated. However, employers should understand the long-term costs to these potential short-term benefits in productivity. Studies have shown that bullying has a long-term impact on staff performances, costs in excess of $200 billion per year and results in psychological and physical ailments similar to those found in soldiers returning from combat. Workers' compensation and lost productivity are impacted by the employee's stress, depression and physical health problems result in time away from work. The health problems experienced by victims of bullying result in a sense of helplessness and negative emotional states. Low self esteem and a negative organizational climate negatively impact creativity and employees' abilities to respond to difficult situations or challenging goals. The breakdown of trust in a bullying environment may mean that employees will fail to contribute their best work, do not give extra ideas for improvement, do not provide feedback on failures and may be less honest about performance. In addition to the costs of supervisor-bullying, bullying behavior perpetrated by a co-worker and ignored by management impacts productivity, morale and leads to increased workplace injuries and "stress" claims. Bullying behavior perpetrated by a supervisor or manager and either ignored or tolerated by upper management can be even more destructive to the effective work environment, which may impact greater numbers of workers than just the main "Perpetrator" and "Target(s)" in the unit.

F. What Should Your Agency Do To Prevent Or Address Workplace/Abusive Conduct?

Fundamental to curtailing workplace bullying is a commitment at the highest level of management that such conduct will not be tolerated. That commitment translates into conduct that:

- Ensure that mandatory harassment prevention training for supervisors also includes a component on "prevention of abusive conduct;"
- Create a comprehensive anti-bullying policy, or alternatively, a Code of Conduct that defines professional behaviors and unacceptable behaviors and includes policies and procedures for response;
- The anti-bullying policy must be communicated throughout the organization;
- Establish as a job expectation/performance standard respectful, non-bullying behavior;

- Establish an awareness campaign so that staff understands what bullying is and what it may look like;
- Encourage reporting;
- Encourage open door policies;
- When witnessed or reported, the bullying behavior must be addressed by management immediately;
- Complaints of bullying must be taken seriously and investigated promptly;
- Reassignment of the Perpetrator may be necessary;
- Discipline staff that violates your agency's anti-bullying policies or that otherwise engage in discourteous or destructive behavior toward coworkers;
- Follow-up with known Target to determine if bullying behavior has abated; and
- Establish an independent contact for employees to report the conduct (e.g., Human Resources contact).

G. WHAT CAN MANAGERS DO ABOUT BULLYING/ABUSIVE CONDUCT?

Managers can intervene to build a collaborative and safe workplace by directing attention to safety and creating contexts where people can speak up and problem solve together. Steps to accomplish this include:

- Publish and discuss the Agency's anti-bullying policies (see Appendix F);
- Make compliance with the Agency's polices a job performance standard;
- Encourage reporting at all levels;
- Take reports of bullying behavior seriously and interface with Human Resources/Personnel to assure compliance with Agency investigative protocol;
- Discipline as appropriate when Agency policy has been violated;
- Follow-up with the Target for an extended period of time to determine if any other issues have arisen;
- Do not reward bullying behavior or accomplishments; and
- Be a good role model.

Section 7 RETALIATION

All of the anti-discrimination laws contain provisions that protect employees who report or oppose discrimination or harassment.[98] But as described in more detail below, the anti-

retaliation laws also protect employees who report, expose, or question employer misconduct, or otherwise engage in protected activity. Thus, an anti-retaliation law is any law that:

- Defines certain employer conduct as either mandated or prohibited; and
- Prohibits employers from retaliating against employees who try to invoke or enforce that law.

To protect against claims of retaliation, an employer should take a proactive and preventative approach that lets employees know that it will not tolerate retaliation and that it encourages employees to report perceived unlawful activity. By doing so, employers gain the opportunity to rectify problems before they turn into litigation.

To state a claim of unlawful retaliation under any of the anti-discrimination statutes, an individual must show that: (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse action; and (3) a causal connection exists between the protected activity and the adverse action.[99]

A. PROTECTED ACTIVITY

An employee engages in protected activities by:

- Refusing to obey an order reasonably believed to be discriminatory;
- Filing a complaint with a federal or state enforcement agency;
- Participating or cooperating with a federal or state enforcement agency conducting an investigation of the employer regarding an alleged unlawful activity, such as the EEOC, DFEH, or Cal/OSHA;
- Testifying as a party or witness against the employer regarding an alleged unlawful activity; or
- Filing an internal complaint with the employer regarding alleged unlawful activity.

Further, because protected activity is generally viewed liberally, employers should treat employees as having engaged in a protected activity whenever the employer is made aware of informal, as well as formal, conduct that appears to question the legality of the employer's conduct. Examples of protected activity include:

- Cooperating with an internal investigation of alleged discriminatory practices;
- Serving as a witness in an EEO investigation or litigation;
- Requesting a reasonable accommodation based on religion or disability;
- Employee complaints (verbal or written) alleging unlawful activity to a supervisor;

- Rumors of an employee complaining of alleged unlawful activity to outside agencies or supervisors;
- Employee involvement in disputes with a former employer; and
- Employee association with another employee engaged in protected activity.

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To effectively and accurately identify protected activity in the workplace, employers should remember the following four points:

1. Protected activities are not limited to formal complaints and can take many forms.
2. A person can allege retaliation even if he or she is not the target of the complained-about conduct.

   Employees who complain about discriminatory conduct are protected, whether or not they have been subjected to that conduct. An employee who, for example, acts as a witness in another employee's sexual harassment lawsuit is engaging in a protected activity.
3. An employee's allegations of employer misconduct need not be correct for the employee's actions to constitute a protected activity.

   So long as an employee has a reasonable, good faith belief that discrimination or harassment occurred, the employee's attempts to expose or complain about that conduct will be protected. [100]
4. An employee need not explicitly use the words discrimination or harassment to engage in protected activity. An employee engages in protected activity if he or she reasonably believes that his or her complaint concerns discrimination or harassment. But an employee may not simply make a vague complaint about personal grievances and expect that his or her employer will know that he or she is opposing discriminatory conduct.[101]

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Any opposition to an employment action—regardless of whether the employee specifically files a grievance or complaint—may be a protected activity for purposes of a retaliation claim. As a result, employers must be able to document legitimate, non-discriminatory business reasons for employment decisions.[102]

B. ADVERSE ACTION

An adverse action is one that materially affects the terms, conditions, or privileges of employment.[103] The phrase "terms, conditions, or privileges" of employment must be interpreted liberally, and with a reasonable appreciation of the realities of the workplace.[104] Adverse actions include employment actions like termination or demotion, but also those actions "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career."[105]

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An adverse employment action may be something less than a disciplinary action or unsatisfactory performance evaluation (e.g., criticizing an employee, soliciting negative information about an employee from others, or making threats of termination).[106] However, the action must negatively affect the employee's compensation, workplace conditions, or status.

The following examples identify types of conduct that courts have found constituted an adverse employment action:

- Verbal abuse, locks changed, and false accusations of incompetence;[107]
- Daily criticism, increased supervision, and unfounded misconduct investigations;[108]
- Denial of overtime;[109]
- Relocation of office to basement and reduction in duties;[110]
- Transfer to another facility;
- Denial of benefits;
- Failure to hire or rehire;
- Intimidation;
- Reassignment affecting prospects for promotion;
- Reducing pay or hours;
- Denial of employee's administrative needs;
- Negative performance reviews; and
- Toleration of harassment by other employees;[111]

In contrast, courts found the following actions did not constitute adverse employment actions:

- Counseling;[112]
- Nitpicking;

- Oral or written criticism of an employee;
- Lateral transfer, unless there is some other materially adverse consequence; and
- Requiring an employee to develop new skills.[113]

But while these actions individually may not constitute an adverse employment action, when taken collectively, such conduct could be sufficient to establish an adverse employment action.

C. CAUSAL CONNECTION/NEXUS

Whether an employee can establish a causal connection between the protected activity and the employer action depends on whether the totality of the circumstances indicates a retaliatory motive. Those factors include the timing of the employer's action and whether the decision maker knew of the employee's protected conduct.

1. TIMING

Courts tend to treat the timing of events differently, depending on how temporally close they are in relation to each other. Where there is a gap in time between the protected activity and the adverse employment action, courts will take that fact into consideration, but not treat it as dispositive. Thus, the passage of time between the protected activity and the adverse action is generally not enough by itself to defeat a retaliation claim. But in some situations when the adverse employment action follows immediately after the protected activity, courts have held that the timing alone is enough to find that the two events are causally connected.

2. EMPLOYER KNOWLEDGE

To bring a successful retaliation claim, an employee must also be able to demonstrate that the employer—and in particular the decision makers involved in the adverse employment action—knew of the employee's protected activity. Employer awareness of the protected activity is an essential component of any retaliation claim. Thus, circumstantial evidence will be insufficient to infer a causal link if the employee cannot show the required employer knowledge. In *Morgan v. Regents of the University of California*, the California Court of Appeals rejected Plaintiff's retaliation claim because there was no evidence that the decision makers who took the challenged adverse employment action knew of his prior discrimination complaint.[114] Similarly, in *Clark County School District v. Breeden*,[115] the United States Supreme Court rejected Plaintiff's retaliation claim, in part because she produced no evidence that the decision maker who ordered the adverse employment action knew of her protected activity.

Case Studies on Employer Knowledge

***Reeves v. Safeway Stores, Inc*[116]**
Plaintiff alleged that a supervisor initiated disciplinary proceedings against him in retaliation for his previous discrimination complaint. Safeway argued there was no causal connection between the protected activity and subsequent

discipline because cause for discipline was separately investigated and the decision to discharge was made by a manager with no knowledge of the employee's protected activities. The Ninth Circuit reversed the lower court's ruling in favor of Safeway on the grounds that Safeway failed to show that *all* material contributors to the decision acted with legitimate nondiscriminatory motives, and Plaintiff presented sufficient proof to establish that retaliation by one or more decision makers was a substantial contributing factor in bringing about his dismissal. If a supervisor uses another employee as a tool for carrying out a discriminatory action, the original actor's purpose will be imputed through the "tool" to their common employer.

***Poland v. Chertoff*[117]**
If in response to an employee's protected activity a supervisor sets in motion a proceeding by an independent decision maker that results in an adverse employment action, the supervisor's bias will be imputed to the employer if the employee can prove that the allegedly independent adverse employment decision was not actually independent because the biased supervisor influenced or was involved in the decision or decision-making process.

D. OTHER ANTI-RETALIATION LAWS

The prohibition against retaliation is not limited to the anti-discrimination provisions set forth in the FEHA, Title VII, the ADEA, or the ADA. In addition to the protections and prohibitions afforded by those statutes, anti-retaliation laws also cover prohibitions against employer conduct ranging from fraud to environmental violations. Accordingly, the scope of retaliation liability is quite broad, protecting employees who expose or complain about a wide range of employer misconduct, from mismanagement of funds to hazardous conditions. Some of these prohibitions are reviewed briefly below to provide employers with a general understanding of the wide array of factual scenarios that can give rise to a retaliation claim.

1. CONSTITUTIONAL FREE SPEECH RIGHTS

While both the California and U.S. Constitutions guarantee the right to free speech, the U.S. Supreme Court and subsequent cases have held that not all speech is protected. For example, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[118]

Similarly, because discrimination in employment is undoubtedly a matter of public concern, any use of state authority to retaliate against those who speak out against discrimination suffered by others can give rise to a cause of action under the First Amendment.[119]

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Employers may discipline employee speech if the speech is:

- Insubordinate;
- Unnecessarily disruptive;
- Delivered in a manner that is not designed to fix the perceived problem;
- Not a matter of public interest;
- Made pursuant to a public employee's official duties; or
- Interferes with working relationships that are essential to the smooth functioning of the organization.

In determining whether or not the speech is protected, consider these questions:

- Is the employee speaking on a matter of public concern or individual concern?
- Has the employee acted in a manner intended to rectify the perceived problem (e.g., gone to superiors, filed a complaint with an outside agency, contacted the press, etc.) or does the employee's speech more resemble disruptive and unsubstantiated gossip in the workplace?
- Has the employee's speech unnecessarily disrupted the workplace or interfered with the smooth functioning of the employer? (Note: Some legitimate accusations are so controversial or explosive that they will inevitably be disruptive. Employee speech in such instances will likely be protected, both as free speech and under state and federal whistleblower statutes, discussed below.)

2. WHISTLEBLOWER STATUTES

(a) California Labor Code section 1102.5(b)

Labor Code section 1102.5(b) prohibits employers from taking an adverse action against an employee because the employee disclosed information of a violation of a local, state, federal law or regulation to a government or law enforcement agency.[120] Section 1102.5(b) prohibits employers, or anyone acting on the employer's behalf, from retaliating against an employee for disclosing wrongdoing by either the employer or fellow employees.[121] Section 1102.5 protects an employee's disclosure of wrongdoing even if the employee is not the first one to report it.[122] A disclosure of wrongdoing is not considered "whistleblowing" if the employer directed the employee to disclose the information for a legitimate business purpose.[123] An employee who

believes he or she has been retaliated against for being a "whistleblower" is not required to seek relief from the Labor Commissioner before filing a lawsuit.[124]

Violation of Labor Code Section 1102.5(b) constitutes a *criminal offense* under Labor Code section 1103.

The phrase, "government or law enforcement agency" includes a public employee's own employer.[125]

(b) California Labor Code section 1102.8 – Posting of "Whistleblower Hotline"

Labor Code section 1102.8 requires that employers display a poster listing employees' rights and responsibilities under the whistleblower laws. This poster must include the phone number for the whistleblower hotline.[126] A copy of the California Department of Labor's sample posting is attached as Appendix E.

(c) Private Attorney General Act of 2004 – California Labor Code section 2698 et seq.

The California Labor Code contains a variety of provisions that allow the Labor and Workforce Development Agency to assess and collect civil penalties from employers found to have violated those provisions. Through Labor Code section 2698 et seq., aggrieved employees can themselves collect, by prevailing in a civil action brought on behalf of themselves or others, the civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency.[127] The prevailing employees are also entitled to an award of reasonable attorneys' fees and costs.[128]

(d) California Government Code section 53297

Under Government Code section 53297, a public employee may file a written complaint under penalty of perjury with a local agency regarding: gross mismanagement, a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[129]

An employer is prohibited from taking any reprisal against any employee or applicant for employment who files a complaint pursuant to Section 53297, unless the local agency reasonably believes that said action or inaction is justified on the basis of separate evidence which shows any of the following:

- The employee's complaint has disclosed information that he or she knows to be false or has disclosed information without regard for the truth or falsity thereof.
- The employee's complaint has disclosed information from records which are closed to public inspection pursuant to law.
- The employee's complaint has disclosed information which is confidential under any other provision of law.

- The employee was the subject of an ongoing or existing disciplinary action prior to the disclosure of information with the local agency.
- The employee has violated any other provision of the local personnel rules and regulations, has failed to perform assigned duties, or has committed any other act unrelated to the disclosure that would otherwise be subject to personnel action.[130]

(e) Unfair Immigration Practices

Effective January 1, 2014, employers are prohibited from engaging in certain unfair immigration-related practices against employees who exercise a right protected under the under the Labor Code or other local ordinance.[131]

"Unfair immigration-related practice" means any of the following practices, when undertaken for the retaliatory purposes:

- Requesting more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code, or a refusal to honor documents tendered pursuant to that section that on their face reasonably appear to be genuine.
- Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under Section 1324a(b) of Title 8 of the United States Code, or not authorized under any memorandum of understanding governing the use of the federal E-Verify system.
- Threatening to file or the filing of a false police report, or false report or complaint with any state or federal agency.
- Threatening to contact or contacting immigration authorities.[132]

Exercising a right protected by the Labor Code or local ordinance includes, but is not limited to, the following:

- Filing a complaint or informing any person of an employer's or other party's alleged violation of this code or local ordinance, so long as the complaint or disclosure is made in good faith.
- Seeking information regarding whether an employer or other party is in compliance with this code or local ordinance.
- Informing a person of his or her potential rights and remedies under this code or local ordinance, and assisting him or her in asserting those rights.[133]

Effective January 1, 2014, there is a presumption that immigration-related actions within 90 days of the exercise of a protected right are committed for the purpose of retaliation, and creates a civil cause of action against an employer who commits an unfair immigration-related practice.[134]

(f) False Claims Act

The False Claims Act is especially pertinent to public entities. These statutes—which exist at the federal and state levels—prohibit false claims for money, goods, or services to a public

agency.[135] They are designed "to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities."[136] These statutes define particular circumstances and procedures under which individuals may act as private attorney generals by initiating claims against employers that they believe have submitted false claims to a governmental entity.

These statutes also include provisions expressly prohibiting employers from retaliating against employees for initiating or assisting in the investigation of alleged false claims.[137]

Employers found to have violated the California False Claims Act can be liable for damages, including double the amount of back pay. The False Claims Act also mandates that the employer pay litigation costs and reasonable attorneys' fees.[138]

Case Study on Whistleblower Retaliation

> ***Wilkins v. St. Louis Housing Authority*[139]**
> An employee of the St. Louis Housing Authority reported to the United States Department of Housing and Urban Development (HUD) deficiencies in the Authority's security operations and its misrepresenting of those deficiencies to HUD. After raising his concerns, the Authority fired the employee. He sued the Authority under the federal False Claims Act. The Court of Appeals upheld a jury award against the Authority. The Court found that the employee's conduct was protected because he reasonably believed that the Authority had acted fraudulently when it misrepresented its security operations.

3. WORKING CONDITIONS

Many state and federal statutes that regulate working conditions or create worker protections also prohibit retaliation against employees who seek to enforce those statutes. The list below is not exhaustive, but illustrates the range of employer conduct that may be subject to retaliation claims:

- Laws that entitle employees to family medical leave: Both the federal Family Medical Leave Act [140] and California Family Rights Act[141] prohibit retaliation against employees who try to invoke their family medical leave rights. California Labor Code section 233(c) prohibits employers from threatening to discipline, disciplining, or in any way discriminating against employees who use or who attempt to use family sick leave. Additionally, California Labor Code section 234 expressly prohibits employers from counting Family Sick Leave toward absence control policies that may lead to or result in discipline, discharge, demotion, or suspension.
- Pregnancy disability law prohibits employers from terminating employees exercising their pregnancy leave rights.[142]

- California's military leave laws[143] and the Uniformed Services Employment and Reemployment Rights Act[144] ensure that employees are not adversely affected in their employment after taking leave for military service.
- Laws that regulate wages: Both the federal Fair Labor Standards Act[145] and California Labor Code establish laws regulating wages. Both also explicitly protect employees who seek to enforce these laws.[146]
- Laws that regulate workplace safety and protect injured workers: Cal/OSHA explicitly protects employees who take steps to expose unsafe working conditions in violation of the safety standards and procedures required by Cal/OSHA.[147]
- Additionally, California Labor Code section 132a protects employees who file workers' compensation claims from retaliation.
- The Clean Air Act of 1977[148] provides discrimination protection and provides for the development and enforcement of standards regarding air quality and air pollution. Employees are protected from retaliation for reporting violations, or alleged violations, of those standards.
- Safe Drinking Water Act of 1974[149] requires that all drinking water systems in public buildings and new construction of all types be lead free. Employees are protected from retaliation for reporting violations, or alleged violations, of those requirements.

Case Study On Workplace Safety

***Franklin v. Monadnock Co.*[150]**
Employee reported to Employer that Co-worker had threatened his safety, as well as that of three other employees, by stating he would have them killed. Employer did nothing in response. A week later, Co-worker tried to stab Employee with a screw-driver. Employee complained to the police about Co-worker's threats. Employer then terminated Employee for complaining about Co-worker. Employee's allegations were sufficient to state a violation of public policy that protects an employee against discharge for making a good faith complaint about working conditions that he reasonably believes to be unsafe.

4. UNION ACTIVITIES

An array of state and federal statutes govern management-labor relations for different sectors of the workforce. In California, employee relations in the public sector are primarily governed by:

- The Meyers-Milias-Brown Act (MMBA) for local governments;[151]
- The Educational Employment Relations Act (EERA) for public K-12 schools and community college districts;[152]
- The Ralph C. Dills Act (Dills Act or SEERA) for state agencies;[153]
- The Higher Education Employer-Employee Relations Act (1979) (HEERA);[154]

- The Trial Court Employment Protection and Governance Act;[155] and
- The Trial Court Interpreter Employment and Labor Relations Act.[156]

In addition to these statutes, the Public Safety Officers Procedural Bill of Rights Act and the Fire Fighters Procedural Bill of Rights Act provide sworn personnel with certain rights and remedies if they are subject to punitive action.[157] All of these statutory schemes prohibit retaliation against employees for engaging in legitimate union activities or insisting upon the protections of these statutes, and treat such interference as an unfair labor practice.

Section 8 PREVENTING HARASSMENT, DISCRIMINATION, AND RETALIATION

It is unlawful for a public entity employer to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring in the workplace.[158] An employer must protect its employees, unpaid interns, volunteers, and anyone providing services pursuant to a contract regardless of immigration status.[159]

An employer can lessen the likelihood of being liable for violating the anti-discrimination laws, if by the time the conduct occurred, the employer had already taken reasonable steps to prevent discrimination and harassment from occurring, including:

- Affirmatively addressing the subject of harassment, discrimination, and retaliation;
- Expressing strong disapproval of such conduct;
- Developing appropriate sanctions for violating the agency's anti-discrimination policy;
- Informing employees of their right to raise and how to raise the issue of, harassment, discrimination, and retaliation under California (FEHA) and federal (Title VII) law; and
- Developing methods to sensitize all concerned.[160]

Indeed, to satisfy several of these steps, the FEHA requires that employers take the following specific actions:

- Post the California Department of Fair Employment and Housing's (DFEH) poster regarding discrimination and harassment in a prominent and accessible location in the workplace; and
- Distribute a sexual harassment information sheet to all employees in a reliable way, such as with the employees' paychecks. You may obtain an information sheet from the DFEH (see Appendix B) or the California Department of General

Services, or you may draft your own information sheet or include the information in your policy. If you draft your own information sheet, it should include the following:

1. A statement that sexual harassment is illegal;
2. The definition of sexual harassment under state and federal law;
3. A description of sexual harassment, including examples;
4. The public entity's internal complaint process that is available for each employee;
5. The legal remedies and complaint process available through the DFEH;
6. Directions on how to contact the DFEH; and
7. Notice of protection from retaliation for opposing unlawful discrimination and harassment.

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You may obtain one free copy of the poster and the information sheet from your local office of the DFEH or online at www.dfeh.ca.gov. You may also obtain multiple copies from the Office of Documents and Publications of the Department of General Services. Make sure you have the most recent version of the poster.

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Other reliable ways to distribute your sexual harassment information sheet include: 1) distributing it as part of an orientation/employment packet to new hires; 2) re-issuing the information sheet to employees on a regular basis; 3) including the required data in your employer's harassment prevention policy; or 4) permanently posting the information sheet at all work sites in prominent and accessible locations.

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Employers should ensure that their policies expressly state that they apply to all forms of discriminatory harassment, not just sexual harassment.

While compliance with these steps will not insulate a public entity employer from liability for unlawful harassment, it will help to prevent unlawful harassment from occurring and possibly insulate the employer from tort liability as well as damages.[161]

The following additional measures may also deter unlawful harassment:

- Promote equal employment opportunity at all levels of the workplace;
- Treat all people on their individual merits, without regard to their sex, race, age, or other protected status;
- Ensure that the visual, verbal, and physical aspects of the work site do not contain indicators of stereotyping based on any protected classifications;
- Do not allow joking or rumors based on physical attributes or any other basis for protected status;
- Do not allow innuendo or gossip which isolate individuals by their protected status;
- Be sensitive to supervisor/subordinate personal relationships which could adversely impact the good judgment and neutrality of the supervisor;
- When monitoring the attire of agency employees, be sure to monitor the attire of both genders;
- Adopt and distribute to all personnel an effective policy against harassment and re-distribute that policy on a regular basis;
- Regularly train all employees, particularly supervisors and managers, on how to avoid harassment;
- Investigate promptly all complaints of harassment and intolerable working conditions;
- Take corrective action promptly, if needed, after each investigation of a complaint; and
- Do not take punitive action against anyone for complaining about harassment, discrimination, or retaliation, or for engaging in any other protected activity.

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All these preventive measures, however, must be balanced against your employees' rights to free speech and association.[162] In general, speech must be about a matter of "public concern" to be protected under the First Amendment. Religion is considered a topic of public concern. Courts weigh the individual's right of free speech on a matter of public concern against the public employer's right to the efficient functioning of government.

Example: A fire department violated the First Amendment by banning reading of *Playboy* magazine, even though the ban was instituted to avoid contentions of sexual harassment.[163]

In addition, it is important for employers to document an employee's misconduct or performance deficiencies carefully in order to successfully resist possible later challenges asserting unlawful discrimination.

Section 9 ANTI-DISCRIMINATION LAWS DO NOT IMMUNIZE EMPLOYEES FROM DISCIPLINE WHEN WARRANTED

The tremendous growth in retaliation claims has left some supervisors afraid to discipline any employee who has, within recent memory, complained about anything. This dynamic not only chills legitimate and necessary employment actions, it encourages the filing of erroneous complaints. Some employees will lodge unfounded complaints so that they will have a "protected activity" to point to if they are ever subjected to an adverse employment action.

The best defense against erroneous claims, as well as the fear of such claims, is to implement basic, good management practices. Supervisors who operate in a work environment where objectivity and consistency are the norm will be less intimidated by the fear of retaliation claims. This is because they will be more confident that they will be able to defend their employment decisions, if challenged. Thus, employers should institute policies, procedures, and training that encourage the fair and consistent treatment of all employees, and the thorough documentation of employer actions.

A. TREAT ALL SIMILARLY SITUATED EMPLOYEES THE SAME

If an employer treats its employees professionally, and applies the same standards, a retaliation claim will be difficult to prove. This is because the employer will be better positioned to rebut the claim of a causal link with a legitimate business reason for its actions. Thus, employers should administer both favorable and unfavorable treatment of its employees in a fair, objective, and consistent manner, regardless of whether an employee has engaged in protected activity.

B. PERFORMANCE EVALUATIONS

Evaluations should be grounded in objective criteria such as the job description and annual goals and objectives. Further, they should include a written description explaining the areas of positive performance, areas that require improvement, and suggestions for how to improve. Employees should be rated similarly for the same quality of work. Similarly, each employee's evaluations should reflect the application of consistent standards. For example, if a supervisor or employer tends to give high ratings for average work, the supervisor or employer should not suddenly start giving an employee who complains average ratings for the same average work.

C. DISCIPLINE

As a general matter, all employees should receive the same level of discipline for the same offense (taking into consideration each employee's unique history of performance and discipline in assessing the seriousness of the conduct at issue). Applying discipline that is supportable by past practice is especially important where the employee has recently engaged in a protected activity. Therefore, if an employee who engaged in protected activity thereafter engages in misconduct, the employer should impose discipline only if it is consistent with past practice regarding the same or similar misconduct. If the misconduct is extreme or unprecedented, discipline should still be imposed, despite the risk of a retaliation claim, because the severity of the misconduct is likely to demonstrate to a court that the employer had a reasonable business motive to impose the discipline.

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Some additional factors to consider before proceeding with any disciplinary action:

- Have you adequately documented the underlying action in which the discipline is based?
- Is the discipline comparable to other forms of discipline imposed on other employees for similar infractions?
- Are you aware of any complaints, formal or informal, lodged by the affected employee regarding any workplace issues? Or, has the affected employee participated in any litigation against the agency in the form of testifying or cooperating with the adverse party?
- If you are aware of such complaints, have these complaints been investigated?
- Have you or any other managerial employee made any "stray comments" about the employee's complaints or participation in the protected activity?
- Are you aware of any threats of reprisals made against the affected employee for participating in the protected activity?

If you are concerned about any of the above issues, you should consult your human resources director or employment attorney to minimize any potential claims of retaliation.

Section 10 DEVELOPING AN ANTI-HARASSMENT, DISCRIMINATION, AND RETALIATION POLICY

Some harassing behavior may not be sufficiently severe or pervasive enough to violate the law, but is still unproductive and offensive. A public agency is well-advised to prohibit inappropriate behavior even if that behavior does not reach the level of unlawful harassment, discrimination, or retaliation.

Employer policies should not mirror the law for two reasons. First, prohibiting inappropriate behavior enables an employer to take corrective action at an early stage, thus preventing more severe and potentially unlawful conduct from developing. Second, if the employer's policy simply recites the legal standard, the employer could be held to have admitted that illegal conduct occurred if it finds that the conduct violated its policy. Any such finding could be used against the employer as an admission if litigation develops. For these reasons, employers should adopt a "zero tolerance" policy. (See Appendices A and D.) In a zero tolerance policy, harassment, discrimination, and retaliation are all prohibited, whether or not they would be found to be unlawful.

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An employer may be able to limit damages in a harassment lawsuit if it can prove that it has internal complaint procedures that are designed to eliminate harassment.[164]

An employer can limit damages if it assures all employees that they can use the employer's internal complaint procedure without retaliation.[165] To do so, employers must do the following:

- Adopt a comprehensive complaint procedure that is user friendly;
- Resolve complaints in a prompt, non-judgmental and objective fashion;
- Communicate and publicize the complaint procedure to all employees; and
- Periodically update and remind employees about the complaint procedure.[166]

A complaint procedure should do all of the following:

- Prohibit discrimination, harassment, and retaliation from both employees and non-employees based on any protected status;
- Protect applicants, independent contractors, and employees from harassment, discrimination, and retaliation;
- Prohibit retaliation for reporting alleged violations, participating in the complaint investigation process, or supporting those who complain or participate in an investigation;
- Give supervisory employees the duty to report discrimination and harassment;

- Provide a thorough, prompt, and objective/non-judgmental investigation procedure;
- Provide confidentiality to the greatest extent possible given the need to investigate and discipline, if necessary, and take other appropriate remedial actions;
- Provide a reference to the remedies and complaint processes available from the EEOC and the DFEH, and directions regarding how to contact those offices; and
- Describe prohibited harassment, and provide examples of the types of harassment.[167]

A public employer's complaint procedure must provide a meaningful mechanism through which an aggrieved employee may inform his or her employer of discriminatory, harassing, or retaliatory conduct.

To be meaningful, the complaint procedure must be designed to encourage victims to come forward. Thus, if the procedure requires an aggrieved employee to complain first to his or her supervisor, it should also provide an alternative route to file a complaint when the alleged harasser is the supervisor. Otherwise, the employee would feel powerless and discouraged from complaining.

Complainants should be informed that their complaints will be conveyed only to those who need to know about it, such as those investigating the complaint and any others involved in remedial or disciplinary action. While the employer should maintain confidentiality to the greatest extent possible, complete confidentiality cannot be guaranteed because of the need to investigate and to provide procedural due process.

Complainants should also be permitted to complain verbally, although the complaint procedure should encourage and may require employees to state their complaints ultimately in writing. After receiving a written complaint, the public employer should acknowledge its receipt in writing and indicate when the complainant can expect a follow-up report.
The person designated to receive complaints should keep a confidential log of the complaints received from non-sworn personnel. For sworn personnel, the employer's internal affairs procedures should be used. A log can serve as a checklist, help the public employer spot repeat victims and alleged offenders, track the effectiveness of the public employer's prevention and remediation efforts, and serve as evidence of the public employer's thorough prevention and prompt remediation efforts. The log may include:

- The names of the complainant and alleged harasser;
- The basis for the complainant's protected status, if any;
- The nature of the complaint;
- The date the complaint was received;
- The name of the person assigned to investigate the complaint;
- Any findings made after the investigation;

- What, if any, remedial action was taken;
- Whether the complainant was satisfied with the result;
- Whether the complainant or alleged harasser filed a claim with the DFEH or the EEOC; and
- Whether the complainant filed a tort claim or a lawsuit.

The one potential weakness of a log is that it might have to be produced in a lawsuit. The likelihood of production is rare, however, because of the privacy interests of the people who file complaints and the people who are disciplined. In the event that a court ordered the disclosure of complainants' identities, the public entity would have to make such disclosures, regardless of the existence of a log. Thus, the benefits of keeping a log, so long as it is kept confidential, outweigh its potential risk as it may assist the employer in subsequent litigation.

Section 11 TRAINING EMPLOYEES TO PREVENT HARASSMENT, DISCRIMINATION, RETALIATION AND ABUSIVE CONDUCT

All public employees, and particularly managers and supervisors, must treat their co-workers and subordinates on the basis of their individual merit and not on the basis of their protected status, or of stereotypes related to their protected status. Education and training can further this goal and can take many forms, including (but not limited to) the following:

- Orientation sessions for all new employees;
- Management/supervisory training sessions and special meetings in each office of the employer with a trainer/facilitator;[168]
- At least annual refresher training for all employees;
- An agenda item at lunch meetings; and
- Speakers from organizations at the forefront of harassment prevention.

Peace officers must receive instruction on sexual harassment in the workplace as part of their basic training. The instruction must include at least:

- The definition of sexual harassment;
- A description of sexual harassment, with examples;
- A statement of the illegality of sexual harassment; and
- The complaint process, legal remedies, and protection from retaliation available to victims of sexual harassment.[169]

California also mandates that supervisors receive harassment prevention training.[170] That mandate specifies that employers with more than 50 employees provide all supervisors with at least two hours of interactive harassment training. Supervisors must receive this training within six months of being appointed to a supervisory position, and at least every two years thereafter.[171]

For purposes of this mandatory training, the FEHA defines "supervisor" as: "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[172] Because of this broad definition, "supervisors" are not limited to only those who are accountable or responsible for the work of their subordinates.[173]

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Any employee who has any level of supervisory discretion, as opposed to routine clerical duties, is a "supervisor" as defined in the Fair Employment and Housing Act.[174]

In September of 2014, the California Legislature passed A.B. 2053. Effective January 1, 2015, this law requires that mandatory harassment prevention training for supervisors also include a component on "prevention of abusive conduct."[175] For purposes of A.B. 2053, abusive conduct is defined as malicious conduct from an employer or employee, unrelated to an employer's legitimate business interests, that a reasonable person would find hostile or offensive.[176] Statutorily listed examples of abusive conduct include: repeated verbal abuse, derogatory remarks, insults, epithets, verbal or physical conduct that reasonably appears threatening, intimidating, or humiliating, or sabotage of another's work performance.[177]

Section 12 INVESTIGATING ALLEGATIONS OF HARASSMENT, DISCRIMINATION, OR RETALIATION

Upon receiving a complaint or becoming aware of potential discriminatory, harassing, or retaliatory conduct, the public employer must investigate the allegations and not give advantages to one side over another.[178] (See Appendix C.)The investigation must be prompt, fair, and thorough.

Public employers who have established complaint investigation procedures are expected by the courts, the EEOC, and the DFEH to follow those procedures. It is particularly important to abide by all timelines.

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Implementing specific investigative procedures can help ensure complete investigations and consistent handling of complaints of harassment, discrimination, and retaliation. Indeed, certain state regulations applicable to specified agencies, e.g., schools and colleges, require implementation of formal procedures.

Public employers in the process of establishing formal investigative procedures should, in the interim, follow accepted principles of investigative procedure.

Case Study on Investigating Allegations of Harassment, Discrimination, and Retaliation

Swenson v. Potter[179]
Swenson believed that a co-worker was sexually harassing her but she did not report it to anyone. Once management became aware of Swenson's complaints, they spoke to the alleged harasser and opened an investigation. The investigation did not find sufficient evidence to support formal discipline. Swenson then sued for sexual harassment. The Ninth Circuit held that the employer could not be held liable under Title VII. The employer's prompt response once it learned of the alleged harassment and the fair and unbiased investigation fulfilled its duty to Swenson.

A. APPOINT AN INVESTIGATOR

For purposes of accountability and continuity, one person should be responsible for investigating complaints. This responsibility should not be delegated to a different person during the course of the investigation.

The investigator, to fulfill his or her responsibility for acting promptly and fairly, must be provided the necessary resources, training, and access to information and potential witnesses.

If the charges are against a high ranking employee or involve particularly sensitive issues, consider retaining an independent, outside investigator who is qualified to undertake this type of investigation.

B. KEEP THE INVESTIGATION CONFIDENTIAL

Complaints should be processed as confidentially as possible. Identities should not be disclosed, except to the extent necessary to continue the investigation. Statements made by employees should not be disclosed to other employees except when required to elicit specific, relevant, and necessary information from the employee.

Occasionally, complaining parties ask for an assurance of confidentiality before providing information. Witnesses should be told that the complaint will be held in confidence except to the

extent necessary to conduct a full investigation or to the extent necessary to obtain testimony in any hearing which might be held.

Less frequently, complaining parties who report the incident of harassment request that the employer not do anything about it. Honoring such a request could place other employees at risk of harassment, and it could place the public employer at risk for liability for failure to investigate and take prompt remedial action. Once on notice of an alleged occurrence of harassment, the public employer is *required* to investigate—even if the complainant requests that there be no investigation. The employer should therefore advise the complainant that it will investigate the complaint, but it should also elicit and address any specific concerns the complainant has regarding an investigation, such as retaliation or fear of physical harm.

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If litigation occurs after an investigation, the complainant, alleged harasser, or both, may seek all of the details of the investigation. The investigator must always remember that anything he or she says to witnesses, writes in a report, or even in personal notes could be disclosed later in a lawsuit. This fact underscores the need for a methodical approach which affords fairness to all witnesses and ensures confidentiality.

C. RIGHT OF REPRESENTATION

Employees participating in investigatory interviews, who have a reasonable belief that discipline may result from the interview, have a right to be represented by their union representative or legal counsel in such an interview upon request.[180]

D. *LYBARGER* ADMONITIONS

Employees do not have a right to refuse to answer questions. Such refusal can be grounds for insubordination and may result in discipline up to and including discharge. Additionally, at-will employees may be terminated for dishonesty during a harassment investigation.[181]

Peace officers suspected of criminal misconduct must receive a *Lybarger* warning because of the special protections provided by the Public Safety Officers Procedural Bill of Rights Act (POBR).[182] Non-Sworn employees may be given a *Lybarger* warning as well. Investigators should note that the POBR also provides other procedural guarantees for public safety officers during interrogations.[183]

In a departure from the POBR, however, the Fire Fighters Procedural Bill of Rights Act (FBOR) specifically provides that an employer "shall provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in an interrogation."[184]

Once the grant of immunity is provided, the employing fire department shall inform a firefighter that the failure to answer questions directly related to the investigation or interrogation may result in punitive action.[185] But because the FBOR's language requiring the grant of immunity is ambiguous, public agencies should consult with legal counsel as to each case where this could be an issue.

E. DISCRIMINATORY INVESTIGATIONS

Victims of harassment, as well as employees who are accused, may challenge the fairness of all aspects of the investigation. An improperly performed investigation can be deemed discriminatory.

To avoid discriminatory investigations, all parties must be given an opportunity to respond to the allegations of the other.[186] An employer must also complete an investigation into harassment even if the harassment stopped, because the employer has a duty to both: (1) end harassment; and (2) deter future harassment by the same offender or others.[187]

Case Studies on Discriminatory Investigations

Aguilar v. Avis Rent a Car Systems[188]
When a client of Avis Rent a Car reported having left behind a calculator in a rental vehicle and the calculator could not be found, the employer initiated an investigation. The investigator, however, only questioned Latino employees about the suspected theft of the calculator. The calculator was subsequently found. The Latino employees filed a lawsuit alleging discrimination and harassment because of race and identified the investigation as one of the actions supporting their lawsuit. The jury found in the employees' favor and the judge issued an injunction ordering the employer to cease and desist from conducting discriminatory investigations.

Fuller v. City of Oakland, California[189]
A female employee made a complaint to employer City about a male co-worker sexually harassing her. The investigator never interviewed the male alleged harasser. During the course of the investigation, the investigator discontinued the investigation, although none of the documents indicated the complainant was untruthful. The Ninth Circuit Court of Appeals found that the City failed to take appropriate remedial steps once it learned of the sexual harassment and was therefore liable under Title VII for a hostile environment and sexual harassment.

Section 13 DETERMINING THE APPROPRIATE REMEDY FOR FINDINGS OF HARASSMENT, DISCRIMINATION, OR RETALIATION

It is unlawful for an employer who knows or should know of harassment to fail to take immediate and appropriate corrective action.[190] Remember, the employer has a duty to both stop the current harassment *and* prevent future harassment of its employees.[191]

Example: A City was liable for its decision not to take remedial action because the harasser had stopped his inappropriate conduct. The Court held that by doing nothing but hoping the harasser did not repeat his misconduct, the City effectively ratified the harassment. Instead, the City should have taken some kind of remedial action, whether it was to discipline the harasser or do something else to deter future harassment by any of its employees.[192]

After a prompt and thorough investigation, the employer should immediately do whatever is necessary and appropriate to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from reoccurring.[193] Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, is always required.[194]

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To discipline public employees for harassment, the public employer must follow appropriate statutory, regulatory, or collectively-bargained procedures. Otherwise, the public employer could be subject to liability from the disciplined harasser.

Generally, the corrective action should reflect the severity of the misconduct. The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not been retaliated against. If the employer's remedial efforts are not effective, the employer should initiate additional, more severe, measures until the harassment ends. The effectiveness of a remedial action is measured by whether it: (1) ends the current harassment; and (2) deters future harassment.[195]

Example: For first time, minor offenses, an employer may discipline the harasser and try to prevent further harassment by giving the employee a verbal warning in a counseling session, expressing strong disapproval, demanding that the unwelcome conduct cease, and threatening more severe disciplinary action if the conduct does not cease. If the harassment continues despite the stern warning, the employer must then pursue disciplinary action more severe than counseling to ensure that the behavior ends.[196]

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Remedial action *should not* include moving the complainant to a less desirable work location to separate the complainant from the alleged harasser and hostile work environment.[197] Such action could be perceived as retaliation for complaining about harassment. A public employer should instead consider transferring or moving the alleged harasser to another department or location. The employer could also consult with the complainant as to how to improve his or her working environment or where, if anywhere, he or she would like to be moved.

Case Study on Employer's Duty to Prevent and Remedy

***Birschtein v. New United Manufacturing, Inc.*[198]**

A co-worker made repeated sexual comments to an employee. A supervisor put an end to the comments, but the co-worker then began to stare at Birschtein several times a day. Birschtein complained to her employer but the employer took no action to stop the co-worker's conduct. Birschtein brought suit against her employer for sexual harassment. The trial court granted summary judgment for the employer, stating that staring did not constitute sexual harassment as a matter of law. A California Court of Appeal disagreed and found that summary judgment was not appropriate because there existed a triable issue of fact as to whether the staring constituted intimidation and hostility. Moreover, the Court found that managerial failure to intervene effectively to prevent or end sexual harassment in the workplace by a fellow employee can amount to a ratification of the misconduct for which the employer may be held liable.

Section 14 INTERNAL ADMINISTRATIVE REMEDIES

Even if a public employer has established its own administrative remedies for resolving complaints of discrimination, harassment, or retaliation, a public employee is free to bypass that process and file his or her claim directly with the EEOC or the DFEH.[199]

But even though an employee is not required to exhaust his or her employer's own internal administrative remedies before filing with the DFEH or EEOC, failure to do so may be a basis upon which a public entity can argue the "avoidable consequences" doctrine to reduce damages.[200]

Employees who wish to file a lawsuit seeking money damages against their public employer and/or their public employee co-workers, supervisors, or elected officials must ordinarily file a Tort Claim with the public employer within six months of the alleged wrongful conduct.[201]

Public employees who wish to sue their employers under Title VII, the ADEA, the ADA, or the FEHA *do not need* to file a Tort Claim.[202] Instead, they must file a claim with either the EEOC or the DFEH.[203] In California, the EEOC and the DFEH have a work-share agreement, so that when a complainant files with one agency, he or she is deemed to have filed with the other agency as well.[204]

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Once you receive notice from the EEOC or DFEH of a charge of discrimination, make sure that any documents potentially related to the charge are maintained and not destroyed.

Section 15 EXHAUSTION OF EEOC AND DFEH ADMINISTRATIVE REMEDIES AND APPLICABLE STATUTE OF LIMITATIONS

A. EEOC ADMINISTRATIVE REMEDIES

In California, to seek damages solely under Title VII, the employee must file a charge of discrimination with the EEOC within 180 days of the unlawful conduct. If the employee seeks damages under both Title VII and the FEHA, then the employee must file the charges of discrimination within 300 days of the unlawful conduct. The EEOC must notify the employer of the charge within 10 days of receiving it and then promptly investigate it.

Case Study on Statute of Limitations

National R.R. Passenger Corp. v. Morgan[205]

Abner Morgan, an African-American, sued his former employer National Railroad Passenger Corporation (Amtrak) under Title VII, alleging that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. Specifically, Morgan alleged that during the time period he worked for Amtrak, he was "consistently harassed and disciplined more harshly than other employees on account of his race." The Supreme Court considered whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside the statutory time period for filing a charge with the EEOC. The Supreme Court held that the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period. But the Court further held that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period. A court may still, however, apply the equitable doctrines that may toll or limit the time period.

During the investigation, each party may submit to the EEOC a statement of position and evidence regarding the allegations in the charge. The EEOC may also issue subpoenas requiring the attendance and testimony of witnesses, the production of evidence, and access to evidence.

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- Remember that although the investigation is confidential, the EEOC file may be made public if the complainant later sues the public agency in a civil lawsuit. Thus, your statement to the EEOC should be factual and persuasive.
- The Lilly Ledbetter Fair Pay Act also clarified the statute of limitations for Title VII claims. Employees may file a Title VII lawsuit for up to 180 days after they receive any paycheck they allege is discriminatory. In other words, each new allegedly discriminatory paycheck resets the statute of limitations under Title VII.

The EEOC has 120 days after receiving the charge to either dismiss the complaint or find that there is reasonable cause to find that the charge is true. If the EEOC determines that the charge might be true, it will seek to remedy any perceived unlawful harassment through confidential and informal methods of conference, conciliation, and persuasion. If conciliation fails, the EEOC will then refer the charge to the Attorney General who may bring a civil lawsuit against the respondent public employer. The EEOC's reasonable cause finding is admissible in a lawsuit claiming a violation of Title VII.[206]

If the EEOC dismisses the charge, or does not take action on it within 180 days of receiving it, the EEOC must give the complainant a Right-To-Sue letter. The complainant will then have 90 days in which to file a civil lawsuit against the respondent named in the charge.[207]

B. DFEH ADMINISTRATIVE REMEDIES

An employee seeking damages under the FEHA must file a claim with the DFEH within one year of the alleged unlawful conduct.[208] Once a complaint is filed, the DFEH either investigates the complaint itself or refers it to the EEOC for investigation. If the DFEH keeps the complaint, it will notify you that a complaint has been filed and will most likely ask you to provide information regarding the complaint.

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The DFEH one-year statute of limitations stops running while an employee pursues an employer's internal administrative process.[209]

If the DFEH keeps the complaint, investigates, and finds the complaint valid, it must then seek to resolve the complaint, in confidence, by conference, conciliation, and persuasion. If conciliation

succeeds, the parties will reduce their resolution to writing and the DFEH will conduct a compliance review the following year.

If the conciliation process fails, the DFEH may bring a civil action in the name of the Department on behalf of the person bringing the complaint.[210] Parties are required to undergo mandatory dispute resolution in the DFEH's internal dispute resolution division before the DFEH will file a complaint.[211] The prevailing party, including the DFEH, may be awarded attorneys' fees and costs, including expert witness fees.[212]

If the DFEH does not bring a civil action within 150 days after the filing of a complaint, or if the DFEH decides earlier that no civil action will be brought, the DFEH must issue a Right-To-Sue letter to the complainant upon the complainant's request.[213] If the complainant does not request a Right-To-Sue letter, then the DFEH will issue its Right-To-Sue letter when it finishes its investigation but no later than one year after it received the complaint. Only after receiving a Right-To-Sue letter may a complainant file a lawsuit based on the alleged harassment. The complainant must file the lawsuit, if at all, within one year from the date of the Right-To-Sue letter.

On January 1, 2013, SB 1038 amended the FEHA to eliminate the Fair Employment Housing Commission, an administrative body that had performed adjudicatory functions for the DFEH. Prior to 2013, the DFEH was only permitted to file an accusation with the Commission, and did not have the authority to file a claim directly in civil court. In addition, SB 1038 created the Fair Employment and Housing Council. The Council is responsible for rulemaking and holding public hearings regarding FEHA-related issues.

Section 16 LIABILITY FOR MONEY DAMAGES

Successful plaintiffs cannot obtain punitive damages from public entity defendants but they can obtain such damages against individual public employees not acting in their official capacity. Moreover, successful plaintiffs may also be entitled to emotional distress damages, back-pay, front-pay, and any other actual damages they have suffered, as well as attorneys' fees and pre-judgment interest.[214] The FEHA also allows successful plaintiffs to request reimbursement of expert witness fees.[215]

The California law that mandates training for supervisors expressly states that providing the training does not insulate against liability for the employer, nor does the failure to provide the training automatically result in liability.[216] Nevertheless, it is reasonable to assume that employees will likely argue that if the employer had provided the training, it might have prevented the very injury that is now the subject of the lawsuit.

A. WHO CAN BE LIABLE?

1. THE PUBLIC ENTITY EMPLOYER

Under both the FEHA and Title VII, public entities may be directly liable to harassment victims in civil actions.[217]

A public entity employer is strictly liable for sexual harassment under California's FEHA if the harasser is an agent or supervisor.[218]

The FEHA broadly defines "supervisor" to include any employee who has any level of supervisory discretion. Although employers are strictly liable for harassment by supervisors, employers can still mitigate their potential damages by showing the following:

- The employer took reasonable steps to prevent and correct workplace harassment;
- The employee unreasonably failed to use the preventive and corrective measures that the employer provided; and
- Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee incurred.

This affirmative defense, known as the "avoidable consequences" doctrine, only applies to damages that the employee could have avoided if it would have been reasonable for him or her to utilize the employer's anti-harassment procedures. If a supervisor commits an act of harassment, the employee can still recover damages for the harassing act itself. Moreover, the employee need not always immediately utilize an employer's grievance process if it is inadequate or not communicated, if the employee reasonably fears reprisal by co-workers or management, or if the employee has natural feelings of embarrassment or shame. The employee's conduct is to be evaluated on a reasonableness standard. Evidence of reasonableness would include whether other complaints of harassment were properly handled, whether the employer prohibited retaliation for reporting harassment, whether sufficient confidentiality procedures existed, and whether the employer consistently and firmly enforced its policies.[219]

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Employers should consider more severe disciplinary measures against supervisors who engage in harassment.

An employer is strictly liable for quid pro quo sexual harassment only if the employer has placed in positions of authority people who extract sexual favors from those over whom they exercise power.

2. INDIVIDUAL PUBLIC EMPLOYEES

Employees are subject to personal liability for harassment under the FEHA, but not under Title VII.[220] Specifically, under the FEHA, employees may be held personally liable for harassment if they participate in unlawful harassment or if they substantially assist or encourage continued harassment. But a supervisor is not personally liable by mere inaction or by acts constituting personnel management decisions.[221]

Further, individual public employees cannot be held liable for retaliation or for discrimination.[222]

B. HARASSMENT BY CLIENTS OR NON-EMPLOYEES

Even if the harasser is not an agent or supervisor of the public entity employer, the employer may still be liable if its agents or its supervisors knew or should have known of the harassment of any employee or applicant but failed to take immediate and appropriate corrective action.[223]

C. CONSTRUCTIVE DISCHARGE

In the common law action for constructive discharge, the employer is liable if its officers, directors, managing agents, or supervisory employees that create or knowingly permit intolerable working conditions that would force a reasonable employee to resign.[224]

The U.S. Supreme Court determined that a plaintiff claiming sexual harassment resulting in "constructive discharge . . . must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."[225] The Court further held that employers may raise the avoidable consequences doctrine (i.e., that the employer took reasonable care to prevent or correct the harassing behavior and that employee did not take advantage of these measures) to reduce damages *only if* the employee did not resign following an action by an employer that was so severe it changed his or her employment status or work situation. Examples of such severe behavior include a humiliating demotion, extreme cut in pay, or transfer to a position with unbearable working conditions.

D. OBLIGATION TO DEFEND AND INDEMNIFY INDIVIDUAL PUBLIC EMPLOYEES

Public entity employers are required to defend and indemnify any public employee in a civil lawsuit if the act or omission giving rise to the injury occurred in the course and scope of his or her employment with the public entity.[226]

The following principles govern whether a public entity employer may be liable for illegal harassment by an employee:

- An employer may be subject to vicarious liability for injuries caused by an employee's injurious actions resulting in or arising from pursuit of the employer's interests;
- An employer may be liable where the injurious actions are engendered by events or conditions relating to the employment;
- An employer may not be liable where the employee's misconduct does not arise from the conduct of the employer's enterprise but instead arises out of a personal dispute;
- An employer may not be liable if an employee abuses job-created authority over others for purely personal reasons, even if the abuse occurs on the employer's premises;
- If the employer has and disseminates a policy against harassment, an employer may not be liable for a non-supervisory employee's acts of unlawful harassment because they are not within the course of his or her employment;[227] and
- A public employer may still be liable after having been dismissed from a lawsuit, and not providing defense for an employee believed not to be acting within the scope of his employment, if the employee agreed to a stipulated judgment stating he acted in the course of his employment and assigned the victim his rights to seek indemnification from the employer.[228]

Case Study on Obligation to Defend and Indemnify

Farmers Insurance Group v. County of Santa Clara[229]

A county was not required to indemnify and pay the defense costs of a deputy sheriff in a sexual harassment lawsuit where the evidence was undisputed that the deputy sheriff "lewdly propositioned and offensively touched other deputy sheriffs working at the county jail." The California Supreme Court held that deliberate targeting of an individual employee for inappropriate touching and requests for sexual favors is not within the scope of a deputy sheriff's employment. The California Supreme Court explained that "the goal of eradicating sexual harassment from the public sector is more effectively advanced by denying sexual harassers the right to indemnity than by insulating them from financial responsibility for their own misconduct." It declined, however, "to adopt a bright line rule that all sexual harassment falls outside the scope of employment as a matter of law under all circumstances."

A public employer may defend and indemnify an employee in a civil suit alleging harassment if the entity determines that the harassment charges are not well founded. A public entity's agreement to provide defense and indemnity in such instances does not affect its right to refuse to defend other employees whose acts of sexual harassment are undisputed. The public employer should study the circumstances of each case, and perhaps seek legal counsel, in determining whether to defend and indemnify an alleged unlawful harasser.

APPENDIX A

SAMPLE POLICY AND COMPLAINT PROCEDURE AGAINST HARASSMENT, DISCRIMINATION, AND RETALIATION

Purpose

The purpose of this Policy is to: establish a strong commitment to prohibit and prevent discrimination, harassment, and retaliation in employment; to define those terms; and to set forth a procedure for investigating and resolving internal complaints. The employer encourages all covered individuals to report—as soon as possible— any conduct that is believed to violate this Policy.

Policy

The employer has zero tolerance for any conduct that violates this Policy. Conduct need not rise to the level of a violation of law to violate this Policy. A single act can violate this Policy and provide grounds for discipline or other appropriate sanctions.

Harassment or discrimination against an applicant, unpaid intern, volunteer, or employee by a supervisor, management employee, elected or appointed official, co-worker, member of the public, or contractor on the basis of race, religion, color, sex (including gender, gender identity, gender expression, transgender, pregnancy, and breastfeeding), national origin, ancestry, citizenship status, disability, medical condition, genetic characteristics or information, marital status, age, sexual orientation (including homosexuality, bisexuality, or heterosexuality), military or veteran status, or any other protected classification as defined below, will not be tolerated.

This Policy applies to all terms and conditions of employment, including, but not limited to, hiring, placement, promotion, disciplinary action, layoff, recall, transfer, leave of absence, compensation, and training.

Disciplinary action or other appropriate sanction up to and including termination will be instituted for prohibited behavior as defined below.

Any retaliation against a person for filing a complaint or participating in the complaint resolution process is prohibited. Individuals found to be retaliating in violation of this Policy will be subject to appropriate sanction or disciplinary action up to and including termination.

Definitions

A. Protected Classifications: This Policy prohibits harassment or discrimination because of an individual's protected classification. "Protected Classification" includes race, religion, color, sex (including gender, gender identity, gender expression, transgender, pregnancy,

and breastfeeding), national origin, ancestry, citizenship status, disability, medical condition, genetic characteristics or information, marital status, age, sexual orientation (including homosexuality, bisexuality, or heterosexuality), and military or veteran status..

B. Policy Coverage: This Policy prohibits the employer, elected or appointed officials, officers, employees, or contractors from harassing or discriminating against applicants, officers, officials, employees, unpaid interns, volunteers, or contractors because of: 1) an individual's protected classification; 2) the perception that an individual has a protected classification; or 3) the individual associates with a person who has or is perceived to have a protected classification.

C. Discrimination: This policy prohibits treating individuals differently because of the individual's protected classification as defined in this Policy.

D. Harassment may include, but is not limited to, the following types of behavior that is taken because of a person's protected classification. Note that harassment is not limited to conduct that employer's employees take. Under certain circumstances, harassment can also include conduct taken by those who are not employees, such as elected officials, appointed officials, persons providing services under contracts, or even members of the public:

(1) Speech, such as epithets, derogatory comments or slurs, and propositioning on the basis of a protected classification. This might include inappropriate comments on appearance, including dress or physical features, or dress consistent with gender identification, or race-oriented stories and jokes.

(2) Physical acts, such as assault, impeding or blocking movement, offensive touching, or any physical interference with normal work or movement. This includes pinching, grabbing, patting, propositioning, leering, or making explicit or implied job threats or promises in return for submission to physical acts.

(3) Visual acts, such as derogatory posters, cartoons, emails, pictures, or drawings related to a protected classification.

(4) Unwanted sexual advances, requests for sexual favors and other acts of a sexual nature, where submission is made a term or condition of employment, where submission to or rejection of the conduct is used as the basis for employment decisions, or where the conduct is intended to or actually does unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment.

E. Guidelines for Identifying Harassment: To help clarify what constitutes harassment in violation of this Policy, use the following guidelines:

1. Harassment includes any conduct which would be "unwelcome" to an individual of the recipient's same protected classification and which is taken because of the recipient's protected classification.

2. It is no defense that the recipient appears to have voluntarily "consented" to the conduct at issue. A recipient may not protest for many legitimate reasons, including the need to avoid being insubordinate or to avoid being ostracized.

3. Simply because no one has complained about a joke, gesture, picture, physical contact, or comment does not mean that the conduct is welcome. Harassment can evolve over time. The fact that no one is complaining now does not preclude anyone from complaining if the conduct is repeated in the future.

4. Even visual, verbal, or physical conduct between two individuals who appear to welcome the conduct can constitute harassment of a third individual who observes the conduct or learns about the conduct later. Conduct can constitute harassment even if it is not explicitly or specifically directed at an individual.

5. Conduct can constitute harassment in violation of this Policy even if the individual engaging in the conduct has no intention to harass. Even well-intentioned conduct can violate this Policy if the conduct is directed at, or implicates a protected classification, and if an individual of the recipient's same protected classification would find it offensive (e.g., gifts, over attention, endearing nicknames).

F. Retaliation: Any adverse conduct taken because an applicant, employee, or contractor has reported harassment or discrimination, or has participated in the complaint and investigation process described herein, is prohibited. "Adverse conduct" includes but is not limited to: taking sides because an individual has reported harassment or discrimination, spreading rumors about a complaint, shunning and avoiding an individual who reports harassment or discrimination, or real or implied threats of intimidation to prevent an individual from reporting harassment or discrimination. The following individuals are protected from retaliation: those who make good faith reports of harassment or discrimination, those who associate with an individual who is involved in reporting harassment or discrimination, and those who participate in the complaint or investigation process.

Complaint Procedure

(A) An employee, job applicant, unpaid intern, volunteer, or contractor who believes he or she has been harassed may make a complaint verbally or in writing with any of the following. There is no need to follow the chain of command:

1) Immediate supervisor;

2) Any supervisor or manager within or outside of the department;

3) Department head; or

4) Director of Human Resources.

(B) Any supervisor or department head who receives a harassment complaint should notify the Director of Human Resources immediately.

(C) Upon receiving notification of a harassment complaint, the Director of Human Resources shall:

1) Provide the complainant with a timely response indicating that the complaint has been received and that a fair, timely, and thorough investigation will be conducted.

2) Timely authorize and supervise a fair and thorough investigation of the complaint by impartial and qualified personnel and/or investigate the complaint. The investigation will afford all parties with appropriate due process and include interviews with: 1) the complainant; 2) the accused harasser; and 3) other persons who have relevant knowledge concerning the allegations in the complaint. 3) Review the factual information gathered through the investigation to reach a reasonable conclusion as to whether the alleged conduct constitutes harassment, discrimination, or retaliation giving consideration to all factual information, the totality of the circumstances, including the nature of the conduct, and the context in which the alleged incidents occurred.4)Timely report a summary of the determination as to whether harassment occurred to appropriate persons, including the complainant, the alleged harasser, the supervisor, and the department head. If discipline is imposed, the level of discipline will not be communicated to the complainant.

3) If conduct in violation of this Policy occurred, take or recommend to the appointing authority prompt and effective remedial action. The remedial action will be commensurate with the severity of the offense.

4) Take reasonable steps to protect the complainant from further harassment, discrimination, or retaliation.

5) Take reasonable steps to protect the complainant from retaliation as a result of communicating the complaint.

(D) The employer takes a proactive approach to potential Policy violations and will conduct an investigation if its officers, supervisors, or managers become aware that harassment, discrimination, or retaliation may be occurring, regardless of whether the recipient or third party reports a potential violation.

(E) Option to report to outside administrative agencies: An individual has the option to report harassment, discrimination, or retaliation to the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH). These administrative agencies offer legal remedies and a complaint process. The

nearest offices are listed in the government section of the telephone book or employees can check the posters that are located on employer bulletin boards for office locations and telephone numbers.

Confidentiality

Every possible effort will be made to assure the confidentiality of complaints made under this Policy. Complete confidentiality cannot occur, however, due to the need to fully investigate and the duty to take effective remedial action. As a result, confidentiality will be maintained to the extent possible. An individual who is interviewed during the course of an investigation is prohibited from discussing the substance of the interview, except as otherwise directed by a supervisor or the Human Resources Director. Any individual who discusses the content of an investigatory interview will be subject to discipline or other appropriate sanction. The employer will not disclose a completed investigation report except as it deems necessary to support a disciplinary action, to take remedial action, to defend itself in adversarial proceedings, or to comply with the law or court order.

Responsibilities

Managers and Supervisors are responsible for:

1. Informing employees of this Policy.
2. Modeling appropriate behavior.
3. Taking all steps necessary to prevent harassment, discrimination, or retaliation from occurring.
4. Receiving complaints in a fair and serious manner, and documenting steps taken to resolve complaints.
5. Monitoring the work environment and taking immediate appropriate action to stop potential violations, such as removing inappropriate pictures or correcting inappropriate language.
6. Following up with those who have complained to ensure that the behavior has stopped and that there are no reprisals.
7. Informing those who complain of harassment or discrimination of his or her option to contact the EEOC or DFEH regarding alleged Policy violations.
8. Assisting, advising, or consulting with employees and the Human Resources Director regarding this Policy and Complaint Procedure.
9. Assisting in the investigation of complaints involving employee(s) in their departments and, if the complaint is substantiated, recommending appropriate corrective or disciplinary action in accordance with employer Personnel Rules, up to and including discharge.
10. Implementing appropriate disciplinary and remedial actions.
11. Reporting potential violations of this Policy of which he or she becomes aware, regardless of whether a complaint has been submitted, to the Human Resources Department or the department head.
12. Participating in periodic training and scheduling employees for training.

Each employee or contractor is responsible for:

1. Treating all employees and contractors with respect and consideration.
2. Modeling appropriate behavior.
3. Participating in periodic training.
4. Fully cooperating with the employer's investigations by responding fully and truthfully to all questions posed during the investigation.
5. Maintaining the confidentiality of any investigation that the employer conducts by not disclosing the substance of any investigatory interview, except as directed by the department head or Human Resources Director.
6. Reporting any act he or she believes in good faith constitutes harassment, discrimination, or retaliation as defined in this Policy, to his or her immediate supervisor, or department head, or Human Resources Director.

Dissemination of Policy

All employees shall receive a copy of this Policy when they are hired. The Policy may be updated from time to time and redistributed with a form for the employee to sign and return acknowledging that the employee has received, read, and understands this Policy.

APPENDIX B

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING FORM 185 REGARDING SEXUAL HARASSMENT

See Attached



The mission of the Department of Fair Employment and Housing is to protect the people of California from unlawful discrimination in employment, housing and public accommodations, and from the perpetration of acts of hate violence.

Employers' Obligations

All employers must take the following actions against harassment:

- Take all reasonable steps to prevent discrimination and harassment from occurring. If harassment does occur, take effective action to stop any further harassment and to correct any effects of the harassment.
- Develop and implement a sexual harassment prevention policy with a procedure for employees to make complaints and for the employer to investigate complaints. Policies should include provisions to:
- Fully inform the complainant of his/her rights and any obligations to secure those rights.
- Fully and effectively investigate. The investigation must be thorough, objective, and complete. Anyone with information regarding the matter should be interviewed. A determination must be made and the results communicated to the complainant, to the alleged harasser and, as appropriate, to all others directly concerned.
- Take prompt and effective corrective action if the harassment allegations are proven. The employer must take appropriate action to stop the harassment and ensure it will not continue. The employer must also communicate to the complainant that action has been taken to stop the harassment from recurring. Finally, appropriate steps must be taken to remedy the complainant's damages, if any.
- Post the Department of Fair Employment and Housing (DFEH) employment poster (DFEH - 162) in the workplace (available through the DFEH publications line [916] 478-7201 or Web site).
- Distribute an information sheet on sexual harassment to all employees. An employer may either distribute this pamphlet (DFEH 185) or develop an equivalent document that meets the requirements of Government Code section 12950(b). This pamphlet may be duplicated in any quantity. **However, this pamphlet is not to be used in place of a sexual harassment prevention policy, which all employers are required to have.**
- All employees should be made aware of the seriousness of violations of the sexual harassment policy and must be cautioned against using peer pressure to discourage harassment victims from complaining.
- Employers who do business in California and employ 50 or more part-time or full-time employees *must* provide at least two hours of sexual harassment training every two years to each supervisory employee and to all new supervisory employees within six months of their assumption of a supervisory position.
- A program to eliminate sexual harassment from the workplace is not only required by law, but is the most practical way for an employer to avoid or limit liability if harassment should occur despite preventive efforts.

Employer Liability

All employers, regardless of the number of employees, are covered by the harassment section of the FEHA. Employers are generally liable for harassment by their supervisors or agents. Harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassing an employee or coworker or for aiding and abetting harassment.

Additionally, the law requires employers to take "all reasonable steps to prevent harassment from occurring." If an employer has failed to take such preventive measures, that employer can be held liable for the harassment. A victim may be entitled to damages, even though no employment opportunity has been denied and there is no actual loss of pay or benefits.

In addition, if an employer knows or should have known that a **non-employee** (e.g. client or customer) has sexually harassed an employee, applicant, or person providing services for the employer and fails to take immediate and appropriate corrective action, the employer may be held liable for the actions of the non-employee.

An employer might avoid liability if

- the harasser is not in a position of authority,

The definition of sexual harassment includes many forms of offensive behavior.

Department of Fair Employment and Housing

such as a lead, supervisor, manager or agent;

- the employer had no knowledge of the harassment;
- there was a program to prevent harassment; and
- once aware of any harassment, the employer took immediate and appropriate corrective action to stop the harassment.

Filing a Complaint

Employees or job applicants who believe that they have been sexually harassed may file a complaint of discrimination with DFEH within **one year** of the harassment.

DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a formal accusation. The accusation will lead to either a public hearing before the Fair Employment and Housing Commission or a lawsuit filed by DFEH on behalf of the complaining party.

If the Commission finds that discrimination has occurred, it can order remedies including:

- Fines or damages for emotional distress from each employer or person found to have violated the law
- Hiring or reinstatement
- Back pay or promotion
- Changes in the policies or practices of the involved employer

Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

For more information, see publication DFEH-159 "Guide for Complainants and Respondents."

For more information, contact DFEH toll free at
(800) 884-1684
Sacramento area & out-of-state at **(916) 478-7200**
TTY number at **(800) 700-2320**
or visit our Web site at ***www.dfeh.ca.gov***

In accordance with the California Government Code and ADA requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact DFEH at the numbers above.

State of California
Department of Fair Employment & Housing

DFEH-185 (11/07)

Sexual Harassment

The Facts About Sexual Harassment

The *Fair Employment and Housing Act* (FEHA) defines sexual harassment as harassment based on sex or of a sexual nature; gender harassment; and harassment based on pregnancy, childbirth, or related medical conditions. The definition of sexual harassment includes many forms of offensive behavior, including harassment of a person of the same gender as the harasser. The following is a partial list of types of sexual harassment:

- Unwanted sexual advances
- Offering employment benefits in exchange for sexual favors
- Actual or threatened retaliation
- Leering; making sexual gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters
- Making or using derogatory comments, epithets, slurs, or jokes
- Sexual comments including graphic comments about an individual's body; sexually degrading words used to describe an individual; or suggestive or obscene letters, notes, or invitations
- Physical touching or assault, as well as impeding or blocking movements

APPENDIX C

SUPERVISOR'S CHECKLIST - WHAT TO DO WHEN YOU RECEIVE A REPORT OF HARASSMENT

- ❑ Complainant tells you about alleged harassment.
- ❑ Tell complainant you are ready to listen. Turn off cell phone, shut your door, and focus full attention on the topic. Make no judgments as to whether the conduct reported is minor or severe; simply assure the complainant that you will follow up promptly according to the agency's policy.
- ❑ Take notes; read back notes to the employee to confirm accuracy and your comprehension.
- ❑ Inform complainant his or her complaint cannot be held in complete confidence, but will only be shared with those who need to know so the agency can conduct a thorough investigation, and to discipline, if appropriate.
- ❑ Inform complainant in writing to acknowledge receipt of complaint, indicate approximate time when the complainant can expect a follow-up report, and inform of the employer's no retaliation policy.
- ❑ Notify Human Resources and the appropriate administrator.
- ❑ Document date and time of report to Human Resources and appropriate administrators consulted.
- ❑ Direct all staff to be candid during investigation. Direct all staff to keep confidential both the questions the investigator asks and the answers the staff member provides.
- ❑ Advise all staff of the need to treat each other with respect while investigation is pending; no retaliation or judgment of complainant or accused.
- ❑ Monitor work environment.

APPENDIX D

POLICY AGAINST RETALIATION

a. Policy: It is the policy of the City to prohibit the taking of any adverse employment action against those who in good faith report, oppose, or participate (as witnesses or accused) in investigations into complaints of alleged violations of City policy or state or federal law in retaliation for that reporting, opposition, or participation. Disciplinary action, up to and including termination, will be taken against an employee or officer who is found to have violated this policy. Any elected official or contractor who violates this Policy Against Retaliation will be subject to appropriate sanctions.

b. Policy Coverage: This Policy Against Retaliation prohibits City officials, officers, employees, or contractors from retaliating against applicants, officers, officials, employees, or contractors because of any of the protected activity as defined herein.

c. Definitions:

1) "Protected activity" includes any of the following:

- Filing a complaint with a federal or state enforcement or administrative agency
- Participating in or cooperating with a federal or state enforcement agency that is conducting an investigation of the City regarding alleged unlawful activity
- Testifying as a party, witness, or accused regarding alleged unlawful activity
- Associating with another employee who is engaged in any of the protected activities enumerated here
- Making or filing an internal complaint with the City regarding alleged unlawful activity
- Providing informal notice to the City regarding alleged unlawful activity
- Calling a governmental agency's "Whistleblower hotline"
- Filing a written complaint under penalty of perjury that the agency has engaged in "gross mismanagement, a significant waste of public funds, or a substantial and specific danger to public health or safety"

2) "Adverse action" may include, but is not limited to, any of the following:

- Real or implied threats of intimidation to attempt or prevent an individual from reporting alleged wrongdoing or because of protected activity
- Refusing to hire an individual because of protected activity
- Denying promotion to an individual because of protected activity

- Taking any form of disciplinary action because of protected activity
- Extending a probationary period because of protected activity
- Altering work schedules or work assignments because of protected activity
- Condoning hostility and criticism of co-workers and third parties because of protected activity

d. Complaint Procedure: An applicant, employee, officer, official, or contractor who feels he or she has been retaliated against in violation of this Policy should immediately report the conduct according to the City's Harassment Complaint procedure so that the complaint can be resolved fairly and quickly.

APPENDIX E

SAMPLE POSTING REQUIREMENT

The Division of Labor Standards Enforcement believes that the sample posting below meets the requirement of Labor Code Section 1102.8(a), except that the lettering is not larger than size 14 point type.

WHISTLEBLOWERS ARE PROTECTED

It is the public policy of the state of California to encourage employees to notify an appropriate government or law enforcement agency when they have reason to believe their employer is violating a state or federal statute, or violating or not complying with a state or federal rule or regulation.

Who is protected?

Pursuant to California Labor Code Section 1102.5, employees are the protected class of individuals. "Employee" means any person employed by an employer, private or public, including, but not limited to, individuals employed by the state or any subdivision thereof, any county, city, city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California. [California Labor Code section 1106]

What is a whistleblower?

A "whistleblower" is an employee who discloses information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses:

1. A violation of a state or federal statute;
2. A violation or noncompliance with a state or federal rule or regulation; or
3. With reference to employee safety or health, unsafe working conditions or work practices in the employee's employment or place of employment.

What protections are afforded to whistleblowers?

1. An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from being a whistleblower.
2. An employer may not retaliate against an employee who is a whistleblower.
3. An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
4. An employer may not retaliate against an employee for having exercised his or her rights as a whistleblower in any former employment.

Under California Labor Code section 98.6, if an employer retaliates against a whistleblower, the employer may be required to reinstate the employee's employment and work benefits, pay lost wages, and take other steps necessary to comply with the law.

How to report improper acts:

If you have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors, or employees, **call the California State Attorney General's Whistleblower Hotline at 1-800-952-5225**. The Attorney General Hotline will refer your call to the appropriate government authority for review and possible investigation.

APPENDIX F

SAMPLE ANTI-BULLYING POLICY

A. Policy: (Agency) is committed to providing a safe work environment. In addition to prohibiting all forms of discrimination and harassment, (Agency) also prohibits any form of "intimidation or bullying" in the workplace or elsewhere, such as at offsite events.

B. Policy Coverage: Every employee and other individuals, such as temporary agency workers, consultants, independent contractors and visitors, have the right to be treated with respect. Bullying is the use of aggression with the intention of harming another individual. It can include any intentional written, visual, verbal, or physical act, when the act physically harms the individual or damages his or her property; has the effect of interfering with an employee's ability to work; is severe or pervasive; and creates an intimidating or threatening environment.

Bullying comes in many shapes and sizes and can take many forms including, but not limited to, excluding, tormenting, taunting, abusive comments, using threatening gestures; pushing, shoving, punching, unwanted physical contact, or any use of violence; graffiti; name-calling, sarcasm, spreading rumors, teasing. Such conduct can also occur via use of electronic or telephonic communications such as the internet, email and chatroom misuse, mobile threats by text messaging, or calls or misuse of cameras and video equipment.

C. Complaint Procedure: (Agency) will not tolerate bullying in any form. Any individual who believes that he or she is being or has been subjected to any form of bullying should immediately report this to his or her supervisor, department head, or Human Resources representative. In addition, any person who believes they have witnessed bullying and any person who has received a report of such conduct, whether the perpetrator is an employee or a non-employee, shall immediately report the conduct to their supervisor or other appropriate person in the chain of command. [List names of those people in the chain of command with a contact number for each person.]

Any employee who is reported to be a perpetrator will be provided due process before any disciplinary action is taken. Individuals who violate this bullying policy are subject to disciplinary action, up to and including termination.

D. Policy Against Retaliation: No employee will be subjected to any form of retaliation for reporting an incident of bullying, or participating in an investigation by (Agency) or its representatives into allegations of bullying. Additionally, all employees have a duty to cooperate in connection with any investigation being conducted.

ENDNOTES

[1] 42 U.S.C. § 2000e et seq.

[2] 29 U.S.C. § 621 et seq.

[3] 42 U.S.C. § 12101 et seq.

[4] 42 U.S.C. § 2000ff et seq.

[5] Gov. Code, § 12900 et seq.

[6] *Mia Macy* (Apr. 20, 2012) E.E.O.C Doc. 0120120821, 2012 WL 1435995.

[7] Gov. Code, § 12926, subd. (r)(1)(C) (Note: breastfeeding and a medical condition related to breastfeeding was recently added to the Government code in 2013, pursuant to AB 2386).

[8] Gov. Code, §§ 12920, 12921, 12926, and 12940.

[9] Gov. Code, §§ 12926, 12940, subds. (a)-(o); 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.; 42 U.S.C. § 12101 et seq.

[10] *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 855-858 [31 Cal.Rptr.2d 617, 622-624], citing *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613 [107 S.Ct. 2022, 2028], rehg. den. (1987) 483 U.S. 1011 [107 S.Ct. 3244]; *Watson v. Deptment of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1291-1292 [261 Cal.Rptr. 204, 211-213], review den., overruled on other grounds.

[11] Gov. Code, § 12951.

[12] Gov. Code, § 12926, subd. (p).

[13] 42 U.S.C. § 2000e,. (j); Gov. Code, § 12926, subd. (q); 29 C.F.R. § 1605.1; *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.* (June 1, 2015) No. 14-86 575 U.S. ___.

[14] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.* (June 1, 2015) No. 14-86 575 U.S. ___. .

[15] The Americans with Disability Act of 2008 broadens protections of the disabled under federal law. The new federal law will have limited application in California because the Fair Employment and Housing Act's disability provisions have already provided for much broader coverage.

[16] Gov. Code, § 12926, subd. (m).

[17] Gov. Code, § 12926, subd. (m)(1)(B).

[18] Gov. Code, § 12926, subd. (m)(2).

[19] Gov. Code, § 12926, subd. (m)(4); 42 U.S.C. § 12102(1)(C).

[20] Gov. Code, § 12926, subd. (m)(6); see 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3.

[21] Gov. Code, § 12926, subd. (m)(6); 42 U.S.C. § 12211.

[22] Gov. Code, § 12926, subd. (j)(5);.

[23] Gov. Code, § 12926, subd. (i).

[24] 42 U.S.C. § 2000e, (k); Gov. Code, §§ 12926, subd. (r), 12940, subd. (j)(4)(C); *Matthews v. Superior Court (Regents of the University of California)* (1995) 34 Cal.App.4th 598, 603 [40 Cal.Rptr.2d 350, 354], as mod.; *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504 (pregnancy harassment), overruled on other grounds; *Badih v. Myers* (1995) 36 Cal.App.4th 1289 [43 Cal.Rptr.2d 229], review den. (Oct 19, 1995).

[25] Gov. Code, § 12926, subd. (r)(2).

[26] Gov. Code, § 12949.

[27] Gov. Code, § 12949.

[28] *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1415-1416 [26 Cal.Rptr.2d 116, 119, 121]; *E.E.O.C. v. Farmer Bros. Co*. (9th Cir. 1994) 31 F.3d 891, 898; *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75 [118 S.Ct. 998].

[29] Gov. Code, § 12940, subd. (j)(4)(C); *Taylor v. Nabors Drilling USA* (2014) 222 Cal.App.4th1228 [166 Cal.Rptr.3d 676].

[30] Gov. Code, § 12945, subd. (a)(3)(A).

[31] Gov. Code, §§ 12926, subd. (b), 12941; 29 U.S.C. § 631.

[32] Gov. Code , § 12940.

[33] Fam. Code, § 297 et seq.

[34] Gov. Code, § 12940 et seq.

[35] Fam. Code, § 297.5, subd. (g).

[36] 42 U.S.C. § 2000ff(2)(B)-(D).

[37] 42 U.S.C. § 2000ff et seq.

[38] 42 U.S.C. § 2000ff-1(a)(1).

[39] 29 C.F.R. § 1635.7.

[40] 42 U.S.C. § 2000ff-1(a)(2).

[41] 42 U.S.C. § 2000ff-1(b).

[42] 42 U.S.C. § 2000ff-1(b)(1)-(6).

[43] 42 U.S.C. § 2000ff-5.

[44] 42 U.S.C. § 2000ff-5(b).

[45] Gov. Code, § 12940; Civ. Code, § 51(b).

[46] Gov. Code, § 12926, subd. (g).

[47] Gov. Code, §12926, subd. (k).

[48] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 475 [30 Cal.Rptr.3d 797, 821]; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046 [32 Cal.Rptr.3d 436, 447-448].

[49] *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 477 [4 Cal.Rptr.2d 522, 528-529], rehg. den. and opn. mod. (Mar 5, 1992); *Trent v. Valley Elec. Ass'n, Inc.* (9th Cir. 1994) 41 F.3d 524, 526 (citing *Sias v. City Demonstration Agency* (9th Cir. 1978) 588 F.2d 692, 695); *E.E.O.C. v. Crown Zellerbach Corp*. (9th Cir. 1983) 720 F.2d 1008, 1013.

[50] *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1085-1086, 1097 [4 Cal.Rptr.2d 874, 875, 883], overruled on other grounds.

[51] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1044.

[52] Gov. Code, § 12926, subd. (o).

[53] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052 [32 Cal.Rptr.3d 436, 453].

[54] 42 U.S.C. § 2000e-2(a).

[55] 42 U.S.C. § 2000e-2(a).

[56] *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317 [100 Cal.Rptr.2d 352].

[57] *McRae v. Dept. of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377 [48 Cal.Rptr.3d 313]; *Galabya v. New York City Bd of Educ.* (2nd Cir. 2000) 202 F.3d 636.

[58] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817], on remand & decision affd. by (1976) 528 F.2d 1102 (1976).

[59] 42 U.S.C. § 2000e-2(m).

[60] *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 [152 Cal.Rptr.3d 392], rehg. den. (Apr 17, 2013).

[61] *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 [152 Cal.Rptr.3d 392], rehg. den. (Apr 17, 2013).

[62] 42 U.S.C. § 2000e-5(g)(2)(B).

[63] 42 U.S.C. § 2000e-2(k)(1)(A); *Stender v. Lucky Stores, Inc.* (N.D. Cal. 1992) 803 F.Supp. 259.

[64] 42 U.S.C. § 2000e-2(k)(2).

[65] *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432 [91 S.Ct. 849].

[66] 42 U.S.C. § 2000e-2(e)(1).

[67] *International Union, United Auto., Aerospace and Agr. Implement Workers of America, U.A.W. v. Johnson Controls, Inc.* (1991) 499 U.S. 187 [111 S.Ct. 1196]; see also *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400 [105 S.Ct. 2743](holding that being younger than 60 years of age was valid BFOQ for the position of flight engineer as it was necessary to the safe transportation of passengers).

[68] *Equal Employment Opportunity Commission v. Spokane Concrete Products, Inc.* (E.D. Wash. 1982) 534 F.Supp. 518.

[69] *Lam v. University of Hawaii* (9th Cir. 1994) 40 F.3d 1551, 1560, n. 13, as amended (Dec 14, 1994); see also *Bollenbach v. Board of Educ. of Monroe-Woodbury Cent. School Dist.* (S.D. N.Y. 1987) 659 F.Supp. 1450 (holding that school district's refusal to assign female bus drivers to routes serving an all male religious school of Hasidic Jews violated Title VII).

[70] Gov. Code, § 12940, subd. (j); 42 U.S.C. § 2000e et seq.; *Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57 [106 S.Ct. 2399].

[71] *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 20-21 [114 S.Ct. 367, 370] (citations omitted); *Meritor Savings Bank, FSB* (1986) 477 U.S. 57, 67-68 [106 S.Ct. 2399, 2405-2406]; *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, cert. den. by (1995) 513 U.S. 1082 [115 S.Ct. 733]; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872; 29 C.F.R. § 1604.11(a); see also *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 347-349 [21 Cal.Rptr.2d 292, 294-296], mod. on den. of rehg. (Aug 20, 1993), review den. (Nov 16, 1993), disapproved on other grounds.

[72] *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264 [42 Cal.Rptr.3d 2].

[73] *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945 [139 Cal.Rptr.3d 464].

[74] Cal. Code Regs., tit. 2 § 7287.6, subd. (b)(1); Unemp. Ins. Code, § 1256.2; Ed. Code, § 212.5; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992 [47 Cal.Rptr.2d 478]; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476-477 [4 Cal.Rptr.2d 522, 528], rehg. den. and opn. mod. (Mar 5, 1992).

[75] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].

[76] *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264 [42 Cal.Rptr.3d 2].

[77] *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr.842, 851], review den. (Jan 18, 1990).

[78] *Koelsch v. Beltone Electronics Corp.* (7th Cir. 1995) 46 F.3d 705; *Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, cert. den. by (1991) 502 U.S. 957 [112 S.Ct. 417].

[79] *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 610 [262 Cal.Rptr.842, 852], review den. (Jan 18, 1990), (citing *Downes v. F.A.A.* (Fed. Cir. 1985) 775 F.2d 288, 293, overruled on other grounds).

[80] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 463-464 [30 Cal.Rptr.3d 797, 811-813].

[81] *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121 [87 Cal.Rptr.2d 132], cert. den. by (2000) 529 U.S. 1138 [120 S.Ct. 2029].

[82] *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 282-285 [42 Cal.Rptr.3d 2, 14-17].

[83] *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116, 118].

[84] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 814].

[85] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 814].

[86] *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686 [101 Cal.Rptr.3d 773], as mod., rehg. den. (Sep 23, 2009).

[87] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797].

[88] *Is Love in the Next Cubicle Over?* (2013) <http://msn.careerbuilder.com/Article/MSN-3312-Workplace-Issues-Is-love-in-the-next-cubicle-over/> *CareerBuilder.com.*

[89] Gov. Code, § 12940, subd. (j)(1).

[90] *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475 [4 Cal Rptr.2d 522, 527-528], rehg. den. and opn. mod. (Mar 5, 1992); 29 C.F.R. § 1604.11(e).

[91] *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1478, fn. 1 (citing *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 516, overruled on other grounds); 29 C.F.R. § 1604.11(a)(1)-(a)(2).

[92] *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1012, fn. 10 [47 Cal.Rptr.2d 478, 492] (quoting *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 607 [262 Cal.Rptr. 842, 851], review den. (Jan 18, 1990)); *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116, 118].

[93] *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 511-513, overruled on other grounds; 29 C.F.R. § 1604.11(a).

[94] *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 513, overruled on other grounds.

[95] Gov. Code, § 12950.1, subd. (b).

[96] Gov. Code, § 12950.1, subd. (g)(2).

[97] Gov. Code, § 12950.1, subd. (g)(2)..

[98] Gov. Code, § 12940, subd. (h); 42 U.S.C. § 2000e-3(a).

[99] *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1125 [75 Cal.Rptr.2d 27, 39]; *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 217 [51 Cal.Rptr.2d 642, 649], rehg. den. (May 2, 1996); *Chen v. County of Orange* (2002) 96 Cal.App.4th 926 [116 Cal.Rptr.2d 786], mod. on den. of rehg., review den. (Mar 14, 2002); *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 [116 Cal.Rptr.2d 602, 612]; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 [32 Cal.Rptr.3d 436].

[100] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043 [32 Cal.Rptr.3d 436, 445].

[101] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046-1047 [32 Cal.Rptr.3d 436, 448-449].

[102] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046-1047 [32 Cal.Rptr.3d 436, 448-449].

[103] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1051 [32 Cal.Rptr.3d 436, 452].

[104] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 [32 Cal.Rptr.3d 436, 455].

[105] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 [32 Cal.Rptr.3d 436, 454].

[106] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054-1055 [32 Cal.Rptr.3d 436, 454-455].

[107] *Gardenhire v. Housing Authority of City of Los Angeles* (2000) 85 Cal.App.4th 236 [101 Cal.Rptr.2d 893], rehg. & review den. (Mar 14, 2001) (Jury award of $1,425,000.00).

[108] *Sarro v. City of Sacramento* (E.D. Cal. 1999) 78 F.Supp.2d 1057.

[109] *Shannon v. Bellsouth Telecommunications, Inc.* (11th Cir. 2002) 292 F.3d 712. The court found that denial of overtime was an adverse action, reasoning that while not everything that makes an employee unhappy is an adverse action, conduct that alters an employee's compensation, terms, conditions, or privileges of employment does constitute adverse action.

[110] *Signer v. Tuffey* (2nd Cir. 2003.) 66 Fed.Appx. 232. The court held that relocation of an office to the basement and reduction in duties is an adverse employment action. The court reasoned that adverse actions are considered material if they are of such quality or quantity that a reasonable employee would find the conditions of his or her employment altered for the worse.

[111] *Gunnell v. Utah Valley State College* (10th Cir. 1998) 152 F.3d 1253.

[112] *Woods v. Washington* (9th Cir. 2012) 475 Fed.Appx. 111 [2012 WL 1111470] (unpublished decision).

[113] *Tran v. Trustees of the State Colleges in Colorado* (10th Cir. 2004) 355 F.3d 1263.

[114] *Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 72-80 [105 Cal.Rptr.2d 652, 667-674].

[115] *Clark County School District v. Breeden* (2001) 532 U.S. 268, 273 [121 S.Ct. 1508, 1511], rehg. den. (Apr 3, 2001) by (2001) 533 U.S. 912 [121 S.Ct. 2264].

[116] *Reeves v. Safeway Stores, Inc*. (2004) 121 Cal.App.4th 95 [16 Cal.Rptr.3d 717].

[117] *Poland v. Chertoff* (9th Cir. 2007) 494 F.3d 1174, on remand (2008) 559 F.Supp.2d 1127.

[118] *Garcetti v. Ceballos* (2006) 547 U.S. 410, 421-423 [126 S.Ct. 1951, 1959-1961]; *Lane v. Franks* (2014) 573 U.S. ____[134 S.Ct. 2369] (sworn testimony is citizen speech).

[119] *Konits v. Valley Stream Central High School* (2nd Cir. 2005) 394 F.3d 121, 125-126.

[120] Lab. Code, § 1102.5, subd. (b).

[121] *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443 [152 Cal.Rptr.3d 595].

[122] *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 [176 Cal.Rptr.3d 268].

[123] *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 [176 Cal.Rptr.3d 268].

[124] *Satyadi v. West Contra Costa Healthcare District* (2014) 232 Cal.App.4th 1022 [182 Cal.Rptr.3d 21].

[125] Lab. Code, § 1102.5, subd. (e).

[126] Lab. Code, § 1102.8.

[127] Lab. Code, § 2699, subd. (a).

[128] Lab. Code, § 2699, subd. (g)(1).

[129] Gov. Code, § 53297.

[130] Gov. Code, § 53298.

[131] Assembly Bill 263; Senate Bill 666.

[132] Lab. Code, § 1019, subd. (b)(1).

[133] Lab. Code, § 1019.

[134] Lab. Code, § 1019, subd. (c).

[135] The California False Claims Act is codified at Government Code, § 12650 et seq. The Federal False Claims Act can be found at 31 U.S.C. § 3729 et seq.

[136] *Rothschild v. Tyco International, Inc.* (2000) 83 Cal.App.4th 488, 494 [99 Cal.Rptr.2d 721, 725].

[137] Gov. Code, § 12650 et seq.

[138] Gov. Code, § 12653.

[139] *Wilkins v. St. Louis Housing Authority* (8th Cir. 2002) 314 F.3d 927.

[140] 29 U.S.C. § 2601 et seq.

[141] Gov. Code, § 12945.2.

[142] Gov. Code, § 12945.

[143] Mil. & Vet. Code, § 389 et seq.

[144] 38 U.S.C. 4301 § et seq.

[145] 29 U.S.C. § 201 et seq.

[146] Lab. Code, § 98.7; 29 U.S.C. § 215 (a)(3).

[147] Lab. Code, § 6310.

[148] 42 U.S.C. § 7622.

[149] 42 U.S.C. §§ 300f - 300j.

[150] *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252 [59 Cal.Rptr.3d 692].

[151] Gov. Code, § 3500 et seq.

[152] Gov. Code, § 3540 et seq.

[153] Gov. Code, § 3512 et seq.

[154] Gov. Code, § 3560 et seq.

[155] Gov. Code, § 71600 et seq.

[156] Gov. Code, § 71800 et seq.

[157] Gov. Code, § 3300 et seq.; Gov. Code, § 3250 et seq.

[158] Gov. Code, § 12940, subd. (k).

[159] Gov. Code, § 12940, subd. (j) ; *Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774 [187 Cal.Rptr.3d 119] (applying FEHA to woman contracted to provide phlebotomy services to the City) ; *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407 [173 Cal.Rptr.3d 689] (FEHA protects all employees regardless of immigration status).

[160] Cal. Code Regs., tit. 2, § 7287.6(b)(3); 29 C.F.R. § 1604.11(f).

[161] Gov. Code, § 12950.

[162] Cal. Code Regs., tit. 2, § 7287.6(b)(1)(E).

[163] *Johnson v. County of Los Angeles Fire Dept.* (C.D. Cal., 1994) 865 F.Supp. 1430.

[164] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].

[165] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].

[166] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].

[167] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441]; Gov. Code, § 12950, subd. (b)(3).

[168] See *Neugarten and Shafritz, Eds., Sexuality in Organizations: Romantic and Coercive Behaviors at Work* (Moore Publishing Co. 1980), pp. 92 et seq.

[169] Pen. Code, § 13519.7.

[170] Gov. Code, § 12950.1.

[171] Gov. Code, § 12950.1.

[172] Gov. Code, § 12926, subd. (t).

[173] *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852].

[174] Gov. Code, § 12926, subd. (t); *Chapman v. Enos* (2004) 116 Cal.App.4th 920 [10 Cal.Rptr.3d 852].

[175] Assem. Bill No. 2053 (2013-2014 Reg. Sess.)

[176] Assem. Bill No. 2053 (2013-2014 Reg. Sess.)(g)(2).

[177] Assem. Bill No. 2053 (2013-2014 Reg. Sess.)(g)(2).

[178] *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121 [87 Cal.Rptr.2d 132], cert. den. by (2000) 529 U.S. 1138 [87 Cal.Rptr.2d 132]; *Sarro v. City of Sacramento* (E.D. Cal. 1999) 78 F.Supp.2d 1057.

[179] *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184.

[180] *National Labor Relations Bd. v. J. Weingarten, Inc.* (1975) 420 U.S. 251 [95 S.Ct. 959].

[181] *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510 [152 Cal.Rpt.3d 154].

[182] *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822 [221 Cal.Rptr. 529]; see also *TRW, Inc. v. Superior Court* (1994) 25 Cal.App.4th 1834 [31 Cal.Rptr.2d 460], rehg. den. (Jul 21, 1994), review den. (Sep 15, 1994), cert. den. by (1995) 513 U.S. 1151 [115 S.Ct. 1102] (extending protections to other public employees).

[183] Gov. Code, § 3303.

[184] Gov. Code, § 3253, subd. (e)(1).

[185] Gov. Code, § 3253, subd. (e)(1).

[186] *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900], rehg. den. (Feb 25, 1998); *Sarro v. City of Sacramento* (E.D. Cal.1999) 78 F.Supp.2d 1057; *Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522, as amended (Apr 24, 1995) .

[187] *Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522, 1528-1529, as amended (Apr 24, 1995).

[188] *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121 [87 Cal.Rptr.2d 132], cert. den. by (2000) 529 U.S. 1138 [120 S.Ct. 2029].

[189] *Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522, as amended (Apr 24, 1995).

[190] *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608, fn. 6, 615 [262 Cal.Rptr. 842, 851, 856], review den. (Jan 18, 1990) (citing *Henson v. City of Dundee* (11th Cir. 1982) 682 F.2d 897, 905); Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(3) (citing Lab. Code, §§ 1411, 1412, 1418, subd. (a), 1420, 1420.1, 1420.15 and Gov. Code, §§ 12920, 12921, 12935, subd. (a), 12940, 12941, 12942.

[191] *Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522, 1528-1529, as amended (Apr 24, 1995).

[192] *Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522, 1528-1529, as amended (Apr 24, 1995).

[193] *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1464, cert. den. by (1995) 513 U.S. 1082 [115 S.Ct. 733].

[194] *Yamaguchi v. U.S. Dept. of the Air Force* (9th Cir. 1997) 109 F.3d 1475, 1482.

[195] *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882.

[196] *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773.

[197] *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1464, cert. den. by (1995) 513 U.S. 1082 [115 S.Ct. 733] (citing *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 780, fn. 9).

[198] *Birschtein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994 [112 Cal.Rptr.2d 347], rehg. den. (Nov 7, 2001), and review den. (Jan 16, 2002).

[199] *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074 [6 Cal.Rptr.3d 457], as mod.

[200] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].

[201] Gov. Code, § 911.2; *Gong v. City of Rosemead* (2014) 226 CalApp.4th 363 [171 Cal.Rptr.3d 881.].

[202] *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 868-869 [193 Cal.Rptr. 760, 764-765].

[203] *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422 [217 Cal.Rptr. 16].

[204] *Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322; 29 C.F.R. § 1601.13.

[205] *National R.R. Passenger Corp. v. Morgan* (2002) 536 U.S. 101 [122 S.Ct. 2061].

[206] *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1483 (citing *Plummer v. Western Intern. Hotels Co., Inc.* (9th Cir. 1981) 656 F.2d 502, 504.)

[207] 42 U.S.C. § 2000e-5; 29 C.F.R. §§ 1601.13, 1601.15, 1601.16, 1601.22.

[208] Gov. Code, § 12960; see also *Denney v. Universal City Studios, Inc.* (1992) 10 Cal.App.4th 1226, 1231 [13 Cal.Rptr.2d 170, 172] overruled on other grounds.

[209] *McDonald v. Antelope Valley Community College District* (2008) 45 Cal.4th 88, 112-113 [84 Cal.Rptr.3d 734].

[210] Gov. Code § 12965, subd. (a).

[211] Gov. Code, §§ 12965, subd. (a), 12981, subd. (a).

[212] Gov. Code § 12989.2.

[213] Gov. Code § 12965, subd. (b).

[214] Gov. Code, § 12965, subd. (b); *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 418 [27 Cal.Rptr.2d 457, 467], as mod., review den. (Apr 28, 1994); *Bihun v. AT&T Information Systems, Inc*. (1993) 13 Cal.App.4th 976, 996-997 [16 Cal.Rptr.2d 787, 797-798], overruled on other grounds.

[215] Gov. Code, § 12965, subd. (b).

[216] Gov. Code, § 12950.1.

[217] *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1014 [47 Cal.Rptr.2d 478, 493-494, 497]; *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9 [42 Cal.Rptr.2d 842, 853]; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221 [185 Cal.Rptr. 270, 276]; *Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57 [106 S.Ct. 2399]; Gov. Code, § 12965, subd. (b).

[218] *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 415-415 [27 Cal.Rptr.2d 457, 466], as mod. (Mar 4, 1994), review den. (Apr 28, 1994) (citing *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608, fn. 6 [262 Cal.Rptr. 842, 851]); Gov. Code, § 12940, subd. (j)(4)(A); *Doe v. Capital Cities/ABC* (1996) 50 Cal.App.4th 1038 [58 Cal.Rptr.2d 122], review den. (Feb 26, 1997); *Patterson v. Domino's Pizza, LLC* (2012) 207 Cal.App.4th 385 [143 Cal.Rptr.3d 396], review granted.

[219] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 [6 Cal.Rptr.3d 441].

[220] *Miller v. Maxwell's Intern., Inc.* (9th Cir. 1993) 991 F.2d 583, 587-588, cert. & rehg. den. by (1994) 510 U.S. 1109 [114 S.Ct. 1049]; *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 603 [40 Cal.Rptr.2d 350, 354], as mod. on den. of rehg. (May 17, 1995); *Page v. Superior Court* (1995) 31 Cal.App.4th 1206 [37 Cal.Rptr.2d 529], review den. (Mar 30, 1995); *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467 [20 Cal.Rptr.3d 428]; Gov. Code, § 12940, subd. (j)(3).

[221] *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 603 [40 Cal.Rptr.2d 350, 354]; *Page v. Superior Court* (1995) 31 Cal.App.4th 1206 [37 Cal.Rptr.2d 529], review den. *(Mar 30, 1995)*; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318 [58 Cal.Rptr.2d 308], review den. (Feb 19, 1997); *Reno v. Baird* (1998) 18 Cal.4th 640 [76 Cal.Rptr.2d 499].

[222] *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 [72 Cal.Rptr.3d 624], rehg. den. (Apr 30, 2008)

[223] Gov. Code, § 12940, subd. (j)(1).

[224] *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1250 [32 Cal.Rptr.2d 223, 230], overruling recognized (2005) 128 Cal.App.4th 452 [27 Cal.Rptr.3d 239].

[225] *Pennsylvania State Police v. Suders* (2004) 542 U.S. 129, 146-147 [124 S.Ct. 2342].

[226] Gov. Code, §§ 825, 825.2, 995; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 997 [47 Cal.Rptr.2d 478, 483].

[227] *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005-1008 [47 Cal.Rptr.2d 478, 487-489].

[228] *Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087 [4 Cal.Rptr.3d 475], review den. (Dec 17, 2003).

[229] *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 997-998 [47 Cal.Rptr.2d 478, 482].