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WORKPLACE HARASSMENT LAW IN CALIFORNIA

A guide to California's workplace harassment laws: which conduct is unlawful, who is protected, and how employees can hold employers accountable.

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In California, unlawful workplace ***harassment*** occurs when a person directs negative, inappropriate, or unwanted conduct at a worker based on certain protected characteristics.[1] Those can include the employee's race, disability, religion, sex, gender identity, marital status, sexual orientation, or pregnancy, among other reasons.[2]

Unlawful harassment in the workplace can take many forms, including:

- Inappropriate jokes, derogatory comments, or innuendo;
- Physical harassment, like unwanted touching or hitting;
- Verbal threats or implied threats;
- Visual harassment, like posters or signs;
- Aggressive or repeated requests for sexual favors;[3] and
- Showing favoritism based on a protected characteristic.[4]

Unlawful workplace harassment can be motivated by many types of meanness, bigotry, or personal gratification.[5] At the same time, many workplace behaviors that seem wrong will *not* amount to unlawful harassment. So, it's important for employers and employees to know the scope of California's legal protections against workplace harassment.

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CH. 01

Sources of Harassment Law in California

Workplace harassment in California, like in many states, is a significant problem. Fortunately, California employees are protected by several sets of laws that prohibit workplace harassment:

- **Title VII of the Civil Rights Act of 1964** is a *federal* law that prohibits discrimination on the basis of race, color, religion, sex, or national origin.[6] Although Title VII does not explicitly prohibit harassment, courts interpret "discrimination" on an unlawful basis to include harassment.[7]
- **The Americans with Disabilities Act** specifically protects those with physical and mental disabilities from unfair discrimination and harassment based on their disability.[8]
- **The Age Discrimination in Employment Act** protects workers over the age of 40 from age-related discrimination and harassment.[9]
- **The Fair Employment and Housing Act** (called "FEHA")[10] is a California *state* law that governs many types of discrimination and harassment faced by employees, unpaid interns, job applicants, and some independent contractors.[11]

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The California Constitution prohibits employment discrimination on the basis of sex, race, creed, color, nationality, or ethnic origin.[12] This is not a traditional route for bringing harassment claims, however, as most are handled under Title VII or FEHA.

Each law provides significantly different protections for employees. In almost all cases, the rules under FEHA are the most protective of employee rights (or *equally* as protective as Title VII).[13] For example, Title VII provides harsh caps on the amount of damages employees can recover in harassment lawsuits,[14] while FEHA does not.[15]

Similarly, FEHA's anti-harassment provisions apply to *all* private, state, and local employers, including employers with only one employee.[16] Title VII, on the other hand, applies only to employers who have 15 or more employees.[17]

Fortunately for employees, employers in California are required to follow the law that is most protective to employees.[18] That means employees can choose to pursue relief under one or more of the laws that benefit them the most.

Most employees choose to pursue their case under FEHA because it is usually the most protective of employee rights. The remainder of this article will focus on employment rights under FEHA, unless otherwise stated.

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CH. 02

Which Characteristics Receive Protection?

In California, all overt physical threats and physical assaults are illegal in the workplace.[19] Most cases, however, do not involve that kind of blatantly illegal or criminal conduct. Instead, most workplace harassment is verbal, written, or implied.

Surprisingly, many types of conduct that most people would consider to be "harassment" are perfectly legal in California. To be illegal, the harassment must be motivated by an unlawful reason.[20] The worker must be specifically targeted or singled out because of their protected characteristic.[21]

EXAMPLE

John supervises a group of salespeople. John is regularly mean to all of them. His meanness, however, is always motivated by his team's failure to meet their sales goals. John has likely *not* engaged in unlawful workplace harassment because he was not motivated by an unlawful reason.[22]

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The rest of this chapter will look at the most common protected characteristics in the context of California's anti-harassment laws. Of note, although many of the examples refer to “employees” being protected, California's anti-harassment laws protect nearly all workers, including employees, job applicants, independent contractors, unpaid interns, and volunteers.[23]

The list of protected characteristics has also grown in recent years. Since January 1, 2023, it includes a worker's reproductive health decisionmaking, which is covered in its own section below.[24] And since January 1, 2025, the law makes explicit that any *combination* of protected characteristics is itself protected. A worker harassed for being, say, both older and disabled does not have to prove which single trait motivated the conduct.[25]

2.1 Age

Age-based harassment occurs when a worker over the age of 40 receives less favorable treatment because of their age.[26] Both state and federal law prohibit covered employers from harassing a worker because of their age, so long as the worker is over the age of 40.[27]

2.2 Race, Color, National Origin, or Ancestry

It is unlawful in California for employers to harass workers based on their race, the color of their skin, their national origin, or their ancestry.[28] It is also unlawful for employers to harass a worker for their association with members of other races, skin colors, national origins, or ancestries.[29]

California defines *race* broadly for these purposes. Under a 2019 law known as the CROWN Act, race includes traits associated with race, such as hair texture and protective hairstyles like braids, locs, and twists.[30] Harassing a worker over those traits is therefore a form of racial harassment.

Workers are protected even if they are members of racial groups that have not been traditionally discriminated against (like white workers).[31] Some people refer to these types of claims as “reverse discrimination” claims.

Of course, a worker's ethnicity will not always be readily known by the employer. California has therefore extended its protections against harassment to workers that are *perceived* to be of a certain race, color, national origin, or ancestry (or perceived to associate with these groups).[32] So even if the worker isn't actually a member of a

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protected class, it is still unlawful for an employer who believes them to be a member of that group to harass on that basis.

2.3 Religion

It is unlawful to harass someone for their religious beliefs.[33] The phrase *religious belief* is a broad term that includes all aspects of religious practices.[34] Specifically, it can include the following:

- **Religious belief**: An actual religious belief or perceived belief. A belief in a god, supreme being, or a deity is not required to be considered *religious*, but something more than a philosophy or way of life is required.[35]
- **Profession of religious belief**: Identifying as a believer or practitioner of a particular faith.
- **Outward signs** of a particular religious belief or practice, including rituals, customs, and manner of dress.[36]

The test to determine whether a religious belief is a "genuine" one is whether it is sincerely held by the employee.[37] It is usually up to the employee, not their employer or a court, to decide what is a tenet of their religious belief, what practices are necessary, or what constitutes religious observation.[38]

2.4 Physical Disabilities

Physical disabilities are the most common type of disability in the workplace. In most cases, a *physical disability* is any bodily condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body's major systems and limits a major life activity.[39]

In general, workers have a right to be free from harassment on the basis of their physical disability.[40] There are several ways an employee can show that they suffer from a physical disability. The most common way is to show three things:

- **Physical impairment.** The employee has an anatomical loss, cosmetic disfigurement, physiological disease, disorder, or condition.
- **Major bodily system.** The physical impairment affects at least one of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular,

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reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

- **Limited Life Activity.** The condition limits a major life activity.[41]

A condition *limits a major life activity* if it makes the achievement of that activity difficult.[42] The phrase "major life activity" is treated broadly. It includes normal social activities, basic life functions (walking, eating, sleeping, etc.), and working.[43]

A worker can also establish that they have a physical disability by showing:

- That they have any health impairment that requires special education or related services;[44]
- That they have a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment;[45] or
- That their employer has a mistaken belief that the worker has or had a physical disability.[46]

In addition to the general test described above, California law has specifically included certain conditions as being within the definition of physical disability:

- Deafness,
- Blindness,
- Missing limbs (whether partial or complete),
- Mobility impairments requiring the use of a wheelchair,
- Cerebral palsy, and
- Chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart and circulatory disease.[47]

An employee does *not* have a qualified disability if their condition is mild and temporary.[48] Mild conditions are determined on a case-by-case basis. They include conditions that have little or no long-term effects.[49] Examples include:

- The common cold,
- Seasonal or common influenza,
- Minor cuts or abrasions,
- Sprains,

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- Muscle aches,
- Soreness,
- Bruises,
- Non-migraine headaches, and
- Minor and non-chronic gastrointestinal disorders.[50]

2.5 Mental Disabilities

A *mental disability*, for these purposes, is any mental or psychological condition that limits a major life activity.[51]

In general, workers have a right to be free from harassment due to their mental disability.[52] Likewise, an employer also may not harass a worker based on a perception that the worker has a mental disability, whether or not the belief is correct.[53] Common examples of qualified mental disabilities include:

- Emotional illnesses,
- Mental illnesses,
- Intellectual or cognitive disability,
- Certain learning disabilities,
- Autism spectrum disorders,
- Schizophrenia,
- Clinical depression,
- Bipolar disorder,
- Post-traumatic stress disorder, and
- Obsessive compulsive disorder.[54]

Importantly, California law specifically excludes certain behavioral problems, even though many of them are arguably mental disabilities:

- Compulsive gambling,
- Kleptomania,
- Pyromania,

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- Substance abuse disorders resulting from the current *unlawful* use of drugs, and
- Certain sexual behavior disorders, like pedophilia, exhibitionism, and voyeurism.[55]

Notably, transgender persons do *not* have an excluded sexual behavior disorder. California law protects their right to appear or dress consistently with the employee's gender identity or gender expression.[56]

2.6 Medical Condition

A *medical condition* is defined as any genetic characteristic associated with a disease or a health impairment related to a cancer diagnosis.[57] Medical conditions are often an issue with employees who have an increased risk of future health problems.

California law protects employees with medical conditions.[58] This means that even though an employee is not currently experiencing symptoms, their employer may *not* harass them.

In other words, a medical condition that merely exposes the employee to an increased risk of future health problems is protected, even before any symptoms appear.

2.7 Genetic Information

In California, an employer may *not* collect genetic information from an employee or prospective employee to make any decisions regarding that individual's employment.[59]

Genetic information may not be acquired from:

- The results of an individual's genetic test,
- The results of the genetic tests of the individual's family members,
- The knowledge that a genetic disease has manifested in the individual's family members, and
- Requests for, or receipt of, genetic services by the individual or a family member.[60]

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The phrase *genetic characteristics* refers to:

- A gene, chromosome, or combination of genes known to cause a certain disease or to statistically increase the risk of it, but that hasn't manifested into actual disease, or
- Inherited characteristics of a disease or disorder, or a characteristic that makes an individual more likely to develop a disease but hasn't manifested into disease yet.[61]

> EXAMPLE
>
> An employer may not fire an employee whose mother has Huntington's disease under the assumption that the employee has inherited the disease.

2.8 Marital Status

An employer does *not* have the right to harass a worker for being single, married, separated, divorced, or widowed.[62] Employers are also prohibited from adopting outright bans on hiring married workers at the same place of employment.[63]

It is not, however, considered harassment or discrimination if an employer decides to regulate married coworkers in the same department to minimize any problems that may occur.[64] It is also not discriminatory or harassing behavior to offer bigger benefits packages to those employees with more dependents, such as spouses.[65]

2.9 Sex

In California, an employer may not favor, discriminate against, or harass persons based on their sex.[66] *Sex* normally refers to whether a person is biologically male or female. But the word “sex” in this context is broader than how it is normally used. It can include discrimination based on:

- Pregnancy or medical conditions related to pregnancy,
- Childbirth or medical conditions related to childbirth,
- Breastfeeding or medical conditions related to breastfeeding,
- A person's gender,

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- ⚥ Gender identity, and
- ⚥ Gender expression.[67]

2.10 Pregnancy

In California, it is unlawful for an employer to harass a pregnant employee on the basis of their pregnancy.[68] Pregnancy harassment by an employer is *always* prohibited, regardless of whether the employee is disabled from the pregnancy.

2.11 Gender, Gender Identity, or Gender Expression

Employers are prohibited from harassing employees on the basis of their gender, gender identity, or gender expression.[69] These terms are broad and include a person's gender-related appearance and behavior, even if that isn't stereotypically associated with the person's assigned sex at birth.[70] Thus, people who are transgender, genderqueer, and gender-fluid are protected against employment harassment in California.

2.12 Sexual Orientation

In California, it is unlawful for an employer to harass a person for their sexual orientation.[71] The phrase *sexual orientation* refers specifically to whether a person is heterosexual, homosexual, or bisexual.[72] Employers are also prohibited from harassing employees for their perceived sexual orientation.[73]

> EXAMPLE
>
> An employer covered under the Fair Employment and Housing Act repeatedly belittles a male employee because he “acts gay.” That employer has engaged in unlawful sexual orientation harassment, regardless of whether the employee is actually gay.[74]

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2.13 Reproductive Health Decisionmaking

Since January 1, 2023, it has been unlawful for an employer to harass a worker based on their reproductive health decisionmaking.[75] The phrase is defined broadly. It includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health.[76] Decisions about contraception, fertility treatment, and pregnancy termination all fall within the definition.

Employers also may not require workers to disclose information about their reproductive health decisionmaking as a condition of employment, continued employment, or an employment benefit.[77]

As with the other characteristics discussed in this chapter, workers are also protected based on their *perceived* reproductive health decisions, whether or not the employer's belief is correct.[78]

> EXAMPLE
>
> An employee's supervisor learns that she uses birth control and repeatedly makes demeaning comments about her choice. The supervisor has engaged in unlawful harassment based on reproductive health decisionmaking.[79]

2.14 Military or Veteran Status

It is illegal to harass active and veteran military service members.[80] California's anti-harassment protections apply to active military service members and veterans of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.[81]

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CH. 03

Which Actions Constitute “Harassment”?

California law prohibits both employers[82] and employees[83] from harassing any worker, employee, applicant, volunteer, independent contractor, or unpaid intern if that harassment is motivated by any of the unlawful reasons listed above.[84]

The list of protected characteristics defines which *motives* are unlawful, but it doesn't define which *actions* are unlawful. Unfortunately, there is no bright-line rule that defines which actions constitute “harassment.” Rather, courts have described the concept using very general terms.[85]

In most harassment cases, the critical question is whether a hostile work environment has been created by the harassment. *Hostile work environment harassment* is conduct that is so severe or pervasive that it alters the conditions of the victim's employment and creates an abusive working environment.[86] The employee does not need to show that their productivity declined. It is enough that the harassment made it more difficult for a reasonable person in their position to do the job.[87]

As the name implies, hostile work environments only violate the law if the conduct is *objectively* hostile or abusive. A few annoying or mildly offensive comments are usually not enough.[88]

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The harassment must also *subjectively* offend, humiliate, or distress the victim.[89] A person cannot claim that they experienced a hostile work environment if they were emotionally unaffected by the harassment or if they purposefully invited it.[90] To prove that the victim suffered, they must usually demonstrate one or more of the following:

- The harassment disturbed their emotional tranquility in the workplace,
- The harassment affected their ability to perform their job as usual, or
- The harassment interfered with and undermined their personal sense of well-being.[91]

Courts often look for repeated instances of unlawful conduct.[92] But a pattern is not required. Since 2019, the Legislature has been explicit that a *single* incident of harassing conduct is enough to create a triable claim if it unreasonably interfered with the employee's work performance or created an intimidating, hostile, or offensive working environment.[93] Older decisions suggesting that an isolated incident counts only when it is extreme, like a physical assault or the threat of one, must be read in light of that rule.[94]

Courts in California use several factors to determine whether the work environment is sufficiently hostile or abusive, looking at the totality of the circumstances:[95]

- **Severity of the Conduct.** Conduct that is particularly bad (like nonconsensual physical touching) is more likely to be unlawful than mild conduct. The worse the conduct is, the less frequently it needs to occur in order to meet the threshold of “pervasive” conduct.
- **Frequency of the Conduct.** Even mild behaviors can be unlawful if they happen frequently enough. Improper activities that happen often are more likely to be considered “pervasive” than those that happen once every other month. Some California courts will even attempt to count or approximate the total number of days on which the conduct occurred.
- **Context of the Conduct.** Under this factor, all of the circumstances surrounding the harassment can be examined. In some cases, there may be circumstances beyond the improper conduct that make it more or less egregious. For example, the conduct may be less egregious if it only took place outside of the workplace. The type of workplace, however, does not change the standard: a coarse or sexualized industry culture is no defense.[96]

The weight of each factor will depend heavily on the facts of the case. And, while these factors are helpful in assessing whether a hostile work environment may be present, it is ultimately the court that makes the determination. Because these are

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fact-intensive questions, California law recognizes that harassment cases are rarely appropriate for resolution before trial on summary judgment.[97]

3.1 *Quid Pro Quo* Sexual Harassment

In sex-related cases, a hostile work environment doesn't necessarily need to exist before conduct rises to the level of unlawful harassment. A supervisor or coworker can violate the law if they engage in *quid pro quo* sexual harassment.

"Quid pro quo" is a Latin phrase that means "this for that."[98] Like the name implies, quid pro quo sexual harassment occurs when sexual favors are requested or demanded in exchange for a specific job benefit.[99] (*E.g.*, "If you perform a sex act on me, I will give you a raise.")

Generally, quid pro quo sexual harassment appears in one of two forms:

- An employer or supervisor ***offers*** an employee some kind of benefit which is conditioned upon the employee submitting to a sexual favor;[100] or
- An employer or supervisor ***threatens*** an employee about some sort of work-related action, like a threat of termination, unless the employee submits to certain sexual demands.[101]

Quid pro quo cases often involve unwanted sexual advances, inappropriate discussions of graphic sexual acts, or commentary on the employee's body and the sexual uses to which it could be put.[102]

These kinds of violations can be committed either expressly or impliedly. Merely hinting at a job benefit in exchange for sexual favors can constitute quid pro quo sexual harassment.[103]

Quid pro quo sexual harassment is usually a serious legal violation. Even just one instance of quid pro quo harassment can be enough to bring a lawsuit, as long as a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands.[104]

3.2 Gender is Irrelevant

Workplace harassment laws protect men and women equally (as well as people of any other gender identity). As such, harassment perpetrated by women is unlawful to the same extent it would be for men.[105] Moreover, harassment is unlawful even when the

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victim is the same gender as the aggressor.[106] And the harasser does not need to be motivated by sexual desire; hostility toward a person because of their sex or gender is enough.[107]

In other words, the genders of both the harasser and the victim are irrelevant. The only question is whether the underlying conduct violated the law.

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CH. 04

Common Examples of Unlawful Harassment

The tests defining “harassment” can be a little difficult to understand. This is particularly true for hostile work environment claims because there is no clear rule defining which conduct is severe or pervasive. As such, when analyzing an allegation, many courts rely on the fact patterns of prior cases. These examples can help clarify where courts draw the line in determining whether conduct is unlawful.

One caution when reading older cases: in 2019, the Legislature clarified (and in some respects lowered) the bar for hostile work environment claims.[108] Decisions from before that change, especially ones that ruled for the employer, do not always reflect where the line sits today.

4.1 Unwanted Physical Touching

Unwanted physical touching is generally the clearest type of harassment. Courts have described physical touching as being more offensive than mere words or verbal abuse, in most cases.[109] As such, it is more likely that a court will find unlawful harassment has occurred where there is physical touching.

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For example, in *Rene v. MGM Grand Hotel, Inc.*, an employee was inappropriately touched on his crotch and anus through his clothing on numerous occasions by his coworkers.[110] The court found that this kind of physical conduct was so severe and pervasive that it constituted an objectively abusive working environment.[111] It therefore held that the employee had a valid claim of unlawful harassment.

Many cases, however, involve facts that are far less egregious. For example, an occasional touch on the arm or back might not rise to the level of harassment, even though the employee might interpret it as sexual.

In *Mokler v. County of Orange*, an employee sued her employer for harassment in part because her supervisor had hugged her and, as he did so, he rubbed her breast with his arm.[112] The court found that this touching was brief and did not constitute a sufficiently extreme act of harassment.[113] So, although the supervisor's behavior was rude, inappropriate, and offensive, the employee did not have a valid claim of harassment.[114]

Unfortunately, courts don't have a clear line for these kinds of close-call cases. Instead, they weigh the severity and frequency of the touchings. And decisions like *Mokler* predate the Legislature's 2019 clarification of the standard, so a similar case might come out differently today.[115]

4.2 Derogatory Comments

Perhaps the most common type of harassment comes in the form of derogatory comments. In the real world, these comments are often directed toward women or minorities in the workplace. They might be jokes, insults, slurs, or other types of verbal harassment.[116]

In California, comments alone, with no physical touching, can be enough to constitute harassment. But the comments usually need to be more than just crude, vulgar, or disparaging to be actionable.[117] Rather, like other hostile work environment claims, derogatory comments must be severe or pervasive.[118]

In one case, for example, an effeminate male restaurant employee was subjected to an unrelenting barrage of derogatory names. He was also repeatedly referred to as a woman and was taunted for behaving like a woman.[119] The court held that this kind of verbal abuse was sufficient to establish a valid claim of unlawful harassment.[120]

In a different case, a male supervisor referred to female employees as “dumb fucking broads” and “fucking cunts.”[121] The court noted that the supervisor's abuse of

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women in the workplace centered on their gender. Accordingly, the court found that there was “no doubt” that the employee was harassed based on her gender.[122]

4.3 Inappropriate Propositions

Propositions are also relatively common in the workplace. In general, a single request to go on a date does *not* amount to harassment.[123] There may, however, be a valid claim of harassment if the employee is subjected to repeated advances by the same person or if the employee is punished for rejecting an advance.

In one case, an employee was asked out on a date three or four times by a coworker.[124] Each time, the employee rejected the request. Some time later, the coworker described his sexual fantasies about the employee to her.[125] Upset, the employee complained to her supervisor about the coworker's conduct. After that, the coworker began to stare at her angrily several times each day.[126]

The court in that case held that the coworker's initial propositions could potentially constitute overt acts of sexual harassment. Likewise, the coworker's prolonged campaign of staring at the employee could potentially constitute unlawful retaliation.[127] An employer in such a situation could be potentially liable for unlawful sexual harassment.

Another clearly prohibited behavior in California is the offering of employment or employment benefits in exchange for sexual acts. As mentioned above, these kinds of offers or threats are unlawful quid pro quos.[128]

Importantly, inappropriate propositions do *not* have to be directly spoken to be unlawful; they can be implied by words or conduct.[129] This can occur when a supervisor or other superior implies that their subordinate will get ahead in the workplace through sexual acts.

4.4 Favoritism and Unequal Treatment

California law prohibits favoritism based on unlawful motivations.[130] In the context of harassment, this kind of discrimination can occur when supervisors reward employees based on their race, gender, religion, or other protected characteristic.

In general, isolated instances of favoritism toward an employee with whom the supervisor is having a sexual affair would *not* constitute unlawful sexual harassment.[131] These situations, however, often blur the line between consensual sexual conduct and job-motivated sexual favors.

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When sexual favoritism in a workplace is widespread, it can create an unlawful hostile work environment. In those cases, the demeaning message conveyed to employees is that they are viewed by management as sexual playthings. Or, even worse, the employees may feel that they are required to engage in sexual conduct with their supervisors or the management to get ahead in their job.[132]

In one such case, two female employees sued their employer for sexual harassment because their supervisor engaged in sexual affairs with three subordinate employees at the same time.[133] The supervisor promised and granted unfair employment benefits to the women with whom he was having sex.[134] The court held that this conduct could potentially constitute sexual favoritism widespread enough to justify a claim of hostile work environment sexual harassment.[135]

4.5 Isolated Incidents

For many years, California courts said that isolated incidents of inappropriate conduct were usually *not* enough to rise to the level of unlawful harassment.[136] Employees were expected to show a concerted pattern of harassment of a repeated, routine, or generalized nature.[137]

The Legislature changed that in 2019. A single incident of harassing conduct is now enough to create a triable claim if it unreasonably interfered with the employee's work performance or created an intimidating, hostile, or offensive working environment.[138]

The change was a direct response to a well-known federal case, *Brooks v. City of San Mateo*. There, a supervisor forced his hand under an employee's sweater and bra to fondle her bare breast.[139] The employee required psychological help and even then was unable to successfully return to her job.[140] The court nevertheless held that, because the incident occurred on a single occasion for a matter of minutes, it did not rise to the level of unlawful hostile work environment harassment.[141]

California has expressly rejected that decision. The Legislature declared that *Brooks* "shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act."[142] Under California law today, a single incident like the one in *Brooks* can support a harassment claim.

Frequency still matters. Conduct that is merely occasional, trivial, or sporadic remains difficult to challenge unless an incident is harmful enough on its own.[143] But no employee should assume that a serious incident is beyond the law's reach just because it happened once.

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4.6 Mildly Offensive Behaviors

There is a lot of conduct that most people would consider improper but nevertheless may not constitute harassment under the law.[144] Simple teasing and offhand comments, for example, will not amount to unlawful conduct unless they are serious or persistent.[145]

Additionally, different people have different comfort levels when it comes to things like physical touching or jokes in the workplace. A good rule of thumb for employers looking to avoid harassment claims is that it's best not to engage in or allow any behavior that may be on the line or that you're not sure an employee would be comfortable with.

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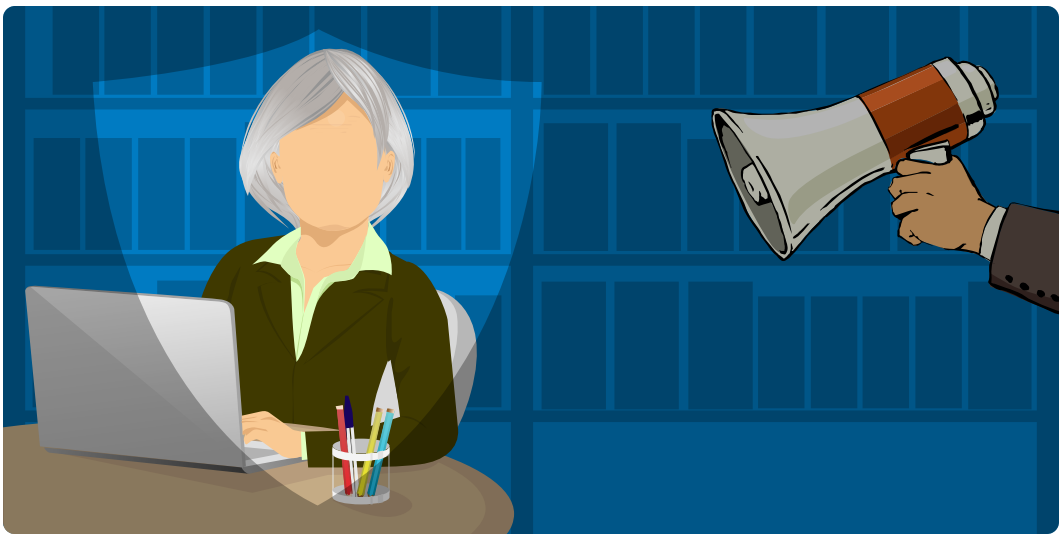
CH. 05

The Duty to Create a Harassment-Free Workplace



In California, employers have a duty to create a harassment-free workplace.[146] For many employers, this duty involves preventing foreseeable harassment, immediately correcting known harassment, and proactively training employees about harassment.[147]

5.1 Preventing Harassment in the Workplace

An employer violates the law if it allows harassment to occur that could have otherwise been prevented.[148] To prove this kind of legal violation, employees must show two things:

- The employer knew or should have known of the harassing conduct, and
- The employer failed to take immediate and appropriate corrective action.[149]

Put simply, if an employee has a history of misconduct or a victim of harassment complains about harassment to the employer, the employer must take all reasonable

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steps necessary to prevent further harassment from occurring.

5.2 Sexual Harassment Training

In California, employers with five or more employees must provide sexual harassment prevention training to all of their California employees, not just supervisors.[150] Supervisory employees must receive at least two hours of training, while nonsupervisory employees must receive at least one hour. The training must be completed within six months of the time the employee is hired or assumes a supervisory position, and it must be repeated once every two years.[151] Seasonal, temporary, and other employees hired to work for less than six months must be trained within 30 calendar days of their hire date or within 100 hours worked, whichever comes first.[152]

The training must include:

- Information and practical guidance about the federal and state laws that prohibit sexual harassment;
- Information about the prevention and correction of harassment and abusive conduct;
- Practical examples of harassment, discrimination, and retaliation;
- Practical examples of harassment based on gender identity, gender expression, and sexual orientation; and
- Information about the remedies available to victims of sexual harassment in employment.[153]

Employers do not have to build this training themselves. The Civil Rights Department (CRD), the state agency formerly known as the Department of Fair Employment and Housing (DFEH), offers free online training courses, one hour long for nonsupervisory employees and two hours long for supervisors. Directing employees to those courses satisfies the training duty.[154]

The failure to provide this training does not automatically make employers liable for sexual harassment.[155] But if a qualified employer fails to comply with California's training requirements, they may find themselves without a defense to certain sexual harassment claims. The failure of the employer to comply with the training requirements could show that the employer did not take reasonable steps to prevent sexual harassment or even correct it.

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5.3 Written Employment Policies

Employers in California are required to develop a written policy regarding the prevention of harassment, discrimination, and retaliation, and distribute that policy to employees.[156] The policy is subject to certain specific requirements, including the following:

- The policy must list all current protected categories covered under the California Fair Employment and Housing Act (FEHA);
- It must indicate that the law prohibits coworkers, third parties, supervisors, and managers from engaging in practices unlawful under FEHA;
- It must create a complaint process;
- It must provide a complaint mechanism that does not require an employee to complain directly to their immediate supervisor;
- It must instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally;
- It must indicate that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected;
- It must state that confidentiality will be kept by the employer to the extent possible, but it cannot indicate that the investigation will be completely confidential;
- It must indicate that if at the end of the investigation misconduct is found, appropriate remedial measures will be taken;
- It must make clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation; and
- It must include a link to, or the website address for, the Civil Rights Department's online sexual harassment training courses.[157]

Additionally, employers must distribute the sexual harassment information sheet prepared by the CRD. Employers are required to distribute that sheet unless they provide their own informational document with equivalent information.[158]

Employers in California are also required to post the CRD's anti-discrimination and harassment notice in a “prominent and accessible” location in the workplace, along

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with a separate CRD poster on transgender rights.[159] Both posters are available on the CRD's website.

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CH. 06

Liability for Workplace Harassment

When harassment occurs in the workplace, the victims suffer. To compensate them for their suffering, California law gives many victims the right to recover money from their harassers.[160]

Many employers believe, incorrectly, that only the person directly harassing another is responsible for paying damages to the employee. While it is true that the individual harassers can be held personally liable for their misconduct,[161] employers are often liable as well.

If the harasser is a supervisor or employer, the employer will be *strictly* liable for the harassment.[162] This means that the employer will be required to pay the victim's damages, even if the employer was not at fault for the harassment and did nothing wrong. Strict liability affects who pays, though, not always how much: the victim's damages may be reduced if the employer took reasonable steps to prevent and correct harassment and the victim unreasonably failed to use the employer's complaint procedures.[163]

If, on the other hand, the harasser is merely a coworker or other non-supervisory employee, the employer will only be liable for the harassment when:

- The employer knew or should have known of the harassing conduct, and

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- The employer failed to take immediate and appropriate corrective action.[164]

This test essentially imposes liability on employers if they were negligent in handling one or more instances of workplace harassment.

Additionally, employers can be liable for harassment even if the harasser is not an employee. But the extent of the employer's liability may depend on the amount of control they have to prevent the nonemployee's offending conduct.[165]

> EXAMPLE
>
> Jane works at a local coffee shop. John, a regular customer, comes into the coffee shop every day and sexually harasses Jane. Jane's supervisor sees the harassment, but does nothing to prevent it from happening. Jane's employer could be liable for failing to prevent the sexual harassment.

When a court finds that a person or business is liable for harassment, the consequences can be severe. Among other damages, employers could be subject to the following:

- Paying the employee backpay, contributing to the employee's retirement funds, or giving the employee other amounts that are meant to compensate them for all the harm caused by the unlawful acts;[166]
- Paying damages equal to the amount of money the employee may have lost from: an unfair firing, the refusal to promote the employee, or unequal pay;[167]
- Repaying the employee's attorney fees;[168]
- Repaying the employee's litigation expenses or expert witness fees;[169]
- Reinstatement of the employee in their job, or paying the employee's future projected earnings if reinstatement isn't feasible;[170]
- Interest on the amounts won as a result of a lawsuit;[171]
- Compensation for the employee's emotional pain or suffering;[172] and
- Punitive damages meant to punish the employer for their wrongdoing.[173]

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These types of damages are the most common seen in employment cases. If specific facts merit, there may be other types of remedies the employee can pursue.

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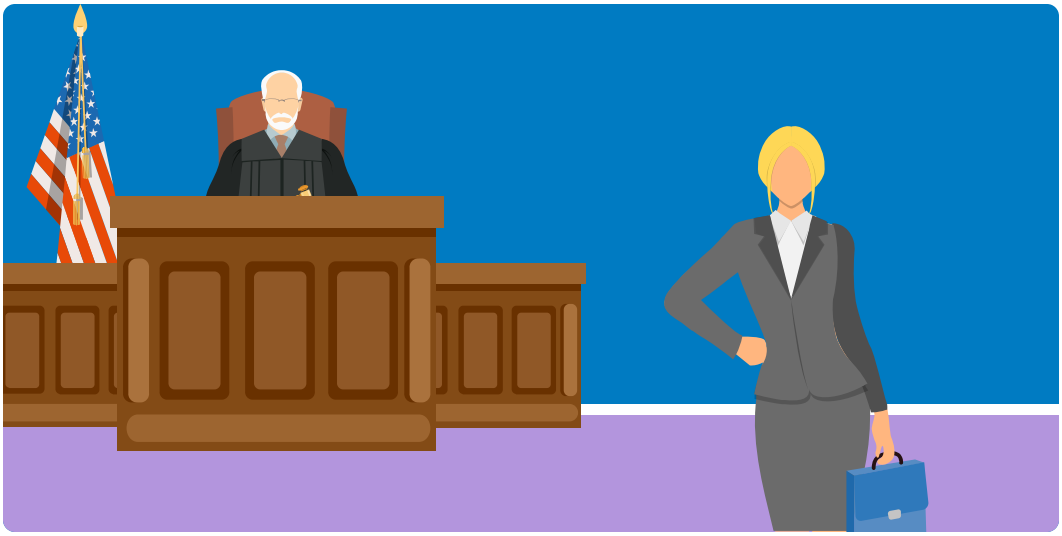
CH. 07

Handling Violations of California's Anti-Harassment Laws



Despite the clear requirements of California law, some employers still violate their employees' legal rights. Employees who have experienced a violation of their right to be free from workplace harassment have three basic options:

- They can attempt to resolve the dispute informally with their employer,
- They can bring an administrative claim to seek damages, or
- They can file a lawsuit in court.

In selecting one of these paths, employees should remember that they may be entitled to compensatory damages, punitive damages, or, in some cases, reinstatement to their former job.

Of course, each option has benefits and disadvantages, and some situations require employees to try all three approaches. It is often a good idea for employees to discuss their case with an employment lawyer.

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7.1 Do Employees Need a Lawyer?

Employees are *not* required to have a lawyer to file a claim against their employer. But it is often a good idea to have one.

The law can be complex and very few cases are straightforward. Even if the facts are strong, an experienced employment law attorney can sometimes help by:

- Collecting all legally relevant information,
- Applying the law to the evidence and related facts in a compelling way,
- Avoiding the strategic pitfalls many nonlawyers are unfamiliar with, and
- Maximizing the financial damages the employee receives.

Of course, there is no guarantee that a lawyer will be able to accomplish these things. But, when employees handle their legal disputes without representation, there is sometimes an increased risk that they will lose or severely harm their case due to legal missteps that a lawyer would have avoided.

If the employer contests the employee's claim, which happens often, legal arguments will have to be made and evidence might need to be presented. This might occur in court or with an administrative agency, sometimes according to complicated legal procedures. It can be a good idea to have a lawyer who is familiar with doing those things.

7.2 Paying for a Lawyer

In many cases, attorneys are willing to work with no upfront costs on the part of the employee. Instead, they will take a percentage of what the employee wins at the end of the case.

It is also possible that the employer will be required to pay the employee's legal fees at the end of the case. Some laws place the burden of those expenses on the employer because it is easier for them to afford it.[174] The reverse is not usually true: an employer that wins a harassment case cannot recover its attorney's fees from the employee unless the court finds the case was frivolous, unreasonable, or groundless.[175]

So, although there is no legal requirement that an employee must have an attorney, navigating the claims process can be much easier if the employee has one.

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7.3 State Law Claims Start with a Government Agency

When an employee decides to sue their employer, a coworker, or their supervisor for violating California's harassment laws, they must first file a complaint with California's Civil Rights Department (the “CRD”).[176] Employees pursuing a claim related to harassment generally *cannot* go straight to court with a lawsuit.[177] An employee who wants to move straight to a lawsuit can, however, request an immediate right-to-sue notice from the CRD, which satisfies this requirement.

The law treats harassment as a form of discrimination. As such, the process for filing a harassment claim with the CRD is the same as the process for filing a discrimination complaint with the CRD. The CRD complaint process is explained in our article: *How to File a Work Discrimination Complaint with California's Civil Rights Department*.

If, after a complaint is filed with the CRD, the claim is not resolved, the employee will be issued a document called a right-to-sue letter.[178] The employee may then pursue their case by bringing a lawsuit in court.

7.4 The Deadline to File (Statute of Limitations)

Employees are up against strict deadlines when pursuing relief for harassment violations. If the employee is bringing claims under state law, they must file a complaint against the employer with California's Civil Rights Department (CRD) within **three years** of the date of the alleged violation.[179]

If the employee has gone through the administrative process and has been issued a right-to-sue letter from the CRD, the employee will then have **one year** to file a lawsuit in civil court against the employer.[180] This one-year clock starts ticking on the date the right-to-sue letter is issued.

There are, of course, exceptions to these time limits. And employees wishing to pursue relief under federal law may be subject to a different timeline altogether. You should speak with a lawyer immediately if you are unsure whether your claim is time-barred.

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7.5 Retaliation Is Prohibited

Even though most employers follow the law, employees are often worried about the consequences of pursuing a claim against their employer. Fortunately, employers are legally prohibited from wrongfully terminating or taking adverse employment actions against their employees simply because they opposed the employer's violations of the law.[181]

Similarly, an employee who has suffered a violation of California's harassment laws has a right to file a complaint, testify, or assist in any proceeding in a claim against their employer. The employer may not retaliate against them for doing so.[182]

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References

1	Gov. Code, § 12940, subd. (j).
2	Gov. Code, §§ 12926, 12940, subd. (j).
3	Cal. Code of Regs., tit. 2, § 11019, subd. (b).
4	*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466.
5	*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63.
6	42 U.S.C. § 2000e-2(a)(1).
7	*Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 64 [106 S.Ct. 2399, 2404] [“Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.”].
8	42 U.S.C. § 12101(b)(2). The ADA has since been modified by the ADA Amendments Act of 2008, which kept the ADA's original purpose but expanded the rights it provided. (Pub.L. No. 110-325, § 2, 122 Stat. 3553.)
9	29 U.S.C. § 621(b).
10	Gov. Code, § 12900 et seq.
11	Gov. Code, § 12940, subd. (j)(1).
12	Cal. Const., art. I, § 8 [“A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.”].
13	See *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040 [noting that, unlike FEHA, “Title VII lacks specific language on sexual harassment”].
14	42 U.S.C. § 1981a(a)–(d).
15	*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215 [“the FEHA does not limit the relief a court may grant in a statutory

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suit charging employment discrimination"]; see Gov. Code, § 12965.

16 Gov. Code, § 12940, subd. (j)(4)(A) ["For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."].

17 42 U.S.C. § 2000e(b).

18 *Bohemian Club v. Fair Employment & Hous. Comm.* (1986) 187 Cal.App.3d 1, 17 [finding that FEHA is not preempted by Title VII].

19 See Penal Code, §§ 242, 422.

20 *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 195 ["In order to prevail under the disparate treatment theory, an employee must show that the employer harbored a discriminatory intent."].

21 Gov. Code, § 12940, subd. (j).

22 See, e.g., CACI No. 2521A [Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))].

23 Gov. Code, § 12940, subd. (j)(1) ["For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract."].

24 Gov. Code, §§ 12926, subd. (y), 12940, subd. (j)(1), as amended by Stats. 2022, ch. 630 (SB 523).

25 Gov. Code, §§ 12920, 12926, subd. (o)(1), as amended by SB 1137 (2024) [declaratory of existing law].

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26 29 U.S.C. §§ 623, 631(a); Gov. Code, §§ 12926, subd. (b) ["'Age' refers to the chronological age of any individual who has reached a 40th birthday."], 12940, subd. (j) [prohibiting harassment on the basis of age, among other protected characteristics].

27 *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal.App.4th 762, 766 ["Both California and federal law prohibit employers from unlawfully discriminating against employees on the basis of their age."]; 29 U.S.C. §§ 621–634; Gov. Code, § 12900, et seq.

28 Gov. Code, § 12940, subd. (j).

29 Gov. Code, §§ 12926, subd. (o)(3), 12940, subd. (j).

30 Gov. Code, § 12926, subds. (w), (x) (the CROWN Act, SB 188 (2019)).

31 *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280 [96 S.Ct. 2574, 2579] ["Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they [non-white] . . . ."].

32 Gov. Code, § 12926, subds. (o)(2), (o)(3) ["A perception that the person has any of those characteristics or any combination of those characteristics" and a perception of association with such a person are treated the same as the characteristics themselves].

33 Gov. Code, § 12940, subd. (j).

34 Gov. Code, § 12926, subd. (q) ["'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. 'Religious dress practice' shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed. 'Religious grooming practice' shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed."].

35 *Friedman v. Southern California Permanente Medical Group* (2002) 102 Cal.App.4th 39, 49 ["A belief in a Supreme Being is not required. [Citations.] But, something more than a philosophy or way of life is required."].

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36 Gov. Code, § 12926, subd. (q).

37 *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1013 [“The relevant inquiry is the sincerity, not the verity of the employee's religious beliefs.”].

38 *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1014; *Fowler v. Rhode Island* (1953) 345 U.S. 67, 70 [73 S.Ct. 526, 527] [“it is no business of courts to say that what is a religious practice or activity for one group is not religion”].

39 Gov. Code, § 12926, subd. (m)(1); *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 584; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1026.

40 Gov. Code, § 12940, subd. (j).

41 Gov. Code, § 12926, subd. (m)(1).

42 Gov. Code, § 12926, subd. (m)(1)(B)(ii) [“A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.”].

43 Gov. Code, § 12926, subd. (m)(1)(B)(iii) [“'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working.”]; Cal. Code of Regs., tit. 2, § 11065, subd. (l)(1) [“Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.”].

44 Gov. Code, § 12926, subd. (m)(2).

45 Gov. Code, § 12926, subd. (m)(3).

46 Gov. Code, § 12926, subds. (m)(4), (m)(5).

47 Cal. Code of Regs., tit. 2, § 11065, subd. (d)(2)(C).

48 Cal. Code of Regs., tit. 2, § 11065, subd. (d)(9)(B).

49 See, e.g., *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 440–444 [no disability found where employee suffered from a mere temporary anxiety disorder], disapproved on other grounds

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in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.

50 Cal. Code of Regs., tit. 2, § 11065, subd. (d)(9)(B) ["'Disability' does not include: . . . conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders."].

51 Gov. Code, § 12926, subd. (j)(1); Cal. Code of Regs., tit. 2, § 11065, subd. (d)(1).

52 Gov. Code, § 12940, subd. (j).

53 Gov. Code, § 12926, subds. (j)(4), (j)(5), (o)(2).

54 Cal. Code of Regs., tit. 2, § 11065, subd. (d)(1).

55 Gov. Code, § 12926, subd. (j) ["'Mental disability' does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs."]; Cal. Code of Regs., tit. 2, § 11065, subds. (d)(9)(A), (q) ["'Sexual behavior disorders,' as used in this article, refers to pedophilia, exhibitionism, and voyeurism."].

56 See Gov. Code, § 12949.

57 Gov. Code, § 12926, subd. (i); Cal. Code of Regs., tit. 2, § 11065, subd. (d)(7).

58 Gov. Code, § 12940, subd. (j).

59 Gov. Code, § 12940, subd. (o) ["It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: . . . For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic."].

60 Gov. Code, §§ 12926, subd. (g), 12940, subd. (o).

61 Gov. Code, § 12926, subd. (i)(2).

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62 Gov. Code, § 12940, subd. (j) [prohibiting harassment on the basis of marital status].

63 *Hope Internat. University v. Superior Court* (2004) 119 Cal.App.4th 719, 724 [“[R]egulations governing California's marital status antidiscrimination laws are clear that marriage between two coworkers is not ipso facto a reason to get rid of one of them.”]; see also *id.* at p. 743 [“the state civil rights statute impliedly provides that employers cannot have an a priori or automatic rule against married coworkers”].

64 Gov. Code, § 12940, subd. (a)(3)(A).

65 Gov. Code, § 12940, subd. (a)(3)(B).

66 Gov. Code, § 12940, subds. (a), (j).

67 Gov. Code, § 12926, subd. (r).

68 Gov. Code, §§ 12926, subd. (r)(1)(A), 12940, subd. (j), 12945.

69 Gov. Code, § 12940, subd. (j).

70 Gov. Code, § 12926, subd. (r)(2) [“'Sex' also includes, but is not limited to, a person's gender. 'Gender' means sex, and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.”].

71 Gov. Code, § 12940, subd. (j).

72 Gov. Code, § 12926, subd. (s) [“'Sexual orientation' means heterosexuality, homosexuality, and bisexuality.”].

73 Gov. Code, § 12926, subd. (o)(2).

74 Gov. Code, §§ 12926, subd. (o)(2), 12940, subd. (j).

75 Gov. Code, § 12940, subd. (j)(1), as amended by Stats. 2022, ch. 630 (SB 523).

76 Gov. Code, § 12926, subd. (y) [“'Reproductive health decisionmaking' includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health.”].

77 Gov. Code, § 12940, subd. (p) [“For an employer to require, as a condition of employment, continued employment, or a benefit of employment, the

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disclosure of information relating to an applicant's or employee's reproductive health decisionmaking."].

78 Gov. Code, § 12926, subd. (o)(2).

79 Gov. Code, §§ 12926, subd. (y), 12940, subd. (j)(1).

80 Gov. Code, § 12940, subd. (j) [prohibiting employers from harassing on the basis of a person's "veteran or military status"].

81 Gov. Code, § 12926, subd. (k) ["'Veteran or military status' means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard."].

82 Gov. Code, § 12940, subd. (j)(4)(A) ["For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."].

83 Gov. Code, § 12940, subd. (j)(3) ["An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."].

84 Gov. Code, § 12940, subd. (j)(1) ["For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract."].

85 See, e.g., *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63 [*Harassment* consists of improper conduct that is engaged in for personal gratification, because of meanness or bigotry, or for other

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personal motives, and is outside the scope of the harasser's job]; *Reno v. Baird* (1998) 18 Cal.4th 640, 646.

86 *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 [“a hostile work environment sexual harassment claim requires a plaintiff employee to show she was subjected to sexual advances, conduct, or comments that were . . . sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment”]; Gov. Code, § 12923, subd. (a).

87 Gov. Code, § 12923, subd. (a) [adopting the standard of Justice Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17: a plaintiff “need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.”].

88 *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 [“Although annoying or 'merely offensive' comments in the workplace are not actionable, conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is unlawful, even if it does not cause psychological injury to the plaintiff.”].

89 Gov. Code, § 12923, subd. (a); *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.

90 *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 68 [106 S.Ct. 2399, 2406] [“The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'”].

91 Gov. Code, § 12923, subd. (a) [harassing conduct is unlawful when it “sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being”]; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608.

92 *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462 [noting that courts consider the frequency and severity of the harassment, among other factors].

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93 Gov. Code, § 12923, subd. (b) [“A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.”], added by Stats. 2018, ch. 955 (SB 1300).

94 See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 [“employment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a physical assault or the threat thereof.'”]; *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1529.

95 *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 [“The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or words (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred.”]; Gov. Code, § 12923, subd. (c) [the existence of a hostile work environment “depends upon the totality of the circumstances,” and a discriminatory remark may be relevant circumstantial evidence even if it was not made in the context of an employment decision or was uttered by a nondecisionmaker].

96 Gov. Code, § 12923, subd. (d) [“It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past.”].

97 Gov. Code, § 12923, subd. (e) [harassment cases are rarely appropriate for disposition on summary judgment; hostile working environment cases involve issues “not determinable on paper”].

98 Cal. Code of Regs., tit. 2, § 11034, subd. (f)(1) [“'Quid pro quo' (Latin for 'this for that') sexual harassment is characterized by explicit or implicit conditioning of a job or promotion on an applicant or employee's submission to sexual advances or other conduct based on sex.”].

99 *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042 [quid pro quo sexual harassment is “a demand for sexual favors in return for a job benefit”].

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100 Cal. Code of Regs., tit. 2, § 11019, subd. (b)(2)(D) [“Harassment includes but is not limited to: . . . Sexual favors, e.g., unwanted sexual advances, which condition an employment benefit upon an exchange of sexual favors.”].

101 *Burlington Indus. v. Ellerth* (1998) 524 U.S. 742, 751 [118 S.Ct. 2257, 2264] [“Cases based on threats which are carried out are referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.”].

102 Cal. Code of Regs., tit. 2, § 11019, subd. (b); *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [“A cause of action for quid pro quo harassment involves the behavior most commonly regarded as sexual harassment, including, e.g., sexual propositions, unwarranted graphic discussion of sexual acts, and commentary on the employee's body and the sexual uses to which it could be put.”].

103 *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [“To state a cause of action on this theory, it is sufficient to allege that a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances.”].

104 *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 [“To establish quid pro quo sexual harassment under these employment laws, a plaintiff must show 'that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands.'”].

105 Gov. Code, § 12940, subd. (j).

106 *Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [“Under both Title VII and FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination because of sex.”].

107 Gov. Code, § 12940, subd. (j)(4)(C) [“Sexually harassing conduct need not be motivated by sexual desire.”].

108 Gov. Code, § 12923, added by Stats. 2018, ch. 955 (SB 1300).

109 *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 [“generally, physical touching is more offensive than unwelcome verbal abuse”]; *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th

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142, 150 [“physical touching generally considered more offensive than mere words”].

110 *Rene v. MGM Grand Hotel, Inc.* (9th Cir. 2002) 305 F.3d 1061, 1064.

111 *Rene v. MGM Grand Hotel, Inc.* (9th Cir. 2002) 305 F.3d 1061, 1065.

112 *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 132.

113 *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 145.

114 *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 145–146.

115 Gov. Code, § 12923, subds. (a), (b).

116 *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 280 [“verbal harassment may include epithets, derogatory comments, or slurs on the basis of sex”].

117 *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 282 [“a hostile work environment sexual harassment claim is not established where a supervisor or coworker simply uses crude or inappropriate language in front of employees or draws a vulgar picture, without directing sexual innuendos or gender-related language toward a plaintiff or toward women in general.”].

118 *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.

119 *Nichols v. Azteca Rest. Enters.* (9th Cir. 2001) 256 F.3d 864, 872–873.

120 *Nichols v. Azteca Rest. Enters.* (9th Cir. 2001) 256 F.3d 864, 878.

121 *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1464.

122 *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1464.

123 *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 153 [isolated incidents insufficient under pre-2019 law]; but see Gov. Code, § 12923, subd. (b) [a single incident may now suffice if it is harmful enough].

124 *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 997.

125 *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 998.

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126 *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 998.

127 *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1002.

128 *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042.

129 *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461 [the prohibition against sexual harassment includes "impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances"].

130 Gov. Code, § 12940, subds. (a), (j).

131 *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 451.

132 *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 451.

133 *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466.

134 *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466.

135 *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 468.

136 *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283 ["courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial"].

137 *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.

138 Gov. Code, § 12923, subd. (b).

139 *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 921.

140 *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 924.

141 *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 927.

142 Gov. Code, § 12923, subd. (b).

143 Gov. Code, § 12923, subds. (a), (b); *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.

144 See, e.g., *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.

145 *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1042.

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146 Gov. Code, § 12940, subds. (j)(1) [“Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.”], (k) [making it unlawful for an employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring”].

147 Cal. Code of Regs., tit. 2, § 11023, subd. (a) [“Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct.”]; Gov. Code, § 12950.1, subd. (a).

148 Gov. Code, § 12940, subd. (j)(1).

149 Cal. Code of Regs., tit. 2, § 11019, subd. (b)(4); *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1419–1420 [“The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action.”].

150 Gov. Code, § 12950.1, subd. (a), as amended by SB 1343 (2017–2018 Reg. Sess.). Before those amendments took effect, the training duty applied only to employers with 50 or more employees and covered only supervisory employees.

151 Gov. Code, § 12950.1, subd. (a).

152 Gov. Code, § 12950.1.

153 Gov. Code, § 12950.1.

154 Gov. Code, § 12950.1; see also Gov. Code, § 12950, subd. (b)(8).

155 Gov. Code, § 12950.1.

156 Cal. Code of Regs., tit. 2, § 11023, subd. (b).

157 Cal. Code of Regs., tit. 2, § 11023, subd. (b).

158 Gov. Code, § 12950, subd. (b).

159 Gov. Code, § 12950, subds. (a)(1), (a)(2).

160 Gov. Code, § 12965; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215 [“the FEHA does not limit the relief a court may

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grant in a statutory suit charging employment discrimination"].

161 *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 62–63 ["it was the intent of the Legislature to place individual supervisory employees at risk of personal liability for personal conduct constituting harassment"].

162 *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041 ["the FEHA makes the employer strictly liable for harassment by a supervisor."].

163 *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026 [adopting the avoidable consequences doctrine for supervisor harassment cases].

164 Gov. Code, § 12940, subd. (j)(1); *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 588.

165 Gov. Code, § 12940, subd. (j)(1) ["An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered."].

166 Civ. Code, § 3333 ["For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."].

167 Civ. Code, § 3333.

168 Gov. Code, § 12965, subd. (c)(6) ["In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees."].

169 Gov. Code, § 12965, subd. (c)(6).

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170 *Pollard v. E. I. du Pont de Nemours & Co.* (2001) 532 U.S. 843, 846 [121 S.Ct. 1946, 1948, 150 L.Ed.2d 62, 67] [“In cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination, courts have ordered front pay as a substitute for reinstatement.”].

171 Civ. Code, § 3287, subd. (a).

172 Civ. Code, § 3333.

173 Civ. Code, § 3294, subds. (a) [“In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.”], (b).

174 Gov. Code, § 12965, subd. (c)(6) [“In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees.”].

175 Gov. Code, § 12965, subd. (c)(6).

176 Gov. Code, § 12960.

177 *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 90 [“Before a person may file a civil complaint alleging a violation of this statute, he or she must first file an administrative claim with the DFEH [now the CRD].”].

178 Gov. Code, § 12965, subd. (c)(1)(A) [if the department does not bring a civil action within 150 days of the complaint, or earlier determines that it will not, it must promptly notify the person that it will issue a right-to-sue notice on request].

179 Gov. Code, § 12960, subd. (e)(5).

180 Gov. Code, § 12965, subd. (c)(1)(C).

181 Gov. Code, § 12940, subd. (h).

182 Gov. Code, § 12940, subd. (h).

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