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THE LEGAL DEFINITION OF “SEXUAL HARASSMENT” IN CALIFORNIA

In California, sexual harassment is unwanted conduct based on sex or gender, and it takes two legal forms: quid pro quo and hostile work environment.

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Sexual harassment generally involves negative, inappropriate, or unwanted conduct directed at a worker based on certain unlawful reasons, like the worker's sex or gender.[1] California law prohibits both employers[2] and employees[3] from sexually harassing any worker, employee, applicant, volunteer, independent contractor, or unpaid intern.[4]

The unlawful reasons that can support a claim of sexual harassment include the worker's:

- Sex,
- Gender,
- Gender identity,
- Gender expression,
- Marital status,
- Sexual orientation,
- Pregnancy,
- Childbirth, or
- Pregnancy-related medical conditions.[5]

This list 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.[6]

To clarify matters, many courts separate sexual harassment claims into two distinct categories:

- Hostile work environment sexual harassment, and
- *Quid pro quo* sexual harassment.[7]

These two categories are not legally definitive, especially because many situations involve both types of sexual harassment.[8] But they help illustrate which actions are prohibited. Both are examined below.

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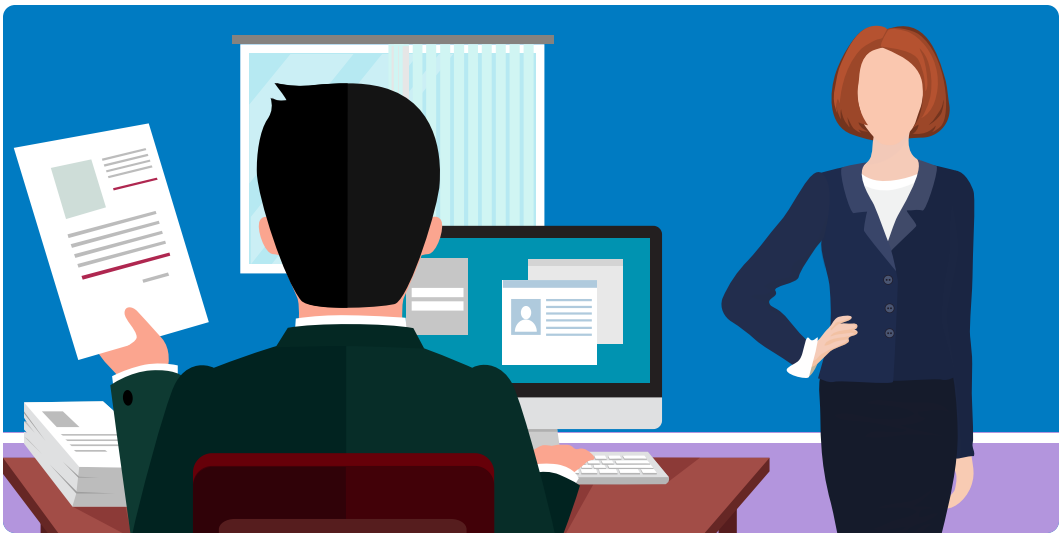
CH. 01

Quid Pro Quo Sexual Harassment



Quid pro quo is a Latin phrase that means "this for that."[9] Like the name implies, quid pro quo sexual harassment occurs when sexual favors are requested or demanded in exchange for a specific job benefit.[10] (*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;[11] 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.[12]

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.[13]

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.[14]

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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.[15]

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CH. 02

Hostile Work Environment Sexual Harassment

Hostile work environment sexual harassment is conduct that is severe or pervasive enough to create an abusive work environment. This type of harassment is unlawful regardless of whether it is motivated by sexual desire.[16] But the improper conduct must be severe, frequent, or both.[17]

Sexual harassment of this sort only violates the law if the conduct is *objectively* hostile or abusive. A few annoying or mildly offensive comments are usually not enough.[18]

In 2019, the Legislature clarified this standard. A worker does not need to prove that their productivity declined because of the harassment. It is enough to show that a reasonable person subjected to the conduct would find, as the worker did, that the harassment made it more difficult to do the job.[19]

The sexual harassment must also *subjectively* offend, humiliate, or distress the victim.[20] 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.[21] To prove that the victim suffered, they must usually demonstrate one or more of the following:

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- 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.[22]

Meeting this test does not necessarily require repeated instances of misconduct. Courts weigh both the frequency and the severity of the harassment: the more severe the conduct, the less often it needs to happen.[23]

In fact, a single incident of harassing conduct is enough to create a triable claim of hostile work environment harassment if it unreasonably interfered with the employee's work performance or created an intimidating, hostile, or offensive working environment.[24] One severe violation, like a physical assault or the threat of one, is a classic example.[25]

Courts in California use several factors to determine whether the work environment is sufficiently hostile or abusive:[26]

- **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 be unlawful.
- **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 legal standard. It doesn't matter that a particular occupation may have tolerated more sexual commentary in the past.[27]

A discriminatory remark can also be relevant evidence of a hostile work environment, even if it was not made as part of an employment decision and even if the speaker was not a decisionmaker.[28]

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

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present, it is ultimately the judge or jury that makes the determination. The Legislature has cautioned that harassment cases are rarely appropriate for disposition on summary judgment, because they involve issues that are “not determinable on paper.” [29]

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CH. 03

Gender Is Usually Irrelevant

Workplace sexual harassment laws protect men and women equally (as well as any other gender identities). As such, sexual harassment perpetrated by women is unlawful to the same extent it would be for men.[30]

Moreover, sexual harassment is unlawful even when the victim is the same gender as the aggressor.[31]

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 Sexual Harassment

The tests defining “sexual 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.

Keep in mind, however, that some of the decisions below predate the Legislature's 2019 clarification of the hostile work environment standard (discussed above). Outcomes that favored employers under the older, stricter reading of the law might come out differently today.[32]

4.1 Unwanted Physical Touching

Unwanted physical touching is generally the clearest type of sexual harassment. Courts have described physical touching as being more offensive than mere words or verbal abuse, in most cases.[33] As such, it is more likely that a court will find unlawful sexual 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.[34] The court found that this kind of physical conduct was so severe and pervasive that it constituted an objectively abusive working environment.[35] It therefore held that the employee had a valid claim of unlawful sexual harassment.

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

In *Mokler v. County of Orange*, an employee sued her employer for sexual harassment in part because her supervisor had hugged her and, as he did so, he rubbed her breast with his arm.[36] The court found that this touching was brief and did not constitute a sufficiently extreme act of harassment.[37] So, although the supervisor's behavior was rude, inappropriate, and offensive, the employee did not have a valid claim of sexual harassment.[38] That decision predates the Legislature's 2019 clarification, however. Under the current single-incident rule, a court could reach a different result on similar facts.[39]

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.

4.2 Sexually Derogatory Comments

Perhaps the most common type of sexual harassment comes in the form of sexually derogatory comments. In the real world, these comments are often directed towards women in the workplace. They might be jokes, insults, slurs, or other types of verbal harassment.[40]

In California, comments alone, with no physical touching, can be enough to constitute sexual harassment. But the comments usually need to be more than just crude, vulgar, or sexually disparaging to be actionable.[41] Rather, like other hostile work environment claims, sexually derogatory comments must be severe or pervasive.[42]

In one case, for example, an effeminate male restaurant employee was subjected to an unrelenting barrage of sexually derogatory names. He was also repeatedly referred to as a woman and was taunted for behaving like a woman.[43] The court held that this kind of verbal abuse was sufficient to establish a valid claim of sexual harassment.[44]

In a different case, a male supervisor referred to female employees as “dumb fucking broads” and “fucking cunts.”[45] The court noted that the supervisor's abuse of women

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in the workplace centered on their gender. Accordingly, the court found that there was "no doubt" that the employee was sexually harassed.[46]

Both of these cases show how abusive conduct can become unlawful when it specifically targets a person because of characteristics related to their gender.

4.3 Inappropriate Propositions

Propositions are also relatively common in the workplace. In general, a single, unadorned request to go on a date does *not* amount to sexual harassment, because a simple request will rarely interfere with the employee's work or create a hostile working environment.[47] There may, however, be a valid claim of sexual 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.[48] Each time, the employee rejected the request. Some time later, the coworker described his sexual fantasies about the employee to her.[49] 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.[50]

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.[51] 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.[52]

Importantly, inappropriate propositions do *not* have to be directly spoken to be unlawful; they can be implied by words or conduct.[53] 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 sex-based discrimination.[54] In the context of sexual harassment, this kind of discrimination can occur when supervisors reward employees with whom they are having sex or punish those who refuse to have sex with them.

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In general, isolated instances of favoritism toward an employee with whom the supervisor is having a sexual affair would *not* constitute unlawful sexual harassment.[55] These situations, however, often blur the line between consensual sexual conduct and job-motivated sexual favors.

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.[56]

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.[57] The supervisor promised and granted unfair employment benefits to the women with whom he was having sex.[58] The court held that this conduct could potentially constitute sexual favoritism widespread enough to justify a claim of hostile work environment sexual harassment.[59]

4.5 Persistent Leering

At least one court has held that persistently staring at an employee in a sexual manner can justify a hostile work environment sexual harassment claim.

In one case, an employee made repeated complaints to her employer that her supervisor was staring at her breasts.[60] The inappropriate staring continued for more than two years. The court held that, in some cases, persistently staring or leering in the workplace can constitute unlawful sexual harassment.[61]

It should be noted, however, that these kinds of cases can be very hard to prove. Juries and judges may be very skeptical that mere looks are sexual in nature, without additional evidence of sexual misconduct.

4.6 Isolated Incidents

In each of these cases, it's important to remember that, in hostile work environment claims, conduct that is merely occasional, sporadic, or trivial is usually *not* enough to rise to the level of unlawful sexual harassment.[62] Employees can prove a claim by showing a concerted pattern of harassment of a repeated, routine, or generalized nature.[63]

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A pattern, however, is not required. As explained above, 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.[64]

The single-incident rule reflects a deliberate choice by the California Legislature. Federal courts once took a much stricter view. In one Ninth Circuit case, a supervisor forced his hand under an employee's sweater and bra to fondle her bare breast.[65] The court reasoned that if a single incident could ever support a hostile work environment claim, “the incident must be extremely severe,” and it held that this one was not, because it occurred on a single occasion and lasted only a matter of minutes.[66]

In 2019, the California Legislature expressly rejected that decision. By statute, the *Brooks* opinion “shall not be used in determining what kind of conduct is sufficiently severe or pervasive” to violate California's harassment laws.[67] A California employee facing facts like those today would have a strong argument that a single serious incident is enough.

4.7 Mildly Offensive Behaviors

There is a lot of conduct that most people would consider improper but nevertheless may not constitute sexual harassment under the law.[68] Simple teasing and offhand comments, for example, will not amount to unlawful conduct unless they are serious or persistent.[69]

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 sexual harassment claims is that it's best not to engage in or allow any behavior which may be on the line or which you're not sure an employee would be comfortable with.

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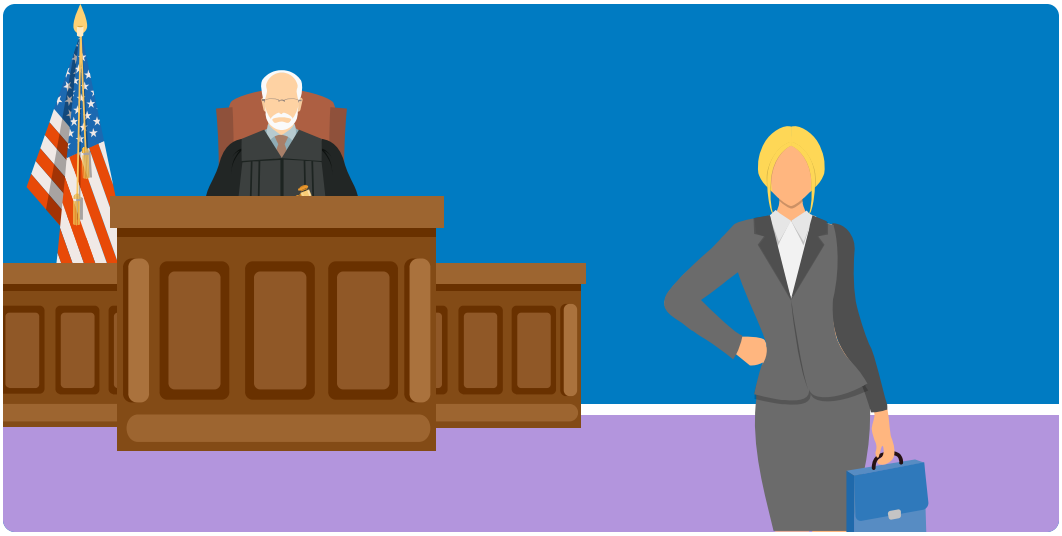
CH. 05

Handling Sexual Harassment Violations



Despite the clear requirements of California law, some employers still violate their employees' legal rights. Employees that have experienced a violation of their right to be free from workplace sexual 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.[70]

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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5.1 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.

5.2 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. In sexual harassment lawsuits, courts can award attorney's fees to a winning employee. A winning employer, by contrast, generally cannot recover its fees unless the court finds the case was frivolous.[71]

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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5.3 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 sexual harassment laws, they must first file a complaint with California's Civil Rights Department (the "CRD"), formerly known as the Department of Fair Employment and Housing (DFEH).[72] Employees pursuing a claim related to sexual harassment generally *cannot* go straight to court with a lawsuit.[73]

Complaints can be filed through the CRD's online portal (the California Civil Rights System, or "CCRS"), or by mail, email, or phone.[74] Employees who already know they want to sue can ask the CRD for an immediate right-to-sue notice when they file, rather than waiting for the agency to investigate.[75]

The law treats sexual harassment as a form of sex discrimination. As such, the process for filing a sexual 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 (CRD)*.

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.[76] The employee may then pursue their case by bringing a lawsuit in court.

5.4 The Deadline to File (Statute of Limitations)

Employees are up against strict deadlines when pursuing relief for sexual harassment violations. If the employee is bringing claims under state law, they must file a complaint against the employer with the CRD no later than **three years** from the date of the alleged violation.[77]

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.[78] 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.[79] 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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5.5 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 employees or taking adverse employment actions against them simply because they opposed the employer's violations of the law.[80]

Similarly, an employee who has suffered a violation of California's sexual 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.[81]

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References

1 Gov. Code, § 12940, subds. (j)(1), (j)(4)(C) [“For purposes of this subdivision, 'harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.”].

2 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.”].

3 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.”].

4 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.”].

5 Gov. Code, § 12940, subds. (j)(1), (j)(4)(C) [“For purposes of this subdivision, 'harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.”].

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

7 *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 65 [106 S.Ct. 2399, 2404]; see also Cal. Code of Regs., tit. 2, § 11034, subd. (f).

8 Cal. Code of Regs., tit. 2, § 11034, subd. (f) [sexually harassing conduct "may be either" quid pro quo or hostile work environment sexual harassment]; see also *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706, fn. 8 [noting that quid pro quo sexual harassment was simply a subcategory of sexual harassment generally].

9 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."].

10 *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"].

11 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."].

12 *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."].

13 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."].

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14 *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.”].

15 *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.'”].

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

17 *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”]; see also Gov. Code, § 12923, subd. (a).

18 *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.”].

19 Gov. Code, § 12923, subd. (a) [“the 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.”], adopting the standard of the concurring opinion of Justice Ruth Bader Ginsburg in *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17 [114 S.Ct. 367].

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

21 *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.'”].

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22 Gov. Code, § 12923, subd. (a) [harassment 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.

23 *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].

24 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.”]; Cal. Code of Regs., tit. 2, § 11034, subd. (f)(2)(A) [“A single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment.”]; see also *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611 [an isolated act of harassment may be actionable if it is sufficiently severe in light of the totality of the circumstances].

25 *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.'”].

26 *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.”]; see also Gov. Code, § 12923, subd. (c) [the existence of a hostile work environment “depends upon the totality of the circumstances”].

27 Gov. Code, § 12923, subd. (d) [“The legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past.”].

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28 Gov. Code, § 12923, subd. (c) [“The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination.”].

29 Gov. Code, § 12923, subd. (e) [“Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms the decision in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues 'not determinable on paper.'”].

30 Gov. Code, § 12940, subd. (j); Cal. Code of Regs., tit. 2, § 11034, subd. (f)(2)(B) [an employer may be liable for sexual harassment “regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator”].

31 *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.”].

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

33 *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 142, 150 [physical touching is generally considered more offensive than mere words].

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

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

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

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

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

39 Gov. Code, § 12923, subd. (b).

40 *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”].

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41 *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.”].

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

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

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

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

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

47 Gov. Code, § 12923, subd. (b) [a single incident of harassing conduct creates a triable issue “if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment”]; see *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 153, decided under the stricter pre-2019 standard.

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

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

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

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

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

53 *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”].

54 Gov. Code, § 12940, subd. (a).

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

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

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

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

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

60 *Billings v. Town of Grafton* (1st Cir. 2008) 515 F.3d 39.

61 *Billings v. Town of Grafton* (1st Cir. 2008) 515 F.3d 39, 50.

62 *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”]; see also Gov. Code, § 12923, subd. (a).

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

64 Gov. Code, § 12923, subd. (b); Cal. Code of Regs., tit. 2, § 11034, subd. (f)(2)(A); *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611.

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

66 *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 926–927.

67 Gov. Code, § 12923, subd. (b) [“the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks v. City of San Mateo* (2000) 229 F.3d 917 and states that the opinion 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.”].

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

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

70 Gov. Code, § 12965; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211 [all relief generally available in noncontractual actions, including punitive damages, may be obtained in a civil action under California's fair employment laws].

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71 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, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.”].

72 Gov. Code, § 12960.

73 *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.”].

74 See Civil Rights Department, *Complaint Process*, https://calcivilrights.ca.gov/complaintprocess/ (opens in new tab).

75 Gov. Code, § 12965, subd. (c)(1)(A); Civil Rights Department, *Complaint Process*, https://calcivilrights.ca.gov/complaintprocess/ (opens in new tab).

76 Gov. Code, § 12965, subd. (c)(1)(A) [“if a civil action is not brought by the department pursuant to subdivision (a) within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought pursuant to subdivision (a), the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice.”].

77 Gov. Code, § 12960, subd. (e)(5).

78 Gov. Code, § 12965, subd. (c)(1)(D) [“The notices specified in subparagraphs (A), (B), and (C) shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice.”].

79 See, e.g., Gov. Code, § 12965, subds. (c)(1)(F), (e), (f) [tolling provisions].

80 Gov. Code, § 12940, subd. (h).

81 Gov. Code, § 12940, subd. (h).

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