LCW LIEBERT CASSIDY WHITMORE

Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment

Statewide Experts | Customized Solutions

www.lcwlegal.com

ALL ABOUT THE AUTHORS

With offices in Los Angeles, San Francisco, Fresno, San Diego and Sacramento, the law firm of Liebert Cassidy Whitmore represents Community College District management in all aspects of labor and employment law, labor relations, and education law as well as providing advice and representation in business and facility matters, both transactional and litigation. The Firm's representation of Community College Districts throughout California, encompasses all phases of counseling and representational services in negotiations, arbitrations, fact findings, and administrative proceedings before local, state and federal boards and commissions, including the Public Employment Relations Board, Fair Employment and Housing Commission, Equal Employment Opportunity Commission, Department of Labor and the Office for Civil Rights of the U.S. Department of Education (OCR). In addition, the Firm handles bidding questions, contract review and revision as well as other contracting issues. The Firm regularly handles a wide variety of labor and employment litigation and litigation regarding business and facilities issues, from the inception of complaints through trial and appeal, in state and federal courts.

Liebert Cassidy Whitmore places a unique emphasis on preventive measures to ensure compliance with the law and to avoid costly litigation. For more than thirty years, the Firm has successfully developed and presented training workshops and speeches on all aspects of employment relations for numerous public agencies and state and federal public sector coalitions, including the Community College League of California (CCLC), Association of California Community College Administrators (ACCCA), Association of Chief Human Resources Officers for Community College Districts (ACHRO), California Community College and University Police Chiefs Association (CA CUPCA), Association of Chief Business Officials (ACBO), California Community College Chief Information Service Officers (CCCCISO), Community College Facility Coalition (CCFC), National Employment Law Institute (NELI), and the Public Agency Risk Management Authority (PARMA).

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

TABLE OF CONTENTS 10-22 C

Section 1 INTRODUCTION

When talking about discrimination, harassment, or retaliation in an academic setting, it is important to remember that there are two distinct environments at issue: the work environment and the educational environment. While each environment presents its own unique challenges, the negative impacts that result from discrimination, harassment, or retaliation in either environment are indisputable. Discrimination, harassment, or retaliation impedes employment and educational opportunities, and negatively impacts employee and student morale, work or academic performance, and the provision of educational services.

Such conduct also: (1) deters quality job applicants from applying to your district; (2) creates a poor public image; and (3) can result in hundreds of thousands of public dollars spent on attorneys' fees and damage awards, rather than on educational services.

This workbook, and the accompanying seminar, provides the training that California law requires employees receive on the prevention of harassment, discrimination, and retaliation. It also discusses the obligations that districts have toward their students in providing them with an educational environment that is free of harassment, discrimination, and retaliation. Lastly, this workbook defines workplace bullying/abusive conduct and provides strategies for prevention.

Section 2 LAWS PROHIBITING HARASSMENT, DISCRIMINATION, AND RETALIATION

Federal and state laws prohibit harassment, discrimination and retaliation in the workplace.

At the federal level, Titles VI and VII of the Civil Rights Act of 1964, codified at 42 U.S.C. sections 2000d *et seq*. and 42 U.S.C. section 2000e, et seq., expressly prohibit discrimination, harassment, and retaliation in the workplace based on certain enumerated protected classifications.[1] These statutes, however, do not identify "age" or "disability" as protected classifications.[2] Instead, it is the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. section 621, et seq., which prohibits discrimination, harassment, and retaliation against employees or job applicants because of age.[3] And it is the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. section 12101 et seq., the ADA Amendments Act of 2008, and Section 504 of the Rehabilitation Act, codified at 29 U.S.C. section 794, which prohibit employers from discriminating, harassing, or retaliating against employees or job applicants because of a physical or mental disability.[4]

In 2008, Congress established a new basis for protection with the passage of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. section 2000ff, et seq.[5] The GINA, specifically Title II, prohibits discrimination in employment based on genetic information.[6] It further prohibits employers from requesting, requiring, or purchasing genetic information, except under a few limited circumstances.[7] In 2009, the United States Supreme

Court held that claims for gender discrimination in violation of the Equal Protection Clause could be brought through a section 1983 action, 42 U.S.C. section 1983.[8]

At the state level, the California Fair Employment and Housing Act (FEHA), California Government Code section 12900, et seq., sets forth the prohibition against discrimination, harassment, and retaliation in the workplace based on a protected status.[9] The FEHA, however, is more than merely the state equivalent of Title VI, VII, the ADEA, the ADA, the ADA Amendments, or the GINA; it provides employees and job applicants with far greater rights than those available through any of those federal statutes, in terms of scope of coverage and available remedies. The FEHA also requires that district employers take all reasonable steps necessary to prevent discrimination and harassment from occurring in the workplace.[10] This mandate, as it pertains to harassment, applies equally to employees, applicants, unpaid interns, volunteers, and persons providing services pursuant to a contract.[11]

LCW Practice Advisor

One notable example of the expanded scope of the FEHA is that the FEHA also protects unpaid interns from harassment and discrimination, and volunteers from harassment.12 The FEHA does not protect volunteers from unlawful discrimination, only harassment. Nonetheless, Districts should refrain from taking adverse actions against volunteers because of their membership in a protected classification.

The California Education Code also prohibits discrimination in employment by any educational institution receiving or benefiting from state funds, and provides a private cause of action for money damages.[13]

Both federal and state laws also prohibit discrimination, harassment and retaliation in the provision of educational services. Title IX of the Educational Amendments Act of 1972 (Title IX), 20 U.S.C. section 1681(a), is the federal law that prohibits sex discrimination in educational programs and activities receiving federal funds.[14] Although Title IX does not specifically reference "harassment," the United States Supreme Court has held that Title IX's ban on sex discrimination encompasses a ban on sexual harassment.[15]

In contrast, California Education Code section 200 et seq., specifically prohibits discrimination and harassment in educational programs or activities on the basis of sex and numerous other protected classifications.[16] And as set forth in California Code of Regulations, title 5, section 59300 et seq., districts have primary responsibilities for ensuring that their educational programs and activities do not discriminate on the basis of a protected status.[17]

Section 3 PROTECTED STATUSES/CLASSIFICATIONS

Federal and/or state law makes it illegal to discriminate or retaliate against, or harass an employee, applicant, or student because of, or based on:

- Race or Color (including traits historically associated with race, including, but not limited to, hair texture and protective hairstyles such as braids, locks, and twists);[18]
- National Origin or Ancestry;
- Religious Creed (including religious dress and grooming practices);
- Physical or Mental Disability;
- Medical Condition (including cancer, a record of cancer, and genetic characteristics, diseases, disorders, or other inherited characteristics);
- Genetic Information (including family medical history);
- Marital Status;
- Sex (including pregnancy, childbirth, breastfeeding, or medical conditions related to pregnancy, childbirth, or breastfeeding[19]);
- Gender (including gender identity);
- Age (40 and above);
- Sexual Orientation (including heterosexuality, homosexuality, and bisexuality);
- Genetic Information
- Veteran or Military Status; [20]
- Opposition to Unlawful Harassment;
- Association with a person that has any of the protected characteristics;
- The perception that a person has any of the protected characteristics;[21] and
- Requesting accommodation of disability or religious beliefs, regardless of whether employer grants the request.[22]

A. RACE AND NATIONAL ORIGIN

Courts have broadly defined what constitutes race or national origin for purposes of establishing a claim of harassment or discrimination. An employee, applicant, or student is protected from harassment or discrimination if he or she is a member of a group that is perceived as distinct when measured against other employees, applicants or students. Under the FEHA, the individual need not be an actual member of the group; its protections apply as long as the individual is

perceived as being in the group.[23] While the group need not have a common birthplace, it should be geographically, culturally, or ethnically distinct.

Thus, a public employee who is African American, Native American, or Iranian American would be a member of a protected class, as would a person who describes himself as East Indian.[24] Since January 1, 2020, the FEHA defines "race" to include hair texture and protective hairstyles, such as braids, locks, and twists.[25]

Further, discrimination or harassment based on an individual's language can fall under the protected status of race or national origin. California law prohibits English-only rules unless: (a) the language restriction is necessary to the safe and efficient operation of the business and there is no alternative practice available that would meet the employer's business need for the rule, (b) the rule is narrowly tailored and effectively fulfills the business need, and (c) the employer has notified its employees of the rule and the consequences of violating the rule.[26] A business need that justifies an English-only rule must be an overriding business purpose such that the language restriction is necessary for the safe and efficient operation of the business; the mere preference of customers or co-workers, or for the purpose of promoting business convenience is not sufficient.[27]

In addition, California law specifically prohibits discrimination based on immigration status or citizenship.[28] For instance, it is unlawful for a district to discriminate against an applicant or employee based on their having a driver's license issued to undocumented persons.[29] It is also unlawful to inquire about an applicant's or employee's immigration status, except as required to comply with federal law.[30] For students, districts are prohibited from collecting information regarding immigration status and must have specific procedures for responding to information requests for purposes of immigration enforcement.[31] Districts, however, are still obligated to comply with federal immigration laws, and conduct that is necessary to comply with federal immigration laws is an exception to the prohibitions against collecting information regarding an applicant's, employee's, or student's immigration status.[32]

B. RELIGIOUS CREED

"Religious creed" includes all aspects of religious belief, observance and practice, including religious dress and grooming practices.[33] More generally, it can include moral or ethical beliefs as to what is right and wrong, as long as the beliefs are sincere and held with the strength of traditional religious views.[34]

The prohibition against religious-based discrimination applies not only to mainstream religious views, but also to non-traditional religious views, and extends to those who profess no religious beliefs.[35] Anti-discrimination laws require that districts reasonably accommodate an employee, applicant, or student's sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations.[36] It is unlawful for a district to discriminate or retaliate against a person who requests a reasonable accommodation based on religion, regardless of whether the employer grants the request.[37]

When evaluating whether an accommodation constitutes an undue hardship, the focus is whether there is an undue hardship on the conduct of the employer's business, not on the employees. Thus, while an accommodation's effects on a co-worker may be burdensome to the co-workers, objections and complaints of fellow employees, on their own, are insufficient to constitute an undue hardship.[38] In addition, districts may not require segregation of an employee from the general public in order to accommodate an employee's religious practice unless expressly requested by the employee.[39] Moreover, a reasonable accommodation does not have to be the employee's preferred accommodation.[40]

Case Studies on Religious Discrimination

E.E.O.C. v. Abercrombie & Fitch Stores, Inc.[41]

Abercrombie & Fitch Stores, Inc. operates several lines of clothing stores, each with its own "style." Accordingly, the company imposes a "Look Policy" that governs the dress of its employees. The Look Policy prohibits employees from wearing "caps," which it does not define, on the basis that they are too informal for Abercrombie's image. Samantha Elauf is a practicing Muslim who wears a headscarf in accordance with her religious beliefs. She applied for a position in an Abercrombie store and was interviewed by Heather Cooke. Cooke rated Elauf as qualified for the position, but was concerned that Elauf's headscarf would conflict with the store's Look Policy. Cooke spoke with the district manager, who told Cooke that Elauf's headscarf violated the Look Policy, as would all other headwear, religious or otherwise, and told Cooke not to hire Elauf.

The EEOC filed suit against Abercrombie on Elauf's behalf, alleging that Abercrombie violated Title VII by not hiring Elauf. The Supreme Court held that even if an employer does not have actual knowledge of an applicant or employee's religious practice or need for accommodation, it can still be liable for religious discrimination as long as the religious practice motivated the employer's decision.

Porter v. City of Chicago[42]

Lattice Porter worked in the Field Services Section (FSS) of the Chicago Police Department's Records Services Division. The Department divided FSS employees into three 8-hour "watches," and assigned to groups based on their days off (i.e., the Friday/Saturday group). Prior to 2005, the Department had accommodated Porter's various requests for group and "watch" changes so she could participate in church activities. But when Porter returned from an eight-month medical leave of absence, the "watch" and group she had previously been assigned to were no longer available. The Department, however, told her it would return her to the Sunday/Monday group once an opening became available. When no opening became available and no one volunteered to switch with Porter, the Department offered to allow her to switch to the 3:00 p.m. to 11:00 p.m. "watch" on Sundays, but Porter did not respond. Between July and

November 2006, Porter developed a pattern of missing work on Sundays, and the Department issued her a counseling report. In November 2006, Porter took a medical leave of absence and never returned to work.

In December 2008, Porter filed a Title VII lawsuit, and accused the City of religious discrimination and failure to accommodate religious practices, among other allegations. During her deposition, Porter testified that she did not want the later "watch," but wanted her old schedule back. The trial court granted the City's motion for summary judgment, and the Court of Appeal affirmed the ruling. The Court of Appeal held that the City's offer to switch Porter to a later "watch" was a reasonable accommodation. The fact that Porter did not want that schedule did not make the City's proposed accommodation unreasonable.

Christian Legal Society v. Martinez[43]
In the Fall of 2004, the Christian Legal Society (CLS) formed at Hastings College of Law, which is part of the U.C. system, and applied for recognition as a "Registered Student Organization" (RSO). RSOs receive school funds and use of the school's name and logo, among other benefits. In exchange, RSOs have to comply with Hastings' non-discrimination policy and accept "all comers" who wish to join the group. The CLS, however, excluded anyone who engaged in "unrepentant homosexual conduct" or held religious beliefs different from the CLS. Because the CLS did not accept "all comers," Hastings rejected the CLS's application for RSO status. CLS sued Hastings for violating its rights to free speech, expressive association, and free exercise of religion under the First and Fourteenth Amendments to the U.S. Constitution.

The district court granted summary judgment, and the Ninth Circuit Court of Appeals affirmed. The CLS appealed to the U.S. Supreme Court, which affirmed the lower courts' rulings. The U.S. Supreme Court held Hastings' "all comers" policy constitutional because the policy was both reasonable and viewpoint neutral. The policy was reasonable because (1) it ensured that the opportunities provided to RSOs were available to all students; (2) it helped Hastings ensure that RSOs abide by its non-discrimination policy; (3) Hastings reasonably believed the policy brings together students from diverse backgrounds and beliefs, which encourages tolerance; and (4) the policy aligned with state anti-discrimination laws. The policy was also viewpoint neutral because all student groups were required to accept "all comers" to become an RSO.

Berry v. Department of Social Services[44]
Daniel Berry worked in the County's Social Services Department assisting clients to transition out of welfare. He claimed that his religious beliefs required him to share his faith. In furtherance of that religious belief, he used County conference rooms for employee prayer meetings, displayed religious items in his work area and shared his religious views with clients. When the

County issued Berry a written reprimand for displaying his religious items after having received a specific directive not to do so, he alleged religious discrimination under Title VII, and violation of his First Amendment rights. The Ninth Circuit affirmed summary judgment for the County and concluded that the County's need to avoid possible violations of the Establishment Clause outweighed any restriction on Mr. Berry's exercise of religious speech on the job.

C. PHYSICAL DISABILITY

Anti-discrimination laws broadly define what constitutes a "physical disability." A physical disability is any physical condition that makes achievement of a major life activity more difficult. The condition includes any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects a major body system or bodily function.[45] The disability could be related to any body system, including neurological, immunological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.[46]

In California, to qualify as a physical disability, the physical condition need only limit the employee or applicant's ability to participate in major life activities.[47] Major life activities include such activities as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. California law further specifies that a physical impairment that requires special education or related services may also qualify as physical disabilities.[48]

Even if a person does not actually have a physical disability, that person could still state a claim of discrimination or harassment based on physical disability if he or she is *regarded as* having a physical disability.[49] Although persons who are recovering addicts can claim a disability, those currently unlawfully using controlled substances (including medical marijuana) or illegal drugs cannot.[50]

Districts, however, should carefully consider any request for an accommodation before determining that the request is not reasonable, or that the alleged disability that triggered the request is not a recognized disability under state or federal law.

NOTE: Although medical marijuana has been legal in California since 1996, the California Supreme Court has held that because the Compassionate Use Act placed no requirements on employers, an employer could still terminate an employee who tested positive for marijuana, even if that employee had a medical recommendation. [51]

Case Study on Medical Marijuana

Ross v. RagingWire Telecommunications, Inc.[52]
An employee had a doctor's recommendation to use cannabis to treat his back pain pursuant to the California Compassionate Use Act, and he informed his employer of that fact and of his use of medical marijuana. After he tested positive for marijuana, the employer fired him and the employee sued, arguing that he should have been allowed to use medical marijuana (off duty) as a reasonable accommodation. The California Supreme Court upheld the termination, because legislation enacted after the Compassionate Use Act provides that employers are not required to accommodate marijuana use, and because marijuana use for medical reasons is still illegal under federal law.

NOTE: Although the passage of Proposition 64 in November 2016 legalized adult recreational use of marijuana, it is still classified as a Schedule 1 Controlled Substance and thus illegal under federal law.

Case Study on Disability Discrimination

Ketryn Cornell v. Berkeley Tennis Club[53]
A Court of Appeal considered whether an employee's obesity was a disability within the meaning of the FEHA. The court considered prior case law that recognized that obesity can result from a physiological condition affecting a bodily system, and may limit a major life activity. The court found that an employee claiming a disability due to obesity must be able to produce evidence showing the obesity has some physiological, systemic basis. In this case, the employee did so successfully by presenting evidence from a physician who opined that her obesity was more likely than not "caused by a genetic condition affecting metabolism." The court also noted that obesity may constitute a perceived disability that triggers employer obligations under the FEHA. In that scenario, it is not necessary for an obese employee to actually be disabled, or for an employer to perceive that a plaintiff's obesity has a physiological cause in order for the FEHA to apply.

D. MENTAL DISABILITY

Both federal and state laws prohibit discrimination based on an individual's actual or perceived mental disability. Mental disability includes emotional or mental illness, intellectual or cognitive disability (formerly referred to as "mental retardation"), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and other psychological conditions.[54] However, neither the ADA nor the FEHA protect sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or the current unlawful use of drugs.[55]

Case Study on Mental Disability Discrimination

Mayo v. PCC Structurals, Inc.[56]

Timothy Mayo began working at PCC Structurals in 1987. Mayo was diagnosed in 1999 with major depressive disorder, but was able to work without significant incident for years due to medication and treatment. After a co-worker complained in 2011 that a supervisor was bullying him, Mayo was called to a meeting with the co-worker and PCC's Human Resources Director. Shortly after the meeting, Mayo made threatening comments to at least three of his co-workers. Mayo's co-workers reported the threats, and PCC's Senior Human Resources Manager called Mayo. Mayo said he could not guarantee that he would not carry out his threats. The Senior Manager immediately suspended Mayo's employment, barred him from company property, and notified the police.

A police officer visited Mayo at his home to discuss the threats. Mayo admitted to making the threats and to owning several guns. When asked if he planned to go to PCC and start shooting people, Mayo responded, "Not tonight." With Mayo's consent, the officer took Mayo to the hospital, where he was placed into custody. Mayo remained in custody for six days, and then took leave under the Family and Medical Leave Act for two months. As Mayo neared the end of his leave, a treating psychologist and treating nurse practitioner cleared Mayo to return to work as he was not a "violent person." PCC terminated Mayo's employment on May 20, 2011. In August 2011, Mayo sued PCC alleging that his termination violated the Oregon Revised Statutes, Oregon's counterpart to the Americans with Disabilities Act (ADA). He asserted that his threatening comments were symptoms of his disability, and therefore his termination was discriminatory.

The court assumed for purposes of the appeal that Mayo was disabled but held that Mayo was unable to show that he was a qualified individual at the time of his termination. It reasoned that an essential function of almost every job is the ability to handle stress appropriately and interact with others. An employee is not qualified when stress leads him to threaten to kill co-workers in chilling detail and on several occasions. Therefore, regardless of whether Mayo's threats stemmed from his major depressive disorder, Mayo could not perform an essential function of his job and was not a qualified individual. The court noted that a contrary rule would put employers in the impossible position of having to choose between terminating a potentially violent employee and violating the ADA, or retaining the employee and risk being deemed negligent if the employee then hurt someone.

LCW Practice Advisor

On occasion, employees claim that they cannot continue to work for a particular supervisor due to stress or anxiety that the supervisor allegedly is causing the employee. But anxiety or stress caused by a supervisor's "standard oversight" of an employee's job performance is not a recognized disability. Accordingly, an employer generally does not have to accommodate an employee who requests a transfer to a different supervisor due to stress or anxiety that the employee's current supervisor is allegedly causing the employee.[57]

Districts should carefully consider any request for an accommodation before determining that the request is not reasonable, or that the alleged disability that triggered the request is not a recognized disability under state or federal law. For example, a support animal may constitute a reasonable accommodation in certain circumstances; however, that determination would require an individualized analysis reached through the interactive process.[58] Further, it is unlawful for districts to retaliate or discriminate against a person requesting an accommodation for a disability, regardless of whether the district grants the accommodation.[59]

E. MEDICAL CONDITION

The FEHA also prohibits discrimination or harassment of an employee or job applicant because of his or her "medical condition." To qualify as a "medical condition," the health impairment must be either (1) related to or associated with cancer, or there must be a record or history of cancer; or (2) caused by a genetic characteristic that is known to cause a disease or disorder or that is associated with a higher risk of developing a disease or disorder.[60]

F. GENETIC INFORMATION

The GINA prohibits employers from discriminating against employees or job applicants based on genetic information. "Genetic information" means information regarding an employee or job applicant's genetic test, the genetic tests of that person's family members, or the person's family medical history.[61] It also includes an employee or job applicant's request for, or receipt of, genetic services, and participation in clinical research that includes genetic services, by that person or his or her family members.[62] The term "genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. It also includes tests to determine whether an employee or job applicant has a genetic predisposition for alcoholism or drug abuse. It does not, however, include tests for the presence of alcohol or illegal drugs.[63]

The GINA also prohibits employers from requesting, requiring, or purchasing genetic information with respect to an employee or job applicant, or his or her family members. There are, however, certain exceptions to this prohibition. Thus, for example, an employer does not violate the GINA when it learns of genetic information through casual conversation with the employee, or by overhearing such casual conversations.[64] Nor does an employer violate the

GINA when it has a lawful reason for requesting genetic information to support a request for reasonable accommodation under the ADA or the FEHA.[65]

The FEHA also prohibits discrimination based on "genetic information."[66] It defines "genetic information" as (1) the individual's genetic tests; (2) the genetic tests of family members of the individual; and (3) the manifestation of a disease or disorder in family members of the individual.[67]

G. SEX/GENDER

Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, the FEHA, and the Education Code prohibit discrimination against employees, job applicants, and students based on sex. Discrimination based on sex includes discrimination based on gender, sexual harassment, and gender harassment.[68] It also includes harassment based on pregnancy, childbirth, breastfeeding, or medical conditions related to pregnancy, childbirth, or breastfeeding.[69] California law further requires employers to provide reasonable accommodation for conditions related to pregnancy or childbirth if the employee so requests on the advice of her health care provider.[70]

The term "gender" includes a person's gender identity, expression, appearance, or behavior, even if it is different from that traditionally associated with the person's sex assigned at birth.[71] Gender identity refers to a person's internal understanding of their gender and may be male, female, a combination of male and female, or neither male nor female.[72] "Gender discrimination" includes sex stereotyping, relying on assumptions about a person's appearance or behavior, or making assumptions about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's gender.[73]

LCW Practice Advisor

Districts must allow employees and students to dress consistently with the employee or student's gender identity and gender expression and protect him or her from harassment and discrimination on that basis.[74]

Harassing conduct of a sexual nature, whether motivated by hostility or by sexual interest, will be deemed to be *based on sex*, regardless of the *gender* of the victim or the sexual orientation of the harasser.[75] Consequently, same-sex harassment and harassment by a homosexual employee/student against an employee/student of the opposite sex are also unlawful.[76] Moreover, an individual alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment.[77]

1. SEXUAL ORIENTATION

California law expressly prohibits discrimination based on sexual orientation. On June 15, 2020, the U.S. Supreme Court, in *Bostock v. Clayton*, finally resolved the long-standing issue of whether Title VII applies to sexual orientation discrimination.[78] In *Bostock*, the Court held 6-3

that "to discriminate [based on sexual orientation or transgender status] requires an employer to intentionally treat individual employees differently because of their sex."[79] The Court's *Bostock* decision reflects a clear trend rejecting a narrow interpretation of "sex discrimination," and is a natural progression of previous cases recognizing sex/gender stereotyping as a form of sex discrimination.[80]

The Court decided *Bostock* solely on Title VII grounds. However, the Ninth Circuit has recognized that sexual orientation discrimination is a form of sex/gender discrimination under Title IX.[81]

2. TRANSGENDER STATUS

"Transgender" is a general term that refers to a person whose gender identity differs from the person's sex assigned at birth. California law clearly defines and expressly prohibits discrimination or harassment based on a student or employee's transgender status. A transgender person may or may not have a gender expression that is different from the social expectations of the person's assigned sex at birth.[82] "Transitioning" refers to a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned at birth, and may or may not include undergoing hormone therapy, surgeries, or other medical procedures.[83]

In 2017, the Civil Rights Department (CRD) (formerly the Department of Fair Employment and Housing) issued new regulations that specifically address further protections for transgender employees. These new regulations prohibit employers from seeking gender or sex-related information from applicants and employees, including seeking proof of an applicant's or employee's gender or gender identity.[84] Moreover, with a few permissible exceptions, employers may not (1) designate a job exclusively for one sex, (2) maintain separate seniority lists based on sex, or (3) condition benefits on sex.[85] Employers also must honor an employee's request to be identified by a preferred gender, name, or pronoun, including gender-neutral pronouns.[86] Further, under the 2017 regulations, employees have the right to use the restroom or locker room that corresponds to their gender identity or expression, and employers may not require proof of transitioning or identification in order to exercise this right.[87] The regulations also protect employees who are currently transitioning or who are perceived to be transitioning.[88]

Since 2018, employers must also display the Civil Rights Department poster on "Transgender Rights in the Workplace," which sets forth additional guidance for employers regarding appropriate and inappropriate questions, dress/grooming standards, and obligations regarding bathroom and locker room usage.[89]

As noted above, the U.S. Supreme Court's decision in *Bostock v. Clayton* extended Title VII's protections to transgender status.[90] Also in 2020, however, the U.S. Department of Education amended Title IX's regulations, and took the position that "Title IX and its implementing regulations … presuppose sex as a binary classification."[91]

Prior to the 2020 amendments to Title IX, however, at least one federal circuit has recognized a transgender student's claim for sex-stereotyping under Title IX.[92] Further, although the Ninth Circuit has yet to rule on the issue, it has rejected claims that a school's policy of allowing transgender students to use restrooms, locker rooms, and showers that matched their gender identity violates *other* students' rights.[93] Because *Bostock* was decided entirely on Title VII grounds, it is unclear what, if any, impacts its holding will have on cases alleging a violation of Title IX.

Case Study on Sex Discrimination

Bostock v. Clayton County, Georgia[94]
This case consolidated three appeals where the employers allegedly fired long-term employees solely for being homosexual or transgender. First, a county fired its employee for conduct "unbecoming" a county employee after he joined a gay softball league. Second, a skydiving company fired an instructor days after he said he was gay. Third, a funeral home fired an employee who presented as a male when hired, but then informed her employer that she planned to "live and work full-time as a woman."

The Court ruled that the plain language of the statute – prohibiting discrimination "because of" sex – incorporates discrimination based on sexual orientation or transgender status. The Court stated: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." For example, if an employer fires a male employee for being attracted to men, but does not fire a female employee for being attracted to men, the employer's decision is based on sex. As the Court explained "homosexuality and transgender status are inextricably bound up with sex . . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

Hively v. Ivy Tech Community College of Indiana[95]
Hively, an openly homosexual woman, began teaching at Ivy Tech Community College of Indiana as a part-time, adjunct professor. Over the span of five years, Hively applied for at least six full-time positions, without success. In 2014, the District did not renew her part-time contract. Hively filed a lawsuit in federal district court, alleging that the District denied her full-time employment and did not renew her contract as an adjunct professor on the basis of her sexual orientation in violation of Title VII. The federal trial court dismissed the lawsuit, holding that Title VII does not protect employees from discrimination on the basis of sexual orientation. Hively appealed.

On April 4, 2017, the U.S. Court of Appeals for the Seventh Circuit became the first federal appeals court to hold that Title VII's prohibition against sex

discrimination includes discrimination on the basis of sexual orientation. The Court concluded that there is no line between a gender nonconformity claim and a claim based on sexual orientation: "Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex."

Videckis v. Pepperdine University[96]
Haley Videckis and Layana White transferred to Pepperdine University from Arizona State University in 2013 and 2014, respectively, and both joined the women's basketball team. Videckis and White alleged that the head coach of the women's basketball team, Ryan Weisenberg, and other members of the coaching staff, engaged in intrusive actions after concluding that Videckis and White were in a lesbian relationship. They claimed that the coaches harassed and discriminated against them in an attempt to force them to leave the team. Videckis and White sued the University. Their lawsuit included a Title IX claim for discrimination on the basis of sexual orientation. The University filed a motion to dismiss on the basis that Title IX did not apply to claims based on sexual orientation discrimination, and the allegations did not support a Title IX claim based on gender stereotype discrimination.

The Court disagreed and determined that Title IX's prohibition of sex discrimination encompassed both sex, in the biological sense, as well as gender. It further determined that discrimination based on gender stereotypes constitutes discrimination based on sex. According to the court, because sexual orientation discrimination is a form of sex or gender discrimination, the "actual" orientation of the victim is irrelevant.

The court found that Videckis and White alleged sufficient facts to assert a claim for sex discrimination. It also found that their allegations were also sufficient to fall under the broader umbrella of gender stereotype discrimination. The court reasoned that if they had been men dating women, instead of women dating women, they would not have been subjected to the allegedly different treatment. The court therefore denied the University's motion to dismiss Videckis and White's Title IX cause of action.

H. AGE

The prohibition against discrimination and harassment based on age protects employees who are at least 40 years of age.[97] It also protects individuals over 40 from age-based stereotypes or generalizations about qualifications, job performance, health, work habits, or productivity.

Case Study on Age Discrimination

Reid v. Google[98]

Reid worked for Google as its Director of Operations and Engineering. During his employment, one of his coworkers made several derogatory comments about him, including saying he was "slow," "fuzzy," "sluggish," "lethargic," and "lack[ed] energy." That same coworker also said Reid's ideas were "obsolete" and "too old to matter." Reid's supervisor once told Reid he was not a "cultural fit" with Google. Other coworkers referred to Reid as an "old man" and "old fuddy-duddy." After Google terminated his employment, he sued Google for various causes of action, including age discrimination. The trial court dismissed Reid's lawsuit on summary judgment, but the appellate court reversed the dismissal, and Google appealed to the California Supreme Court.

The California Supreme Court rejected Google's argument that California courts should adopt the "stray remarks" doctrine established by the U.S. Supreme Court. The Court stated that age-based remarks not made directly in the context of an employment decision or made by a non-decisionmaker may still be relevant, circumstantial evidence of discrimination. The Court also noted that while a "slur," in and of itself, does not prove actionable discrimination, when combined with other evidence, an otherwise isolated remark may create sufficient evidence to defeat an employer's motion to dismiss. The Court also noted that the "stray remarks" doctrine contains a major flaw in that discriminatory remarks by non-decisionmaker employees can still influence the actual decisionmaker. The California Supreme Court affirmed the appellate court's decision, which resurrected Reid's age discrimination claim.

I. VETERAN OR MILITARY STATUS

California law also identifies "Veteran or Military Status" as a protected category. The FEHA defines "Veteran or Military Status" to mean a member or veteran of the U.S. Armed Forces, U.S. Armed Forces Reserve, U.S. National Guard, or California National Guard.[99] The FEHA also protects individuals who an employer perceives to be a veteran or member of the military, as well as individuals who are associated with someone who is a veteran or member of the military.[100] Employers, however, may still inquire about Military and Veteran status in order to determine eligibility for Veterans' preference points in hiring.[101]

J. MARITAL STATUS

California law prohibits discrimination or harassment based on "marital status." Although the FEHA does not define "marital status," it is reasonably interpreted as protecting persons who are single, married, divorced or widowed, as well as those registered as domestic partners.[102] This prohibition, however, does not affect an employer's right to establish rules regulating the working of spouses in the same department, as long as the rules are necessary for reasons of supervision, safety, security, or morale.[103]

LCW Practice Advisor

As provided by Family Code section 297 et seq., the California Domestic Partner Rights and Responsibilities Act (Domestic Partnership Act), domestic partners must generally be treated as spouses under California law. For employers, this means that domestic partners are entitled to the same protections under the FEHA, the California Family Rights Act (CFRA), and various Labor Code provisions as spouses. The Domestic Partnership Act specifically prohibits public agencies, including districts, from discriminating against any person or couple because the person "is a registered domestic partner rather than a spouse."[104]

Case Study on Marital Status Discrimination

Nakai v. Friendship House Association of American Indians, Inc.[105]
Orlando Nakai was employed by a drug and alcohol rehabilitation program and was married to the program CEO's daughter, who was also employed there. Nakai's wife informed the CEO (her mother) that Nakai was armed with a gun, had relapsed, and was angry with program employees. Nakai's wife obtained a temporary restraining order and provided it to the program CEO. The program CEO placed Nakai on administrative leave and then terminated him based on this information. Nakai claimed that he was terminated because he was married to the CEO's daughter, which he claimed was unlawful marital status discrimination. Nakai also claimed that the program CEO had a duty under the FEHA to investigate his wife's allegations that he was armed and dangerous. The appellate court affirmed the lower court's findings in favor of the employer. First, it found that the FEHA prohibits discrimination against classes of people based on their married or unmarried status. Nakai's claim failed because he claimed he was treated differently based on the identity of the person to whom he was married (the program CEO's daughter), not because of his status as a married individual. The court also found that the employer had no duty to Nakai under the FEHA, as the alleged *perpetrator* of harassment, to investigate his wife's complaints. Rather, employers owe this duty to potential *victims* of harassment.

K. OPPOSITION TO UNLAWFUL CONDUCT

Discrimination, harassment, or retaliation based on *opposition to such conduct* is itself unlawful retaliation. These protections apply even if a covered individual does not say the word "harassment" when reporting the alleged unlawful conduct.[106] Because it is difficult, if not impossible, for a layperson to know if the complained-of conduct is "unlawful," all that is required is a sincere, *good faith and reasonable belief* that the complained-of conduct is unlawful. Thus, even if no unlawful conduct occurred, a district may not retaliate against an

employee for complaining about conduct that he or she sincerely and reasonably believes is unlawful.[107] It is also unlawful to harass or take any adverse action against an employee who supports or associates with a coworker who has complained about unlawful harassment or discrimination.[108]

Examples of Protected Activity:

- An employee complained about the alleged sexually offensive conduct of an outside consultant whose seminar she had been required to attend. Although the employee might have been wrong as to whether the conduct was illegal, she had a good faith and reasonable belief that it was. As a result, her employer could not retaliate against her for complaining.[109]
- An employee refused to follow the orders of her supervisor to fire a subordinate and replace the subordinate with "someone hot." Because the employee had a good faith and reasonable belief that the order to fire was unlawful, the employee engaged in protected activity.[110]
- A student filed a complaint against a professor after professor improperly refused to allow student to return to class because of a medical condition.[111]

L. ASSOCIATION/PERCEPTION

The anti-discrimination laws also prohibit discrimination, harassment, and retaliation of an employee, job applicant, or student because of that individual's association with a person of a protected class, or because that individual is perceived as being a member of a protected class.[112]

The ADA and FEHA explicitly include being "regarded as" having a mental/physical disability within the definition of "disability."[113] In order to establish discrimination based on being "regarded as" having a disability, plaintiffs do not have to establish that the employer held a subjective belief that the employee was disabled.[114] Rather, an employee can state a claim by establishing that he or she was subjected to an adverse employment action because of a perceived physical or mental impairment, whether or not the impairment is perceived to limit a major life activity.[115]

Case Study on Association Discrimination

Castro-Ramirez v. Dependable Highway Express[116]
Castro-Ramirez had a son who required daily dialysis and Castro-Ramirez was the only one trained to administer it to him. Castro-Ramirez worked as a truck driver and for years, his employer accommodated his request to work earlier shifts so he could go home at night and administer the dialysis. Castro-Ramirez's new supervisor, however, refused to assign him earlier shifts. Instead, the new supervisor assigned Castro-Ramirez to a late shift and a long route that would have made it difficult for Castro-Ramirez to return home to tend to his son. Castro- Ramirez refused to work it and his employer terminated him. The Court declined to decide whether FEHA requires employers to

reasonably accommodate employees who are associated with a disabled person. The Court did, however, hold that discrimination based upon an associational disability is a viable claim and that whether an employer did, or did not, offer an accommodation could be relevant to the issue of discrimination.

Section 4 DISCRIMINATION

Unlawful discrimination means treating an employee or job applicant differently from others because of that person's actual or perceived protected status. The different treatment must relate to the terms and conditions of employment and be reasonably likely to negatively affect an employee's job performance or prospects for advancement or promotion.[117] An employee or job applicant can claim discrimination if the different treatment deprives or tends to deprive the employee or job applicant of employment opportunities or employment status.[118]

In addition to harassment and retaliation claims, which are covered later in this chapter, a discrimination claim may be based on the following grounds:

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

A. DISPARATE TREATMENT

Intentional discrimination—or "disparate treatment"—occurs when an employer impermissibly considers characteristics such as race, religion, age, sex, etc., when making an employment decision that adversely affects an applicant or employee.[119] In other words, an employer intentionally discriminates against an applicant or employee when the employer treats the applicant or employee differently *because of* his or her protected status.

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

- They are member of a protected class;
- They were qualified for the position for which they applied, or were performing their job in a manner consistent with the employer's legitimate expectations;
- They suffered an adverse employment action; and
- The employer had a discriminatory motive.[120]

Once an employee or applicant establishes a prima facie case of disparate treatment, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action, i.e., the employer needs to provide a legitimate business reason for its action. If the employer establishes a legitimate, nondiscriminatory reason, the burden shifts back to the applicant or employee to prove that the employer's stated reason is not the real reason, but is pretext and an excuse for the actual discrimination and the real reason for the employer's action is discriminatory (i.e., based on the employee or applicant's protected status).

1. ADVERSE EMPLOYMENT ACTION – DEFINED

An adverse action is one that materially affects the terms, conditions, or privileges of employment. The phrase "terms, conditions, or privileges" of employment must be interpreted liberally, and with a reasonable appreciation of the realities of the workplace. Adverse actions include employment actions like termination or demotion, but courts have also expanded the definition to include denial of a raise, diminished or increased responsibilities, the assignment of unduly burdensome work, and a less distinguished title. Further, actions that are not materially adverse in isolation may collectively rise to an adverse action.[121]

However, not all unwelcome employment actions constitute an adverse employment action. Generally, in order to constitute an adverse employment action, the action must be reasonably likely to deter reasonable employees from engaging in protected activities.

Case Studies on Adverse Employment Action

> ***Featherstone v. Southern California Permanente Medical Group***[122]
> Ruth Featherstone worked for the Southern California Permanente Medical Group for a couple of years and was an at-will employee. Following a medical leave of absence during which Featherstone had surgery to treat a sinus tumor, Featherstone was released back to work without restrictions. Shortly thereafter, Featherstone called her supervisor and resigned. Her supervisor asked her to confirm her resignation in writing, which she did. Featherstone later informed her employer that she was suffering from an adverse drug reaction and had an "altered mental state" when she resigned. The adverse reaction caused Featherstone to have a temporary disability and Featherstone asked to rescind the resignation. Her employer declined and Featherstone sued for disability discrimination under the FEHA, claiming, among other things, that the employer's refusal to allow her to rescind her resignation was an adverse employment action. The trial court disagreed and entered summary judgment against Featherstone, who appealed. The appellate court upheld the trial court's decision. The Court found that refusing to accept an employee's request to rescind a voluntary resignation is not an adverse employment action absent certain circumstances, such as an employer's coercion or misconduct. It reasoned that Southern California Permanente Medical Group was under no contractual obligation to grant Featherstone's request. Since Featherstone could

not show an adverse employment action, her discrimination claims under the FEHA failed.

Whitewall v. County of San Bernardino[123]
Whitehall, a San Bernardino County Children and Family Services (CFS) employee, was assigned to investigate the living conditions of four children. Whitehall collected evidence that suggested the children were abused and neglected. The deputy director of CFS instructed Whitehall to withhold and alter certain evidence, and Whitehall learned that CFS had not provided a complete police report to the court that was handling the case. Whitehall then provided the deputy county counsel with a copy of all photos she had obtained from the police and CFS removed her from the case. Concerned about possible liability for having submitted altered photos in the case, Whitehall filed a motion to inform the juvenile court that CFS had perpetrated a fraud upon the court. At this point, CFS placed Whitehall on paid administrative leave pending an investigation into her disclosure of information to the deputy county counsel and juvenile court. Whitehall sued, claiming that the County violated Labor Code section 1102.5, which prohibits employers from retaliating against an employee who discloses improper government activity. The appellate court found that placing Whitehall on paid administrative leave constituted an adverse action under the circumstances, where the leave was two months long and there was little to investigate about Whitehall's disclosure of accurate information to the deputy county counsel and juvenile court. The court made clear that whether paid administrative leave constitutes an adverse employment action turns on the facts of each case, including the effect on the employee and the workplace context of the claims.

LCW Practice Advisor

Placing an employee on paid administrative leave, or even investigating an employee, may be considered an adverse employment action but is typically necessary for employee discipline. Districts should take care to ensure that, when investigating employees or placing them on administrative leave, it applies its policies consistently.

In the context of a discrimination claim brought by a student, the same analytical framework and standards for "adverse action" apply.[124] However, instead of affecting the terms, privileges, and conditions of employment, courts ask whether the student was deprived of access to educational benefits.[125]

2. "MIXED MOTIVE"

Unlawful discrimination can also occur when an employment decision is motivated, in part, by discriminatory considerations, even though other lawful and legitimate considerations may have also supported the employment decision.[126] An applicant or employee may prevail in a

discrimination lawsuit if the individual can prove that discrimination was a *substantial* motivating reason for the employer's adverse employment action.[127] This standard of liability applies only to claims of discrimination and retaliation, but does not apply to other unlawful practices under FEHA, including harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide certain leaves of absence.[128]

While a district may be liable in a mixed-motive discrimination case, the applicant's or employee's remedies are much more limited. For example, the court could award declaratory and/or injunctive relief, attorneys' fees, and costs directly attributable to the pursuit of the claim, but may not award monetary damages or reinstatement.[129]

Case Study on Mixed Motive

Laverty v. Drexel University[130]
Jennifer Laverty worked as a customer service representative in the Bursar's Office at Drexel University. Her duties including helping students who had questions regarding billing statements. Laverty's supervisors informed her that her written responses to students were poorly drafted and difficult to understand, and gave her specific criticism and suggestions for improvement. As her initial probationary period approached, Laverty's supervisors were still concerned about her work performance. They placed her on a Performance Improvement Plan (PIP), and identified goals to achieve in a continued 30-day probationary period. The PIP also referenced all the counseling Laverty had received up to that point. In the section regarding employee comments, Laverty agreed she needed improvement and would try to be more conscientious in her work. During the PIP, supervisors provided frequent feedback to Laverty, but her performance did not improve. While on her PIP, Laverty announced she was pregnant. Less than a month later, Drexel fired Laverty for unsatisfactory performance, and Laverty sued for pregnancy discrimination.

The Court dismissed Laverty's claim. The court noted that although Laverty had established a prima facie case of pregnancy discrimination, Drexel provided legitimate, non-discriminatory reasons for her termination, which Laverty failed to show were actually pretext. Because Drexel put forth extensive evidence of Laverty's poor performance, dating back to shortly after she first began producing written work and before learning of her pregnancy, the court found that Laverty was unable to demonstrate any reasonable inference that the stated reasons for Laverty's termination were mere pretext for discrimination.

B. DISPARATE IMPACT

Disparate impact discrimination occurs when an employer's facially neutral policy or practice has a disproportionate adverse impact on a protected group of persons, such as a particular racial or ethnic group. Proof may be offered in the form of statistical disparities showing that although a policy or practice may have been adopted without discriminatory motives, it results in

significant adverse effects on protected groups, such that that they are functionally equivalent to intentional discrimination.[131] To prevail on a disparate impact claim, the applicant or employee must be able to prove either:

- That an employment policy or practice results in a disparate impact on a protected group of persons, and the district cannot demonstrate that the policy or practice is job-related and consistent with a business necessity; or
- A less discriminatory alternative practice is available but the employer refuses to adopt it.[132]

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

- Business Necessity
- Bona Fide Occupational Qualification

1. BUSINESS NECESSITY DEFENSE

A district can defeat a claim of disparate impact by demonstrating that the challenged employment policy or practice is *job-related* and consistent with *business necessity*. To demonstrate successfully that an employment practice is job-related and a business necessity, the district must show that the employment practice is necessary and bears a manifest relation to the employment at issue.[133] For example, a requirement that faculty applying to teach computer science courses be familiar with the latest advances in technology would constitute a business necessity because faculty will be required to instruct students in the latest computer technologies. This requirement would satisfy the business necessity standard despite its potential adverse impact on older applicants. The defense of business necessity, however, is limited to disparate impact claims, and is not a defense to a claim of disparate treatment.[134]

With respect to English-only policies, regulations by the Civil Rights Department (formerly the Department of Fair Employment and Housing) specify that a "business necessity" is one that is necessary to the safe and efficient operation of the business; mere customer or co-worker convenience or business convenience is insufficient.[135] (See Section 3(A) of this workbook.)

2. BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

An employment policy or practice may also be justified if the employer can prove that it is a bona fide occupational qualification (BFOQ).[136] To constitute a valid BFOQ, the employment policy or practice must affect an employee's ability to perform the job and must relate to either the essence or the central mission of the employer's business.[137]

The BFOQ defense, however, is a very narrowly drawn exception to discriminatory employment policies or practices. Courts have rejected BFOQ defenses based on sex where there is insufficient evidence that the excluded sex cannot adequately perform the work. For instance, a court held that being male was not a BFOQ for the job of truck driver where there was no evidence that women could not perform the job.[138] In contrast, another court held that being

female was an objective, verifiable job qualification for correctional officers assigned to a woman's prison and responsible for performing tasks that only could be performed by female officers as a matter of law.[139]

The BFOQ defense, however, cannot be based on the mere preference of co-workers, clients, customers, or other third parties.[140] For example, in *Lam v. University of Hawaii*, the court held that alleged "Japanese cultural preferences" for male authority figures did not qualify as a BFOQ for the position of Director of Pacific Asian Legal Studies at a law school. The court expressly rejected such third-party preferences as justification for discriminatory hiring practices.[141]

Section 5 HARASSMENT

There are two types of harassment: Hostile (Work/School) Environment harassment and Quid Pro Quo harassment.

A. HOSTILE WORK/EDUCATIONAL ENVIRONMENT HARASSMENT

Anti-discrimination laws protect employees from hostile work environments.[142] They also protect students from hostile educational environments.[143] Whether a work environment rises to the level of being unlawfully hostile or abusive requires a case-by-case analysis of the following factors:

- The frequency of the harassing conduct;
- The severity of the harassing conduct;
- Whether the harassing conduct is physically threatening or humiliating;
- Whether the harassing conduct is unwelcome;
- Whether the harassing conduct unreasonably interferes with an employee's work performance or alters other conditions of employment so as to make it more difficult to do the job; and
- Whether a member of the protected class would consider the harassment hostile and offensive, i.e., the "reasonable victim" standard.[144]

Though these same factors apply to cases involving hostile educational environments, the test is whether the hostile environment deprived the student of some of the advantages, privileges, services, or opportunities of the educational program.[145]

Conduct amounting to harassment may include:

- Speech, such as epithets, derogatory comments, slurs, jokes, or lewd propositions;[146]

- Physical acts, such as assault, including sexual assault, impeding or blocking movement, offensive touching, or any physical interference with normal movement;
- Visual insults, such as derogatory posters, cartoons, or drawings;
- Unwanted sexual advances, requests for sexual favors or other acts of a sexual nature where submission is made a term or condition of employment, academic status or progress, or where submission to or rejection of the conduct is used as the basis for employment or academic decisions, or where the conduct is intended to or actually does unreasonably interfere with an individual's work or academic performance or creates an intimidating, hostile, or offensive working or educational environment;[147] or
- A supervisor's widespread favoritism toward particular subordinates communicates a message that the only way to advance is to have close friendships or sex with supervisors.[148]

1. HOSTILE WORK ENVIRONMENT (EMPLOYEES)

Up through 2018, to establish a hostile work environment claim, an employee needed to show that: (1) they were subjected to verbal, visual or physical conduct of a harassing nature *because of* their actual or perceived protected status;[149] (2) the conduct was both subjectively *and* objectively unwelcome; and (3) the conduct was sufficiently severe *or* pervasive to alter the conditions of the employee's working environment so as to create an abusive work environment.[150]

Effective January 1, 2019, a new section of the Government Code declares that "harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct 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."[151] Under this new law, even one single incident of harassing conduct can be enough to create a hostile work environment if the conduct unreasonably interfered with the employee's work performance or created an intimidating, hostile, or offensive working environment.[152] This analysis depends on the totality of the circumstances, and a single discriminatory remark, even if not made directly in the context of an employment decision like termination or discipline, and even if uttered by a colleague who is not a decision-maker, may be relevant evidence of discrimination.[153] This means that while the "severe or pervasive" standard will still apply to complaints under federal Title VII, complaints raised under FEHA may have a lower threshold to reach the issue of whether there was a hostile environment.

Currently, the law also states the legal standard for sexual harassment should not vary by workplace, and therefore employers cannot use as a defense that their particular industry or work-environment is more tolerant of certain behaviors. An employee will not need to show his or her "tangible productivity" declined as a result of harassment in a workplace harassment suit,

and may instead show a "reasonable person" subject to the alleged discriminatory conduct would find the harassment altered working conditions so as to make it more difficult to work.[154] Finally, this new law makes clear that dismissing harassment claims at the early stages of litigation will become more difficult for employers under these new standards, as motions to dismiss claims pre-trial are now disfavored under the revised law.[155]

In California, an employee does not have to be a direct victim of the harassment, or even personally observe the alleged harassment to state a hostile work environment claim. Instead, the employees need only show that they learned about the harassment from a third party.[156] But if the alleged harassment is not directed at the employee, then the employee must still be able to show that the harassing conduct so altered working conditions as to make it more difficult for the employee to do the employee's job.[157]

A work environment can also be unlawfully hostile even if there have been no sexual advances.[158] Work environments, in which those who have sexual relationships with supervisors receive job benefits, create a sexually hostile work environment for third party employees who are not involved in such sexual relationships.[159] Of course, unwelcome sexual advances that alter the conditions of employment can also comprise a hostile work environment.[160]

Case Studies on Hostile Work Environment

Zetwick v. County of Yolo[161]
Victoria Zetwick, who worked for the county as a correctional officer, sued the county and its sheriff for creating a sexually hostile work environment. She claimed that during a 12-year period, the sheriff greeted her with unwelcome hugs on over 100 occasions and forced an unwelcome kiss on her at least once. Such conduct was a source of constant stress and anxiety for Zetwick, which made it difficult for her to concentrate and caused her to lose sleep. The district court granted defendants' motion for summary judgment, and Zetwick appealed. In reversing the lower court's decision, the Ninth Circuit rejected the "sort of black letter rule," derived from prior case law that would allow hugs and kisses on the cheek as within the realm of common workplace behavior. The Ninth Court reasoned that a reasonable juror could find, for example, from the frequency of the hugs, that the sheriff's conduct was out of proportion to "ordinary workplace socializing," and had instead become abusive. The Court noted that it was necessary to consider the cumulative effect of the sheriff's conduct and evaluate whether it was sufficiently severe or pervasive to alter the officer's work conditions.

Westendorf v. West Coast Contractors of Nevada, Inc.[162]
Shortly after Jennifer Westendorf began working as a project manager for West Coast Contractors, her supervisor, Joslyn, called her duties "girly work" but quickly apologized. Ramirez, the company's president, learned of the comment, spoke with Joslyn, and told Westendorf to let him know of any further comments. Westendorf then began working once a week at a

construction site. Patrick Ellis, another employee supervised by Joslyn also worked at the site. Ellis made numerous sexual comments around Westendorf, including talking about the breast size of other women. Joslyn once participated in the comments, and other times would smile or laugh at Ellis' comments. Westendorf always demanded that Ellis stop. Westendorf reported the comments to Ramirez, but Ellis' behavior continued. After Ramirez returned from vacation, Joslyn and Westendorf both complained about each other to Ramirez. Ramirez told Westendorf that he was "tired of listening to this," that she obviously had trouble getting along with Joslyn, and that she should get her personal belongings and leave. Westendorf alleged sexual harassment under Title VII. The Ninth Circuit found that although the comments were "crude and offensive," the conduct was neither severe nor pervasive enough to alter Westendorf's terms and conditions of employment and did not create a work environment that a reasonable person would find hostile or abusive.

Rehmani v. Superior Court[163]

Mustafa Rehmani, a Pakistan-born Muslim worked as a System Test Engineer for Ericsson, Inc. Prior to Ericsson terminating Rehmani for sending prohibited emails from a co-worker's email account, Rehmani told Human Resources that several of his Indian colleagues had been harassing him based on his national origin and religion. After his termination, Rehmani sued Ericcson for harassment based on national origin and religion, retaliation, and failure to investigate and prevent harassment and retaliation. He claimed that three of his Indian colleagues were frequently rude, dismissive, and hostile toward him. He cited their unwillingness to help him with projects, and alleged that the harassment became more severe and pervasive after the November 2008 attacks in India by Pakistani terrorists. He identified various offensive comments such as "Pakistan and Afghanistan need to be bombed and wiped out because of the terrorist activity there and because it was spreading to India"; and "You're not going to blow me up, right?" He also alleged that one of his Indian colleagues joked that Rehmani was out "celebrating 9/11 and planning terrorist attacks." He claimed he reported these incidents to his supervisor, but she told him she did not want to hear his complaints. The Court of Appeal reversed the trial court's summary adjudication of the harassment claim. It noted that harassment can include intimidation, ridicule, and insult, and that Rehmani had presented sufficient evidence for a jury to conclude that he was harassed because of his religion and/or national origin, and that his complaints were enough to trigger an investigation.

Miller v. Department of Corrections[164]

Edna Miller worked at the California Department of Corrections. She learned that the Chief Deputy Warden was having sexual affairs with three different subordinates. Miller competed for promotion against one of the subordinates who was having an affair with the Chief Deputy Warden. Miller did not get the promotion, and watched the subordinate who was having the affair with the boss

make an unprecedented rise in the ranks. Miller and others witnessed the boss and the subordinates engage in sexual touching during Department social events. Miller complained, but did not use the term "sexual harassment" or "sexual discrimination." The California Supreme Court determined that widespread sexual favoritism creates a hostile work environment even for third party employees. As explained by the Court, sexual favoritism communicates the demeaning message that female employees are viewed as sexual playthings or that the only way for women to get ahead in the workplace is to have sex with the boss. If management could reasonably believe that an employee is complaining about sexual harassment, the employee is protected from retaliation and the employer has a duty to investigate.

LCW Practice Advisor

Sexual harassment does not have to be based upon sexual desire or sexual intent. Where offensive comments are made between members of the same sex and are motivated by "horseplay" instead of sexual desire, a harassment claim under the FEHA can be established.[165]

LCW Practice Advisor

A 2019 workplace survey found that dating others from work is widespread. Approximately 58% of employees reported having an office romance.[166] Employers can respond by maintaining appropriate standards of non-sexual conduct in the workplace and training employees about the potential individual liability that can result from workplace romances.

Employers also may potentially be liable for harassment committed against their employees by vendors, contractors, students, and other third parties if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment.[167] Thus, it is up to districts and their supervisors to ensure that *nobody* in the work environment, including students or other non-employees, engages in harassing conduct.[168]

2. HOSTILE EDUCATIONAL ENVIRONMENT (STUDENTS)

Districts have a duty to protect their students from discriminatory harassment.[169] The harassment must be severe and pervasive as to deny a student equal access to the school district's programs or activities.[170] Districts can be liable for student-on-student harassment, as well as harassment committed by a faculty or staff member against a student.[171] In terms of sexual harassment in the school environment, Title IX defines sexual harassment as including sexual assault, dating violence, domestic violence, and stalking.[172] (For more information on Title IX requirements, see Section 14 of this workbook.)

To establish a claim for discrimination based on harassment, a student must show that: (1) they were subjected to harassment based on a protected characteristic; (2) the district had notice of the

alleged harassment; and (3) the district acted with "deliberate indifference" in responding to the allegations.[173]

Case Study on Student Harassment/Hostile Educational Environment

Jonhson v. Clovis Unified School District[174]
Plaintiffs sued the school district for harassment and hostile educational environment in violation of Title IX. They alleged that their fourth grade teacher sexually harassed them by inappropriately touching and tickling them, including touching them under their clothes. They alleged that the teacher's conduct interfered with their ability to attend and perform at school, and prevented them from receiving their full educational benefits and opportunities, and by doing so, created a hostile educational environment. Although the Court acknowledged that Title IX allows a student to sue a district for sexual harassment by a teacher, it dismissed the complaint (with leave to amend) because the plaintiffs had failed to state sufficient facts that the district had actual knowledge of the teacher's conduct. The Court explained that a school district is not liable for a teacher's harassment of a student unless a district official with the authority to address and correct the unlawful conduct has actual knowledge of the conduct and fails to adequately respond.

Sanches v. Carrollton-Farmers Branch Independent School District[175]
Sanches and J.H. were both cheerleaders at Creekview High School (CHS) in Carrollton, Texas. Sanches claimed that after she started dating J.H.'s ex-boyfriend, C.P, J.H. sexually harassed her by calling her a "ho." Sanches' mother notified administration of the name-calling that same day, and within two hours, the principal started investigating the incident. Based on the investigation, the principal moved J.H. to another sixth period class away from Sanches.

Thereafter, the district received a letter from the mother's attorney expressing concern that Sanches would be disadvantaged at cheerleading tryouts, and proposing that Sanches be allowed to join the cheerleading team without a try out. Aside from two lines about the name-calling incident, the letter did not include any other claim of sexual harassment. The district rejected the proposal and an impartial panel subsequently cut Sanches from the cheerleading team. Only then did Sanches' mother allege that J.H. sexually harassed Sanches by starting a rumor that Sanches had a hickey on her chest, and by slapping C.P.'s buttocks and making an offensive comment to C.P. and Sanches. The principal investigated these incidents and found them to lack merit. Due to the conflicting reports from both Sanches and J.H., CHS decided to take no further action.

Sanches' mother thereafter filed a grievance with the district. The only relief sought, however, was for CHS to allow Sanches to join the squad. After the

district denied the grievance, Sanches sued the district. She claimed that the district violated Title IX by being deliberately indifferent to her sexual harassment allegations. The district obtained summary judgment at the trial court level, and Sanches appealed.

The Court of Appeals affirmed. It noted that a school district that receives federal funding may be liable under Title IX for student-on-student harassment if the district: "(1) had actual knowledge of the harassment; (2) the harasser was under the district's control; (3) the harassment was based on the victim's sex; (4) the harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit; and (5) the district was deliberately indifferent to the harassment." The Court found that J.H.'s behavior did not constitute sexual harassment because the alleged harassment was not based on sex, but personal animus. It further held that the alleged harassment was neither severe, pervasive nor objectively unreasonable.

The Court further held that the district did not act with deliberate indifference to Sanches' claims, as evidenced by its prompt and multiple investigations of Sanches' claims. It also explained that ineffective responses will not always be clearly unreasonable, and noted that Title IX does not require flawless investigations or perfect solutions. Accordingly, the district did not violate Title IX.

Donovan v. Poway Unified School District[176]
Two students endured severe and pervasive sexual orientation harassment from other students while attending Poway High School. The harassment, which peaked during their junior year, included death threats, being spit on, physical violence, threats of violence, vandalism to their personal property, and being called anti-gay epithets such as "faggot," and "dyke" on a near-daily basis. Plaintiffs met with the school principal and provided a log chronicling the harassment they experienced and witnessed during their junior year. During the time they were being harassed, they also complained to the district superintendent, an assistant principal, and many other administrators and teachers. The district argued that it adequately responded to the students' complaints, that plaintiffs did not provide sufficient information, and that the plaintiffs rejected various options suggested by the district.

At trial, the evidence showed that plaintiff gave district staff written reports of numerous incidents of harassment shortly after they occurred and that district staff failed to follow their normal procedures in investigating these incidents (e.g., the staff did not question all the witnesses or try to obtain additional information). For many of the reported incidents (which repeated themselves) there was no investigation at all. One administrator suggested the students ignore the language or inform the harassing students that it was offensive. After

the two students presented the principal with their log of harassing incidents, the principal did not speak to any of the identified subjects or witnesses, or attempt to get more information from the plaintiffs. Both students completed their senior year through a home-study program in order to avoid the anti-gay harassment. After a six-week trial, the jury found that the district violated plaintiffs' rights under Education Code section 220 and Title IX.

On appeal, the district argued that substantial evidence did not support the jury's findings. The court disagreed and found that substantial evidence supported the jury's finding that the district acted with deliberate indifference. The court noted that the two students had been subject to severe and pervasive harassment for at least two years and that the harassment persisted after plaintiffs reported such incidents to the district.

LCW Practice Advisor

Whenever a district becomes aware of a student-on-student sexual harassment claim, the district should respond to the matter promptly with an investigation or another appropriate measure.

B. QUID PRO QUO

"Quid pro quo" is the other type of harassment. "Quid pro quo" is Latin for "this for that." In the context of sexual harassment, quid pro quo harassment occurs when submission to sexual conduct is an explicit or implicit condition of a job, a job benefit, or the absence of a job detriment.[177] It can also occur when submission to sexual conduct is explicitly or implicitly made a term or condition of a student's academic status or progress, or is used as the basis for making decisions affecting the student's academic status or progress, educational services or programs, or activities available at or through the district.[178] Thus, the accused harasser must be in a position to affect the accuser's employment (i.e., a supervisor) or academic status (i.e., a faculty member). This form of harassment can include sexual propositions, unwarranted graphic discussion of sexual acts, or comments about the alleged victim's body.[179]

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

- Whether the sexual conduct was unwelcome;
- Whether a reasonable person in the accuser's position, who is the same gender as the accuser and has the same fundamental characteristics as the accuser, would have believed he or she was the subject of quid pro quo harassment;
- Whether the accused harasser intended to subject the accuser to quid pro quo harassment; and;

- Whether there is a close connection between a discussion about job/educational benefits and a request for sexual favors.[180]

Case Study on Sexual Quid Pro Quo Harassment

Nichols v. Frank[181]
The Ninth Circuit found that a deaf-mute subordinate was subjected to quid pro quo harassment when her supervisor, who was the only employee who knew sign language, requested oral sex from her right after discussing her request for a leave of absence, her attendance record, and her continued employment.

Whether quid pro quo harassment can occur on a basis other than sex remains to be seen. At least one court, however, has applied the quid pro quo harassment analysis to religion. The court held that religious quid pro quo harassment could be found to occur if an employee is required or coerced to abandon, alter, or adopt a religious practice as a condition of the job, a job benefit, or the absence of a job detriment.[182]

Case Study on Religious Quid Pro Quo Harassment

Venters v. City of Delphi[183]
Employee claimed she was terminated because she did not share her supervisor's religious beliefs. The Seventh Circuit found that the employee stated a claim for religious harassment where her supervisor described the police station as "God's house" and that to work in that house, she had to be spiritually whole, which required her to be "saved." The supervisor also told the employee that if she was unwilling to play by "God's rules," and if she did not choose "God's way" over "Satan's way," she would lose her job. The supervisor also told the employee that he had concluded she was leading a sinful life, and thus, he could not permit the "evil spirit that had taken [her] soul" to continue inhabiting the police department.

Section 6 BULLYING AND ABUSIVE CONDUCT

A. INTRODUCTION

Although workplace bullying is not illegal, it is a growing area of concern. Proponents of anti-bullying legislation, as well as employee advocates for "healthy workplaces," point to the hidden costs to employers in low morale, higher rates of absenteeism, and lower productivity in the workplace.

The FEHA requires that mandatory harassment prevention training for supervisors include a component on prevention of "abusive conduct".[184] The FEHA defines abusive conduct as

conduct of an employer or employee in the workplace, undertaken with malice, that is unrelated to an employer's legitimate business interests, and which a reasonable person would find hostile or offensive.[185] This definition is very similar to the definition of "bullying" for student disciplinary purposes.[186] Statutorily listed examples of abusive conduct include repeated verbal abuse, derogatory remarks, insults, epithets, verbal or physical conduct that reasonably appears threatening, intimidating, or humiliating, or sabotage of another's work performance.[187]

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

Workplace bullying/abusive conduct consists of repeated, unreasonable actions of a "Perpetrator" (or a group of "Perpetrators") directed towards a "Target" employee (or a group of employees), which are intended to intimidate, degrade, humiliate, or undermine the employee(s); or which create a risk to the health or safety of the employee(s). Workplace bullying may also involve an abuse or misuse of power. Bullying behavior creates feelings of defenselessness and injustice in the Target and may undermine a Target individual's sense of dignity at work. Bullying situations may involve employee-on-employee bullying, as well as a supervisor bullying a subordinate employee. "Mobbing" is another form of bullying, and occurs when a group of co-workers target another worker or group of workers.

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

C. BULLYING/ABUSIVE CONDUCT IS NOT ILLEGAL HARASSMENT

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

Though the FEHA requires that mandatory harassment prevention training for supervisors include a component on "prevention of abusive conduct,"[188] the fact remains that abusive conduct in the workplace is not, in itself, illegal under either Title VII or FEHA. It does not impose liability on the abuser, or on the employer for failing to stop acts of abusive conduct.

Bullying/abusive conduct, as opposed to illegal harassment, is not motivated by animus towards a protected class. Rather, bullying/abusive conduct happens when the harassing conduct is done in order to intimidate, degrade, humiliate, or undermine the employee. Thus, bullying, like harassment, can occur between workers of the same race, national origin and gender.

Bullying and abusive conduct itself is not illegal. However, once the conduct is identified, management should address it because bullying/abusive conduct can violate an agency's personnel rules (e.g., rules prohibiting "discourteous" treatment) and will likely disrupt the workplace. Further, because the Perpetrator's motivations are not always clear, such conduct may also lead to claims and complaints of illegal harassment. Thus, to avoid costly investigations, administrative review and even litigation, an employer should make all reasonable efforts to eradicate bullying and abusive conduct in the workplace.

D. EXAMPLES OF BULLYING/ABUSIVE CONDUCT

Bullying and abusive conduct can take many forms, including:

- Swearing or shouting;
- Repeated derogatory remarks, insults or epithets;
- Exclusion or social isolation;
- Humiliation;
- Any form of physical threat or physical intimidation;
- Demeaning comments about a person's appearance;
- The use of patronizing titles or nicknames;
- Persistent, unwelcome teasing;
- Gratuitous sabotaging or undermining a person's work performance;
- Spreading malicious rumors or insulting someone; and
- Picking on someone or setting him or her up to fail.

E. HOW BULLYING/ABUSIVE CONDUCT IMPACTS THE WORKPLACE

Bullying/abusive conduct exacts a significant toll within an organization. It can lead to increased levels of stress among employees, high rates of absenteeism and increased turnover. In addition to the costs associated with bullying by a supervisor, bullying behavior perpetrated by a co-worker and ignored by management also negatively impacts productivity and morale and leads to increased workplace injuries and "stress" claims.

F. WHAT SHOULD YOUR DISTRICT DO TO PREVENT OR ADDRESS WORKPLACE BULLYING/ABUSIVE CONDUCT?

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

- Ensures that mandatory harassment prevention training for supervisors also includes a component on "prevention of abusive conduct;"

- Creates a comprehensive anti-bullying policy, or alternatively, a Code of Conduct that defines professional behaviors and unacceptable behaviors and includes policies and procedures for response;
- Ensures that the anti-bullying policy is communicated throughout the organization;
- Establishes respectful, non-bullying behavior as a job expectation/performance standard;
- Establishes an awareness campaign so that staff understand what bullying is and what it may look like;
- Encourages reporting;
- Encourages open door policies;
- Ensures management immediately addresses bullying behavior whether it is personally witnessed or reported;
- Takes all complaints of bullying seriously and investigates them promptly;
- Reassigns the Perpetrator if necessary;
- Disciplines staff that violate the district's anti-bullying policies or that otherwise engage in discourteous or destructive behavior toward coworkers;
- Follows up with known Target to determine if bullying behavior has abated; and
- Establishes an independent contact (e.g., Human Resources contact) to whom employees can report the bullying/abusive conduct.

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

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

- Publishing and discussing the district's anti-bullying policies;
- Making compliance with the district's policies a job performance standard;
- Encouraging reporting at all levels;
- Taking reports of bullying behavior seriously and interacting with Human Resources/Personnel to ensure compliance with district investigative protocol;
- Imposing discipline as appropriate when the district policy has been violated;

- Following up with the Target for an extended period of time to determine if any other issues have arisen; and
- Being a good role model.

Section 7 RETALIATION

All of the anti-discrimination laws contain provisions that protect employees and students who report or oppose discrimination or harassment.[189] But as described in more detail below, the anti-retaliation laws also protect employees and students who report, expose, or question employer/district misconduct, or who otherwise engage in protected activity. Thus, an anti-retaliation law is any law that:

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

To protect against claims of retaliation, districts should take a pro-active and preventative approach that lets employees and students know that it will not tolerate retaliation and that it encourages employees and students to report perceived unlawful activity. Through such an approach, districts gain the opportunity to rectify problems before they turn into litigation.

To state a claim of unlawful retaliation under any of the anti-discrimination statutes, an individual must show that: (1) he or she engaged in a protected activity; (2) the employer/district subjected the employee/student to an adverse action; and (3) a causal connection exists between the protected activity and the adverse action.[190]

A. PROTECTED ACTIVITY

An employee or student engages in protected activity by:

- Refusing to obey an order reasonably believed to be discriminatory;[191]
- Filing a complaint with a federal or state enforcement agency;[192]
- Participating in or cooperating with a federal or state enforcement agency, such as the Equal Employment Opportunity Commission (EEOC), the California Civil Rights Department (CRD) (formerly the Department of Fair Employment and Housing), or Cal/OSHA, in its investigation of the employer regarding an alleged unlawful activity;[193]
- Testifying as a party or witness against the employer regarding an alleged unlawful activity;[194]

- Reporting perceived harassment, discrimination or retaliation to an employer;[195]
- Filing an internal complaint with the employer regarding alleged unlawful activity;
- Opposing an unlawful practice, including complaining to a harassing supervisor;[196] or
- (For employees) requesting or taking paid sick leave, family medical leave, or emergency paid sick leave.[197]

An employee's complaint or report constitutes a protected activity as long as the employee reasonably believes he or she is reporting unlawful behavior.[198] Because what constitutes a "protected activity" is generally viewed liberally, districts should consider employees as having engaged in a protected activity whenever the district is made aware of informal, as well as formal, conduct that appears to question the legality of the district's conduct.

Examples of protected activity include:

- Cooperating with an internal investigation of alleged discriminatory practices;[199]
- Serving as a witness in an EEO investigation or litigation;
- Requesting a reasonable accommodation based on religion or disability;[200]
- Reporting a co-worker's discriminatory comment(s);[201]
- Advocating on behalf of disabled students;[202]
- Involvement in disputes with a former employer; and
- Associating with another employee engaged in protected activity.[203]

LCW Practice Advisor

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

1. As illustrated above, protected activities are not limited to formal complaints and can take many forms.

2. A person can still be a victim of retaliation even if the person was not personally subjected to discrimination or harassment.
   Employees who complain about discriminatory conduct are protected, whether or not they have been subjected to that conduct. An employee who, for example, acts as a witness in another

employee's sexual harassment lawsuit is engaging in a protected activity.

3. An employee's allegations of employer misconduct need not be correct for the employee's actions to constitute a protected activity.

   So long as an employee has a reasonable good faith belief that discrimination occurred, the employee's attempts to expose or complain about that conduct constitute protected activity. [204]

4. An employee need not explicitly use the words discrimination or harassment to engage in protected activity. An employee engages in protected activity if the employee reasonably believes that their complaint concerns discrimination or harassment. But an employee may not simply make a vague complaint about personal grievances and expect that their employer will know that the employee is opposing discriminatory conduct.[205]

B. ADVERSE ACTION

Under California law, an adverse action is one that materially affects the terms, conditions, or privileges of employment.[206] The phrase "terms, conditions, or privileges" of employment must be interpreted liberally, and with a reasonable appreciation of the realities of the workplace.[207] Adverse actions include employment actions like termination or demotion, but also those actions "reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career."[208]

Under federal law, the standard for an adverse action is whether the employer's action is likely to deter victims of discrimination from complaining to the EEOC, the courts, or their employers.[209] Thus, federal law looks at the deterrent effect of the employer's conduct, rather than its effect on the employee's employment.

LCW Practice Advisor

An adverse employment action may be something less than a disciplinary action or unsatisfactory performance evaluation (e.g., criticizing an employee, soliciting negative information about an employee from others, or making threats of termination).[210]

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

- Verbal abuse, locks changed and false accusations of incompetence;[211]
- Daily criticism, increased supervision and unfounded misconduct investigations;[212]
- Denial of overtime;[213]
- Relocation of office to basement and reduction in duties;[214]
- Transfer to another facility;
- Denial of benefits;
- Failure to hire or rehire;
- Intimidation;
- Reassignment affecting prospects for promotion;
- Reducing pay or hours;
- Denial of employee's administrative needs;
- Negative performance reviews;
- Tolerating harassment by other employees; and[215]
- Tolerating harassment by non-employees in the workplace.[216]

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

- Nitpicking;
- Mere oral or written criticism of an employee;
- Lateral transfer (where there is no diminution in pay or benefits) unless some other materially adverse consequence; and
- Requiring an employee to develop new skills.[217]

While these actions *individually* may not constitute an adverse employment action, taken *collectively*, such conduct could be sufficient to establish an adverse employment action.[218]

C. CAUSAL CONNECTION/NEXUS

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

1. TIMING

Courts tend to treat the timing of events differently depending on how close they are in relation to each other. When there is a time gap between the protected activity and the adverse employment action, courts will take that fact into consideration, but not treat it as dispositive.[219] Thus, the passage of time between the protected activity and the adverse action is generally not enough, by itself, to defeat a retaliation claim. But when the adverse employment action follows immediately after the protected activity, courts have held that the timing alone is enough—in some situations—to find the two events causally connected.[220]

2. EMPLOYER KNOWLEDGE

To bring a successful retaliation claim, an employee must also be able to demonstrate that the employer–and in particular the decision-makers involved in the adverse employment action–knew of the employee's protected activity. Employer awareness of the protected activity is an essential component of any retaliation claim.[221] Circumstantial evidence will be insufficient to infer a causal link if the employee cannot show the required employer knowledge. Thus, a court rejected a plaintiff's retaliation claim because there was no evidence that the decision-makers who took the challenged adverse employment action knew of his prior discrimination complaint.[222] Similarly, a plaintiff could not state a retaliation claim when she produced no evidence that the decision-maker who ordered the adverse employment action knew of her protected activity.[223]

Case Studies on Employer Knowledge

Reeves v. Safeway Stores, Inc[224]
The plaintiff alleged that a supervisor initiated disciplinary proceedings against him in retaliation for his previous employment discrimination complaint. Safeway argued there was no causal connection between the protected activity and subsequent discipline because cause for discipline was separately investigated and the decision to discharge was made by a manager with no knowledge of the employee's protected activities. The Ninth Circuit reversed a lower court ruling in favor of Safeway on the grounds that Safeway failed to show that *all* material contributors to the decision acted for legitimate nondiscriminatory motives, and the plaintiff presented sufficient proof to establish that retaliation by one or more decision-makers was a substantial contributing factor in bringing about his dismissal. If a supervisor uses another employee as a "tool" to carry out a discriminatory action, the original actor's purpose will be imputed through the "tool" to their common employer.

Poland v. Chertoff[225]
A supervisor with the Department of Homeland Security, in response to a federal employee's protected activity, set in motion a proceeding by an independent decision-maker that resulted in an adverse employment action. The Court held that the supervisor's bias against the employee would be imputed to the Department if the employee could prove that the allegedly independent

adverse employment decision was not independent because the biased supervisor influenced or was involved in the decision or decision-making process.

Staub v. Proctor Hospital[226]
Two supervisors, Mulally and Korenchuk, were hostile to Staub's military obligations with the U.S. Army Reserves. They allegedly made statements that his military service was a drain on the department, and that his service was a "joke" and a waste of taxpayer money. Mulally said that she wanted to find a way to get rid of him, and took disciplinary action against him based on an alleged hospital rule. Staub disputed that the rule exists, but even if it did, he did not violate it. Three months later, a coworker complained to Buck, the Vice President of Human Resources, about Staub's frequent unavailability and abruptness. Shortly thereafter, Korenchuk reported to Buck that Staub had again violated the hospital rule, which Staub again denied. Buck relied on Korenchuk's accusation, and after reviewing Staub's personnel file, fired him. Staub challenged the firing through the hospital's grievance process and told Buck that Mulally had fabricated the allegations underlying the Corrective Action out of hostility for his military obligations. Buck did not follow-up on Staub's allegations and upheld the termination.

Staub sued the hospital for discrimination in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and received a jury verdict in his favor. The U.S. Supreme Court affirmed that verdict. It explained that an employer is liable for violating the USERRA if a supervisor performs an act motivated by antimilitary animus, intends that act to cause an adverse employment action, and that act causes the ultimate employment action. According to the court, there was evidence that Mulally's and Korenchuk's actions were motivated by hostility toward Staub's military obligations, and were causal factors underlying Buck's decision to fire Staub.

D. OTHER ANTI-RETALIATION LAWS

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

1. CONSTITUTIONAL FREE SPEECH RIGHTS

Although district employees do not lose their constitutional free speech rights once hired by a community college district, not all speech is protected speech.[227] To qualify as constitutionally protected speech, the employee's speech or expressive conduct must be on a matter of public concern. An employee's speech is "of public concern" if it helps citizens make informed decisions about the operation of their government.[228] Conversely, speech is not of public concern when the speech deals with individual personnel disputes and grievances. Nor is an employee's speech protected when the information would be irrelevant as to how the public evaluates the district's performance.[229]

In addition, to qualify as protected speech, the employee's speech must be independent of the employee's official duties as a district employee. When a public employee's statements are made pursuant to the employee's official duties, the employee is not speaking as a citizen for First Amendment purposes but as an agent of the public agency, and the speech is not protected.[230]

But just because the employee's speech constitutes a matter of public concern does not mean that the employee has the right to engage in that speech. Instead, the employee's interest in speaking on that matter must be balanced against the district's interest in promoting the efficiency of the public services it performs through its employees.[231] In balancing these divergent interests, courts must afford the public employer wide discretion and control over how it manages its personnel matters.[232]

Case Studies On Employee Free Speech

Garcetti v. Ceballos[233]
Plaintiff worked for the county as a deputy district attorney. After he wrote a disposition memorandum that recommended dismissal of a pending case based on purported government misconduct, the county transferred him to a different courthouse and denied him promotion. In his lawsuit against the county, the plaintiff alleged that the county violated his free speech rights by subjecting him to adverse employment actions in retaliation for his speech. The United States Supreme Court rejected his claim and held that because the plaintiff did not speak as a citizen when he wrote his memo, the First Amendment did not protect his speech.

Brandon v. Maricopa County[234]
A county attorney in Arizona provided comments to a newspaper reporter about a settlement of a lawsuit in which she had represented the county. The article suggested that the county made an excessive settlement offer to avoid embarrassment for key officials who potentially would have been deposed in the matter. Doubting her judgment, county risk management officials asked that the attorney's cases be assigned to other lawyers and she was later terminated, allegedly because of an altercation at work. The attorney sued the county alleging retaliation for exercising her First Amendment rights. The Ninth

Circuit held that the attorney's comments to the reporter were not protected speech because the attorney made the comments in the course of her official duties. First, she was speaking as a legal representative of the county in that her public statements related to the very matter she was handling on the county's behalf. Second, the comments fell within the broad set of official duties she owed to the county as its attorney. Finally, the court found that although employee reports of employer misconduct may be classified as outside the employee's job duties, the attorney did not allege corruption or serious misconduct in her comments to the reporter. The attorney's comments merely implied that the county acted without professional advice when paying the settlement, which reflected poorly upon the county.

Demers v. Austin[235]

A university professor distributed a pamphlet to members of the print and broadcast media, to administrators at the university, to some of his colleagues, to an advisory board and others. His pamphlet discussed plans to separate two faculties of study as part of restructuring the liberal arts college. He also distributed drafts of a book he was writing, which contained some criticisms of the university. Thereafter, the professor believed that after he circulated the materials, the administration retaliated against him by giving him negative annual performance reviews that supposedly contained falsehoods, by conducting two internal audits, and by sending him an official disciplinary warning. The professor sued the university for retaliating against him for exercising his First Amendment rights. The trial court held, based on the U.S. Supreme Court's 2006 decision in *Garcetti v. Cellabos* (which found that a public employee does not have First Amendment rights when speaking on matters in the course and scope of his or her employment), that the speech was unprotected because the teacher's speech was made pursuant to his official duties.

On appeal, the Ninth Circuit Court of Appeal reversed, holding that *Pickering*, not *Garcetti*, was the appropriate standard for evaluating speech related to "scholarship or teaching" made pursuant to the official duties of a teacher or professor. The *Pickering* test states that an employee's speech is protected when: (a) it involves a matter of public concern and (b) the employer's interest in regulating the speech is outweighed by the interest of protecting free speech. The court relied on Supreme Court precedent stressing the importance of protecting academic freedom under the First Amendment and found that the pamphlet addressed a matter of public concern. In regards to the teacher's book, the court remanded for further proceedings as there was insufficient evidence in the record to determine whether the in-progress book triggered retaliation (without addressing whether it concerned a matter of public interest).

Rodriguez v. Maricopa County Community College District[236]
A community college professor, using a district-maintained distribution list, sent out a series of racially charged emails with disparaging remarks about non-whites. Several district employees complained that the emails created a hostile work environment. The college president sent an email to everyone on the distribution list stating his support for the values and philosophy of diversity embraced by the district. The chancellor issued a press release stating that the college professor's emails were not aligned with the district's vision, but that disciplinary measures would undermine academic freedom. The district did not discipline the college professor. A class of district employees then filed suit alleging that the district's failure to respond *properly* to the college professor's emails created a hostile environment and violated the Equal Protection Clause of the U.S. Constitution.

The district court denied both the college president's and the chancellor's claim for qualified immunity. The Ninth Circuit Court of Appeal reversed. According to the Ninth Circuit, the college professor's emails did not constitute unlawful harassment, but were, instead, protected speech. The Court noted that the employees' objection to the speech was based entirely on the professor's point of view, and the government may not silence speech simply because others find it offensive. The right to provoke, offend, and shock lies at the core of the First Amendment. The Court also expressed doubt that the professor's speech could ever constitute unlawful harassment. The offensive quality of his speech was based entirely on the meaning of the speech, and not on any conduct or implicit threat of conduct that the speech contained. The Court further noted that to maintain academic freedom, college must have the ability to allow people to voice their opinions, even if controversial.

Bauer v. Sampson[237]
Community college professor expressed his disapproval of the college president through writings and illustrations published in an underground campus newspaper, and the college sought to discipline the professor for that conduct. The Ninth Circuit found that while the professor's writings and illustrations were hyperbolic and at times adolescent, insulting, and uncivil, his free speech interest outweighed the college's interest in regulating the speech, and thus, the college could not rely upon the professor's statements as a basis for discipline. As the Ninth Circuit noted, the professor's statements focused directly on issues of public interest and importance involving the college, which was involved in contentious debate, and the professor's writings were not a source of disharmony on campus and did not affect the professor's job performance.

Lane v. Franks[238]
College director of at-risk youth testified before a federal grand jury and in two criminal trials concerning a State representative who had been on the college's payroll despite performing no work for the college and who he had terminated.

In his testimony, the employee testified about matters related to his own job duties. The college laid the employee off along with 29 other employees, but then rescinded all but two layoffs. The employee who had testified remained laid off. The employee sued the college, alleging the college retaliated against him for exercising his First Amendment rights when he testified before the grand jury and in the two criminal trials. His case went to the United States Supreme Court, which held that speech by a public employee rendered as sworn testimony does not lose its First Amendment protection just because it related to the employee's official duties. Rather, this speech may be protected.

LCW Practice Advisor

Employee Speech is not protected speech when it is:

- Insubordinate;
- Unnecessarily disruptive;
- Delivered in a manner that is not designed to fix the perceived problem;
- Not a matter of public interest;
- Made pursuant to an employee's official duties (for non-teaching employees); or
- Interfering with working relationships that are essential to the smooth functioning of the organization. [239]

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

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

Students also have constitutionally protected speech rights.[240] Although students do not lose their constitutionally protected speech rights when on campus or engaging in campus-sponsored

activities, the "special characteristics of the school environment" allow districts to regulate student speech.[241] Thus, districts may regulate student speech where district officials can reasonably predict that the student speech would substantially disrupt or materially interfere with student activities.[242] In fact, where the student speech is contrary to the district's basic educational mission, it may preclude that speech altogether.[243] The ability to control student speech, however, is likely to be reduced at the college level, as compared to the K-12 level (where students are considered more impressionable).

Case Studies On Student Free Speech

Nguon v. Wolf[244]
School district prohibited inappropriate public displays of affections (IPDA). Plaintiff, a high school student, accused the school district of violating her First Amendment rights when it disciplined her for expressing her sexual orientation through public displays of affection with another female student. The Court rejected the plaintiff's claim. According to the Court, the school district did not violate the plaintiff's First Amendment rights when it disciplined her for engaging in IPDA because her "expressive conduct" was inconsistent with the school's mission to have students learn.

Morse v. Frederick[245]
During a school-sponsored and school-sanctioned event that occurred off-campus, students displayed a banner that read "Bong Hits 4 Jesus." The school principal believed that the banner promoted illegal drug use and instructed the students to remove the banner. All but one student complied. The school principal confiscated the banner, and suspended the student. When the school district upheld his suspension, the student filed a lawsuit accusing the district of violating his free speech rights. The U.S. Supreme Court held that the school principal did not violate the student's right to free speech when he confiscated the banner or suspended the student. According to the Court, a school district can ban speech that encourages or promotes drug use because of the "special characteristics of the school environment," and the important, and possibly compelling, interest in deterring drug use by schoolchildren. It noted that because the event occurred during school hours, and the school principal had approved the event, the activity was subject to the district's discipline, even though it involved an off-campus event. Accordingly, the district could discipline the student.

2. WHISTLEBLOWER STATUTES

(a) California Labor Code section 1102.5(b)

Labor Code section 1102.5(b) prohibits employers from taking adverse actions against an employee because the employee disclosed information of a violation of local, state, or federal rule or regulation to a government or law enforcement agency, regardless of whether disclosing the information is part of the employee's job duties.[246] Section 1102.5(b) prohibits employers, or

anyone acting on the employer's behalf, from retaliating against an employee for disclosing wrongdoing by either the employer or fellow employees.[247] Section 1102.5 protects an employee's disclosure of wrongdoing even if the employee is not the first one to report it.[248] A disclosure of wrongdoing is not considered "whistleblowing" if the employer directed the employee to disclose the information for a legitimate business purpose.[249] Employees who believes they have been retaliated against for being a "whistleblower" are not required to seek relief from the Labor Commissioner before filing a lawsuit.[250]

Since 2016, California extended whistleblower protection to family members of someone who has, or is perceived to have, engaged in protected whistleblowing conduct. The law makes clear that an employer cannot retaliate against a whistleblower or any the whistleblower's family members who may also work for the agency. Violation of Labor Code section 1102.5(b) constitutes a *criminal offense* under Labor Code section 1103.

The phrase, "government or law enforcement agency" includes a public employee's report to his or her own employer.[251] To state a claim under Labor Code section 1102.5(b), the employee does not have to be correct in their belief that prohibited conduct had occurred. Instead, the employee need only show that they had reasonable cause to believe that a federal or state statute was violated.[252]

LCW Practice Advisor

A public employee is not required to make a formal report to establish a claim under section 1102.5. Rather, a public employee can establish a claim based on any adverse action taken against an employee based on an employee's informal disclosure of a violation of state or federal rule, regulation, or law.

LCW Practice Advisor

In 2022, the California Supreme Court held that the evidentiary standard set forth in Labor Code section 1102.6 applies to whistleblower claims brought under Labor Code section 1102.5, not the three-part burden-shifting framework the U.S. Supreme Court laid out in *McDonnell Douglas Corp. v. Green*.[253]

Based on this recent ruling, when bringing a whistleblower retaliation claim under section 1102.5, an employee is not required to show that their employer's lawful reason for taking an adverse action against them was pretextual. Even if an employer had a genuine, nonretaliatory reason for its adverse action, a plaintiff still meets their burden under section 1102.6 if it is shown that the employer also had at least one retaliatory reason that was a contributing factor in the action.

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

Labor Code section 1102.8 requires that employers display a poster listing employees' rights and responsibilities under the whistleblowing laws. This poster must include the phone number for the State Attorney General's whistleblower hotline.[254]

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

The California Labor Code contains a variety of provisions that allow the Labor and Workforce Development Agency to assess and collect civil penalties from employers found to have violated those provisions. However, pursuant to California Labor Code section 2699, aggrieved employees can themselves collect, by prevailing in a civil action brought on behalf of themselves or others, the civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency.[255] Employees bringing a claim under the Private Attorney General Act need not demonstrate that they suffered an actual injury in order to prevail, only that a knowing and intentional violation occurred.[256] The prevailing employees are also entitled to an award of reasonable attorneys' fees and costs.[257]

(d) California Government Code sections 53297-53298

Under Government Code section 53297, an employee or applicant for employment may file a written complaint under penalty of perjury with a local agency, including a community college district, regarding: gross mismanagement, a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.258

Pursuant to Government Code Section 53298, a district is prohibited from taking any reprisal against any employee or applicant for employment who files a complaint pursuant to section 53297 unless the district reasonably believes that its action or inaction is justified on the basis of separate evidence showing that:

- The employee's complaint has disclosed information that he or she knows to be false or has disclosed information without regard for the truth or falsity thereof;
- The employee's complaint has disclosed information from records which are closed to public inspection pursuant to law;
- The employee's complaint has disclosed information which is confidential under any other provision of law;
- The employee was the subject of an ongoing or existing disciplinary action with the local agency prior to the disclosure of information; or
- The employee has violated any other provision of the local personnel rules and regulations, has failed to perform assigned duties, or has committed any other act unrelated to the disclosure that would otherwise be subject to personnel action.[259]

(e) Community College District Employee's Reporting of Unlawful Activities

The Reporting by Community College Employees of Improper Governmental Activities Act, set forth at California Education Code section 87160 et seq., prohibits retaliation against district employees or job applicants who disclose either actual or alleged improper governmental activities. As defined by Education Code section 87162(c) an "improper governmental activity" is any act by a district or district employee taken in the performance of the employee's official duties that violates a state or federal law or regulation, is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.260

Like other whistleblower protections, it prohibits not only the direct use of official authority to intimidate, threaten, coerce, or command any person for the purpose of interfering with that person's right to disclose improper governmental activities, but also the indirect use of official authority for that purpose.[261] Similarly, the Act also prohibits attempts to intimidate, threaten, coerce or command any person from disclosing improper governmental activities.[262]

An employee or applicant who believes he or she has been retaliated against in violation of this Act has the right to file a written complaint with his or her supervisor, a community college administrator, or a local law enforcement agency. Complaints filed with local law enforcement agencies must be filed within 12 months of the most recent act of alleged retaliatory conduct.[263]

Within 10 working days of the complaint's submission, the State Personnel Board will initiate either a hearing or an investigation of the complaint. The executive officer for the State Personnel Board must then provide the complainant and the district with written findings of his or her investigation or hearing no later than 60 days thereafter. The district bears all the costs associated with any hearings conducted by the State Personnel Board under Education Code section 87164.[264]

If the executive officer's findings show misconduct by the district, the district can request a hearing before the State Personnel Board itself.[265] If the executive officer's findings are not appealed to the State Personnel Board, or if the State Personnel Board itself determines that a violation of this Act occurred, it can order any appropriate relief, including reinstatement, backpay, and expungement of any adverse records from the employee's personnel file.[266] Once such a determination is made, the State Personnel Board will order that a notice of that violation be placed in the supervisor's or administrator's official personnel records.[267]

This Act also allows the aggrieved employee or applicant to file a private cause of action for damages against the person who intentionally engaged in the retaliatory conduct, but only if they she first filed a written complaint with a local law enforcement agency.[268] If the aggrieved employee or applicant prevails at trial, they would also be entitled to collect reasonable attorney's fees. If malicious conduct is proven, the Court can award punitive damages to the aggrieved employee or applicant.[269]

(f) False Claims Act

A particular form of whistleblower statutes especially pertinent to public entities is the "False Claims Act." These federal and state statutes prohibit the submission of false claims for money,

goods or services to a public agency.[270] They are designed "to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities."[271] To that end, these acts identify particular circumstances and procedures under which individuals may essentially act as private attorney generals by initiating claims against employers they believe have submitted false claims to a governmental entity.[272]

These acts also include provisions expressly prohibiting employers from retaliating against employees for initiating or assisting in the investigation of alleged false claims.[273] Employers found to have retaliated against employees in violation of the California False Claims Act can be liable for damages, including double the amount of back pay, interest, and special damages. The False Claims Act also mandates that employers found liable for such conduct pay litigation costs and reasonable attorney's fees.[274]

Case Studies on Whistleblower Retaliation

Wilkins v. St. Louis Housing Authority[275]
An employee of the St. Louis Housing Authority reported deficiencies in the Authority's security operations to the United States Department of Housing and Urban Development (HUD). That employee also reported that the Authority had been misrepresenting those deficiencies to HUD. After the employee reported his concerns to HUD, the Authority fired him. He sued under the federal False Claims Act, prevailed at trial, and the Court of Appeals upheld the jury award against the Authority. The court found that the employee's conduct was protected because he reasonably believed that the Authority had acted fraudulently when it misrepresented its security operations.

Kaye v. Board of Trustees of San Diego County Public Law Library[276]
County terminated an at-will employee for insubordination and serious misconduct after he sent an email criticizing his supervisors and complaining about their inquiry into an invitation he received to speak at a conference. In his lawsuit, he alleged, among other things, that his termination violated the whistleblower protections of the California False Claims Act (CFCA). The trial court granted summary adjudication on this claim, and the Court of Appeal affirmed. The court noted that while the CFCA was to be construed broadly, the employee's email was not made in connection with any report or request for investigation of a false claim. Instead, it was made to complain about his supervisor's inquiry into his conference invitation. The court further found that because the employee's remarks about his supervisor's attendance at the conference were based on speculation and inaccurate assumptions, they did not reflect reasonably based suspicions of an imminent false claim.

3. WORKING CONDITIONS

Many state and federal statutes that regulate working conditions or create worker protections also prohibit retaliation against employees who seek to enforce those statutes. While the list below is

not exhaustive, it does illustrate the range of employer conduct that may be subject to retaliation claims:

- Laws that entitle employees to family medical leave:
  1. Both the federal Family Medical Leave Act (FMLA)[277] and the California Family Rights Act (CFRA)[278] prohibit retaliation against employees who try to invoke their provisions. Effective January 1, 2021, the CFRA will apply to all employers with five or more employees.
  2. The Families First Coronavirus Response Act prohibits retaliation against employees who take or request Emergency Paid Sick Leave or Expanded Family Medical Leave.
  3. California Labor Code section 233(c) prohibits employers from threatening to discipline, disciplining, or in any way discriminating against employees who use or who attempt to use Family Sick Leave.
  4. California Labor Code section 234 expressly prohibits employers from counting Family Sick Leave toward absence control policies that may lead to or result in discipline, discharge, demotion, or suspension.
  5. California Labor Code Section 246.5 prohibits employers from threatening to discipline or disciplining, or in any way discriminating against employees who use or who attempt to use Paid Sick Leave.[279]
  6. California Labor Code section 230.1 prohibits employers from discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking from taking time off work to: seek medical attention for resulting injuries, receive counseling, participate in safety planning, or obtain services from a domestic violence shelter, program, or rape crisis center.[280] The statute also requires employers to provide written notice of the rights of victims of domestic violence, sexual assault, or stalking to all new employees upon hire, and to other employees upon request.
- California's pregnancy disability law prohibits employers from terminating pregnant employees exercising their leave rights.[281]
- Military leave laws: California's Military & Veterans Code sections 389 et seq, the federal Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. sections 4301 et seq (USERRA), and California Education Code section 87018, all ensure that employees are not adversely affected in their employment for taking leave for military service. In addition, the National Defense Authorization Act provides additional protections for qualifying exigency leave and military caregiver leave.282
- Laws that regulate wages: Both the federal Fair Labor Standards Act (FLSA)[283] and the California Labor Code establish laws regulating wages. Both also explicitly protect employees who seek to enforce these laws.[284]

- Laws that regulate workplace safety and protect injured workers: Labor Code section 6300 et seq. explicitly protects employees who take steps to expose unsafe working conditions that violate the safety standards and procedures required by Cal OSHA.[285] Additionally, California Labor Code section 132a prohibits employers and their insurers from retaliating against employees who file workers' compensation claims.[286]

Case Study Regarding Military Leave

Huhmann v. Federal Express[287]
Employee alleged that his employer violated the USERRA by denying him a signing bonus he would have earned had he not served in the military. The court applied a two-step analysis to determine whether the employee was entitled to the bonus: the "escalator principle" and the "reasonable certainty" test. First, under the escalator principle, the court reasoned that under the USERRA, a member of the military should not be removed from the normal progress of his or her "career trajectory," but must be returned to the same position of employment in which he or she would have been employed if their employment had not been interrupted by military service. This principle presumes that employees will advance upward in their career trajectories as predictably as if they were standing on an upward moving staircase. Second, the trial court applied the "reasonably certain" test which asks two questions: 1) whether looking forward it is reasonably certain that employees who complete training regularly advance in their career, and 2) whether in hindsight an employee did in fact advance, or would have probably advanced, if training or employment was not interrupted by military service. The trial court found that applying these standards, the employee was entitled to the bonus. The Ninth Circuit confirmed that the trial court appropriately applied the two-step analysis.

Case Study Regarding Misconduct During Leave

Richey v. Autonation, Inc.[288]
Employer maintained a general understanding that outside employment of any kind (including self-employment) while on approved leave was against company policy, and employees were fired for violating this policy. Employee also received a manual noting that outside work while on an approved CFRA leave was prohibited. While working full-time, employee opened a seafood restaurant. Employee's supervisors met with him shortly thereafter to discuss his work attendance and performance, as he was observed to be "a bit off his game." Then, employee injured his back while moving furniture. He requested leave from employer under the FMLA and the CFRA, and his employer granted his leave request. In addition, the employer sent employee a letter warning him that employees are prohibited from pursuing outside employment while on leave. The following week, the employer sent an employee to observe the employee at his seafood restaurant. The employee was observed sweeping,

bending over, hanging a sign, and working at the front counter. The employer dismissed the employee for holding outside employment and the employee sued the employer alleging violation of his rights under the CFRA. The court held that the CFRA did not protect the employee from termination because he was not fired for taking leave but because he violated the employer's outside work policy while on family leave.

Case Study Regarding Workplace Safety

Franklin v. Monadnock Co.[289]
Employee reported to his employer that a coworker had threatened his safety, as well as that of three other employees, by stating he would have them killed. The employer, however, did nothing in response. A week later, the coworker tried to stab the employee with a screwdriver. The employee complained to the police about the coworker's threats. The employer then terminated the employee for complaining about the coworker. The court held that the employee's allegations were sufficient to state a violation of public policy that protects an employee against discharge for making a good faith complaint about working conditions that he reasonably believes to be unsafe.

4. UNION ACTIVITIES

An array of state and federal statutes govern labor relations for different sectors of the workforce. In California, the Educational Employment Relations Act (EERA)[290] governs labor relations in community college districts. The EERA prohibits both employers and employee organizations from retaliating against employees for engaging in legitimate union activities or insisting upon the protections of these statutes, and treats such interference as an unfair labor practice.[291]
In addition to these statutes, the Public Safety Officers Procedural Bill of Rights Act provides peace officers, including community college police officers, with certain rights and remedies when subject to interrogations, investigations, or punitive action.[292]

Case Studies Regarding Union Activities

Cabrillo Community College District[293]
Moberg filed an unfair practice charge against the Cabrillo Community College District. In his charge, Moberg alleged that the District withdrew a tentative offer of employment, placed him on an immediate paid leave, requested an interview with him to discuss his academic credentials, and decided not to offer him future employment after it learned that Moberg had filed an unfair practice charge against another district. He claimed that the District's actions constituted retaliation in violation of the EERA. PERB's Office of the General Counsel, however, disagreed and dismissed Moberg's charge. Moberg appealed and PERB found that Moberg sufficiently alleged a case of retaliation and ordered that a complaint issue. In support of its finding, PERB considered the close temporal proximity of the adverse actions the District took after it learned

about Moberg's unfair practice charge against the other district, and the District's investigation into Moberg's credentials. According to PERB, those allegations supported an inference that the District's actions were motivated by Moberg's protected activity.

Los Angeles Community College District[294]
The District issued an adjunct faculty member a letter advising him that he would be placed on paid administrative leave while the District initiated a fitness-for-duty examination. The letter stated, in part, "You are hereby directed not to contact any members of the faculty, staff or students." PERB found that the District's overbroad directive interfered with the faculty member's protected rights by prohibiting the discussion of employment conditions with others.

Regents of the University of California[295]
A University of California employee claimed that the University suspended and terminated him in retaliation for engaging in protected activities. PERB did not find a causal connection between the employee's suspension or termination and his grievances, unfair practice charge, or requests for union representation during meetings with management. It did find that his termination was at least partially motivated by his attempt to assert his rights under the collective bargaining agreement pertaining to whether a doctor's note was required by the sick leave provision. However, it was clear the University had concerns with the employee's ability to follow direct orders as well as the manner in which he challenged his supervisors about assigned tasks long before and long after the protected activity. The University therefore established that it would have taken the same action even if the employee had not engaged in protected activity. Further, PERB noted that it has no authority to determine whether adverse actions that were not motivated by protected activity were just or proper.

County of Riverside[296]
Although a probationary employee engaged in protected activity when he sought advice, and a supervisor knew of that protected activity when he recommended the employee be released from probation, PERB upheld the dismissal of the complaint. PERB found that the employee had not shown that his protected activity was the motivating factor behind the supervisor's recommendation.

Section 8 ANTI-DISCRIMINATION LAWS DO NOT IMMUNIZE EMPLOYEES FROM DISCIPLINE WHEN WARRANTED

The fear of being sued for retaliation makes some employers reluctant to discipline any employee who has, within recent memory, complained about anything. This dynamic not only chills legitimate and necessary employment actions, it encourages the filing of erroneous complaints. Some employees will lodge unfounded complaints so they can point to "protected activity" if they are ever subjected to an adverse employment action.

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

A. TREAT ALL EMPLOYEES EQUITABLY

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

B. PERFORMANCE EVALUATIONS

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

C. DISCIPLINE

As a general matter, all employees should receive the same level of discipline for the same offense (taking into consideration each employee's unique history of performance and discipline in assessing the seriousness of the conduct at issue.) Applying discipline that is supportable by past practice is especially important where the employee has recently engaged in a protected activity. Thus, if an employee who engaged in protected activity thereafter engages in

misconduct, the employer should impose discipline only if it is consistent with past practice regarding the same or similar misconduct. If the misconduct is extreme or unprecedented, discipline should still be imposed, despite the risk of a retaliation claim, because the severity of the misconduct is likely to demonstrate to a court that the employer had a reasonable business motive to impose the discipline.

LCW Practice Advisor

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

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

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

Section 9 PREVENTING HARASSMENT, DISCRIMINATION, AND RETALIATION

Because the anti-discrimination laws mandate that districts take all reasonable steps necessary to prevent discrimination and harassment from occurring in both the work and educational environments,[297] it is essential that districts act decisively on the issue of discrimination and

harassment. A claimant must prevail on an underlying claim of discrimination, harassment, or retaliation to successfully sue on the claim that the district failed to take reasonable steps to prevent discrimination, harassment, or retaliation. But even if the claimant does not prevail on the underlying claim of harassment, discrimination or retaliation, the Civil Rights Department (CRD) (formerly the Department of Fair Employment and Housing) may still seek non-monetary preventive remedies against an employer.[298] Prevention means more than simply having a policy that prohibits discrimination, harassment, and retaliation from occurring. It means affirmatively addressing the subject of harassment, discrimination, and retaliation by (1) informing employees and students that the district does not tolerate such conduct, (2) promptly and thoroughly investigating complaints that do arise, and (3) effectively remedying any policy violations that occur.[299]

The FEHA requires that employers notify employees of its protections by:

- Posting the CRD's poster regarding discrimination and harassment in a prominent and accessible location in the workplace;
- Posting the CRD's poster regarding transgender rights in a prominent and accessible location in the workplace; and
- Distributing a sexual harassment information sheet to all employees in a reliable way, such as with the employees' paychecks. You may obtain an information sheet from the Civil Rights Department or the California Department of General Services, or you may draft your own information sheet or include the information in your policy.[300] If you draft your own, it should include the following:
    1. A statement that sexual harassment is illegal;
    2. The definition of sexual harassment under state and federal law;
    3. A description of sexual harassment, including examples;
    4. The district's internal complaint process that is available for each employee;
    5. The legal remedies and complaint process available through the CRD and the Civil Rights Council (CRC) (formerly the Fair Employment and Housing Council);
    6. Directions on how to contact the CRD and the CRC; and
    7. Notice of protection from retaliation for opposing unlawful discrimination and harassment.
- Effective April 1, 2016, the law requires employers to have a harassment, discrimination, and retaliation prevention policy that sets forth its complaint and investigation procedures.

LCW Practice Advisor

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

LCW Practice Advisor

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

In 2017, the Civil Rights Department published a guide for California Employers on how to address and prevent workplace harassment.[301] The guide describes the elements of an effective anti-harassment program, and outlines the investigatory steps an employer should take if it receives a report of harassment or other wrongful behavior.

In addition, Title 5, section 59320 et seq. of the California Code of Regulations requires that districts establish and adopt written policies that prohibit discrimination and harassment based on a protected status. It also requires that districts notify students and employees of those prohibitions.[302]

Districts should also keep track of all complaints received so it can spot repeat victims and alleged offenders, and monitor the effectiveness of its prevention and remediation efforts.

Title IX also requires community college districts to adopt, distribute, and post policies and procedures that address sexual harassment (including sexual violence) and requires school districts to designate/appoint a Title IX Coordinator.[303] (For more information on Title IX requirements, see Section 14 of this workbook.)

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

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

Employer standards for conduct should not mirror the law for two reasons. First, prohibiting inappropriate behavior enables an employer to take corrective action at an early stage, thus preventing more severe and potentially unlawful conduct from developing. Second, if the

employer's policy simply recites the legal standard, the employer could be held to have admitted that illegal conduct occurred if it finds that the conduct violated its policy. Any such finding could be used against the employer as an admission if litigation develops. For these reasons, employers should adopt a "zero tolerance" policy. Zero tolerance policies prohibit any abusive conduct, harassment, discrimination, and retaliation, whether or not the conduct meets the threshold of being either severe or pervasive.

A. CONTENTS OF THE POLICY

Regulations by the Civil Rights Department (formerly the Department of Fair Employment and Housing), amended effective February 11, 2021, set forth requirements regarding employer policies regarding prevention of harassment, discrimination, and retaliation. Not only do the laws require employers to have a policy, they also set forth specific requirements for such a policy, including that the policy must:

1. Be in writing.
2. List all current protected categories covered under the Act.
3. Indicate that the law prohibits co-workers, third parties, supervisors, and managers from engaging in conduct prohibited by the Act.
4. Set forth a complaint process that ensures complaints receive:
    a. Employer confidentiality, to the extent possible;
    b. A timely response;
    c. Impartial and timely investigations by qualified personnel;
    d. Documentation and tracking for reasonable progress;
    e. Appropriate options for remedial actions and resolutions; and
    f. Timely closures.
5. Provide a complaint process that does not require an employee to complain directly the employee's supervisor, by providing additional avenues to lodge complaints, such as:
    a. Direct communication with a designated representative, Human Resources manager, EEO officer, other supervisor, or ombudsperson;
    b. A complaint hotline; and/or
    c. A referral to the EEOC and the Civil Rights Department.
6. Instruct supervisors to report misconduct or complaints of misconduct to a designated representative or a Human Resources manager. If an employer has five (5) or more employees, this topic must be in the mandated sexual harassment training provided by the employer.
7. Indicate that, upon receipt of allegations of misconduct, the employer will conduct a fair, timely, and thorough investigation that provides all parties with due process and reaches reasonable conclusions based on the evidence collected.

8. State that the employer will keep the complaint and investigation confidential to the extent possible, but not indicate that the investigation will be completely confidential.
9. Indicate that appropriate remedial measures will be taken if, at the end of the investigation, misconduct is found.
10. Make clear that employees will not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.
11. Includes a link to, or the Civil Rights Department's website address for, the sexual harassment online training courses created by the Civil Rights Department.[304]

To have a meaningful policy, the employer must design the complaint procedure to encourage victims to come forward. Coming forward can be particularly difficult if the complainant's supervisor is both the alleged harasser and the only person to whom the complainant may report the conduct. There may be other reasons that the employee is not comfortable speaking to a direct supervisor as well. In recognition of these situations and to encourage reporting, the law prohibits employers from adopting complaint procedures that only direct an employee to complain to the employee's supervisor. Instead, employers must adopt policies that provide employees with at least one alternative route to file a complaint.

To further encourage victims to come forward, employers must maintain confidentiality of complaints and investigations to the greatest extent possible. However, the employer must make clear in its policy that complete confidentiality cannot be guaranteed. The nature of investigations and due process rights of the accused employee require some level of disclosure by the employer. Complainants should be informed that their complaints will be conveyed only to those who need to know about it, such as those investigating the complaint and any others involved in remedial or disciplinary action.

In addition to the policy components described above, a district's anti-harassment, discrimination and retaliation policy should also do all of the following:

- Prohibit discrimination, harassment, and retaliation from both employees and non-employees based upon any protected status;
- Protect employees, applicants, independent contractors, and students from harassment, discrimination, and retaliation; and
- Provide those alleging non-employment-based misconduct with information for filing a complaint with the Office for Civil Rights of the U.S. Department of Education (OCR).

While the complaint procedure should encourage employees and students to state their complaints in writing, complainants should also be allowed to make verbal complaints. Upon receiving a complaint, the district should acknowledge its receipt in writing and indicate when the complainant can expect a follow-up report. For more information regarding the investigation process itself, see Section 12 below. Finally, if 10% or more of the workforce at any facility

speaks a language other than English as their primary language, districts must translate the prevention policies into each relevant language.[305]

As described in more detail in Section 14 of this workbook, Title IX requires districts to adopt policies and procedures addressing sexual harassment and that it designate a Title IX Coordinator.[306]

B. DISSEMINATING THE POLICY

In addition to developing an anti-harassment, discrimination, and retaliation policy, the district must also disseminate the policy in one or more of the following ways:

1. Print and provide a hardcopy of the policy to all employees with an acknowledgement form for the employee to sign and return.
2. Send the policy via e-email with an acknowledgement form for the employee to sign and return;
3. Post the policy on the employer's intranet with a tracking system that ensures that all employees have read and acknowledged receipt of the policy;
4. Providing and discussing the policy with new hires; and/or
5. Any other way that ensures employees receive and understand the policy.

C. DOCUMENTING AND TRACKING COMPLAINTS

The district must keep documentation and track the progress of complaints through its process. To accomplish this, the person designated to receive complaints should keep a confidential log of the complaints received. A log can serve as a checklist, help the district track the progress of particular investigations and complaints, spot repeat victims and alleged offenders, monitor the effectiveness of the district's prevention and remediation efforts, and serve as evidence of the district's thorough prevention and prompt remediation efforts. The log may include:

- The names of the complainant and alleged harasser;
- The complainant's protected status, if applicable;
- The nature of the complaint;
- The date the complaint was received;
- The name of the person assigned to investigate the complaint;
- The findings from the investigation;
- What, if any, remedial action was taken;
- Whether the complainant was satisfied with the result;
- Whether the complainant or alleged harasser filed a claim with the Civil Rights Department, the EEOC, or the OCR; and

- Whether the complainant filed a tort claim or a lawsuit.

Any documentation created or kept by the district regarding complaints may have to be produced in a lawsuit. The likelihood of production is rare, however, because of the privacy interests of the people who file complaints and the people who are disciplined. In the event that a court orders the disclosure of other complainants' identities, the district would have to make such disclosures, regardless of the existence of a log.

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

All district employees, and particularly managers and supervisors, must treat their co-workers and subordinates professionally and respectfully and make decisions based on each employee's individual merit. Districts should prohibit and discourage abusive conduct and conduct or decisions based on an employee's protected status or on stereotypes related to a protected status. Training can further these goals by educating employees on (1) how to identify workplace behaviors that constitute harassment, (2) the negative effects of harassment, and (3) responding to and correcting harassing or abusive behavior.

A. MANDATORY HARASSMENT PREVENTION TRAINING

While required harassment training for supervisory employees has been in effect since 2005, California law was amended in 2018 to also require harassment training for nonsupervisory employees and seasonal/temporary employees hired to work less than six months (SB 1343/SB 778). As required by the 2018 amendments, the Civil Rights Department (formerly the Department of Fair Employment and Housing) has developed online training courses on the prevention of sexual harassment in the workplace to assist employers in satisfying related harassment training requirements.[307] However, employers may still conduct in-person classroom training and must still ensure compliance with FEHA's training requirements. Below is a summary of the Civil Rights Department's training requirements.

Districts must maintain the following information related to the mandated harassment trainings for a minimum of two years: (1) names of the employees trained; (2) dates of the trainings; (3) sign-in sheets; (4) copies of all certificates of attendance or completion issued; (5) types of trainings; (6) copies of all written or recorded materials that comprise the training; and (7) names of the training providers.[308] In addition, for any interactive electronic trainings, the trainer must maintain copies of all materials, employee questions, and written responses to employee questions for two years.[309]

1. SUPERVISORY EMPLOYEES

California law requires a private employer with five or more employees, as well as all public sector employers (including community college districts) to provide harassment prevention training to its supervisors.[310] This is commonly referred to as "AB 1825" harassment training, based on the name of the legislative bill that enacted this training requirement.

Supervisors must receive at least two hours of training every two years. New supervisors must receive training within six months of being hired or promoted and then at least every two years thereafter. Employers must maintain training materials and documentation tracking attendance and compliance for a period of at least two years.[311]

For purposes of harassment prevention training, the FEHA defines "*supervisor*" as:

"[A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."[312]

Because of this broad definition, "supervisors" are not limited to only those who are accountable or responsible for the work of their subordinates.

LCW Practice Advisor

Any employee who has any level of supervisory discretion, as opposed to routine clerical duties, is a "supervisor" as defined in the Fair Employment and Housing Act.[313]

2. NON-SUPERVISORY EMPLOYEES

California law requires a private employer with five or more employees, as well as all public employers, provide all *non-supervisory* employees with at least one hour of classroom or other effective interactive training and education regarding sexual harassment within six months of assuming their positions. For all employees, the required training must occur at least once every two years.[314]

3. TEMPORARY AND SEASONAL EMPLOYEES HIRED TO WORK LESS THAN SIX MONTHS

Effective January 1, 2021, employers must also provide the applicable supervisory or non-supervisory training for seasonal and temporary employees, or any employee that is hired to work for less than six months. This training must be provided within thirty calendar days after the employees' hire date, or within their having worked 100 hours – whichever occurs first.[315]

The Civil Rights Department ("CRD") has developed online training courses on the prevention of sexual harassment in the workplace.[316] However, employers may still conduct in-person classroom training and must still ensure compliance with FEHA's training requirements.

4. REQUIRED HARASSMENT TRAINING STANDARDS

Following the initial implementation of supervisory employee harassment training requirements in 2005 under AB 1825, the Civil Rights Department implemented regulations for employers to follow in providing compliant harassment training to employees. The Civil Rights Department subsequently modified these regulations, effective January 1, 2021, to incorporate the new nonsupervisory employee and temporary/seasonal employee training requirements implemented under SB 1343/SB 778. The regulations generally outline the following terms and conditions for such training:

- Types of compliant trainings (classroom, e-learning, webinar);
- Trainer qualifications;
- Frequency and tracking of compliant trainings;
- Objectives and content of trainings;
- Documentation of trainings; and
- Remedies for failure to comply in providing required trainings.[317]

Since AB 1825 was implemented in 2005 to provide harassment training, California law has been amended to expand scope of the training to include other topics, including:

- Since 2015, California law requires that mandatory harassment prevention training include a component on "prevention of abusive conduct."[318] Abusive conduct is defined as malicious conduct from an employer or employee, unrelated to an employer's legitimate business interests, that a reasonable person would find hostile or offensive.[319] Statutorily listed examples of abusive conduct include: repeated verbal abuse, derogatory remarks, insults, epithets, verbal or physical conduct that reasonably appears threatening, intimidating, or humiliating, or sabotage of another's work performance.[320]
- Since 2018, California law requires that mandatory harassment prevention training include a component on harassment based on gender identity, gender expression, and sexual orientation.[321]
- Employers are also allowed to provide "bystander intervention training" to enable bystanders to recognize potentially problematic behaviors and to motivate them to take action when they observe such conduct. Employers are not required to provide this training, but if they do, the training may include exercises to provide bystanders with the skills and confidence to

intervene as appropriate and to provide them with resources they can call upon that support their intervention.[322]

B. TITLE IX TRAINING

Title IX contains specific requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.[323] This training must cover:

- The definition of sexual harassment;
- The scope of the school district's education program;
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- Any technology to be used at a live hearing (if applicable);
- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.[324]

Districts must also ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.[325] Training materials cannot rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints.[326]

C. TRAINING REQUIRED BY THE CALIFORNIA EDUCATION CODE

In 2020, the California legislature passed Senate Bill No. 493 (SB 493), which amended Education Code section 66262.5 to amend the definition of "sexual harassment" and added Education Code section 66281.8. Effective January 1, 2022, Section 66281.8 requires postsecondary institutions that receive state financial assistance, including California Community Colleges, to provide certain training to specified employees.

In addition to notifying all employees of the obligation to report harassment to appropriate school officials, districts are required to provide the following training:

First, a district must provide a comprehensive, trauma-informed training program to campus officials involved in investigating and adjudicating sexual assault, domestic violence, dating violence, and stalking cases, including employees engaged in the grievance procedures related to sex discrimination and sexual violence.[327] This training must cover:

- Trauma-informed investigatory and hearing practices that help ensure an impartial and equitable process;

- Best practices for assessment of a sexual harassment or sexual violence complaint;
- Best practices for questioning of the complainant, respondent, and witnesses; and
- Implicit bias and racial inequities, both broadly and in school disciplinary processes.[328]

Materials approved by the district for this training must include statistics on the prevalence of sexual harassment and sexual violence in the educational setting, and the differing rates at which students experience sexual harassment and sexual assault in the educational setting based on their race, sexual orientation, disability, gender, and gender identity. When possible, citation to such statistics shall be included in the written sexual harassment policies required by Education Code section 66281.5 accompanying the district's grievance procedures.[329]

Second, if a district has on-campus housing, it must ensure that residential life student and nonstudent staff, or their equivalent, annually receive training on how to handle, in a trauma-informed manner, reports made to them of sexual harassment or sexual violence, and situations in which they are aware of sexual harassment or sexual violence, in student residential facilities.[330]

Third, a district must provide training to all employees on the identification of sexual harassment, including the person to whom it should be reported.[331] Section 66281.8 does not require a district to provide separate training specifically for the identification of sexual harassment; districts may include this requirement in existing employee training on sexual harassment.

D. OTHER TRAINING

There are a number of ways to train and raise awareness for the prevention of harassment and bullying, including (but not limited to) the following:

- Providing orientation sessions for all new employees;
- Providing management/supervisory training sessions and special meetings in each office of the employer with a trainer/facilitator;[332]
- Offering refresher training for all employees on at least an annual basis;
- Including the topic as an agenda item at lunch meetings; and
- Inviting speakers from organizations at the forefront of harassment prevention to speak to employees.

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

- The definition of sexual harassment;

- A description of sexual harassment, with examples;
- A statement of the illegality of sexual harassment; and
- The complaint process, legal remedies, and protection from retaliation available to victims of sexual harassment.[333]

Section 12 INVESTIGATING ALLEGATIONS OF HARASSMENT, DISCRIMINATION, OR RETALIATION

Title 5 of the California Code of Regulations requires that districts investigate and attempt to resolve complaints alleging violation of state and federal anti-discrimination laws.[334] It sets forth the specific procedures districts must follow when handling discrimination complaints filed by students and employees.[335] Title 5 also mandates that districts implement formal complaint procedures.[336]

But while Title 5 provides guidance regarding the investigation process districts must follow in terms of deadlines and notifications, it does not establish the specific investigation procedures to be used.[337] Instead, each district must establish its own.

A. APPOINT AN INVESTIGATOR

Title 5 requires that each district designate one person as the district officer responsible for receiving complaints and coordinating the subsequent investigations. Depending on the circumstances, that district officer can assign the actual investigation of the complaint to other staff or retain an outside investigator.[338] If the complaint names or implicates a high-ranking employee or if it involves particularly sensitive issues, we recommend that districts retain an outside investigator.

Once the district officer assigns the complaint for investigation, the district should provide the investigator with relevant documents and information, as well as access to potential witnesses.

Case Studies for Investigating Allegations of Harassment, Discrimination and Retaliation

Swenson v. Potter[339]
Melanie Swenson believed that a coworker was sexually harassing her, but she did not report it to anyone. Once management became aware of Swenson's concerns, they spoke to the alleged harasser and opened an investigation. The investigation did not find sufficient evidence to support formal discipline. Swenson then sued for sexual harassment. The Ninth Circuit held that the employer could not be held liable under Title VII. The employer's prompt response, once it learned of the alleged harassment and the fair and unbiased investigation, fulfilled its duty to Swenson.

Jameson v. Pacific Gas and Electric Company[340]
A Court of Appeal dismissed a lawsuit brought by a manager who claimed he was wrongfully terminated. The court affirmed that employers may defend against wrongful termination claims by showing that the decision to terminate was made in good faith after an appropriate investigation, and for reasons that are neither arbitrary nor pretextual. Plaintiff argued that the investigation was inadequate because the investigator did not grant the complainant's request to interview three additional witnesses and declined to follow-up with the complainant after the initial interview. The appellate court reiterated well-settled legal principles relating to employers' reliance on workplace investigations, including the principle that employers are not required to use a specific investigation method as long as the method is fair. Thus, the issue was not whether the investigation could have been better or more comprehensive, but whether the investigator's findings were reached "honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual." The court also found that fairness in the investigation process "contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of trial."

B. KEEP THE INVESTIGATION CONFIDENTIAL

Districts should process complaints as confidentially as possible, with identities disclosed only when necessary. Statements made by employees should not be disclosed to other employees except to elicit specific, relevant, and necessary information from the employee.

At the start of each investigative interview, witnesses should be told that the information they provide will only be shared with those who have a need to know and only as necessary to conduct a complete, thorough, and fair investigation. Witnesses should also be told that the information provided may also need to be disclosed during any hearing of the matter which may be held.

However, under the new Title IX regulations, districts may not restrict either the complainant or respondent (person accused of misconduct) from discussing the allegations under investigation.[341]

Case Study on Investigation Admonishments

Perez v. Los Angeles Community College District[342]
The Los Angeles Community College District (District) advised Carlos E. Perez, an adjunct faculty member, that he would be placed on paid administrative leave while the District initiated a fitness-for-duty examination. The letter was stamped "Confidential," and stated: "You are hereby directed not to contact any members of the faculty, staff, or students." Perez filed an unfair practice charge alleging that the District violated the EERA by retaliating

against him because of his protected conduct and by interfering with his exercise of his protected rights. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued an unfair practice complaint on the interference allegations. Following the hearing, the PERB administrative law judge (ALJ) concluded that the District's directive to Perez not to contact any members of the faculty, staff, or students constituted unlawful interference with protected rights. Perez appealed, but PERB affirmed the ALJ's proposed decision.

Relying on the National Labor Relations Board's *Banner Health System* decision, PERB reasoned that if employees are prohibited from discussing wages, hours, and working conditions at the workplace, they are less equipped to make free and informed decisions about whether to exercise their rights to form, join, or participate in a union. In this case, the District's directive not to contact faculty, staff, or students would reasonably be interpreted as prohibiting Perez from participating in a variety of protected activities, such as discussing his working conditions with his union or initiating a grievance. While the District argued that Perez was not prohibited from contacting his union, and that his union was copied on the letter containing the directive, PERB held that copying the union on the letter did not clearly notify Perez that it did not intend to intrude on his protected rights. The fact that the letter was labeled "confidential" could reasonably be construed to prohibit any discussion of the matter. The language in the letter was broad and absolute, and contained no clarifiers. PERB stated that, "[i]n circumstances not present here, the employer may have the right to demand confidentiality of its investigation." It noted, however, that the employer will have the burden of establishing a legitimate justification for the prohibition, and that in this case, the District did not explain why its directive was necessary to preserve the integrity of its investigation. Therefore, PERB held that the District's directive infringed on Perez's protected rights.

Note: *Public employers routinely issue "gag" orders during the course of administrative investigations. Though this decision did not involve an investigation, the Banner Health System decision, upon which PERB relies, did involve an investigation: NLRB held that a "general" concern about protecting the integrity of an investigation is not sufficient to prohibit employees from discussing matters under investigation. Rather, the employer must now show that (1) witnesses need protection, (2) evidence is in danger of being destroyed, (3) testimony is in danger of being fabricated or (4) there is a need to prevent a cover up. It is recommended that agencies do not issue "blanket" gag orders. Rather, districts that want to prevent employees from discussing an investigation should identify one of these four elements as a legitimate reason for prohibiting such communications.*

Accordingly, districts that ask for confidentiality during an investigation should be prepared to establish that confidentiality is necessary to protect a witness, prevent the destruction of evidence, preserve testimony, prevent a cover-up, or further another legitimate business interest. It is also recommended that districts state, in writing, that employees are not prohibited from exercising their protected rights.

Note: *The NLRB has since overruled the* Banner Health System *decision in* Apogee Retail, LLC.[343] *In Apogee, the NLRB held that an investigative confidentiality rule, which by its terms applied only for the duration of the employer's investigation, would be lawful. The NLRB found that the* Banner Health System *approach failed to recognize or consider the importance of investigative confidentiality provisions. The NLRB noted that confidentiality provisions protect both employees and the employer, including that employees possess a substantial interest in the full, fair, prompt, and accurate resolution of complaints of employee misconduct, which is served by confidentiality assurances. Further, the NLRB opined that the* Banner Health System *test placed a substantial burden on employers to demonstrate that the circumstance of the investigation required confidentiality prior to any investigation. PERB has not adopted the* Apogee *case so PERB's adoption of the* Banner Health System *test still controls for California public employers.*

Occasionally, complaining parties may request that the employer not take any action regarding their allegations. Districts cannot and must not agree to those requests. Once on notice of possible unlawful harassment, discrimination, or retaliation, a district must investigate the allegations—even if the complainant asks the district not to. Failure to do so can place other employees or students at risk of harassment or discrimination. It can also preclude the district from asserting the avoidable consequences doctrine as an affirmative defense or as a basis to reduce damages.

Thus, when faced with a request that the district do nothing about the allegations of unlawful harassment, discrimination, or retaliation, a district should advise the complainant that it is required to investigate and address the complaint. The district should also, however, elicit and address any specific concerns the complainant may have regarding an investigation, assure the complainant that retaliation will not be tolerated, and advise the complainant what to do should he or she suspect retaliatory conduct.

Under the new Title IX regulations, a college is only required to respond when it has actual knowledge of alleged sexual harassment, and "actual knowledge" is narrowly defined as those instances when a district official who has authority to implement interim supportive measures has actual notice of the sexual harassment.[344] The U.S. Department of Education has indicated

that this departure from the previously established Title IX framework better "respects the autonomy of a complainant."[345] However, as mentioned above, a district can still be liable for failing to respond under state law.

When a complainant insists on remaining anonymous, it is important to document in writing the fact that the complainant requested his or her identity remain confidential.

LCW Practice Advisor

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

C. RIGHT OF REPRESENTATION

Employees participating in investigatory interviews, who have a reasonable belief that discipline may result from the interview, have a right to representation in the interview by either their union representative or legal counsel, upon request.[346]

D. *LYBARGER* ADMONITIONS

Districts can require employees to answer questions, and employees do not have the right to refuse to do so. An employee's refusal to answer questions can constitute insubordination, and may result in discipline up to, and including, termination.[347]

Peace officers, including district police, suspected of criminal misconduct must receive a *Lybarger* warning because of the special protections provided by the Public Safety Officers Procedural Bill of Rights Act (POBR).[348] The POBR also provides other procedural guarantees for the interrogation of public safety officers.[349] Non-sworn employees may be given a *Lybarger* warning as well. A district may compel an employee to answer questions in an administrative investigation regarding the employee's job performance without first obtaining a formal grant of immunity from criminal use of the employee's statements, as long as the employer does not force the employee to waive his or her constitutional protection against use of those statements in a criminal proceeding. [350]

Case Studies on *Lybarger* Admonitions

Lybarger v. City of Los Angeles[351]
Lybarger was a police officer with the City of Los Angeles. After he refused to answer questions during an administrative interview being undertaken as a result of a criminal investigation, the City discharged him for insubordination.

Lybarger instituted mandate proceedings to set aside his termination, but the trial court denied the petition. The Supreme Court reversed, holding that although Lybarger had neither a constitutional nor a statutory right to remain silent free of administrative sanction, the administrative agencies never admonished him, as required by the Public Safety Officers Procedural Bill of Rights Act, that his statements could not be used against him in a subsequent criminal proceeding.

Spielbauer v. County of Santa Clara[352]
Spielbauer worked for Santa Clara County as a deputy public defender. After discovering that Spielbauer may have made misrepresentations to a trial court, his employer began an internal investigation. At the outset of Speilbauer's disciplinary interview, the investigator admonished him that although he had the right to remain silent, he was being ordered to answer questions as part of his employment, and that if he refused he would face possible termination for insubordination. The investigator also provided Spielbauer with a *Lybarger* admonition.

Despite the *Lybarger* admonition, Spielbauer refused to answer his employer's questions and he was terminated for, among other things, insubordination. In challenging his termination at the trial court level, he claimed that the Fifth Amendment privilege against self-incrimination entitled him to refuse to answer questions unless he received, in advance, a formal grant of criminal use immunity. The trial court disagreed and upheld the termination. The Court of Appeal, however, reversed and the County sought review.

In reinstating the trial court's decision, which affirmed the termination, the California Supreme Court explained that the constitutional privilege against compelled self-incrimination in a criminal case does not mean that a public employee cannot be "compelled, upon threat of job discipline, to answer questions about his or her job performance, so long as the employee is not also required to surrender the constitutional privilege against criminal use of any statements thereby obtained." The Court reasoned that public employees owe a "paramount" duty to their employers, and that public employers have an important interest in ensuring the proper performance of public duties. According to the Supreme Court, requiring public employers to obtain a formal grant of immunity before they could compel their employees to answer questions would impede investigations into employee misconduct, and would undermine "the urgent administrative need to root out and eliminate misfeasance by public employees." As the Court explained, decades of state and federal case law allow an employer to compel an employee to answer job-related questions in a disciplinary investigation.

LCW Practice Advisor

The California Supreme Court's decision in *Spielbauer* reiterates what lower courts and federal courts have stated for decades: an employer can require a public employee, under threat of discipline, to answer job-related questions as long as the employer does not require the employee to surrender his or her right against the use of any such statements in a subsequent criminal proceeding. While the Court did not specifically hold that a *Lybarger* admonition must be provided to non-peace officer public employees in that situation, the County of Santa Clara did provide a *Lybarger* admonition to Spielbauer.[353] Thus, districts may continue to rely upon *Lybarger* warnings.

E. DISCRIMINATORY INVESTIGATIONS

Whether the district conducts the investigation itself or retains an outside investigator, the investigation must not only be prompt and thorough, but fair and impartial as well. Failure to ensure a fair investigation can result in the victim of the alleged harassment, or even the alleged harasser, challenging the fairness of the investigation. An improperly performed investigation can itself constitute an act of discrimination. Thus, to avoid claims of unfair or discriminatory investigations, all parties must be given an opportunity to respond to the allegations of the other.[354]

While the initiation of the investigations may put a halt to the alleged harassment, the district must still complete the investigation. Aside from the fact that Title 5 specifically requires that the district set forth the results of its investigation in a written report,[355] the district has a duty to both: (1) end harassment; and (2) deter future harassment by the same offender or others.[356] The California Community College Chancellor's office, however, may require a district to modify its policies if it feels that the district's policies are inconsistent with the standards established by Title 5.[357]

Case Studies on Discriminatory Investigations

Aguilar v. Avis Rent a Car Systems[358]

When a client reported having left a calculator in a rental vehicle, and the calculator could not be found, the employer initiated an investigation. The investigator, however, only questioned Latino employees about the suspected theft of the calculator. During the course of the investigation, a police officer was summoned and the Latino employees were told that federal immigration authorities would be called if they did not cooperate. The calculator was subsequently found. The Latino employees filed a lawsuit alleging discrimination and harassment because of race, and identified the investigation as one of the actions supporting their lawsuit. The jury found that the investigator's conduct constituted discrimination, and that Avis knew or should

have known about the discriminatory conduct but failed to take corrective action. The judge issued an injunction ordering the employer to cease and desist from conducting discriminatory investigations. On appeal, Avis did not contest the validity of the jury's findings (only the injunctive relief).

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

Because it is unlawful for a district that knows, or should know, of harassment, discrimination, or retaliation to fail to take immediate and appropriate corrective action, a district cannot simply wait until the investigation is complete before taking action.[359] Depending on the allegations, the district may need to place the alleged harasser on paid administrative leave pending the investigation's completion. Alternatively, the district should transfer/reassign the alleged harasser to another location.[360]

If the investigation sustains the allegations of harassment, discrimination, or retaliation, the district should immediately do whatever is necessary and appropriate to resolve the situation. Appropriate remedies include making the victim whole by restoring lost employment/educational benefits or opportunities, mandating training for all employees, and taking whatever action is necessary to prevent the misconduct from reoccurring.[361] Disciplinary action against the harasser, ranging from reprimand to discharge for employees or from warning to expulsion for students, is always required.[362]

Generally, the corrective action should reflect the severity of the misconduct. An employer's obligation to sufficiently respond to allegations of harassment/discrimination is not discharged unless prompt, *effective* action has been taken.[363] Thus, districts should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation. If the district's remedial efforts fail to end the misconduct, the district should impose additional, more severe measures until the harassment ends. The effectiveness of a district's remedy will depend on its ability to stop the harassment and dissuade potential harassers from unlawful conduct. [364]

Example: For first time, minor offenses, an employer may discipline the harasser and try to prevent further harassment by: (1) giving the harasser a verbal warning in a counseling session, (2) expressing strong disapproval, (3) demanding that the unwelcome conduct cease, and (4) threatening more severe disciplinary action if the conduct does not cease. If the harassment continues despite the stern warning, the district must then pursue disciplinary action more severe than counseling to ensure that the behavior ends.[365]

LCW Practice Advisor

Remedial action *should not* include moving the complainant in an effort to separate the complainant from the alleged harasser and hostile environment.[366] Doing so could be perceived as retaliation for complaining about harassment.

Case Studies on Employer's Duty to Prevent and Remedy

Dickson v. Burke Williams, Inc.[367]
Domaniqueca Dickson, a massage therapist at a spa, filed a lawsuit claiming that she was subjected to harassing and discriminatory conduct by two customers. The jury found that the employee had been subjected to unwanted harassing conduct based on sex but that the employer spa was not liable for because the harassing conduct was not sufficiently severe or pervasive. The jury also found the employer liable for failure to take reasonable steps necessary to prevent sexual harassment or sex discrimination. On appeal, the court found that an employee cannot maintain an action for failing to take reasonable steps necessary to prevent conduct that does not amount to actionable harassment (i.e. it amounts to nothing more than teasing, an offhand comment, or an isolated incident).

Birschtein v. New United Manufacturing, Inc. [368]
A coworker made repeated sexual comments to Birschtein. After supervisory intervention ended the inappropriate comments, the coworker began to stare at Birschtein several times a day. Birschtein complained to her employer but the employer did nothing to stop the coworker's conduct. Birschtein sued her employer for sexual harassment. The trial court held that "staring" did not constitute sexual harassment, and granted summary judgment for the employer. The Court of Appeal disagreed. It held that the employer was not entitled to summary judgment because a triable issue of fact existed as to whether the staring constituted intimidation and hostility. The court also found that managerial failure to intervene effectively to prevent or end sexual harassment in the workplace can amount to a ratification of the misconduct for which the employer may be held liable.

Reynaga v. Roseburg Forest Prod.[369]
Efrain Reynaga and his son worked for Roseburg Forest Products where they were the only millwrights of Mexican descent. The lead millwright, Timothy Branaugh, allegedly harassed Reynaga with racially disparaging comments. After Reynaga made verbal and written complaints, management initiated an investigation into Reynaga's allegations. Ultimately, the company adjusted Branaugh's schedule so that he and the Reynagas would not work the same shift. A short time later, Roseburg's Human Resources and Safety Supervisor advised them that Branaugh would sometimes be on site with them. The Reynagas refused to work at the same time as Branaugh and were terminated

shortly after. Reynaga sued Roseburg in federal court alleging, among other things, hostile work environment under 42 U.S.C. § 1981 and Title VII. The district court granted summary judgment in favor of Roseburg on all claims. The U.S. Court of Appeals for the Ninth Circuit, however, reversed most of the district court's ruling. The court found that while Roseburg may have acted promptly in investigating Reynaga's complaints, a jury could reasonably conclude that Roseburg failed to then take effective remedial measures to stop the harassment. In addition, despite initially separating the men, Roseburg later had them work at the same time. Thus, the court held that Roseburg could be found liable for the hostile work environment that Branaugh allegedly created.

Fuller v. City of Oakland, California[370]
A female police officer complained of sexual harassment by a male co-worker. The police department's internal affairs department investigated the complaint, but no remedial or disciplinary action was taken. .The investigator accepted the accused harasser's statements as true without taking reasonable steps to corroborate such facts, even after the male employee admitted to previously lying to the investigator. The investigator failed to interview a percipient witness favorable to plaintiff and gave insufficient weight to evidence that contradicted the male employee's statement. The district court found that the city's investigation was inadequate and did not constitute adequate remedial action. The Ninth Circuit Court of Appeals affirmed, clarifying that "an investigation is principally a way to determine whether any remedy is needed and cannot substitute for the remedy itself."

Section 14 TITLE IX REQUIREMENTS FOR RESOLVING COMPLAINTS OF SEXUAL HARASSMENT

Title IX regulations contain specific requirements for responding to, investigating, and resolving complaints or allegations of sexual harassment, which includes sexual assault.[371] To the extent these requirements overlap and conflict with state law, districts must comply with federal law.[372]

A. RESPONDING TO COMPLAINTS/ALLEGATIONS

Under the new Title IX regulations (effective August 14, 2020)[373], districts must respond "promptly in a manner that is not deliberately indifferent" whenever they have *actual knowledge* of sexual harassment.[374] "Actual knowledge" means that the Title IX Coordinator or any other district official who has authority to institute supportive measures on behalf of the district has notice of sexual harassment or allegations of sexual harassment.[375] Notice occurs when the Title IX Coordinator or other official with authority: (1) witnesses sexual harassment; (2) hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant's parent, friend, or peer); (3) receives a

written or verbal complaint about sexual harassment or sexual harassment allegations; or (4) is informed by other means.[376]

Districts are not required to respond if they only "should have known;" or if the only employee(s) with actual notice of sexual harassment lack authority to impose supportive measures.[377] Districts have discretion to determine which employee(s) have authority to impose supportive measures and may require other employees to report sexual harassment to the Title IX Coordinator (which would trigger the district's grievance procedure).

Supportive measures are reasonably available, non-punitive and non-disciplinary individualized services designed to ensure equal educational access, protect safety, or deter sexual harassment and are not unreasonably burdensome to the other party.[378] Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.[379] A district cannot remove a respondent (i.e., accused) student before it has followed the grievance procedure, except in emergency situations to protect from an immediate threat to the physical health or safety of an individual.[380] The district can, however, place a non-student employee on administrative leave pending the grievance process.[381]

When a district has actual knowledge of alleged/potential sexual harassment, it must promptly contact the complainant to discuss availability of supportive measures, consider the complainant's wishes with respect to supportive measures, and, if the complainant has not done so already, explain how to file a formal complaint.[382]

The regulations provide that districts need only investigate sexual harassment allegations when it has received a formal complaint.[383] A formal complaint is a written document filed and signed by a complainant or Title IX Coordinator alleging sexual harassment, as defined in the regulations, and requesting that the school investigate the allegations against a respondent.[384] Where a district has actual knowledge of alleged sexual harassment, but no formal complaint has been filed, the district need only provide supportive measures.[385] (However, other federal and state laws, or the district's own policies, may require investigation even without a formal complaint.)

B. GRIEVANCE PROCESS

A district's Title IX policy must include a grievance procedure that provides for the prompt and equitable resolution of student and employee complaints.[386] The grievance procedure must:

- Provide remedies any time the district finds the respondent responsible for a Title IX violation;
- Presume the respondent is not responsible for a Title IX violation until the conclusion of the grievance process and not impose disciplinary sanctions without following a grievance process;

- Require an objective evaluation of all relevant evidence and avoid credibility determinations based on a person's status as a complainant, respondent, or witness;
- Require Title IX personnel to receive training and be free from conflicts of interest or bias for or against complainants or respondents;
- Post materials used to train Title IX personnel on websites;
- Include reasonably prompt time frames for conclusion of the grievance process;
- Describe the range of possible remedies and disciplinary sanctions;
- Identify the evidentiary standard which can be either the preponderance of the evidence or the clear and convincing evidence standard;
- Describe the district's appeal procedures;
- Not use information protected under a legally recognized privilege, unless the person holding the privilege waives it.[387]

C. NOTICE REQUIREMENTS

Under Title IX, upon receipt of a formal complaint, districts must provide all known parties (i.e., person(s) accused of potential misconduct and person(s) bringing the complaint or allegation) with written notice of its receipt.[388] The written notice must:

- Include sufficient details regarding the allegations of sexual harassment that are known at the time, such as identities of the parties involved, the conduct at issue, and the date(s) and location(s) of the alleged incident;
- Include a statement that the respondent is presumed not responsible for the alleged conduct until a determination is made at the end of the grievance process;
- Inform the parties that they may have an advisor of their choice (who may be an attorney) and that they may inspect and review evidence that is directly related to the allegations in the formal complaint, including evidence that the district may not use in reaching a determination;
- Inform the parties of any district policy or code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.[389]

D. INVESTIGATIONS AND STANDARD OF PROOF

Under the new Title IX regulations, districts are to adopt a standard of evidence that applies to all formal complaints of sexual harassment (in other words, the same standard must apply to complaints against students and employees).[390] The standard can be either a "preponderance of

the evidence" standard or a "clear and convincing evidence" standard.[391] Further, the regulations specify that the burden of gathering enough evidence to reach a determination rests on the district and not on any party.[392]

During investigations and throughout the grievance process, districts must:

- Provide the parties an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Allow parties to be accompanied by a representative of his or her choice to any related meeting or proceeding;
- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the district does not intend to rely in reaching a determination, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation;
- Provide both parties 10 days to submit a written response to the evidence, which the investigator will consider prior to completing the investigation report.[393]

The investigator must create an investigation report at least 10 days prior to the hearing or determination that fairly summarizes the relevant evidence and send the report to each party for their review and written response.[394]

E. LIVE HEARING

Districts must provide for a live hearing as part of the grievance process as set forth below.[395] These requirements are intended to safeguard students'/employees' due process rights.

1. RIGHT TO AN ADVISOR OF CHOICE

At the live hearing, each party (i.e., person(s) bringing the complaint or allegation and person(s) accused of potential misconduct) shall be represented by an advisor of his or her choice (who may, but is not required to be, an attorney).[396] If a party does not have an advisor present at the live hearing, the district must provide *without fee or charge* an advisor of the party's choice.[397]

2. CROSS-EXAMINATION

At the live hearing, each party's advisor must be allowed to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.[398] Such cross-examination at the live hearing must be conducted directly, orally, and in real time and must be conducted by the party's advisor (parties cannot perform this questioning themselves).[399]

Only relevant questions will be allowed.[400] Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless: (1) such questions and evidence are offered to prove that someone other than the respondent committed the alleged conduct; or (2) the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.[401] Before a complainant, respondent, or witness answers, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.[402]

3. MANNER OF LIVE HEARING

At the request of either party, districts must provide for the live hearing to occur with the parties located in separate rooms via live videoconference.[403] At the district's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.[404]

Districts must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.[405]

F. DECISIONS AND DISMISSALS

Neither the Title IX Coordinator not the investigator(s) may serve as the decision-maker(s).[406] In determining responsibility, decision-maker(s) shall apply the standard of evidence selected by the district and issue a written decision that:

- Identifies the allegations;
- Describes the procedural steps taken from the receipt of the complaint through the determination, including methods used to gather evidence;
- Lists findings of fact that support the determination;
- Lists conclusions regarding the application of the district's policies to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and whether the district will provide any remedies designed to restore or preserve equal access to the education program; and
- Information on procedures and permissible bases for appealing the decision.[407]

For Title IX purposes, the district must dismiss a complaint if, upon investigation, it finds that:

- The alleged conduct, even if proved, would not constitute sexual harassment;
- The alleged conduct, even if proved, did not happen in the district's educational program or activity; or
- The alleged conduct did not occur against a person in the United States.[408]

A complaint may be dismissed any time during the investigation or grievance process if:

- The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations;
- The respondent is no longer enrolled or employed by the school district; or
- Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.[409]

Upon dismissal, the district must promptly send written notice to the parties of the dismissal and reason(s) therefor.[410]

G. RIGHT TO APPEAL

Complaints and respondents may appeal the district's decision on a formal complaint or allegation for the following reasons:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination and could affect the outcome of the matter;
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against either party (either generally or individually) that affected the outcome of the matter.[411]

Districts may allow students/employees to appeal on additional grounds.[412] In any appeal, the decision-maker on appeal cannot be the same person who issued the original determination.[413]

Section 15 CALIFORNIA EDUCATION CODE REQUIREMENTS FOR RESOLVING COMPLAINTS OF SEXUAL HARASSMENT

Following the enactment of the new Title IX regulations (effective August 14, 2020), the California legislature passed Senate Bill No. 493 (SB 493), which amended Education Code

section 66262.5 to amend the definition of "sexual harassment" and added Education Code section 66281.8. These amendments added additional protections regarding sexual harassment.

Although the Governor signed SB 493 in September of 2020, districts were not obligated to implement the new requirements in Section 66281.8 until January 1, 2022.[414] Receipt of state financial assistance is conditioned on implementing, and at all times complying with these new requirements, so it is critical that districts implement the requirements starting January 1, 2022.[415]

In addition to the training requirements discussed in Section 11 above, SB 493 imposed the following requirements on postsecondary institutions, including California Community Colleges.

A. Notice and Publication Requirements

Prior to the passage of SB 493, the Education Code already required districts to have a written policy on sexual harassment, including information on the complaint process and a timeline for the complaint process.[416] Districts are required to do the following with this written policy:

- Make it available on its internet website;
- Display it in a prominent location in the main administrative building or other area of the campus or schoolsite;
- Provide it, as it pertains to students, as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session, as applicable;
- Provide it to each faculty member, all members of the administrative staff, and all members of the support staff at the beginning of the first quarter or semester of the school year, or at the time that there is a new employee hired; and
- Include it in any district publication that sets forth the comprehensive rules, regulations, procedures, and standards of conduct for the district.[417]

Pursuant to the new Education Code section added through SB 493, districts are now also required to disseminate this notice of nondiscrimination to the following individuals or entities:

- Each employee of the district;
- Each volunteer who will regularly interact with students; and
- Each individual or entity under contract with the district to perform any service involving regular interaction with students at the district.

Districts must also publish the name, title, and contact information (which shall include telephone number, office location, and email address) of the following individuals in a prominent

place on its internet website, with accompanying text clearly associating them with the sexual harassment and sexual violence grievance processes:

- The Title IX coordinator or other designated employee; and
- Any individual official within the district with the authority to investigate complaints or sexual harassment and sexual violence or to institute corrective measures such as sanctions, accommodations, or other forms of resolution of the complaint.[418]

Districts are also required to provide notice to all students of the grievance procedures (see details on these grievance procedures below), including where and how complaints may be filed.[419]

B. DESIGNATION OF RESPONSIBLE EMPLOYEE

Districts are required to designate at least one district employee to coordinate its efforts to comply with and carry out its responsibilities under Education Code section 66281.8.[420] The employee may be the same individual as the district's federal Title IX coordinator. The designated employee must have adequate training on what constitutes sexual harassment and on trauma-informed investigatory and hearing practices, and must understand how the district's grievance procedures operate.

C. ADDITIONAL REQUIRED RULES AND PROCEDURES FOR THE PREVENTION OF SEXUAL HARASSMENT

Prior to the passage of SB 493, the Education Code already required districts to adopt detailed and victim-centered policies and protocols regarding sexual assault, domestic violence, dating violence, and stalking involving a student (both on and off campus) that comport with best practices and current professional standards.[421] The Education Code also requires districts, to the extent feasible, to enter into memoranda of understanding, agreements, or collaborative partnerships with existing on-campus and community-based organizations, including rape crisis centers and domestic violence centers, to refer students for assistance or make services available to students, including counselling, health, mental health, victim advocacy, and legal assistance, and including resources for the accused.[422] The Education Code also requires districts to implement comprehensive prevention and outreach programs addressing sexual violence, domestic violence, dating violence, and stalking, and to include outreach programming as part of every incoming student's orientation.[423]

Pursuant to the new Education Code section added through SB 493, districts are required to adopt rules and procedures within these required polices, and the policies required by Title IX, that *also* provide for all of the following elements:

- The district's primary concern shall be student safety. Any disciplinary measures imposed by the district for violations of the district's student

conduct policy at or near the time of the incident being investigated shall be consistent with Education Code section 67386, subdivision (b)(10), which limits a district's ability to impose disciplinary sanctions on an individual who participates as a complainant or witness in an investigation of sexual assault, domestic violence, dating violence, or stalking.[424]

- The district must take reasonable steps to respond to each incident of sexual harassment involving individuals subject to the district's policies that occur in connection with any educational activity or other program of the district, **as well as incidents that occurred outside of those educational programs or activities, whether they occurred on or off campus**, if, based on the allegations, there is any reason to believe that the incident could contribute to a hostile educational environment or otherwise interfere with a student' access to education.[425]
- Regardless of whether or not a complaint has been filed under the district's grievance procedures, if the district knows, or reasonably should know, about possible sexual harassment involving individuals subject to the district's policies at the time, the district must promptly investigate to determine whether the alleged conduct more likely than not occurred, or otherwise respond if the district determines that an investigation is not required. If the district determines that the alleged conduct more likely than not occurred, it must immediately take reasonable steps to end the harassment, address the hostile environment, if one has been created, prevent its recurrence, and address its effects. **A district shall be presumed to know of sexual harassment if a responsible employee knew, or, in the exercise of reasonable care, should have known, about the sexual harassment.** The district may rebut this presumption of knowledge if it shows <u>all</u> of the following:
- The district provides training and requires all non-confidential responsible employees to report sexual harassment;
- Each non-confidential responsible employee with actual or constructive knowledge of the conduct in question was provided training and direction to report sexual harassment; and
- Each non-confidential responsible employee with actual or constructive knowledge of the conduct in question failed to report it.[426]
- The district must consider and respond to requests for accommodations relating to prior incidents of sexual harassment that could contribute to a hostile educational environment or otherwise interfere with a student's access to education where both individuals are, at the time of the request, subject to the district's policies.[427]
- If a student complainant requests confidentiality, which could preclude a meaningful investigation or potential discipline of the potential respondent, or that no investigation or disciplinary action be pursued to address alleged

sexual harassment, the district must take the request seriously, while at the same time considering its responsibility to provide a safe and nondiscriminatory environment for all students, including for the complainant. The district must generally grant the request.

- In determining whether to disclose a student complainant's identity or proceed to an investigation over the objection of the student complainant, the district may consider whether any of the following apply:
- There are multiple or prior reports of sexual misconduct against the respondent.
- The respondent reportedly used a weapon, physical restraints, or engaged in battery.
- The respondent is a faculty or staff member with oversight of students.
- There is a power imbalance between the student complainant and respondent.
- The complainant believes that the complainant will be less safe if the complainant's name is disclosed or an investigation is conducted.
- The district is able to conduct a thorough investigation and obtain relevant evidence in the absence of the complainant's cooperation.
- Section 66281.8, subdivision (b)(3)(D), contains additional steps for a district to take based on whether it determines that it can honor the student's request for confidentiality or that it must disclose the complainant's identity to the respondent or proceed with an investigation.[428]

D. STUDENT GRIEVANCE PROCEDURES

Pursuant to the new Education Code section added through SB 493, districts are required adopt and publish on their internet websites grievance procedures that provide for prompt and equitable resolution of sexual harassment complaints filed by a student against an employee or another student.[429] For a complete list of the required components of these grievance procedures, see Education Code section 66281.8, subdivision (b)(4). A partial list of some notable requirements for the grievance procedures follows:

- They shall state that the investigation and adjudication of alleged misconduct under this section related to sexual harassment is not an adversarial process between the complainant, the respondent, and the witnesses, but rather a process for the district to comply with its obligations under existing law. The complainant does not have the burden to prove, nor does the respondent have the burden to disprove, the underlying allegation or allegations of misconduct.
- They shall ensure that the persons or entities responsible for conducting investigations, finding facts, and making disciplinary decisions are neutral.

- They shall ensure trauma-informed and impartial investigation of complaints. Student parties shall be given an opportunity to identify witnesses and other evidence to assist the district in determining whether a policy violation has occurred, and shall be informed that any evidence available but not disclosed during the investigation might not be considered at a subsequent hearing.
- They shall include that the investigator or hearing officer shall not consider the past sexual history of a complainant or respondent except in the limited circumstances permitted under the statute.
- They shall prohibit questions of either party or of any witnesses that are repetitive, irrelevant, or harassing.
- They shall provide that the institution shall decide whether or not a hearing is necessary to determine whether any sexual violence more likely than not occurred. In making this decision, an institution may consider whether the parties elected to participate in the investigation and whether each party had the opportunity to suggest questions to be asked of the other party or witnesses, or both, during the investigation. Any hearing shall be subject to the following rules:
- Any cross-examination of either party or any witness shall not be conducted directly by a party or a party's advisor.
- Either party or any witness may request to answer the questions by video from a remote location.
- Student parties shall have the opportunity to submit written questions to the hearing officer in advance of the hearing. At the hearing, the other party shall have an opportunity to note an objection to the questions posed. The district may limit such objections to written form, and neither the hearing officer nor the district are obligated to respond, other than to include any objection in the record. The hearing officer shall have the authority and obligation to discard or rephrase any question that the hearing officer deems to be repetitive, irrelevant, or harassing. In making these determinations, the hearing officer is not bound by, but may take guidance from, the formal rules of evidence.
- Generally, the parties may not introduce evidence, including witness testimony, at the hearing that the party did not identify during the investigation and that was available at the time of the investigation. However, the hearing officer has discretion to accept for good cause, or exclude, such new evidence offered at the hearing.
- They shall provide an explanation of the meaning of the preponderance of the evidence standard, and affirm that it shall apply to such adjudications.
- They shall provide a reasonably prompt timeframe for all of the major stages of the complaint process, as well as a process for extending the

district's timelines for good cause only, and shall provide for the prompt communication of that information to the complainant and respondent.

- They shall provide for written notice to parties of the outcome of the complaint, including whether a policy violation was found to have occurred, the basis for that determination, including factual findings, and any discipline imposed.
- They shall provide assurance that the district will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.
- They shall require that student parties receive notice if the district is conducting a formal investigation. The notice shall include the allegations and the alleged district policy violations under review. Any new allegations that arise during the course of the investigation that could subject either party to new or additional sanctions shall be subject to the same notice requirements.
- They shall afford both student parties the opportunity to each have a support person or adviser accompany the student party during any stage of the process.
- They shall advise student parties of their right to consult with an attorney, at their own expense, at any stage of the process if they wish to do so. An attorney may serve as the student's support person or adviser.
- They shall allow either party to appeal the outcome of the grievance proceeding if the district has such an appeals process. A district's grievance procedure may limit the grounds for an appeal, provided that any limitation shall apply equally to all parties and that the non-appealing party shall have an opportunity to respond to the appeal.
- They shall outline the possible interim measures that may be put in place during the pendency of an investigation, the supportive measures that may be provided in the absence of an investigation, and the disciplinary outcomes, remedial measures, and systemic remedies that may follow a final finding of responsibility, subject to certain restrictions.
- They shall describe the obligations of all faculty and staff designated by the district as required to report concerns of sexual harassment to the Title IX coordinator or other designated employee. An individual who has a confidential relationship with a student or students by law is exempt from having to report sexual harassment concerns to the Title IX coordinator or other designated employee, unless otherwise required by law.
- They shall contain a requirement that the Title IX coordinator or other designated employee assess each report of sexual harassment and provide outreach, as appropriate, to each identifiable student who is alleged to be the victim of the reported conduct.

- They shall provide a process for a student to report sexual harassment by a third party. The district shall respond to those reports to address or prevent a hostile educational environment or to ensure students' access to education.
- Section 66281.8 does not establish a duty or obligation owed by a district to nonstudent parties that does not already exist by statute or agreement.[430]

Section 66281.8 allows a district to use the student disciplinary procedures or other separate procedures to resolve sexual harassment complaints. Any procedures used to investigate complaints of sexual harassment, including, disciplinary procedures, must afford a complainant and a respondent a prompt and equitable resolution. If a district chooses to rely on existing procedures for compliance with the requirements of Section 66281.8, the Title IX coordinator or designated employee must review those procedures to ensure that they comply with the requirements of Section 66281.8.[431]

Section 16 INTERNAL AND TITLE 5 ADMINISTRATIVE REMEDIES

Even though districts must establish their own internal administrative remedies for resolving complaints of discrimination, harassment, or retaliation, complainants are not required to utilize those internal remedies. Instead, complainants asserting employment-based claims may go directly to the EEOC or the California Civil Rights Department (formerly the Department of Fair Employment and Housing).[432] Similarly, complainants with non-employment-based discrimination claims may file directly with the Office for Civil Rights of the U.S. Department of Education ("OCR").[433]

But for complainants who do choose to utilize the complaint processes established by Title 5, then Title 5 procedures govern. Complaints alleging a violation of Title 5 may be written or verbal; written complaints must be provided to the district officer designated to receive such complaints.[434] Verbal complaints must be lodged with the district officer designated to receive such complaints, and that officer must record the verbal complaint in writing and take appropriate steps to ensure the writing accurately reflects the facts alleged in the complaint.[435] The district must notify the complainant of his or her right to file his or her complaint directly with the Civil Rights Department or EEOC, or with the OCR.[436]

Employment-based complaints must be filed within 180 days of the date of the alleged unlawful act.[437] An exception to this 180-day requirement is allowed where knowledge of the alleged unlawful act is first obtained after the 180 days have already expired. In that limited situation, the deadline to file the complaint is extended for no more than 90 days beyond the 180 days.[438]In contrast, non-employment-based complaints may be filed within one year of the date of the alleged unlawful discrimination, or within one year of the date on which the complainant knew or should have known of the facts underlying the allegation of unlawful discrimination.[439]
If an employee opts against pursuing the district's internal remedy before filing a complaint with the Civil Rights Department or the EEOC, the district may be able to reduce the employee's

damage claim by asserting the "avoidable consequences" doctrine as an affirmative defense.[440] This affirmative defense, however, only applies to damages that the employee could have avoided if it would have been reasonable for him or her to utilize the district's anti-harassment procedures.[441] (See Section 15 below for more detailed information.)

Employees, job applicants, or students alleging claims under Title VII, Title IX, the ADEA, the ADA, the GINA or the FEHA *do not need* to file a Tort Claim to pursue their claims in either federal or state court.[442] In contrast, claims under state civil rights statutes are subject to the Tort Claims Act.[443]

LCW Practice Advisor

Once you receive notice of a charge of discrimination, you should maintain all documents potentially related to the charge. You should also take steps to make sure that relevant documents, including electronically-stored records, are not destroyed.[444]

Section 17 EXHAUSTION OF EEOC AND CIVIL RIGHTS DEPARTMENT ADMINISTRATIVE REMEDIES AND APPLICABLE STATUTE OF LIMITATIONS

A. EEOC ADMINISTRATIVE REMEDIES

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

As part of its investigation of the charges, the EEOC will request that the employer respond to the allegations and produce evidence regarding the allegations. The EEOC may also issue subpoenas requiring the attendance and testimony of witnesses, the production of evidence, and access to evidence.

LCW Practice Advisor

Remember that although the investigation is confidential, the EEOC file may be made public if the complainant later sues the district in a civil lawsuit. Thus, your statement to the EEOC should be factual and persuasive, with an eye to possible disclosure to the public.

Case Study on Statute of Limitations

National R.R. Passenger Corp. v. Morgan[445]
Morgan sued his former employer, National Railroad Passenger Corporation (Amtrak), under Title VII alleging that he was subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. Specifically, he alleged that during his employment, he was "consistently harassed and disciplined more harshly than other employees on account of his race." The Supreme Court considered whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside the statutory time period for filing a charge with the EEOC. It held that the statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period. But the court further held that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period. A court may still, however apply the equitable doctrines that may toll or limit the time period.

LCW Practice Advisor

The Lilly Ledbetter Fair Pay Act also clarified the statute of limitations for Title VII claims. Employees may file a Title VII lawsuit up to 180 days after they receive any paycheck they allege is discriminatory. Thus, each new allegedly discriminatory paycheck resets the statute of limitations under Title VII.

The EEOC has 120 days after receiving the charge to either dismiss the complaint or find that there is reasonable cause to find that the charge is true. If the EEOC determines that the charge might be true, it will attempt to remedy any perceived unlawful conduct through confidential and informal methods of dispute resolution. If those methods fail, the EEOC will then refer the charge to the Attorney General who may bring a civil lawsuit against the district.

If the EEOC dismisses the charge, or does not take action on it within 180 days of receiving it, the EEOC must give the complainant a Right-To-Sue letter. The complainant will then have 90 days in which to file a civil lawsuit against the respondent named in the charge.[446]

B. CIVIL RIGHTS DEPARTMENT ADMINISTRATIVE REMEDIES

As of January 1, 2020, complainants have up to three years to file a claim with the Civil Rights Department (CRD) (formerly the Department of Fair Employment and Housing).[447] Prior to that date, the statute of limitations was one year. While the change in the limitations period did not revive any claims that had already expired under the former one-year statute of limitations, any potential claims that were still within the one-year limitations period as of December 31, 2019 now had a three-year statute of limitations.[448]

If the complainant does not request an immediate Right-to-Sue letter when filing their Charge of Discrimination with the CRD, the CRD must either promptly investigate the complaint itself or refer it to the EEOC for investigation. If the CRD keeps the complaint, it will notify the district that a complaint has been filed and will most likely ask the district to provide information responsive to the complaint.

LCW Practice Advisor

The Civil Rights Department's three-year statute of limitations stops running while an employee pursues an employer's internal administrative process.[449]

If the CRD keeps the complaint, investigates, and finds the complaint valid, it must then seek to resolve the complaint, in confidence, by conference, conciliation, and persuasion. Participation in the conciliation process is voluntary. If conciliation succeeds, the parties will reduce their resolution to writing and the CRD will conduct a compliance review the following year.[450] If the conciliation process fails or does not seem appropriate, the CRD may file a civil action directly with the court.[451] Before filing a lawsuit, however, the CRD will now require all parties to undergo mandatory dispute resolution free of charge in the CRD's Internal Dispute Resolution Division. If the CRD's lawsuit is successful, it can receive reasonable attorney fees and costs, including expert witness fees.

If the CRD does not file a civil action within 150 days of receiving the complaint, or does not complete its investigation within one year of receiving the claim, it must issue a Right-To-Sue letter to the complainant. A complainant may not file a FEHA lawsuit until the CRD issues a Right-To-Sue letter. Once the CRD issues its Right-to-Sue letter, the complainant then has one year from the date of the letter to file a FEHA lawsuit.[452]

Section 18 LIABILITY FOR MONEY DAMAGES

While successful plaintiffs cannot obtain punitive damages from defendant districts, they can obtain punitive damages against individual district employees not acting in their official capacity. Successful plaintiffs may also be entitled to emotional distress damages, backpay, front-pay, and any other actual damages they have sustained, as well as attorneys' fees and pre-judgment interest.[453] The FEHA also allows successful plaintiffs to request reimbursement of expert witness fees.[454]

The California law that mandates training for supervisors expressly states that providing the training does not insulate the employer against liability, nor does the failure to provide the training automatically result in liability.[455] It is reasonable to assume, however, that employees alleging discrimination or harassment will likely argue that if the employer had provided the mandated training, it might have prevented the very injury that resulted in the lawsuit being filed.

A. WHO CAN BE LIABLE?

1. THE DISTRICT

Under both the FEHA and Title VII, districts may be directly liable to harassment victims in civil actions.[456]

But under the FEHA, a district will be *strictly liable* for harassment if the harasser is a district agent or supervisor.[457] This means the district is liable whether or not it knew about the harassment, and even if it took reasonable steps to prevent it.

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

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

This affirmative defense, known as the "avoidable consequences" doctrine, only applies to damages that the employee could have avoided if it would have been reasonable for him or her to utilize the employer's anti-harassment procedures. If a supervisor commits an act of harassment, the employee can still recover damages for the harassing act itself. [458]

Moreover, an employee will not be expected to utilize an employer's grievance process if the process provided is inadequate or has not been communicated to employees. An employee will also not be expected to utilize the grievance process where the employee reasonably fears reprisal by coworkers or management, or where the employee has natural feelings of embarrassment or shame. The employee's conduct is to be evaluated on a reasonableness standard. Evidence of reasonableness would include whether other complaints of harassment were handled properly, whether the employer prohibited retaliation for reporting harassment, whether sufficient confidentiality procedures existed, and whether the employer consistently and firmly enforced its policies. [459]

LCW Practice Advisor

Because districts are strictly liable for harassment by supervisors, districts should consider stronger disciplinary measures against supervisors who harass.

2. INDIVIDUAL PUBLIC EMPLOYEES

Employees are subject to personal liability for harassment under the FEHA, but not under Title VII.[460] Specifically, under the FEHA, employees may be personally liable for harassment if they participate in unlawful harassment, or substantially assist or encourage continued harassment.[461] But a supervisor is not personally liable by mere inaction or by acts constituting personnel management decisions.[462] Thus, individual district employees cannot be held liable for retaliation or for discrimination.[463]

Case Study on Individual Liability

> ***Jones v. The Lodge at Torrey Pines***[464]
> Jones alleged that after protesting to his supervisor about conduct he felt constituted sexual harassment of the female employees, his supervisor began retaliating against him. He claimed the retaliation consisted of unfair performance evaluations and formal and informal reprimands that resulted in his resignation from employment. At trial, the jury awarded Jones damages in the amount of $1,395,000 against the employer, and $155,000 against the supervisor who retaliated against him. But the trial court threw out the jury's verdict and found in the employer's favor. Jones appealed, and the Court of Appeal reinstated the jury verdict. On review, the California Supreme Court reversed the jury award, but only as to the individual supervisor and held that the FEHA's prohibition against retaliation did not authorize liability against individual employees. The Supreme Court observed that retaliation, like discrimination, arose out of personnel management decisions, whereas harassment was not conduct necessary for the employer's business or the supervisor's job performance.

B. HARASSMENT BY CLIENTS OR NON-EMPLOYEES

Even if the harasser is not a district agent or supervisor, the district may still be liable if its agents or its supervisors knew, or should have known, of the harassment of any employee or applicant, but failed to take immediate and appropriate corrective action.[465]

C. CONSTRUCTIVE DISCHARGE

In the common law action for constructive discharge, the employer is liable if its officers, directors, managing agents, or supervisory employees create or knowingly permit intolerable working conditions that would force a reasonable employee to resign.[466]

The U.S. Supreme Court determined that a plaintiff claiming sexual harassment resulting in "constructive discharge... must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response".[467] The Court further held that employers may raise the avoidable consequences doctrine (i.e. that the employer took reasonable care to prevent or correct the harassing behavior and that employee did not take advantage of

these measures) to reduce damages, but *only if* the employee did *not* resign following an action by an employer that was so severe it changed their employment status or work situation. Examples of such severe behavior include a humiliating demotion, extreme cut in pay, or transfer to a position with unbearable working conditions.

D. OBLIGATION TO DEFEND AND INDEMNIFY INDIVIDUAL PUBLIC EMPLOYEES

State law requires that districts defend and indemnify its employee in a civil lawsuit filed against the employee if the employee's act or omission giving rise to the injury occurred in the course and scope of employment with the district.[468]

The following principles govern whether a district may be liable for an employee's conduct:

- A district may be subject to vicarious liability for injuries caused by an employee's injurious actions resulting in or arising from pursuit of the district's interests;
- A district may be liable where the injurious actions are engendered by events or conditions relating to the employment;
- A district may *not* be liable where the employee's misconduct does not arise from the conduct of the district's enterprise but instead arises out of a personal dispute;
- A district may *not* be liable if an employee abuses job-created authority over others for purely personal reasons, even if the abuse occurs on the district's premises;
- If the district has and disseminates a policy prohibiting harassment, the district may *not* be liable for a non-supervisory employee's acts of unlawful harassment because the harassing employee's conduct is not within the course of his or her employment;[469]
- A district may still be liable after having been dismissed from a lawsuit, and not providing defense for an employee believed to not be acting within the scope of their employment, if the employee agreed to a stipulated judgment stating they acted in the course of their employment and assigned the victim their rights to seek indemnification from the district.[470]

Case Study on Obligation to Defend and Indemnify

Farmers Insurance Group v. County of Santa Clara[471]
The County of Santa Clara was not required to indemnify and pay the defense costs of a deputy sheriff sued for sexual harassment where the undisputed evidence showed that the deputy sheriff "lewdly propositioned and offensively touched other deputy sheriffs working at the county jail." The California Supreme Court held that deliberate targeting of an individual employee for

> inappropriate touching and requests for sexual favors is not within the scope of a deputy sheriff's employment. As the Court explained, "the goal of eradicating sexual harassment from the public sector is more effectively advanced by denying sexual harassers the right to indemnity than by insulating them from financial responsibility for their own misconduct." It declined, however, "to adopt a bright line rule that all sexual harassment falls outside the scope of employment as a matter of law under all circumstances."

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

ENDNOTES

[1] 42 U.S.C. § 2000e.

[2] 42 U.S.C. § 2000e.

[3] 29 U.S.C. § 621 et seq.

[4] 42 U.S.C. § 12101 et seq.

[5] 42 U.S.C. § 2000ff.

[6] 42 U.S.C. § 2000ff.

[7] 42 U.S.C. § 2000ff-1(b).

[8] See *Fitzgerald v. Barnstable School Committee* (2009) 555 U.S. 246 [129 S.Ct. 788].

[9] Cal. Gov. Code, § 12900 et seq.

[10] Cal. Gov. Code, § 12940, subd. (j)(1) and (k).

[11] Cal. Gov. Code, § 12940, subd. (j)(1); Cal. Code Regs., tit. 2, §§ 11009(e), 11019(b)(1).

[12] Gov. Code, § 12940, subd. (c) and (j); Cal. Code Regs., tit. 2, §§ 11009(e), 11019(b)(1).

[13] Cal. Ed. Code, §§ 220, 262.3; Donovan v. Poway Unified School District (2008) 167 Cal.App.4th 567 [84 Cal.Rptr.3d 285].

[14] 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31(b)(7).

[15] *Franklin v. Gwinett County Public Schools* (1992) 503 U.S. 60, 75-76 [112 S.Ct. 1028].

[16] Cal. Ed. Code, § 200 et seq. protects persons against discrimination and harassment because of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic included in the definition of hate crimes as set forth in Penal Code, § 422.55.

[17] Cal. Code Regs., tit. 5, § 59300 et seq.

[18] Gov. Code, § 12926, subd. (w)-(x), effective January 1, 2020, pursuant to Sen. Bill No. 188).

[19] Gov. Code, § 12926, subd. (r)(1)(C) (Note: breastfeeding and a medical condition related to breastfeeding was added to the Government Code in 2013, pursuant to Assem. Bill No. 2386).

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

[21] Cal. Gov. Code §§ 12920, 12921, 12926, 12940, subds. (a)-(h); 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.; 42 U.S.C. § 12101 et seq.; Cal. Ed.Code §§ 210.1-210.2, 210.7, 212, 212.1, 212.3, 212.6, 220 ; 42 U.S.C. § 2000ff et seq.

[22] Effective, January 1, 2016, AB 987 amends Cal. Gov. Code section 12940 to prohibit an employer or other covered entity from retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

[23] Cal. Code Regs., tit. 2, § 11027.1, subd. (a).

[24] *Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 855, 857–858 [31 Cal.Rptr.2d 617, 622], citing *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613 [107 S.Ct. 2022, 2028], rehg. den. by (1987) 483 U.S. 1011 [107 S.Ct. 3244]; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1291–1292 [261 Cal.Rptr. 204, 211–213], review den., overruled on other grounds.

[25] Cal. Gov. Code § 12926, subd. (w)-(x).

[26] Cal. Gov. Code, § 12951; Cal. Code Regs., tit. 2, § 11028, subd. (a).

[27] Cal. Code Regs., tit. 2, § 11028, subd. (a).

[28] Cal. Code Regs., tit. 2, § 11028, subd. (f) (discriminating against an applicant or employee based on immigration status is prohibited unless the employer can demonstrate that is required to do so in order to comply with federal law).

[29] Cal. Code Regs., tit. 2, § 11028, subd. (g).

[30] Cal. Code Regs., tit. 2, § 11028, subd. (f)(2).

[31] Cal. Ed. Code, § 234.7.

[32] Cal. Code Regs., tit. 2, § 11028, subd. (f)(2); Ed. Code, § 234.7, subd. (a).

[33] Cal. Gov. Code, § 12926, subd. (q); Cal. Code Regs., tit. 2, § 11060.

[34] 42 U.S.C. § 2000e(j); Cal. Gov. Code, § 12926, subd. (q); 29 C.F.R. § 1605.1; *Welsh v. U.S.* (1970) 398 U.S. 333, 339 (disagreement recognized in *Berman v. United States* (9th Cir. 1946) 156 F.2d 377, 380

[35] *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, n. 11 [81 S.Ct. 1680]; *Young v. Southwestern Sav. and Loan Ass'n.* (5th Cir. 1975) 509 F.2d 140.

[36] 42 U.S.C. § 2000e-2(a); Gov. Code, § 12940, subd. (l); Cal. Code Regs., tit. 2, § 11062).

[37] Cal. Code Regs., tit. 2, § 11062, subd. (d).

[38] *Crider v. University of Tennessee, Knoxville* (6th Cir. 2012) 492 Fed.Appx. 609.

[39] Cal. Code Regs., tit. 2, § 11062, subd. (a).

[40] *Porter v. City of Chicago* (7th Cir. 2012) 700 F.3d 944.

[41] *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.* (2015) 575 U.S. 768 [135 S.Ct. 2028].

[42] *Porter v. City of Chicago* (7th Cir. 2012) 700 F.3d 944.

[43] *Christian Legal Soc. Chapter of the University of California, Hastings College of Law v. Martinez* (2010) 561 U.S. 661 [130 S.Ct. 2971].

[44] *Berry v. Department of Social Services* (9th Cir. 2006) 447 F.3d 642.

[45] 42 U.S.C. § 12102, subd. (1); 29 C.F.R. § 1630.2, subd. (g); Gov. Code, § 12926, subd. (m).

[46] Cal. Gov. Code, § 12926, subd. (m).

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

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

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

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

[51] *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920.

[52] *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920 [70 Cal.Rptr.3d 382, 174 P.3d 200].

[53] *Ketryn Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908 [227 Cal.Rptr.3d 286].

[54] Gov. Code., § 12926, subd. (j); Cal. Code Regs., tit. 2, § 11065, subd. (d)(1); Ed. Code., § 210.1; 42 U.S.C. § 12101.

[55] Gov. Code, § 12926, subd. (j)(5); 42 U.S.C. § 12211, subd. (b).

[56] *Mayo v. PCC Structurals, Inc.* (9th Cir. 2015) 795 F.3d 941.

[57] *Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal. App.4th 78 [187 Cal.Rptr.3d 745].

[58] Cal. Code Regs., tit. 2, § 11065, subd. (a)(3).

[59] Cal. Code Regs., tit. 2, § 11068, subd. (k).

[60] Cal. Gov. Code, § 12926, subd. (i).

[61] 42 U.S.C. § 2000ff, subd. (4)(A); 29 C.F.R. § 1635.3, subd. (c)(1)(i)-(iii).

[62] 42 U.S.C. § 2000ff, subd. (4)(B); 29 C.F.R. § 1635.3, subd. (c)(1)(iv),(v).

[63] 42 U.S.C. § 2000ff, subd. (8); 29 C.F.R. § 1635.3, subd. (f).

[64] 42 U.S.C. § 2000ff-1, subd. (b)(1); 29 C.F.R. § 1635.8, subd. (b)(1)(ii).

[65] 42 U.S.C. § 2000ff-1, subd. (b)(3); 29 C.F.R. § 1635.8, subd. (b)(1)(i(D)(1).

[66] Senate Bill 559; Cal. Gov. Code, § 12940, subd. (o).

[67] Cal. Gov. Code, §12926, subd. (g).

[68] 42 U.S.C. § 2000e, subd. (k); 42 U.S.C., § 2000d; Cal. Gov. Code, §§ 12926, subd. (q), 12940, subd. (j)(4)(C); Cal. Code Regs., tit. 2, § 11030; *Matthews v. Superior Court (Regents of the University of California)* (1995) 34 Cal.App.4th 598, 603 [40 Cal.Rptr.2d 350, 354], as mod., on den. of rehg. (May 17, 1995); 20 U.S.C. §§ 1681–1688; Ed. Code §§ 220 and 221.5.

[69] Cal. Code Regs., tit. 2, § 11036; *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504 (pregnancy harassment), overruled on other grounds; *Badih v. Myers* (1995) 36 Cal.App.4th 1289 [43 Cal.Rptr.2d 229], review den.

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

[71] Cal. Gov. Code, § 12926, subd. (q)(2).

[72] Cal. Code Regs., tit. 2, § 11030, subd. (b).

[73] Cal. Code Regs., tit. 2, §§ 11029, 11030.

[74] Cal. Gov. Code, § 12949.

[75] Cal. Code Regs., tit. 2, § 11031(d).

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

[77] Cal. Code Regs., tit. 2, § 11034(f).

[78] *Bostock v. Clayton County, Georgia* (2020) 590 U.S. ---.

[79] *Bostock v. Clayton County, Georgia* (2020) 590 U.S. ---.

[80] See *Oncale v. Sundowner Offshore Services, Inc*. (1998) 523 U. S. 75; cf. e.g., *Smith v. Liberty Mut. Ins. Co.* (5th Cir. 1978) 569 F.2d 325 (holding that Title VII is only intended to provide equal job opportunities for males and females and does not prohibit gender/sex stereotypes).

[81] *Videckis v. Pepperdine University* (C.D. Cal. 2015) 100 F.Supp.3d 927.

[82] Cal. Code Regs., tit. 2, § 11030, subd. (e).

[83] Cal. Code Regs., tit. 2, § 11030, subd. (f).

[84] Cal. Code Regs., tit. 2 § 11034, subd. (h)-(i).

[85] Cal. Code Regs., tit. 2 § 11034, subd. (b)-(c).

[86] Cal. Code Regs., tit. 2 § 11034, subd. (h)(3)-(h)(4).

[87] Cal. Code Regs., tit. 2 § 11034, subd. (e).

[88] Cal. Code Regs., tit. 2 §§ 11030 , subd. (f), 11034, subd. (i)(4).

[89] Cal. Gov. Code, § 12950, subd. (a)(2).

[90] *Bostock v. Clayton County, Georgia* (2020) 590 U.S. ---.

[91] 85 Fed.Reg. 30178 (May 19, 2020).

[92] See *Whitaker v. Kenosha Unified School District No. Board of Education* (7th Cir. 2017) 858 F.3d 1034.

[93] *Parents for Privay v. Barr* (9th Cir. 2020) 949 F.3d 1210.

[94] *Bostock v. Clayton County, Georgia* (2020) 590 U.S. ---.

[95] *Hively v. Ivy Tech. Comm. College of Indiana* (7th Cir. 2017) 853 F.3d 339.

[96] *Videckis v. Pepperdine Univ*., 150 F. Supp. 3d 1151 (C.D. Cal. 2015).

[97] Cal. Gov. Code, §§ 12926, subd. (b), 12940, subd. (a)

[98] *Reid v. Google* (2010) 50 Cal.4th 512 [113 Cal.Rptr.3d 327].

[99] Cal. Gov. Code, § 12926, subd. (k).

[100] Department of Fair Housing and Employment, Workplace Rights for members of the military and Veterans (2016).

[101] Cal. Gov. Code, § 12940, subd. (p).

[102] Cal. Gov. Code, § 12940, subd. (a); Cal. Fam. Code, § 297.5, subd. (g).

[103] Cal. Gov. Code, § 12940, subd. (a)(3)(A).

[104] Cal. Fam. Code, § 297.5, subd. (g).

[105] *Nakai v. Friendship House Association of American Indians, Inc.* (2017) 15 Cal.App.5th 32 [222 Cal.Rptr.2d 662].

[106] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 475 [30 Cal.Rptr.3d 797, 115 P.3d 77], on remand to (2006) 2006 WL 147513 unpublished/uncitable; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046 [32 Cal.Rptr.3d 436].

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

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

[109] *Trent v. Valley Elec. Ass'n Inc.* (9th Cir. 1994) 41 F.3d 524, 526.

[110] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046 [32 Cal.Rptr.3d 436, 116 P.3d 1123].

[111] *Amir v. St. Louis University* (1999) 184 F.3d 1017.

[112] Cal. Gov. Code, § 12926, subd. (n); Cal. Ed. Code, §§ 200; 210.2; 220; 221.5 et seq.; 42 U.S.C. § 12102(1)(C),(3); *Thompson v. North American Stainless, LP* (2011) 562 U.S. 170 [131 S.Ct. 863] (employee who was terminated after his fiancé who worked for same employer filed complaint with EEOC, fell within zone of interests that allowed him to file retaliation claim under Title VII.).

[113] 29 C.F.R. § 1630.2, subd. (g)(iii); Cal. Gov. Code, § 12926, subds. (j)(4), (m)(4); Cal. Code Regs., tit. 2, § 11065, subd. (d)(5).

[114] *Nunies v. HIE Holdings, Inc*. (9th Cir. 2018) 908 F.3d 428.

[115] *Nunies v. HIE Holdings, Inc.* (9th Cir. 2018) 908 F.3d 428, 434-35.

[116] *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028 [207 Cal.Rptr.3d 120], review den.

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

[118] 42 U.S.C. § 2000e-2(a).

[119] 42 U.S.C. § 2000e-2(a).

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

[121] *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 [32 Cal.Rptr.3d 436] (in a claim for retaliation, the adverse employment action can be "a series of subtle, yet damaging, injuries); *Waite v. Gonzaga University* (E.D. Wash. 2019) 2019 WL 544947, *4 (alleged adverse employment actions considered in aggregate to state a cause of action for disability discrimination).

[122] *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150 [217 Cal.Rptr.3d 258], review den.

[123] *Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352 [225 Cal.Rptr.3d 321], review den., (Feb 14, 2018).

[124] *Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 661, 663-64 [242 Cal.Rptr.3d 757] (applying Title VII framework to student's discrimination claim).

[125] *Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 667-86 [242 Cal.Rptr.3d 757].

[126] 42 U.S.C. § 2000e-2(m). Limited on Constitutional Grounds by *Rweyemamu v. Cote2nd Cir*.(Conn.)Mar. 21, 2008.

[127] *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 [152 Cal.Rptr.3d 392], rehg. den. (Apr 17, 2013); Cal. Code Regs., tit. 2, § 11009(c).

[128] Cal. Code Regs., tit. 2, § 11009(c).

[129] 42 U.S.C. § 2000e-5(g)(2)(B).

[130] *Laverty v. Drexel University* (E.D. Pa., Jan. 21, 2016, No. CV 14-5511) 2016 WL 245307.

[131] *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 817 [57 Cal.Rptr.3d 430], review den.

[132] 42 U.S.C. § 2000e-2(k)(1)(A); *Stender v. Lucky Stores, Inc.* (N.D. Cal. 1992) 803 F.Supp. 259.

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

[134] 42 U.S.C. § 2000e-2(k)(2).

[135] Cal. Code Regs., tit. 2, § 11028, subd. (a)(2).

[136] 42 U.S.C. § 2000e-2(e)(1); *Ambat v. City and County of San Francisco* (9th Cir. 2014) 757 F.3d 1017 (applying bona fide occupational qualification defense to FEHA claims).

[137] *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc*. (1991) 499 U.S. 187 [111 S.Ct. 1196], on remand to (7th Cir. 1991) 935 F.2d 272, appeal after remand (7th Cir. 1992) 969 F.2d 290; see also *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400 [105 S.Ct. 2743] (holding that being younger than 60 years of age was valid BFOQ for the position of flight engineer as it was necessary to the safe transportation of passengers).

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

[139] *Teamsters Local Union No. 117 v. Washington Department of Corrections* (9th Cir. 2015) 789 F.3d 979.

[140] 29 C.F.R. § 1604.2, subd. (a)(iii).

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

[142] Cal. Gov. Code, § 12940, subd. (k); 42 U.S.C. § 2000e et seq.; 42 U.S.C. § 2000ff; 42 U.S.C. § 12101, et seq.; 29 U.S.C. § 621, et seq.; *Meritor Savings Bank, FSB v. Vinson* (1986) 477 U.S. 57 [106 S.Ct. 2399].

[143] *Davison ex rel. Sims v. Santa Barbara High school Dist*. (C.D. Cal. 1998) 48 F.Supp.2d 1225 (student stated cause of action for race discrimination based on peer-to-peer harassment); *Nicole M. By and Through Jacqueline M. v. Martinez Unified School Dist.* (N.D. Cal., 1997) 964 F.Supp. 1369 (student stated cause of action for sex discrimination based on peer-to-peer harassment); Cal. Ed. Code, §§ 200 et seq.; 230, subd. (g); 231.4; Cal. Code Regs., tit. 5, § 59300, et seq.

[144] 34 C.F.R., § 106.30, subd. (a); *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17 [114 S.Ct. 367, 370]; *Meritor Savings Bank, FSB v. Vinson, et al.* (1986) 477 U.S. 57, 67-68 [106 S.Ct. 2399, 2405-2406]; *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, cert. den. by (1995) 513 U.S. 1082 [115 S.Ct. 733]; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872; 29 C.F.R. § 1604.11(a); see also *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 347-349 [21 Cal.Rptr.2d 292], disapproved on other grounds. See also 2017 California Senate Bill No. 1300, California 2017-2018 Regular Session – adding section 12923, subd. (a), to the Government Code, effective Jan. 1, 2019.

[145] *Nicole M. By and Through Jacqueline M. v. Martinez Unified School Dist.* (N.D. Cal., 1997) 964 F.Supp. 1369; see also, Cal. Ed. Code, § 212.5, subd. (c).

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

[147] Cal. Code Regs., tit. 2, § 11019(b)(1); Cal. Unemp. Ins. Code, § 1256.5; Cal. Ed. Code, § 212.5; *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992 [47 Cal.Rptr.2d 478]; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476–477 [4 Cal.Rptr.2d 522, 528], rehg. den. and opn. mod.

[148] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797, 115 P.3d 77], on remand to (2006) 2006 WL 147513 unpublished/uncitable.

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

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

[151] Gov't Code, § 12923 (a).

[152] Gov't Code, § 12923 (b).

[153] Gov't Code, § 12923 (c).

[154] Gov't Code, § 12923 (d).

[155] Gov't Code, § 12923 (e).

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

[157] *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 282-284 [42 Cal.Rptr.3d 2]; but see 2017 California Senate Bill No. 1300, California 2017-2018 Regular Session – adding section 12923, subd. (a), to the Government Code, effective Jan. 1, 2019.

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

[159] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 814, 115 P.3d 77], on remand to (2006) 2006 WL 147513 unpublished/uncitable.

[160] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 814, 115 P.3d 77], on remand to (2006) 2006 WL 147513 unpublished/uncitable; 2017 California Senate Bill No. 1300, California 2017-2018 Regular Session – adding section 12923, subd. (a), to the Government Code, effective Jan. 1, 2019.

[161] *Zetwick v. County of Yolo* (9th Cir. 2017) 850 F.3d 436.

[162] *Westendorf v. West Coast Contractors of Nevada, Inc.* (9th Cir. 2013) 712 F.3d 417.

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

[164] *Miller v. Department of Corrections* (2005) 36 Cal.4th 446 [30 Cal.Rptr.3d 797], on remand to (2006) 2006 WL 147513 unpublished/uncitable.

[165] *Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228 [166 Cal.Rptr.3d 676].

[166] Vault Careers, Attention Cubicle Cupid : The 2019 Office Romance Survey Results Are In ! (February 14, 2019), https://www.vault.com/blogs/workplace-issues/2019-vault-office-romance-survey-results.

[167] Cal. Gov. Code, § 12940, subd. (j)(1)-(3).

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

[169] Ed. Code, § 220; 20 U.S.C. § 1681.

[170] 34 C.F.R. § 106.30, subd. (a); see also, *Nicole M By and Through Jacqueline M v. Martinez Unified School Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389 (pleading harassment that deprived plaintiff of advantages, privileges, or services sufficient to state cause of action under Unruh Civil Rights Act).

[171] *Gebser v. Lago Vista Independent School District* (1998) 524 U.S. 274, 277 [118 S.Ct. 1989] (faculty-on-student harassment actionable under Title IX); *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567 [84 Cal.Rptr.3d 285], rehg. den (student-on-student harassment based on sexual orientation actionable under Education Code section 220); *Davison ex rel. Sims v. Santa Barbara High School Dist.* (C.D. Cal. 1998) 48 F.Supp.2d 1225 (student-on-student racial harassment actionable under Unruh Civil Rights Act and Title VII) but see *Brennon B. v. Superior Ct. of Contra Costa Cty.* (2020) 57 Cal. App. 5th 367 (holding that the Unruh Civil Rights Act does not apply to California's public school districts, since they are not business establishments under the Act).

[172] 34 C.F.R. § 106.30, subd. (a).

[173] *Davison ex rel. Sims v. Santa Barbara High School Dist*. (C.D. Cal. 1998) 48 F.Supp.2d 1225, 1230; *Johnson v. Clovis Unified School Dist.* (E.D. Cal. 2007) 2007 WL 1456062 (citing *Klemencic v. Ohio State University* (6th Cir. 2001) 263 F.3d 504, 510.

[174] *Jonhson v. Clovis Unified School District* (E.D. Cal. 2007) 2007 WL 1456062.

[175] *Sanches v. Carrollton-Farmers Branch Independent School Dist.* (5th Cir. 2011) 647 F.3d 156.

[176] *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567 [84 Cal.Rptr.3d 285], rehg. den.

[177] 29 C.F.R. § 1604.11(a)(1)-(a)(2); Cal. Ed. Code, § 212.5; Cal. Code Regs., tit. 2, § 11034(f)(1); *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475 n.1, citing *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 511, overruled on other grounds.

[178] Cal. Ed. Code, § 212.5.

[179] *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992 [47 Cal.Rptr.2d 478, 491 n.10], quoting *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607 [262 Cal.Rptr.842, 851], review den.; *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116].

[180] *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1527, as amended; *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 511-513, overruled on other grounds; 29 C.F.R. § 1604.11(a).

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

[182] *Venters v. City of Delphi* (7th Cir. 1997) 123 F.3d 956.

[183] *Venters v. City of Delphi* (7th Cir. 1997) 123 F.3d 956.

[184] Assem. Bill No. 2053 (2013-2014 Reg. Sess.); Cal. Gov. Code, § 12950.1, subd. (b).

[185] Cal. Gov. Code § 12950.1, subd. (i)(2).

[186] Cal. Ed. Code, § 48900, subd. (r).

[187] Cal. Gov. Code § 12950.1, subd. (i)(2).

[188] Cal. Gov. Code, § 12950.1, subd. (b).

[189] Cal. Gov. Code, § 12940, subds. (g)-(h) ; 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 2000ff-6; Cal. Ed. Code, § 234.1, subd. (f).

[190] *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119 [75 Cal.Rptr.2d 27, 35]; *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 217 [51 Cal.Rptr.2d 642], rehg. den.; *Chen v. County of Orange* (2002) 96 Cal.App.4th 926 [116 Cal.Rptr.2d 786], mod. on den. of rehg. (Mar. 14, 2002), review den. (May 15, 2002); *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 [116 Cal.Rptr.2d 602]; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028 [32 Cal.Rptr.3d 436].

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

[192] 42 U.S.C. § 2000e-3(a); *Steele v. Youthful Offender Parole Board* (2008) 162 Cal.App.4th 1241, 1252 [76 Cal.Rptr.3d 632], rehg. den.

[193] 42 U.S.C. §2000e-3(a); Cal. Gov. Code, § 12940, subd. (h); *Steele v. Youthful Offender Parole Board* (2008) 162 Cal.App.4th 1241, 1252 [76 Cal.Rptr.3d 632], rehg. den.

[194] 42 U.S.C. § 2000e-3(a); Cal. Gov. Code, § 12940, subd. (h); *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142 [119 Cal.Rptr.2d 131]; *Merritt v. Dillard Paper Co.* (11th Cir. 1997) 120 F.3d 1181, 1189-1191, rehg. den. and suggestion for rehg. en banc den. by 130 F.3d 446.

[195] *Westendorf v. West Coast Contractors of Nevada, Inc.* (9th Cir. 2013) 712 F.3d 417; *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945 [139 Cal.Rptr.3d 464].

[196] *E.E.O.C. v. New Breed Logistics* (6th Cir. 2015) 783 F.3d 1057, rehg. en banc den., (Jul 8, 2015).

[197] Labor Code, §§ 233-34; Cal. Code Regs., tit. 2, § 11094.

[198] *E.E.O.C. v. Go Daddy Software, Inc.* (9th Cir. 2009) 581 F.3d 951, cert. den. by (2010) 562 U.S. 827 [131 S.Ct. 68].

[199] *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.* (2009) 555 U.S. 271 [129 S.Ct. 846].

[200] *Ekstrand v. School District of Somerset* (7th Cir. 2012) 683 F.3d 826.

[201] *E.E.O.C. v. Go Daddy Software, Inc.* (9th Cir. 2009) 581 F.3d 951.

[202] *Barker v. Riverside County Office of Educ.* (9th Cir. 2009) 584 F.3d 821.

[203] *Thompson v. North American Stainless, LP* (2011) 562 U.S. 170 [131 S.Ct. 863, 178 L.Ed.2d 694].

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

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

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

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

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

[209] *Burlington Northern and Santa Fe Railway. Co. v. White* (2006) 548 U.S. 53, 68 [126 S.Ct. 2405], not followed on state law grounds as stated in (2019) 826 S.E.2d 457.

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

[211] *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236 [101 Cal.Rptr.2d 893], rehg. and review den. (Jury award of $1,425,000.00).

[212] *Clifford v. American Drug Stores, Inc.* (Cal. Ct. App., Aug. 22, 2005, No. B158635) 2005 WL 2002376, unpublished/uncitable, rehg. & review den. Defendants set upon a course of constant retaliation, involving accusations and investigations of dishonesty, constant criticism, daily visits with heightened scrutiny and organized shunning, according to the plaintiff, who said she then began to experience physical discomfort and, eventually, panic attacks.

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

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

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

[216] *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53 [119 Cal.Rptr.3d 166]; rehg. & review den.

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

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

[219] *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377 [48 Cal.Rptr.3d 313], rehg. & review den.

[220] *Clark County School District v. Breeden* (2001) 532 U.S. 268, 273-274 [121 S.Ct. 1508], rehg. den. by (2001) 533 U.S. 912 [121 S.Ct. 2264].

[221] *Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 72–80 [105 Cal.Rptr.2d 652]; *Clark County School District v. Breeden* (2001) 532 U.S. 268 [121 S.Ct. 1508], rehg. den. by (2001) 533 U.S. 912 [121 S.Ct. 2264].

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

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

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

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

[226] *Staub v. Proctor Hospital* (2011) 562 U.S. 411 [131 S.Ct. 1186], new trial granted by 421 Fed.Appx. 647.

[227] *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois* (1968) 391 U.S. 563 [88 S.Ct. 1731], superseded by statute (1995) 139 N.H. 337; see also *City of San Diego v. Roe* (2004) 543 U.S. 77 [125 S.Ct. 521] ("a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment.").

[228] *Pool v. VanRheen* (9th Cir. 2002) 297 F.3d 899, 906; see also *Ulrich v. City and County of San Francisco* (9th Cir. 2002) 308 F.3d 968.

[229] *Pool v. VanRheen* (9th Cir. 2002) 297 F.3d 899, 906; see also *Ulrich v. City and County of San Francisco* (9th Cir. 2002) 308 F.3d 968.

[230] *Garcetti v. Ceballos* (2006) 547 U.S. 410 [126 S.Ct. 1951]; *McArdle v. Peoria School Dist. No. 150* (7th Cir. 2013) 705 F.3d 751.

[231] *Waters v. Churchill* (1994) 511 U.S. 661, 668 [114 S.Ct. 1878, 1884]; *Dixon v. University of Toledo* (6th Cir. 2012) 702 F.3d 269, cert. den. by (2013) 571 U.S. 824 [134 S.Ct. 119].

[232] *Gilbrook v. City of Westminster* (9th Cir. 1999) 177 F.3d 839, 867, as amended on den. of rehg., cert den. (1999) 528 U.S. 1061 [120 S.Ct. 614]; *Dixon v. University of Toledo* (6th Cir. 2012) 702 F.3d 269, cert. den. by (2013) 571 U.S. 824 [134 S.Ct. 119].

[233] *Garcetti v. Ceballos* (2006) 547 U.S. 410 [126 S.Ct. 1951].

[234] *Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837.

[235] *Demers v. Austin* (9th Cir. 2014) 746 F.3d 402.

[236] *Rodriguez v. Maricopa County Community College Dist.* (9th Cir. 2010) 605 F.3d 703.

[237] *Bauer v. Sampson* (9th Cir. 2001) 261 F.3d 775.

[238] *Lane v. Franks* (2014) 573 U.S. 228.

[239] *Connick v. Myers* (1983) 461 U.S. 138 [103 S.Ct. 1684]; *Demers v. Austin* (9th Cir. 2014) 746 F.3d 402

[240] *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 506 [89 S.Ct. 733, 21 L.Ed.2d 731].

[241] *Morse v. Frederick* (2007) 551 U.S. 393 [127 S.Ct. 2618, 2622, 168 L.Ed.2d 290]; see also *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503, 514 [89 S.Ct. 733].

[242] *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503, 514 [89 S.Ct. 733].

[243] *Morse v. Frederick* (2007) 551 U.S. 393 [127 S.Ct. 2618, 2622] (citing *Hazelwood School District v. Kuhlmeier* (1988) 484 U.S. 260, 266 [108 S.Ct. 562].).

[244] *Nguon v. Wolf* (C.D. Cal. 2007) 517 F.Supp.2d 1177.

[245] *Morse v. Frederick* (2007) 551 U.S. 393 [127 S.Ct. 2618, 168 L.Ed.2d 290].

[246] Cal. Lab. Code, § 1102.5, subd. (b).

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

[248] *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 [176 Cal.Rptr.3d 268] rehg. den. (Sep 18, 2014), review den. (Nov 25, 2014).

[249] *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538 [176 Cal.Rptr.3d 268] rehg. den. (Sep 18, 2014), review den. (Nov 25, 2014).

[250] *Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022 [182 Cal.Rptr.3d 21] review den. (Mar 18, 2015).

[251] Cal. Lab. Code, § 1102.5, subd. (e).

[252] *Devlyn v. Lassen Mun. Utility Dist.* (E.D. Cal. 2010) 737 F.Supp.2d 1116.

[253] *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 [503 P.3d 659]; see *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S. Ct. 1817].

[254] Cal. Lab. Code, § 1102.8.

[255] Cal. Lab. Code, § 2699, subd. (a).

[256] *Raines v. Coastal Pac. Food Distributors Inc*. (2018) 23 Cal.App.5th 667 [243 Cal.Rptr.3d 1].

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

[258] Cal. Gov. Code, §§ 53296, subd. (c); 53297.

[259] Cal. Gov. Code, § 53298.

[260] Cal. Ed. Code, § 87162, subd. (c).

[261] Cal. Ed. Code, § 87163, subd. (a).

[262] Cal. Ed. Code, § 87163, subd. (a).

[263] Cal. Ed. Code, § 87164, subd. (a).

[264] Cal. Ed. Code, § 87164, subd. (c)(2).

[265] Cal. Ed. Code, § 87164, subd. (d).

[266] Cal. Ed. Code, § 87164, subd. (e).

[267] Cal. Ed. Code, § 87164, subd. (f).

[268] Cal. Ed. Code, § 87164, subd. (h).

[269] Cal. Ed. Code, § 87164, subd. (h).

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

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

[272] Cal. Gov. Code, § 12652, subds. (c)-(f); 31 U.S.C. § 3730(b)-(d).

[273] Cal. Gov. Code, § 12653; 31 U.S.C. § 3730(h).

[274] Cal. Gov. Code, § 12653; 31 U.S.C. § 3730(h).

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

[276] *Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48 [101 Cal.Rptr.3d 456], rehg. & review den. (2010).

[277] 29 U.S.C. §§ 201 et seq.

[278] Cal. Gov. Code, § 12945.2.

[279] Cal. Lab. Code § 246.5, subd. (c).

[280] Cal. Lab. Code § 230.1.

[281] Cal. Gov. Code, §§ 12943, 12945.

[282] 29 U.S.C. §§ 2611(14), 2612(a)(1)(E).

[283] 29 U.S.C. § 201 et seq.

[284] *See*, e.g. Cal. Lab. Code, § 98.7

[285] Cal. Lab. Code, § 6310.

[286] Cal. Lab. Code, § 132, subd. (a).

[287] *Huhmann v. Federal Express Corporation* (9th Cir. 2017) 874 F.3d 1102.

[288] *Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909 [182 Cal.Rptr.3d 644].

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

[290] Cal. Gov. Code, §§ 3540 et seq.

[291] Cal. Gov. Code, §§ 3543.5, subd. (a); 3543.6, subd. (b).

[292] Cal. Gov. Code, §§ 3300 et seq., 3250 et seq.

[293] *Moberg v. Cabrillo Community College District* (2015) PERB Decision No. 2453 [_ PERC ¶ _].

[294] *Los Angeles Community College District* (2014) PERB Decision No. 2404 [39 PERC ¶ 82].

[295] *Estes v. Regents of the University of California* (2012) PERB Dec. No. 2302-H [20 PERC ¶ 149].

[296] *County of Riverside* (2011) PERB Dec. No. 2184-M [36 PERC ¶ 2].

[297] Cal. Gov. Code, § 12940, subds. (j)-(k); Cal. Ed. Code, § 200 et seq.

[298] Cal. Code Regs., tit. 2, § 111023(a)(2)-(3).

[299] Cal. Gov. Code, § 12940, subds. (j)-(k); Cal. Code Regs., tit. 5, § 59300, et seq.; 28 C.F.R. § 35.107(b); 34 CFR. §§ 104.7(b), 106.8(b), 110.25(c).

[300] Cal. Gov. Code, §§ 12950, 12950.1.

[301] DFEH Workplace Harassment Prevention Guide for California Employers (2017), available at < https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf > (as of September 30, 2022).

[302] Cal. Code Regs., tit. 5, §§ 59320, 59322, 59326.

[303] 34 C.F.R. § 106.8, subd. (a), (b); 34 C.F.R. § 106.45, subd. (b)(1).

[304] 2 CCR § 11023(b).

[305] Cal. Code Regs., tit. 2, § 11023(e).

[306] 34 C.F.R. § 106.8, subd. (a), (b); 34 C.F.R. § 106.45, subd. (b)(1).

[307] Gov. Code, § 12950.1, subd. (k)-(m). [as amended by Sen. Bill 1343 (January 1, 2019), Sen. Bill 778 (Aug. 30, 2019), and Assemb. Bill 3369 (Sept. 28, 2020.]

[308] Cal. Code Regs., tit. 2, § 11024(b)(2).

[309] Cal. Code Regs., tit. 2, § 11024(a)(2).

[310] Gov. Code, § 12950.1.

[311] 2 CCR § 11024(b)(2).

[312] Gov. Code, § 12926, subd. (t).

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

[314] Gov. Code, § 12950.1, subd. (a) [as amended by Sen. Bill 1343 (January 1, 2019) and Sen. Bill 778 (Aug. 30, 2019).].

[315] Gov. Code, § 12950.1, subd. (f). [as amended by Sen. Bill 1343 (January 1, 2019), Sen. Bill 778 (Aug. 30, 2019), and Sen. Bill 530 (January 1, 2020).].

[316] Gov. Code, § 12950.1, subd. (k)-(l). [as amended by Sen. Bill 1343 (January 1, 2019) and Sen. Bill 778 (Aug. 30, 2019).].

[317] 2 C.C.R. § 11024.

[318] Gov. Code, § 12950.1, subd. (b).

[319] Gov. Code, § 12950.1, subd. (i)(2).

[320] Gov. Code, § 12950.1, subd. (i)(2).

[321] Gov. Code, § 12950.1, subd. (c).

[322] Gov. Code, § 12950.2 [as amended by Sen. Bill 1300 (January 1, 2019).] .

[323] 34 C.F.R. § 106.45, subd. (b)(iii).

[324] 34 C.F.R. § 106.45, subd. (b)(iii).

[325] 34 C.F.R. § 106.45, subd. (b)(iii).

[326] 34 C.F.R. § 106.45, subd. (b)(iii).

[327] Cal. Ed. Code §§ 66281.8, subd. (b)(6); 67386, subd. (b)(12).

[328] Cal. Ed. Code § 66281.8, subd. (b)(6).

[329] Cal. Ed. Code § 66281.8, subd. (b)(6).

[330] Cal. Ed. Code § 66281.8, subd. (b)(7).

[331] Cal. Ed. Code § 66281.8, subd. (b)(9).

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

[333] Cal. Pen. Code, § 13519.7.

[334] Cal. Code Regs., tit. 5, § 59320.

[335] Cal. Code Regs., tit. 5, § 59334.

[336] Cal. Code Regs., tit. 5, § 59322.

[337] Cal. Code Regs., tit. 5, § 59322.

[338] Cal. Code Regs., tit. 5, § 59324.

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

[340] *Jameson v. Pacific Gas and Electric Co.* (2017) 16 Cal.App.5th 901 [225 Cal.Rptr.3d 171], review den. (Jan 17, 2020).

[341] 34 C.F.R. § 106.45, subd. (b)(5)(iii).

[342] *Perez v. Los Angeles Community College District* (2014) PERB Decision No. 2404.

[343] *Apogee Retail LLC*, 368 NLBR No. 144 (2019).

[344] 34 C.F.R. § 106.44, subd. (a).

[345] 85 Fed. Reg. 30040.

[346] *N.L.R.B. v. J. Weingarten, Inc.* (1975) 420 U.S. 251 [95 S.Ct. 959]; Cal. Gov. Code, § 3303, subd. (i).

[347] *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822 [221 Cal.Rptr. 529].

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

[349] Cal. Gov. Code, § 3303.

[350] *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704 [88 Cal.Rptr.3d 590], cert den.(2009) [129 S.Ct. 2841].

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

[352] *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704 [88 Cal.Rptr.3d 590], cert den. by (2009) 557 U.S. 921 [129 S.Ct. 2841].

[353] *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704 [88 Cal.Rptr.3d 590], cert den. by (2009) 557 U.S. 921 [129 S. Ct. 2841].

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

[355] Cal. Code Regs., tit. 5, § 59334.

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

[357] Cal. Code Regs., tit. 5, § 59322.

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

[359] See Gov. Code, § 12940, subds. (j)(1), (k); Cal. Code Regs., tit. 2, § 11019, subd. (b)(4).

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

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

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

[363] *Fuller v. City of Oakland* (9th Cir.) 47 F.3d 1522, 1528, as amended.

[364] *Fuller v. City of Oakland* (9th Cir.) 47 F.3d 1522, 1528-29, as amended; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882.

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

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

[367] *Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307 [184 Cal.Rptr.3d 774], review den.

[368] *Birschtein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994 [112 Cal.Rptr.2d 347], rehg. & review den.

[369] *Reynaga v. Roseburg Forest Products* (9th Cir. 2017) 847 F.3d 678.

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

[371] 34 C.F.R. §§ 106.30, subd. (a), 106.44, 106.45 [defining sexual assault as defined in 20 U.S.C. § 1092, subd. (f)(6)(A)(v)), dating violence (as defined in 34 U.S.C. § 12291, subd. (a)(10), domestic violence (as defined in 34 U.S.C. § 12291, subd. (a)(8)), and stalking (as defined in 34 U.S.C. § 12291, subd. (a)(30).

[372] 34 C.F.R. § 106.6, subd. (a).

[373] On July 20, 2021, the U.S. Department of Education's Office for Civil Rights (OCR) released a new guidance document titled "Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)." The Q&A clarifies how OCR interprets schools' existing obligations under the 2020 amendments to the Department's Title IX regulations, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment. The Q&A can be found here: https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.

[374] 34 C.F.R. § 106.44, subd. (a).

[375] 34 C.F.R. § 106.30.

[376] 85 Fed. Reg. 30040 (May 19, 2020).

[377] 34 C.F.R. §§ 106.30, 106.44, subd. (a); 85 Fed. Reg. 30040-41 (May 19, 2020).

[378] 34 C.F.R. § 106.30, subd. (a).

[379] 34 C.F.R. § 106.30, subd. (a).

[380] 34 C.F.R. § 106.44, subds. (a), (c).

[381] 34 C.F.R. § 106.44, subd. (d).

[382] 34 C.F.R. § 106.44, subd. (a).

[383] 34 C.F.R. § 106.44, subd. (b)(1).

[384] 34 C.F.R. § 106.30.

[385] 34 C.F.R. § 106.44.

[386] 34 C.F.R. § 106.45, subd. (b).

[387] 34 C.F.R. § 106.45, subd. (b)(1).

[388] 34 C.F.R. § 106.45, subd. (b)(2).

[389] 34 C.F.R. § 106.45, subd. (b)(2).

[390] 34 C.F.R. § 106.45, subd. (b)(1)(vii).

[391] 34 C.F.R. § 106.45, subd. (b)(1)(vii).

[392] 34 C.F.R. § 106.45, subd. (b)(5)(i).

[393] 34 C.F.R. § 106.45, subd. (b)(5).

[394] 34 C.F.R. § 106.45, subd. (b)(5)(vii).

[395] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[396] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[397] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[398] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[399] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[400] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[401] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[402] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[403] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[404] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[405] 34 C.F.R. § 106.45, subd. (b)(6)(i).

[406] 34 C.F.R. § 106.45, subd. (b)(7)(i).

[407] 34 C.F.R. § 106.45, subd. (b)(7)(ii).

[408] 34 C.F.R. § 106.45, subd. (b)(3)(i).

[409] 34 C.F.R. § 106.45, subd. (b)(3)(ii).

[410] 34 C.F.R. § 106.45, subd. (b)(3)(iii).

[411] 34 C.F.R. § 106.45, subd. (b)(8)(i).

[412] 34 C.F.R. § 106.45, subd. (b)(8)(i).

[413] 34 C.F.R. § 106.45, subd. (b)(8)(ii).

[414] Cal. Ed. Code, § 66281.8, subd. (e).

[415] Cal. Ed. Code, § 66281.8, subd. (e).

[416] Cal. Ed. Code, § 66281.5.

[417] Cal. Ed. Code, § 66281.5.

[418] Cal. Ed. Code, § 66281.8, subd. (b)(5).

[419] Cal. Ed. Code, § 66281.8, subd. (b)(4)(A)(ii).

[420] Cal. Ed. Code, § 66281.8, subd. (b)(2).

[421] Cal. Ed. Code, § 67386.

[422] Cal. Ed. Code, § 67386, subd. (c).

[423] Cal. Ed. Code, § 67386, subds. (d) and (e).

[424] Cal. Ed. Code, § 66281.8, subd. (b)(3)(A).

[425] Cal. Ed. Code, § 66281.8, subd. (b)(3)(B).

[426] Cal. Ed. Code, § 66281.8, subd. (b)(3)(C).

[427] Cal. Ed. Code, § 66281.8, subd. (b)(3)(C).

[428] Cal. Ed. Code, § 66281.8, subd. (b)(3)(D).

[429] Cal. Ed. Code, § 66281.8, subd. (b)(4).

[430] Cal. Ed. Code, § 66281.8, subd. (b)(4).

[431] Cal. Ed. Code, § 66281.8, subd. (c).

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

[433] Cal. Code Regs., tit. 5, § 59328(f)(2).

[434] Cal. Code Regs., tit. 5, § 59328(a) and (c).

[435] Cal. Code Regs., tit. 5, § 59328(e).

[436] Cal. Code Regs., tit. 5, §§ 59328; 59333.

[437] Cal. Code Regs., tit. 5, § 59328(g)(1).

[438] Cal. Code Regs., tit. 5, § 59328(g)(1).

[439] Cal. Code Regs., tit. 5, § 59328(f).

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

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

[442] *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1284-1285 [261 Cal.Rptr. 204, 211]; *Snipes v. City of Bakersfield* (1983) 145 Cal.App.3d 861, 868-869 [193 Cal.Rptr. 760, 764-765].

[443] *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 760 [120 Cal.Rptr.2d 550].

[444] Cal. Code Civ. Pro., §§ 2016.020, subds. (d)-(e), 2031.010, subd. (e), 2031.030, 2031.060, 2031.210, subd. (d), 2031.230, 2031.240, subd. (b)(1), 2031.280, subds. (c)-(d), 2031.285, 2031.310, subds. (d)-(g),(j), 2031.320, subd. (d).

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

[446] 42 U.S.C. § 2000e-5; 29 C.F.R. §§ 1601.13, 1601.15, 1601.16, 1601.22.

[447] Gov. Code, §§ 12960, 12965.

[448] Assem. Bill No. 9 (2019-2020 Reg. Sess.) § 3.

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

[450] Cal. Gov. Code, § 12964.

[451] Cal. Gov. Code, § 12965.

[452] Cal. Gov. Code, § 12965, subd.(b).

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

[454] Cal. Gov. Code, § 12965, subd. (b).

[455] Cal. Gov. Code, § 12950.1(d).

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

[457] *Kelly-Zurian, v. Wohl Shoe Co.* (1994), 22 Cal.App.4th 397, 415-415 [27 Cal.Rptr.2d 457, 466], as mod., review den., citing *Fisher v. San Pedro Peninsula Hosp*. (1989) 214 Cal.App.3d 590, 608 n.6 [262 Cal.Rptr. 842], review den.; Cal. Gov. Code, § 12940, subd. (j)(4)(A); Doe v. Capital Cities/ABC (1996) 50 Cal.App.4th 1038 [58 Cal.Rptr.2d 122], review den.

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

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

[460] *Miller v. Maxwell's Intern., Inc.* (9th Cir. 1993) 991 F.2d 583, 587-588, cert. & rehg. den. by (1994) 511 U.S. 1048; *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 603 [40 Cal.Rptr.2d 350, 354], as mod. on den. of rehg.; *Page v. Superior Court* (1995) 31 Cal.App.4th 1206 [37 Cal.Rptr.2d 529], review den.; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467 [20 Cal.Rptr.3d 428]; Cal. Gov. Code, § 12940, subd. (j)(3)..

[461] Cal. Code Regs., tit. 2, § 11019(b)(6).

[462] *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 603 [40 Cal.Rptr.2d 350, 354], as mod. on den. of rehg.; *Page v. Superior Court* (1995) 31 Cal.App.4th 1206 [37 Cal.Rptr.2d 529], review den.; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318 [58 Cal.Rptr.2d 308], review den.; *Reno v. Baird* (1998) 18 Cal.4th 640 [76 Cal.Rptr.2d 499].

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

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

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

[466] *Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1251 [32 Cal.Rptr.2d 223] overruled on other grounds *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498 [59 Cal.Rptr.2d 20].

[467] *Pennsylvania State Police v. Suders* (2004) 542 U.S. 129, 130 [124 S.Ct. 2342, 2344], not followed as dicta (8th Cir. 2007) 496 F.3d 880.

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

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

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

[471] *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 996 [47 Cal.Rptr.2d 478].

LCW CCD Workbook Order Form

BROWN ACT/PUBLIC RECORDS ACT	QTY	COST	TOTAL
Public Meeting Law (the Brown Act) and the Public Records Act for Community College Districts		$55	
CONFLICTS OF INTEREST AND ETHICS			
Conflicts of Interest, Ethics and Open Government		$75	
DISABILITY AND OCCUPATIONAL SAFETY			
The Disability Interactive Process for Community Colleges		$75	
Managing Employee Injuries, Disability and Occupational Safety		$75	
DIVERSITY			
Diversity in Community College District Employment: Effective and Lawful EEO Hiring and Succession Planning		$75	
EDUCATION ADMINISTRATION ISSUES			
Frequently Used Education Code and Title 5 Sections for Community College Districts		$55	
EMPLOYMENT RELATIONS			
An Employment Relations Primer for CCD Administrators and Supervisors		$75	
Disaster Service Workers – If You Call Them, Will They Come?		$55	
Human Resources Academy I for CCDs		$55	
Human Resources Academy II for CCDs		$55	
Reductions in Staffing		$75	
Temporary Employees of a CCD		$75	
Terminating the Employment Relationship		$55	
EVALUATION AND DISCIPLINE			
Academic and Classified Evaluation and Discipline		$75	
FAIR LABOR STANDARDS ACT (FLSA)			
FLSA Fundamentals for School Districts and Community Colleges		$55	
FLSA Public Sector Compliance Guide		$95	

FREE EXPRESSION	QTY	COST	TOTAL
Free Expression on College Campuses		$75	
HARASSMENT/DISCRIMINATION/RETALIATION			
Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment		$75	
INVESTIGATIONS			
Finding the Facts: Disciplinary and Harassment Investigations		$75	
LABOR RELATIONS			
Labor Relations: Collective Bargaining in Community College Districts		$75	
Labor Relations Fundamentals for CCDs		$75	
Unfair Practice Charges and PERB		$55	
LEAVES			
Leave Rights for California Community College Employees		$75	
PRIVACY			
Privacy Issues in the Community College Workplace		$75	
RETIREMENT			
Retirement Issues for California's Community Colleges & K-12 School Districts		$75	
SUPERVISION AND MANAGEMENT			
12 Steps to Avoiding Liability		$55	
Best Practices in Personnel Management		$75	
Prevention and Control of Absenteeism and Abuse of Leave in Community College Districts		$55	
VIOLENCE IN THE WORKPLACE			
Promoting Safety in Community College Districts		$75	

Name: _____

Title: _____

College/District: _____

Address: _____

_____

Phone: _____ Email: _____

To order these workbooks online and to view the Tables of Contents, please visit:
www.lcwlegal.com/news/workbooks

You can also submit your order by:

MAIL: 6033 W. Century Blvd., 5th Floor
Los Angeles, CA 90045

FAX: (310) 337-0837

Please make your check payable to:
LIEBERT CASSIDY WHITMORE

For further information, please contact the LCW Training Department at (310) 981-2000 or info@lcwlegal.com

Subtotal:	
CA Sales Tax: (for your city)	
Total Enclosed:	

LCW reserves the right to cancel any orders and/or refuse to process any orders, at its discretion.