

Understanding Common Claims

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I. Harassment

A. Conduct Prohibited

In addition to discrimination prohibitions, California law prohibits **harassment** of an employee, an applicant, or an independent contractor, based on that person's *protected class*. Cal. FEHA, Gov't Code §12940(j)(1). Federal law is analogous, except independent contractors are not protected. Title VII of Civil Rights Act of 1968, 1991 (42 U.S.C. §2000e et seq.), *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67, 106 S.Ct. 2399; the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

In California, the *protected classes* include

1. Age (40 and over)
2. Ancestry
3. Color
4. Religious Creed
5. Denial of Family and Medical Care Leave
6. Disability (mental and physical) including HIV and AIDS
7. Marital Status
8. Medical Condition (cancer and genetic characteristics)
9. Genetic Information
10. National Origin
11. Race
12. Religion
13. Sex (which includes pregnancy, childbirth and medical conditions related to pregnancy or childbirth)
14. Gender, Gender Identity, and Gender Expression
15. Sexual Orientation

Federal law has parallel protections, except for sexual orientation or marital status. The EEOC has held, however, that gender identity and expression is protected under Title VII's gender discrimination prohibitions.

B. The Two Types of Harassment Considered Unlawful

1. **Quid pro quo** where enduring the offensive conduct becomes a condition of continued employment, and
2. **Hostile work environment** where the conduct is *severe or pervasive* enough to create a work environment that a *reasonable person* would consider intimidating, hostile, or abusive.

C. Test of Sufficiently Severe or Pervasive for Hostile Work Environment Claim

Whether an environment is sufficiently severe or pervasive to amount to a viable legal claim is decided by looking at the *totality of the circumstances*. Factors to be considered in evaluating the *totality of the circumstances* include:

- the nature of the unwelcome acts or words (with physical conduct generally considered more offensive than mere words);
- the frequency of the offensive acts or encounters;
- the total number of days over which all the offensive conduct occurred; and
- the context in which the harassing conduct occurred.

Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 609-610, 262 Cal.Rptr. 84; *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 22-23, 114 S.Ct. 367, 371.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to a *reasonable person*. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Cal. Gov't Code §12940(j); Cal. Code Regs. tit. 2, §§7287.6(b)(A)-(D) and 7291.1(f)(1).

Note that employers may have anti-harassment policies that are stricter than the law, such as "zero tolerance" policies. In such case, the harassment need not rise to the level of severity or pervasiveness required to be unlawful, but may still amount to a violation of company policy.

D. Reasonable Person Standard for Hostile Work Environment Claim

In deciding the *reasonable person* standard in the context of a hostile work environment, the fact-finder "should consider the *victim's perspective* and not stereotyped notions of acceptable behavior." EEOC Compliance Manual (CCH) § 615, P 3114, p. 3274. For example, sexual slurs, displays of "girlie" magazines and even well-intentioned compliments can constitute a hostile

environment, even if many people determine it to be harmless or insignificant. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 961. The harasser's conduct is evaluated from the objective standpoint of a *reasonable person* in a similar environment, under similar or like circumstances. *Harris v. Forklift Sys.* (1993) 510 U.S. 17, 114 S.Ct. 367; *Nichols v. Azteca Restaurant* (9th Cir. 2001) 256 F.3d 864; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 262 Cal.Rptr. 84.

E. “Welcomeness” in the Context of a Sexual Harassment Claim

In order to find for the claimant in a sexual harassment claim, the question that must be answered in the affirmative is whether the claimant by his or her conduct indicated that the alleged sexual advances were *unwelcome*. To prove the conduct was *unwelcome*, the claimant must show that the conduct was undesirable or offensive and that it was not solicited or invited. A victim's voluntary submission to sexual conduct does not necessarily mean she was not sexually harassed under the law. *Meritor Savings Bank v. Vinson* (1986) 477 US 57, 68, 106 S.Ct. 2399, 2406; *Catchpole v. Brannon* (1995) 36 Cal.App.4th 923, 42 Cal.Rptr.2d 440; *Moylan v. Maries County* (8th Cir. 1986) 792 F. 2d 746; see also, *Henson v. City of Dundee* (11th Cir. 1982) 682 F.2d 897, 903: "unwelcome" conduct is conduct that an employee did not solicit or incite, and that the employee regards as undesirable or offensive.

In a 1990 policy guideline, the EEOC explained that if *welcomeness* (or witness credibility) is at issue, a harassment claim will be strengthened if the charging party made a contemporaneous complaint or protest (i.e., while the harassment is ongoing or shortly after it has ceased). The EEOC added, however, that a complaint or protest is not a necessary element of a harassment claim, given that victims may fear repercussions from their complaints. 64 EEOC Compliance Manual (CCH) § 615, P 3114, p. 3270.

F. Difference in Supervisor versus Co-Worker or Third Party Harassment

The employer is automatically liable for harassment by a supervisor that results in an adverse employment action such as termination, failure to promote or hire, and loss of wages.

If the supervisor's harassment creates a hostile work environment but results in no tangible adverse action against the victim, the employer can avoid liability or reduce its monetary exposure if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Under federal law, the employer may be able to avoid liability altogether if able to prove both prongs of the defense. This is commonly known as the *Ellerth/Faragher* affirmative defense. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S.Ct. 2257; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S.Ct. 2275.

The California Supreme Court added a third prong to the elements of the defense in a FEHA claim. An employer would also have to show that reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered. It also held that if the employer could prove all three elements, it could not avoid liability altogether, however, it could reduce the damages to which an employee might otherwise be entitled. This is commonly known as the "avoidable consequences" defense. *State Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 6 Cal. Rptr.3d 441.

In considering whether the employer took reasonable steps to prevent and promptly correct harassing behavior, the employer should have developed, distributed and implemented anti-harassment policies, conducted interactive training, undertaken prompt, independent, and thorough investigations of harassment claims, and taken appropriate remedial action.

The employer will be liable for harassment by non-supervisory employees or third parties over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

G. Employers Covered

The statutory anti-harassment laws apply to an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, with one (1) or more employee under California FEHA, and fifteen (15) or more employees under federal law. The majority of states have their own anti-discrimination laws which apply to employers with less than 15 employees.

H. Sexual Harassment based on Gender, Not Sex

Conduct that is not sexual in nature, but is otherwise based on a person's gender, will also constitute sexual harassment in violation of the FEHA and Title VII. For example, see, *Fuller v. City of Oakland* (9th Cir. 1995) 47 F. 3d 1522 (repeated "hang up" telephone calls, intrusion into plaintiff's personnel file, and threats to plaintiff and her boyfriend's physical safety violated Title VII); *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 350, 21 Cal. Rptr. 292 (comments that women do not belong in the workplace created actionable claim of hostile work environment under FEHA); *Hall v. Gus Construction Co.* (8th Cir. 1988) 842 F. 2d 1010, 1014 (sexual harassment hostile environment claim established under Title VII where female traffic controllers at all male construction sites were subjected to name calling; male crew members urinated in one plaintiff's water bottle and another in plaintiff's car's gas tank; and defendant failed to fix the truck females were forced to drive until one of the males had to drive it).

I. Evidence of Known Harassment of Others

Incidents of harassment directed toward employees in the workplace other than the complainant, but observed by or known to the complainant are admissible in civil actions to determine whether a reasonable person in the complainant's position would find the conduct severely hostile or abusive. A reasonable person also may be offended by knowledge that other workers are being similarly harassed in the workplace, even if he or she does not personally witness that conduct. *Beyda v City of Los Angeles* (1998), 65 Cal. App.4th 511, 519, 76 Cal. Rptr. 2d 547; see also *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976.

Compare, *Brooks v. City of San Mateo* (9th Cir. 2000) 214 F.3d 1082, where incidents involving two other victims, but unknown to the plaintiff during her employment, could not be considered **on the issue of whether or not a reasonable person would have found the environment to be offensive**. Such evidence might be admissible for other purposes however. See, for example, *Pantoja v. Anton* (2001) 198 Cal. App. 4th 87, where evidence of harassing activity against other female employees, which occurred outside of the plaintiff's presence and at times when the plaintiff was not even employed, was found admissible as evidence to **show intent, to impeach defendant's credibility, and to rebut factual claims made by defense witnesses**.

J. Limits on discoverable and admissible evidence in Sexual Harassment Cases

California and federal law provide statutory and constitutional protections for the sexual harassment plaintiff.

1. California Code of Civil Procedure §2017.220 protects the plaintiff from discovery into the plaintiff's alleged sexual conduct with individuals other than the alleged harasser, except in limited circumstances and upon noticed motion for good cause shown.
2. California Evidence Code §783 requires a noticed motion, offer of proof of relevancy, and a showing that the evidence is not inadmissible pursuant to Evidence Code §352, before the evidence may be offered to attack the credibility of the plaintiff.
3. Federal Rule of Evidence Rule 412 and California Evidence Code §1106 make inadmissible to prove consent or absence of injury evidence of plaintiff's opinions (including dreams and fantasies), reputation, and specific instances of sexual conduct with persons other than the alleged harasser, except in limited circumstances, and upon noticed motion for good cause shown.
4. Federal Rules of Evidence, Rule 412, the rape shield law, generally precludes evidence of a victim's character in sex offense cases. There are three exceptions: (1) to prove that the origin of semen, pregnancy, or other physical evidence was someone other than the accused, (2) to prove a victim's past sexual

activity with the accused, and (3) when constitutionally required. In addition, notice and in-chamber procedures are mandated. An excellent discussion of the rule is presented in *Wolak v. Spucci* (2d Cir. N.Y. 2000) 217 F.3d 157, 160-161:

“Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication. See, e.g., Burns v. McGregor Electronics Indus., 989 F.2d 959, 962-63 (8th Cir. 1993) (holding that plaintiff's posing for nude pictures for magazine did not indicate sexual advances at work were welcome); cf. Gallagher v. Delaney, 139 F.3d 338, 346 (2d Cir. 1998) (holding that plaintiff's extramarital office affair did not permit court to find as a matter of law that plaintiff was open to sexual advances). Even if a woman's out-of-work sexual experiences were such that she could perhaps be expected to suffer less harm from viewing run-of-the-mill pornographic images displayed in the office, pornography might still alter her status in the workplace, causing injury, regardless of the trauma inflicted by the pornographic images alone. Thus, defendants failed to establish that ‘the probative value’ of Wolak's admissions concerning her activities outside the office, ‘substantially outweighed the danger of harm . . . and of unfair prejudice,’ and the evidence was not admissible. Fed. R. Evid. 412(6)(2).”

See also, *Socks-Brunot v. Hirschvogel Inc.* (S.D. Ohio 1999) 184 F.R.D. 113, 117-119: Rule 412 prohibits testimony offered by the defendant-employer that the plaintiff spoke to co-employees about personal, sexual matters, and therefore invited the crude sexual comments from her supervisor.”

5. Further, California and federal case law also protect the plaintiff from unnecessary intrusion into her personal and sexual history. Examples include: plaintiff's fantasies about persons, other than the alleged harasser not admissible, *B.K.B. v. Maui Police Dept.* (9th Cir. 2002) 276 F.3d 1091, amended by 2002 U.S. App. LEXIS 276; questions about plaintiff's marriage problems not discoverable, *Tylo v. Superior Court*, (1997) 55 Cal.App.4th 1379, 64 Cal.Rptr.2d 731; evidence of plaintiff's childhood sexual abuse not discoverable, *Knoettgen v. Superior Court* (1990) 224 Cal. App. 3d 111. Cal. Code Civ. Proc. §2017(d); Cal. Evid. Code §1106.

II. Disability Law

A. Three Prohibitions:

1. Discriminating against someone based on their actual, perceived, or record of disability;
2. Failing to accommodate someone with a known qualified disability, except where there is an undue hardship to the company; and
3. Failing to engage in the interactive process.

The federal Americans with Disabilities Act of 1990 (ADA) 42 U.S.C. § 12101 et seq. and the California Fair Employment and Housing Act (FEHA) Gov. Code § 12900 et seq. are the principal statutes that prohibit discrimination against individuals with disabilities in California.¹ The ADA and the FEHA prohibit employment discrimination by a covered entity against an individual with a disability who is qualified.

The ADA proscribes discrimination in job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Unlawful "discrimination" includes, among other things, limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of his or her disability. 42 U.S.C. § 12112(b)(1). This includes an employer's participation in a contractual or other arrangement or relationship (including a relationship with a labor union) that has the effect of subjecting a qualified applicant or employee with a disability to prohibited discrimination. However, employers may prefer some physical attributes over others, such as height or medical conditions that do not rise to the level of a substantial impairment; accordingly, they may establish physical criteria for certain jobs. *Sutton v. United Air Lines* (1999) 527 U.S. 471, 490-493, 119 S. Ct. 2139, 144 L. Ed. 2d 450, overruled by statute on other grounds

California's discrimination laws have historically offered greater protection to employees than the federal laws, including the federal ADA. For example, the ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1). However, under the California FEHA, disability is defined as an impairment that makes performance of a major life activity "difficult." Cal Gov. Code § 12926(j) and (l). Thus, under California law, persons with a wide variety of diseases, disorders or conditions would be deemed to have a disability who, under the definitions set forth in the ADA and the United States Supreme Court's narrow interpretations of that statute, might not be considered

¹ See also, the federal Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. which applies only to federal contractors 29 U.S.C. § 793 (Section 503), and recipients of federal funds, See 29 U.S.C. § 794 (Section 504) also prohibits disability discrimination. Federal contractors are also subject to the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. § 4211 et seq. which protects disabled veterans. 38 U.S.C. § 4212.

“disabled” and therefore denied protection. A chart illustrating some of the differences between federal and state law is available at <http://www.dfeh.ca.gov/res/docs/Publications/dfch-208dh.pdf>

Under the FEHA, as amended, the definitions of mental and physical disability were broadened to prevent discrimination based on a person's "record or history" of certain impairments. Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, multiple sclerosis, and heart disease.

The California legislature clarified that the definitions of physical and mental disability only require a “limitation” upon a major life activity, not a “substantial limitation” as required by the ADA. They further stated that when determining whether an employee’s condition is a limitation, mitigating measures should not be considered, unless the mitigation itself limits a major life activity. Working” is a major life activity regardless of whether the actual or perceived working limitations implicate a specific position or broad class of employment. Whereas, under the ADA, the mental or physical disability must affect a person’s ability to obtain a broad class of employment.

An employer or employment agency cannot ask about a job applicant’s medical or psychological condition or disability except under certain circumstances. In addition, it is illegal to ask current employees about these conditions unless the condition is related to the employee’s job.

B. “Known” Disability

The FEHA requires employers to reasonably accommodate the known physical or mental disabilities of any applicant or employee unless the employer can demonstrate that such an accommodation would result in undue hardship to the operation of the business. The FEHA requires an employer to accommodate only a known physical disability. The employee bears the burden of giving the employer notice of his or her disability. *Avila v. Continental Airlines* (2008) 165 Cal. App. 4th 1237, 1252-1253, 82 Cal. Rptr. 3d 440 (trial court properly granted employer summary judgment on claim that employer refused to accommodate plaintiff's disability, where plaintiff did not make employer aware of his disability or physical limitations it caused, such that employer was on notice that plaintiff required accommodation).

Federal law is similar. An employer's duty to make reasonable accommodations does not arise if the employer is unaware of the limitation of the "otherwise qualified." Thus, an employer is not expected to "read [the employee's] mind and know he secretly wanted a particular accommodation." *Schmidt v. Safeway, Inc.* (D. Or. 1994) 864 F. Supp. 991, 997. On the other hand, the employer's duty to provide reasonable accommodation arises when it learns of the underlying facts, and "[t]he employee need not mention the ADA or even the term 'accommodation.'" *Schmidt, supra*; see EEOC Compliance Manual (CCH) § 902 (Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities). But cf. *Hedberg v. Indiana Bell Tel. Co., Inc.* (7th Cir. 1995) 47 F.3d 928, 932-934 (employer must know of

disability, and knowledge of disability cannot be inferred from knowledge of symptoms caused by disability, such as tardiness and apparent laziness); *Hamm v. Runyon* (7th Cir. 1995) 51 F.3d 721, 725 (tardiness not an obvious symptom of arthritis).

C. A “Qualified Disability”

1. Qualified Disability under California Law

The FEHA basically defines two categories of disability: mental disability and physical disability. Each category contains its own specific definitions. Additionally, under the FEHA, an employee with a “medical condition” is also entitled to accommodation.

The following are the specific definitions of physical disability, mental disability, and medical condition as outlined in the FEHA:

Physical Disability—Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of several body systems and limits a major life activity. The body systems listed include the neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine systems. A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity, such as working, if it makes the achievement of the major life activity difficult. When determining whether a person has a disability, an employer cannot take into consideration any medication or assistive device, such as wheelchairs, eyeglasses or hearing aids, that an employee may use to accommodate the disability. However, if these devices or mitigating measures “limit a major life activity,” they should be taken into consideration.

Physical disability also includes any other health impairment that requires special education or related services; having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment which is known to the employer; and being perceived or treated by the employer as having any of the aforementioned conditions.

Mental Disability—Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity, or having any other mental or psychological disorder or condition that requires special education or related services. An employee who has a record or history of a mental or psychological disorder or condition which is known to the employer, or who is regarded or treated by the employer as having a mental disorder or condition, is also protected.

It should be noted that under **both** physical and mental disability, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, are specifically excluded and are not protected under the FEHA.

Medical Condition—Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer, or a genetic characteristic. A “genetic characteristic” can be a scientifically or medically identifiable gene or chromosome or an inherited characteristic that could statistically lead to increased development of a disease or disorder. For example, women who carry a gene established to statistically lead to breast cancer are protected under state law. Keep in mind, however, that California Government Code section 12940 (o) makes it an unlawful employment practice for an employer to subject, directly or indirectly, any applicant or employee, to a test for the presence of a genetic characteristic.

2. **Qualified Disability under Federal Law**

Under the ADA, a "qualified individual" is an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m) (defining "qualified"); The plaintiff bears the burden of proving that he or she is "qualified." *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1087 ; *Hutton v. Elf Atochem North America, Inc.* (9th Cir. 2001) 273 F.3d 884, 892 . Essential functions in this context are defined as the fundamental job duties of the employment position the individual with a disability holds or desires. They do not include the marginal functions of the position. Functions are considered essential for the following nonexclusive reasons: (1) the position exists for the purpose of performing that function; (2) the number of available employees who share that function is limited; and (3) the function is highly specialized. 29 C.F.R. § 1630.2(n)(1), (2).

A "disability" under the ADA is defined as any of the following:

- (1) A physical or mental impairment that substantially limits one or more of an individual's major life activities.
- (2) A record of such impairment.
- (3) Being regarded as having such impairment.

42 U.S.C. § 12102(1)

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) narrowed some of the gaps between California and federal law, especially on the subject of defining a disability. Basically, the ADAAA directed the EEOC to revise its regulations defining the term "substantially limits" to make it more inclusive. It also expanded the definition of major life

activities to include reading, bending and communicating, among others. In addition, like California law, the ADAAA provides that mitigating measures, other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability. Overall, the ADAAA emphasized that the definition of "disability" should be interpreted broadly.

For more details on the EEOC new regulations, see:

http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm

D. Duty to Accommodate a Qualified Disability and to Engage in the Interactive Process

Once a disability that is protected under the law is established, an employer is obligated to provide a reasonable accommodation unless the accommodation would represent an undue hardship to the business operation. In the process of determining a reasonable accommodation, an employer must enter into a good-faith, interactive process to determine if there is a reasonable accommodation that would allow the applicant or employee to obtain or maintain employment. The first step of the "interactive process" is determining the "essential functions" of the position.

1. Essential Job Function

When determining whether a job function is essential, the following should be taken into consideration:

- (1) the position exists to perform that function;
- (2) there are a limited number of employees available to whom the job function can be distributed; or
- (3) the function is highly specialized.

Evidence of whether a particular function is essential includes the employer's judgment as to which functions are essential; a written job description prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experiences of past incumbents in the job; or the current work experience of incumbents in similar jobs.

Once an employer has evaluated the position and the essential functions of the position, he or she should begin the process of determining reasonable accommodation by engaging in good-faith interaction with the employee.

2. Reasonable Accommodation

Reasonable accommodation is any appropriate measure that would allow the applicant or employee with a disability to perform the essential functions of the job. It can include making facilities accessible to individuals with disabilities or restructuring jobs, modifying work schedules, buying or modifying equipment, modifying examinations and policies, or other accommodations. For example, providing a keyboard rest for a person with carpal tunnel syndrome may qualify as a reasonable accommodation. A person with asthma may require that the lawn care be rescheduled for a non-business day.

3. Interactive Process

California State law incorporates guidelines developed by the Equal Employment Opportunity Commission in defining an “interactive process” between the employer and the applicant or employee with a known disability. The guidelines include:

- (1) consulting with the individual to ascertain the precise job-related limitations and how they could be overcome with a reasonable accommodation; and
- (2) identifying potential accommodations and assessing their effectiveness.

Although the preferences of the individual in the selection of the accommodation should be considered, the accommodation implemented should be one that is most appropriate for both the employee and the employer.

4. Good Faith

Federal courts have provided an interpretation of “good faith,” essentially stating that an employer and employee must communicate directly with each other to determine essential information and that neither party can delay or interfere with the process. To demonstrate good-faith engagement in the interactive process, the employer should be able to point to cooperative behavior that promotes the identification of an appropriate accommodation.

5. Undue Hardship

The FEHA does provide legal reasons an employer can permissibly refuse to accommodate a request for reasonable accommodation from an applicant or employee. One of the legal reasons is whether the accommodation would present an undue

hardship to the operation of the employer's business. If an employer denies accommodation because it would be an "undue hardship," it must be shown that the accommodation requires significant difficulty or expense, when considered in the light of the following factors:

- (1) The nature and cost of the accommodation needed;
- (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility;
- (3) The overall financial resources of the employer, the overall size of the business with respect to the number of employees, and the number, type, and locations of its facilities;
- (4) The type of operations, including the composition, structure, and functions of the workforce of the employer; and
- (5) The geographic separateness, administrative or fiscal relationship of the facility or facilities.

For example, an applicant with severe vision impairment applies for employment with a small market that has only four other employees. The applicant requires assistance to work the register by having another employee present at all times. The business in question would not have to provide the accommodation if, for example, it could not afford the cost of the additional staff or could not afford the cost of remodeling to accommodate two employees at the same time.

6. Appropriate and Inappropriate Questions to Applicant or Employee

What questions may be directed to an individual depends, largely, upon whether the individual is an applicant for a position or is currently employed by the employer.

a. Pre-employment Inquiries

Prior to employment, it is unlawful for an employer to require an applicant to attend a medical/psychological examination, make any medical/psychological inquiry, make any inquiry as to whether an applicant has a mental/physical disability or medical condition, or make any inquiry as to the severity of the disability or medical condition.

However, an employer may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation or require a medical/psychological examination or make an inquiry of a job applicant **after** an employment offer has been made but **prior** to the start of employment provided that the examination or inquiry is job-related and consistent with business necessity and all new employees in the same job classification are subject to the same examination or inquiry.

b. **Post-employment Inquiries**

In determining a disability, an employer may only request medical records directly related to the disability and need for accommodation. However, an applicant or an employee may submit a report from an independent medical examination before disqualification from employment occurs. The report must be kept separately and confidentially as any other medical records, except when a supervisor or manager needs to be informed of restrictions for accommodation purposes or for safety reasons when emergency treatment might be required.

If the individual is a current employee, the employer may not require any medical/psychological examination of an employee or make any of the following inquiries:

- (1) Medical or psychological;
- (2) Whether an employee has a mental/physical disability; or
- (3) The nature or severity of a physical disability, mental disability, or medical condition.

However, an employer may require any examinations or inquiries that it can show to be job-related *and* consistent with business necessity. Furthermore, an employer may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

III. **Retaliation/Whistleblowing**

Employers may subject themselves to retaliation liability when they take adverse employment action against an employee who has complained of actual or reasonably perceived unlawful conduct. To establish a prima facie case of retaliation, a plaintiff must show:

- (1) he or she engaged in a protected activity;
- (2) the employer subjected the employee to an adverse employment action; and
- (3) there was a causal link between the protected activity and the employer's adverse action.

After the employee establishes the prima facie case, the employer must offer a legitimate, nonretaliatory reason for its adverse action. If the employer establishes this, the presumption of retaliation drops out, and the burden shifts back to the employee to prove intentional retaliation. *Akers v. County of San Diego* (2002), 95 Cal. App. 4th 1441, 1453.

A. **Adverse Employment Action in Retaliation Cases**

Under Federal law, any action that would have dissuaded a reasonable person from complaining is considered an “adverse employment action” in retaliation claims. *Burlington Northern &*

Santa Fe Ry. Co. v. White (2006), 548 U.S. 53, 68. Note that, under federal law, there is a difference between an “adverse employment action” in retaliation cases, as opposed to that found in intentional discrimination cases. In the latter, the “adverse employment action” is defined as a “material change in the terms or conditions of employment,” such as discharge, demotion, wage cut, material loss of benefits, a career effecting transfer. The California FEHA standard for both retaliation and intentional discrimination is this same “material change” standard. The unique circumstances of the affected employee as well as the workplace context of the claim must be taken into account in determining whether the adverse action materially affects the terms, conditions or privileges of employment. *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052. Since this is a tougher standard than the “deterrence test,” here are some examples of what would be considered “adverse employment actions” in both retaliation and intentional discrimination cases:

- *Wyatt v. City of Boston* (1st Cir. 1994) 35 F.3d 13 at pp. 15-16 ["employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees"].
- *Gunnell v. Utah Valley State College* (10th Cir. 1998) 152 F.3d 1253, 1264 [holding that coworker hostility or retaliatory harassment, if sufficiently severe, can constitute adverse employment action for purposes of a title VII retaliation claim].
- *Wideman v. Wal-Mart Stores, Inc.* (11th Cir. 1998) 141 F.3d 1453, 1456 [finding that written reprimands, an employer's solicitation of negative comments by coworkers, and a one-day suspension constituted adverse employment actions].
- *Corneveaux v. CUNA Mut. Ins. Group* (10th Cir. 1997) 76 F.3d 1498, 1507-1508 [holding that an adverse employment action occurred when an employee was required to "go through several hoops" in order to obtain severance benefits].
- *Yartzoff v. Thomas* (9th Cir. 1987) 809 F.2d 1371, 1376 [transfers of job duties and undeserved performance ratings, if proven, would constitute adverse employment decisions].

B. Federal Retaliation Statutes

Federal discrimination laws prohibit retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, or opposing employment practices that one reasonably believes discriminates against individuals, in violation of these laws.

The federal Whistleblower Protection Act protects applicants and employees from unfavorable personnel actions for disclosing a violation of any law, rule or regulation, or gross mismanagement, waste, abuse of authority, or substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law. 5 U.S.C. §2302.

The Sarbanes-Oxley Whistleblower Act prohibits publicly traded companies from taking adverse action against an employee for reporting employer conduct that the employee reasonably

believes violates federal securities laws (e.g., violations of mail, wire, bank, or securities fraud; violations of rules or regulations of the SEC; or federal laws relating to fraud against shareholders) or for assisting an SEC investigation. 18 USC §1514A. For an extensive list of federal statutes that prohibit retaliation, see The Rutter Group, *California Practice Guide, Employment Litigation*, Appendix A, Federal Whistleblower Statutes, pp. 5-135, et. seq. 1.

C. California Retaliation Statutes

California has numerous state statutes that protect employees who engage in “whistleblowing” activities.

Like the federal discrimination statutes, the state discrimination laws prohibit retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, or opposing employment practices that one reasonably believes discriminates against individuals, in violation of these laws. California Government Code §12940(k). For example, in *Colarossi v. Coty US Inc.* (2002) 97 Cal. App. 4th 1142, summary judgment for defendants was reversed where the timing of a decision to terminate the plaintiff shortly after she participated in an investigation of a company director for sexual harassment (when prior to the investigation she was considered a top performer who had garnered awards), along with testimony by plaintiff's supervisor that the director had said she would get revenge on the employees who cooperated in the investigation, was deemed sufficient evidence of retaliation by the appellate court.

California Labor Code §1102.5 prohibits employers from taking adverse action against an employee for reporting conduct that the employee reasonably believes violates a state or federal statute, rule or regulation.

Government Code §12653 prohibits employers from adopting any rule or policy prohibiting employees from disclosing information to a government or law enforcement agency, or in furthering a false claims action under Government Code §12652; or in discriminating or retaliating against employees who engage in such activities in the terms and conditions of their employment.

Health & Safety Code §1278.5 prohibits health care facilities from discriminating or retaliating against any employee for presenting a grievance or complaint to an accrediting agency or other governmental agency, or for cooperation in an investigation or proceedings related to the quality of care, services or conditions at a facility. It also prohibits retaliation against an employee who complains to an employer or to a government agency about unsafe patient care or conditions. For a more comprehensive list of California statutes that prohibit retaliation against whistleblowers, see The Rutter Group, *California Practice Guide, Employment Litigation*, Appendix B, California Whistleblower Statutes, pp. 5-141, et. seq.

IV. Wrongful Termination/Discipline Cases

The key elements of a claim of wrongful termination (or wrongful demotion) in violation of public policy are as follows:

- (1) The employee engaged in conduct that is protected by a public policy that is fundamental, beneficial for the public, and embodied in a statute, regulation, or constitutional provision;
- (2) The employee was thereafter subjected to discharge or some other adverse employment action; and
- (3) A causal connection exists between the employee's protected conduct and the adverse employment action.

See, for example, *Addy v. Bliss & Glennon* (1996) 44 Cal. App. 4th 205, 217, 51 Cal. Rptr. 2d 642 ; *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1256-1259, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 ; *Judicial Council of California Civil Jury Instructions, CACI 2430.*

A. Termination or Demotion in Violation of Public Policy

The employer's right to take adverse action against an employee is limited by the discrimination and whistleblowing laws. This limitation applies to more than the termination of an employee. It also applies to demotions or any other action that materially affects the employee's terms and conditions of employment, if that action is a result of discrimination or in retaliation for reporting the employer's illegal activity. *Scott v. Pacific Gas & Elec. Co.* (1995) 11 Cal.4th 454, 464-465.

B. Termination or Demotion in Breach of Contract

Likewise, an employer cannot demote an employee where employed under an express or implied contract limiting the employer's right to do so. *Scott, supra*. The promise must be definite and certain to be enforceable. *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1327: a promise to give merit increases based on performance was insufficient to bar a demotion without good cause.

An employer's policies, practices and communications can also form the basis of a promise not to be demoted without good cause. *Scott, supra*, at 464. For example, employers with progressive discipline policies that regularly hold themselves bound to follow the system in disciplining employees can be found to have impliedly promised no disciplinary action without following that system.

C. Promissory Estoppel

An employer can be held liable for damages caused by its breach of promise made to and relied upon by an employee. For example, an employer may be liable where new employment was promised but then rescinded because the newly hired employee visited the office in jeans and a tee shirt prior to his start date. *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61, 67; *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692; *US Ecology, Inc. v. State of Calif.* (2005) 129 Cal.App.4th 887, 904, 908.

The elements of promissory estoppel are:

- (1) a clear promise by the employer,
- (2) reliance by the employee,
- (3) substantial detriment, and
- (4) damages measured by the extent of the obligation promised and not performed.

Toscano v. Greene Music (2004) 124 Cal.App.4th 685, 692.

V. Disparate Treatment and Other Forms of Proof in Discrimination Cases

“Disparate treatment” is intentional discrimination against one or more persons on prohibited grounds: i.e., treating similarly situated individuals differently in their employment because of a protected characteristic. *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, 335-336. This is the most commonly encountered theory of proof of discrimination under Title VII and the California FEHA.

A. Evidence of disparate treatment.

There are two methods of proving disparate treatment:

(1) **Direct evidence** (rare): Evidence which proves discriminatory animus without inference or presumption. *Goodwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221. Examples, include ageist, sexist, racial or other discriminatory remarks by the decision maker related to the decision making process, or made by a supervisor influencing the decision making (i.e., “cat’s paw” theory). *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles* (10th Cir. 2006) 450 F.3d 476, 484.

(2) **Indirect evidence** (most common): Evidence that shows that the wrongful action occurred under circumstances suggesting a discriminatory motive. The elements of this claim include showing that the employee was a member of the protected class, that s/he

was qualified or competently performing the job, that s/he suffered an adverse employment action, and that the action occurred under circumstances suggesting a discriminatory motive. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802. This is commonly known as the “McDonnell Douglas” burden-shifting framework, as more particularly described below.

B. The McDonnell Douglas Burden-Shifting Framework

In *McDonnell Douglas Corporation v. Green, supra*, the United States Supreme Court established the well-known burden-shifting framework applicable to Title VII disparate treatment claims when a plaintiff lacks direct evidence of discriminatory animus. In *McDonnell Douglas*, the issue at trial was framed by two opposing factual contentions. The plaintiff alleged that he was not re-hired by the defendant because of his race, color, and involvement in civil rights activities, while the employer asserted that the decision was based on the plaintiff's unlawful conduct against the company. Grappling with "the order and allocation of proof in a private, non-class action challenging employment discrimination," the Court designed a burden shifting framework to apply in such circumstances.

Under the McDonnell Douglas test, a plaintiff must carry the burden of establishing, by a preponderance of the evidence, a prima facie case of employment discrimination by showing:

1. that he or she is a member of a protected class;
2. that he or she applied and was qualified for a job (or other employment opportunity or benefit) for which an employer was seeking applicants;
3. that, despite the plaintiff's qualifications, he or she was rejected or suffered some other adverse employment action; and
4. that, after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications (or provide the benefit to other such persons).

Once plaintiff carries the initial burden of establishing a "prima facie case of ... discrimination," the burden then shifts to the employer "to articulate some legitimate, non-discriminatory reason" for the decision at issue. However, the defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Finally, the employee, who retains the burden of persuasion, must be afforded a fair opportunity to show that the employer's stated reason was in fact pretext. He or she may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

Under the *McDonnell Douglas* framework, the plaintiff thus retains ultimate responsibility for proving discriminatory animus; the burden of disproving animus is not shifted to the employer.

C. Proving Intentional Discrimination by Indirect Evidence of Disparate Treatment

The types of circumstantial evidence admissible to show an employer's discriminatory intent include:

1. "Me Too" Testimony by Other Employees May Be Relevant to Prove Discriminatory Intent.

"Me too" evidence is evidence from employees other than the claimant who claim that they too were subject to discrimination by the employer. *Sprint v. Mendelsohn* (2008) 552 U.S. 379, 128 S.Ct. 2240; *Johnson v. United Cerebral Palsy/Spastic Children's Found. of Los Angeles and Ventura Counties*(2009) 173 Cal.App.4th 740, 767; *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 109-111. Under Federal law, "me too" evidence is admissible if it is relevant to show a party's bias or discriminatory animus. In *Sprint, supra*, the US Supreme Court affirmed that a trial judge should not make a "per se" determination that "me too" evidence would never be admissible. The Supreme Court held that evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination. The Court further held that the "me too" evidence of five witnesses who neither worked for the plaintiff's supervisor, nor in the same area, was nonetheless relevant to Sprint's discriminatory animus toward older workers. The exclusion of this evidence at trial, the court held, unfairly inhibited plaintiff from presenting her case to the jury. Following the *Sprint* holding, a California Court of Appeal ruled that "me too" evidence of harassing activity against other female employees, which occurred outside of the plaintiff's presence and at times when the plaintiff was not even employed, is admissible as evidence to show intent under Evid. Code, § 1101, subd. (b), to impeach defendant's credibility, and to rebut factual claims made by defense witnesses. *Pantoja v. Anton* (2011) 198 Cal. App. 4th 87, petition for review and depublication request(s) denied, 2011 Cal. LEXIS 11911 (Cal. Nov. 16, 2011). See , also, *Bihun v. AT&T Info Systems*(1993) 13 Cal.App.4th 976: evidence of harassing supervisor's sexual misconduct with female employees was relevant to employer's knowledge of the harassment and its failure to act; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 760: declarations from five women attesting they were discriminated against after telling the employer they were pregnant were admissible in pregnancy discrimination case to show intent or motive, for the purpose of casting doubt on the employer's stated reason for an adverse employment action.

See, also, *Becker v. ARCO Chem. Co.* (3rd Cir. 2000) 207 F.3d 176, 194; *Obrey v. Johnson*, (9th Cir. 2005) 400 F.3d 691, 697; *Brown v. Trustees of Boston Univ.* (1st Cir. 1989).891 F.2d 337, 349-350.

2. **An Inference of Discrimination May Arise Where Similarly Situated Employees, Not of The Same Protected Class, Are Treated More Favorably.**

"[W]hether two employees are similarly situated is ordinarily a question of fact." *Beck v. United Food & Commercial Workers Union Local 99* (9th Cir. 2007) 506 F.3d 874, 885 n.5 The employees' roles need not be identical; they must only be similar "in all material respects." *Moran v. Selig* (9th Cir. 2006) 447 F.3d 748, 755; see also *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 660. Materiality will depend on context and the facts of the case. *Hawn v. Executive Jet Mgmt. Inc.* (9th Cir. 2010) 615 F.3d 1151, 1157-1158; see also *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804 (1973).

Generally, individuals are similarly situated when they have similar jobs and display similar conduct. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 641. In *Vasquez*, the court found that the employees were not similarly situated where the type and severity of an alleged offense was dissimilar. Likewise, in *Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 1125-26, the court held that an alleged distinction between a female pilot and several male pilots was not material. Under the allegations of that case, the court concluded that a female pilot, who had deficient communication and cooperation skills, was similarly situated to male pilots, who had deficiencies in their technical piloting skills, because both types of deficiencies could be addressed through retraining. Any distinction between the two types of skill sets was "not material for purposes of determining whether the male pilots were 'similarly situated' to" the plaintiff; therefore, the female pilot had made out a prima facie case of discrimination by showing that the male pilots received remedial training for their deficiencies while she received no such instruction. *Id.* at 1126. *Nicholson* demonstrates that whether employees are similarly situated -- i.e., whether they are "similar in all material respects," *id.*, at 1125 -- is a fact-intensive inquiry, and what facts are material will vary depending on the case.

To be "similarly situated," it is not required that the employees have the same supervisor. For example, where the plaintiffs' (male pilots) direct supervisor was excluded from the decision to terminate them, the fact that their female comparators had different direct supervisors did not render them dissimilar in a material respect. The relevant decision-maker in that case was aware of both the allegations against plaintiffs and the allegations plaintiffs had made against the female flight attendants. Similarity between two persons or groups of people is a question of fact that cannot be mechanically resolved by determining whether they had the same supervisor without attention to the underlying issues. *Hawn, supra*, at 1157.

3. **Employer's Inconsistent Explanations for the Reasons for the Adverse Action May Also Create an Inference of Discriminatory Motive.**

In *EEOC v. Ethan Allen, Inc.* (2nd Cir. 1994) 44 F.3d. 116, an age discrimination case, the EEOC introduced evidence suggesting that Ethan Allen provided inconsistent explanations for its

decision to terminate the plaintiff. Ethan Allen maintained at trial that its officials engaged in a thorough comparison of the merits of both plaintiff and his coworker in accordance with its layoff policy, ultimately deciding that his coworker was better suited to undertake any available projects. In its initial response to the state's investigation, however, Ethan Allen stated that the sole reason for the plaintiff's discharge was a decrease in the duties of his special projects position. Once it was discovered by the state investigator that there was work for the plaintiff, as evidenced by the assignment of projects to a significantly younger employee, the company no longer asserted this explanation. Rather, it then cited plaintiff's performance problems, including his aversion to paperwork and his unwillingness to travel -- even though Ethan Allen originally discounted performance as a determinative factor. By the time of trial, Ethan Allen claimed it had carefully weighed the two employees in the context of the criteria established by the written layoff policy. Ethan Allen offered this reason despite the fact that one of the decision-makers previously had admitted that the layoff policy was ignored as a guideline.

The appellate court held that from such discrepancies a reasonable juror could infer that the explanations given by Ethan Allen at trial were pretextual; that they were developed over time to counter the evidence suggesting age discrimination uncovered by the state investigation. The court relied on the following authority for its holding: *DeMarco v. Holy Cross High School* (2d Cir. 1993) 4 F.3d 166, 170, stating that pretext inquiry takes into consideration "whether the putative non-discriminatory purpose was stated only after the allegation of discrimination"; *Schmitz v. St. Regis Paper Co.* (2d Cir. 1987) 811 F.2d 131, 132, holding that a shift in justifications given at trial which indicated an after-the-fact rationalization by the defendant could be sufficient to prove pretext; *Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421, 1434: "In the ordinary case, such fundamentally different justifications for an employer's action . . . give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that . . . the official reasons [were not] the true reasons;" *Castleman v. Acme Boot Co.* (7th Cir. 1992) 959 F.2d 1417, 1422: "A jury's conclusion that an employer's reasons were pretextual can be supported by inconsistencies in . . . the decisionmaker's testimony."). A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination. See *DeMarco*, 4 F.3d at 170: "Proof that the employer has provided a false reason for its action permits the finder of fact to determine that the defendant's actions were motivated by an improper discriminatory intent, but does not compel such a finding."

The *Ethan Allen* court found that the EEOC offered sufficient evidence for this case to be sent to the jury. "While the evidence presented by Ethan Allen might well demonstrate that the plaintiff was terminated for reasons not related to age, this is a question better left for the jury to resolve. Accordingly, we conclude that the district court improperly granted Ethan Allen's [motion for judgment as a matter of law after trial.]" *EEOC v. Ethan Allen, Inc.* (2nd Cir. 1994) 44 F.3d. 116, 120-121; See, also, *Gus v. Bechtel Nat'l Inc.* (Cal. 2000) 24 Cal.4th 317, 363.

4. Statistical Evidence May Be Used to Create an Inference of Discriminatory Intent.

Statistical data may be used to establish a general discriminatory pattern in the employer's employment practices, creating an inference of discriminatory intent with respect to the plaintiff's treatment. *Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 694; *Falls v. Kerr-McGee Corp.* (10th Cir. 1991) 944 F.1d 743, 746; *Barnes v. Gen-Corp, Inc.* (6th Cir. 1990) 896 F2d 1457, 1466.

For example, statistical evidence may establish a general discriminatory pattern in hiring and promotion practices, which creates an inference of discriminatory intent with respect to the individual employment decision at issue. *Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1363 (Title VII); *Mangold v. California Public Utils. Comm'n* (9th Cir. 1995) 67 F.3d 1470. However, there is some debate about whether statistical evidence alone is sufficient to establish a prima facie case of disparate treatment. Compare, e.g., *Diaz, supra*, (Title VII; statistical evidence alone as sufficient) with *Gay v. Waiters' and Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 552-553 (Title VII; statistical evidence alone rarely sufficient); *Laborde v. Regents of University of California* (9th Cir. 1982) 686 F.2d 715, 718 (Title VII; statistical evidence relevant, though not necessarily sufficient, in establishing prima facie case).

When the sample size is small, the court may make no statistical inference of intentional discrimination. The utility of statistics in disparate treatment cases depends on all of the surrounding facts and circumstances. Statistical evidence derived from an extremely small universe has little predictive value and must be disregarded. The problem with a small number is that slight changes in the data can drastically alter the result. See, e.g., *Gibbs v. Consolidated Services* (2003) 111 Cal. App. 4th 794, 801, 4 Cal. Rptr. 3d 187 (that employer terminated only three former employees, all of whom were over 40, had virtually no significance in itself, where given variety of factors involved in termination decisions, statistical sample was too small to support inference of discrimination); *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 663 (although three of four casuals singled out for layoff were white, sample size was too small); *Sengupta v. Morrison-Knudsen Co.* (9th Cir. 1986) 804 F.2d 1072, 1075 (fact that four of five employees laid off (out of 28 total) were African American too small sample).

Inferences drawn from statistical proof are strongest when they are substantiated by other evidence in the case which brings "the cold numbers convincingly to life." *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 339, 97 S. Ct. 1843, 1856, 52 L. Ed. 2d 396 (statistical data is bolstered by anecdotal data). The relevance and usefulness of statistical data depends upon all of the surrounding facts and circumstances. For example, in *Aragon v. Republic*

Silver State Disposal, Inc.(9th Cir. 2002) 292 F.3d 654, the fact that three of four casual employees singled out for layoff were white was insufficient to raise an inference of racial discrimination. The statistical evidence constituted too small a sample size to support a statistical inference of intentional discrimination. Further, the statistical evidence presented no stark pattern of racial discrimination, nor did it account for possible nondiscriminatory variables, such as job performance. *Aragon, supra*, at 663. See, also, *Hazelwood School Dist. v. United States* (1977) 433 U.S. 299, 312, 97 S. Ct. 2736, 2744, 53 L. Ed. 2d 768 .

VI. Statute Of Limitations

The Statute of Limitations is the time limit within which a lawsuit or claim must be filed. Missing the statute is fatal to the claim unless the statute is otherwise tolled (see below). Here are some of the statutes of limitations for the most common employment claims. Note that these statutes apply to California, unless otherwise noted. Statutes of Limitations vary from state to state and state law differs from federal law.

A. California State Discrimination, Harassment or Retaliation Claim (“FEHA claim”)

The FEHA claim must be filed with the California Department of Fair Employment and Housing (“DFEH”) within one year of the adverse action (e.g., discrimination, harassment, etc.). After the DFEH issues a Right to Sue Notice, the claimant has one year to file a case in California state court.

B. Federal Discrimination, Harassment or Retaliation Claim (Title VII ADEA, ADA, etc.)

Such claims must be filed with the Equal Employment Opportunity Commissions within three hundred days, if the claimant is in California. In some other states, the filing must be done in as little as one hundred and eighty days. This will vary from state to state. Once the EEOC issues a Right to Sue Notice, the claimant has only ninety days to file a case in federal court.

C. Breach of Employment Contract

The statute of limitations for breach of a written employment contract is four years from the date of the breach. If the contract is oral or implied-in-fact, a case must be filed within two years of the breach.

D. Public Policy Violation Claims

A claim for wrongful termination or demotion in violation of public policy must be filed in California within two years of the wrongful termination or demotion.

E. Some Exceptions

1. The “Continuing Violation” Rule

A “continuing violation” in California may be found where the employer’s unlawful conduct begins **before** the limitations period and continues in effect during that period (e.g., conduct that began five years ago, but continued into the present may all be actionable as a “continuing violation”). The California Supreme Court in *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824 held that where the violations consists of a course of discriminatory conduct against a single individual, the employer may be liable for the entire course of conduct, including acts that predate the statutory period. In order to claim a continuing violation, an employee must show that the discriminatory acts predating the statutory period were (1) similar in kind to those within the statutory period; (2) occurred with reasonable frequency; and (3) have not “acquired a degree of permanence” (in other words, it should be clear to the employee that continued adverse treatment by the employer is to be expected, and any further efforts at conciliation are futile). *Richards, supra*, 26 Cal.4th at 823.

Federal law differs. The U.S. Supreme Court has rejected the “continuing violations” doctrine in Title VII cases, other than those alleging harassment. *See, National Railroad Passenger Co. v. Morgan* (2002) 536 U.S. 101, 110. However, with respect to federal claims for pay discrimination based on gender, the Lily Ledbetter Fair Pay Act of 2009 changed the law to say that the 180 day federal statute of limitations for filing a pay discrimination suit begins again with each new paycheck that contains the unfair pay. The bill was passed in response to a 2007 U.S. Supreme Court decision holding that the statute of limitations on equal pay act suits begins on the date the pay was originally set, and does not begin again with each new paycheck containing discriminatory pay.

2. Waiver

Under both California and federal law, a statute of limitations can be waived by the person or entity which would benefit from the statute’s application (generally, the employer). California permits a waiver of up to four years, and the waiver may be renewed for successive four year periods by separately-executed agreements. California Code of Civil Procedure section 360.5.

A statute of limitations defense is also waived if it’s not timely asserted in the appropriate pleading, regardless of how long the plaintiff waited to file suit. For example, Federal Rules of Civil Procedure, Rule 8(c) requires that the statute of limitations must be pleaded in the responsive pleading (usually the answer or motion to dismiss in federal court, or the answer or demurrer in state court), and that the failure to raise the affirmative defense waives the defense.

California requires that the specific statute of limitations be identified. California Code of Civil Procedure section 458. The federal rules do not require that the specific statute be identified.

3. Equitable Estoppel

If a party is responsible for wrongfully concealing facts upon which a claim is based, that party may be equitably estopped from asserting the statute of limitations as a defense. Examples include when an employer misrepresents or fraudulently conceals facts necessary to support a discrimination charge, and the plaintiff is thereby prevented from timely asserting his or her rights. Fraudulent concealment, however, requires active conduct by the defendant which prevents the plaintiff from filing on time. The fraudulent act(s) must be above and beyond the conduct which gives rise to the underlying claim. The Plaintiff must also show that his or her reliance on the information provided by the defendant was reasonable. See e.g., *Santa Maria v. Pacific Bell* (9th Cir. 2000) 202 F.3d 1170, 1177.

4. Equitable Tolling

Under California law, the statute of limitations for a state law FEHA claim for, *inter alia*, discrimination, harassment or retaliation, is tolled if the state agency (the DFEH) deters its investigation of a timely-filed charge to the EEOC. The period to file suit in state court is equitable tolled during pendency of the EEOC investigation until a right to sue letter is received from the EEOC (even if the DFEH had already issued a right to sue letter under the FEHA at the time of deferral to the EEOC). See *Downs v. Dept. of Water and Power* (1997) 58 Cal.App.4th 1093, Government Code section 12965(d) and (e). However, pursuing arbitration or a grievance under a collective bargaining procedure does not toll the limitations period for filing an employment discrimination charge with the applicable agency.

In addition, a plaintiff's claim may be subject to equitable tolling if he or she can show excusable ignorance of the existence of a claim within the limitations period and a lack of prejudice to defendants. See *Santa Maria, supra*. Mental disability may also be a basis for tolling in **extreme** cases. See e.g., *Melendez-Arroyo v. Cutler-Hammer de Puerto Rico, Co. Inc.* (1st Cir. 2001) 273 F.3d 30, 37-38. .

VII. Non-EEO Investigations

A. Other Wrongful Conduct As Defined By Company Policy And Laws

In addition to investigations of alleged violations of the above laws, there are numerous workplace situations that may call for an investigation, some of which are violations of law (e.g., theft, assault and battery, fraud, etc.), whereas others are express employment policies that don't rise to a level of illegality.

In some cases, the employer will have provided a list of unacceptable workplace conduct to its employees in the employee handbook, which would include both legal and company violations. Following is an example of a standard policy:

It is not possible to list all forms of behavior that are considered unacceptable in the workplace. The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment. The list is not intended to be exhaustive:

1. *Theft or inappropriate removal or possession of property.*
2. *Working under the influence of alcohol or illegal drugs.*
3. *Possession, distribution, sale, transfer or use of alcohol or illegal drugs in the workplace, while on duty or while operating employer-owned vehicles or equipment.*
4. *Fighting or threatening violence in the workplace.*
5. *Sexual or other unlawful or unwelcome harassment.*
6. *Possession of dangerous or unauthorized materials, such as explosives or firearms, in the workplace.*
7. *Unauthorized use of telephones, electronic devices, mail system or other employer-owned equipment.*
8. *Unauthorized disclosure of business "secrets" or confidential information.*

In addition, some companies provide a code of conduct. Some may be as broadly worded as requiring professionalism and honesty in all business dealings on behalf of the company, or it may be very detailed in listing important requirements to support the corporate culture and business reputation. Detailed codes of conduct usually include being professional and honest in all dealings; a requirement for cooperating in company investigations; maintaining the company's business and proprietary information in confidence; avoiding conflicts of interest; not misusing or abusing company property and/or assets; and complying with company antidrug policies. (The code of conduct is also a good place to reaffirm the company's non-discrimination and anti-harassment policies, as well as each employee's responsibility to comply with and support equal treatment.)

Last but not least, companies now use their employment policies to give notice to employees of proper and improper use of company-owned electronic devices, as well as the company's right to search such devices, including the right to monitor and search computers, cell phones, iPhones and other devices provided to the employee.

Under California law, the company retains the right to unilaterally change its policies in most circumstances. The leading case on the issue is the California Supreme Court case of *Asmos v. Pacific Bell* (2000) 23 Cal.4th 1. In *Asmos*, the California Supreme Court was asked to answer the question: Once an employer's unilaterally adopted policy--which requires employees to be retained so long as a specified condition does not occur--has become a part of the employment contract, may the employer thereafter unilaterally terminate the policy, even though the specified condition has not occurred?

The California Supreme Court held that the answer was yes--an employer may unilaterally terminate a policy that contains a specified condition, if the condition is one of indefinite duration, and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits. In the *Asmos* case, the policy condition, that employees would be retained so long as “there was no change that would materially affect the company’s business plan achievement,” was indefinite in that it did not state an ascertainable event that could be measured in any reasonable manner. The facts showed that plaintiffs enjoyed the benefits of the policy for a reasonable time period (five years), and that defendant gave its employees reasonable and ample notice (few months) of its intent to terminate the policy. Defendant also did not at any time interfere with employees' vested benefits in effecting the policy termination. In addition, plaintiffs accepted the company's modified policy by continuing to work in light of the modification. The decision was a 4-3 split by the Justices.

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