JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on July 18–19, 2019

Title
Jury Instructions: Civil Jury Instructions (Release 35)

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (CACI)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
July 19, 2019

Date of Report
June 19, 2019

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the revised civil jury instructions prepared by the committee on the subject of workplace harassment. On Judicial Council approval, the instructions will, at publisher option, either be published immediately in print in a special edition of or supplement to CACI, or presented only online until the new 2020 print edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*) is published.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective July 19, 2019, approve for publication revisions to the following civil jury instructions:

1. CACI No. 2521A. *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*
2. CACI No. 2521B. *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*

3. CACI No. 2521C. *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employee or Entity Defendant*
4. CACI No. 2522A. *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*
5. CACI No. 2522B. *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*
6. CACI No. 2522C. *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*
7. CACI No. 2524. *"Severe or Pervasive" Explained*

Note that for the 2521 group, the employer is the defendant. For the 2522 group, an individual is the defendant. The A instructions are for conduct directed at the plaintiff employee; the B instructions are for conduct directed at coworkers; the C instructions are for sexual favoritism. CACI No. 2524 provides additional guidance on what constitutes "severe or pervasive" conduct.

A table of contents and the proposed revised instructions are attached at pages 15–47.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At this meeting, the council approved the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI* to ensure that the instructions remain clear, accurate, current, and complete.

This is release 35 of *CACI*. It is a special out-of-cycle release in response to a particularly challenging legal development. The council approved release 34 at its May 2019 meeting.[2]

Analysis/Rationale

The instructions in this release are proposed to be revised in light of Government Code section 12923, effective January 1, 2019. (See Senate Bill 1300, Stats. 2018, ch. 955.) This statute's introductory sentence states: "The Legislature hereby declares its intent with regard to application of the laws about harassment contained in this part." The statute then contains five subdivisions, which address various aspects of workplace harassment jurisprudence. The thrust of the statute is directed toward courts in their interpretation of harassment law. A clear intent is

[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] The committee now also issues two releases annually in January and July for online only delivery. These online-only releases—Numbers 33A and 34A for 2019—are limited to nonsubstantive technical changes and the like.

to discourage the granting of summary judgments and to allow more workplace harassment claims to be tried.[3] The complete statute is attached at page 8.

The statute has generated significant discussion and some controversy in the employment law world. Comments received from different segments of the bar presented very different perspectives on the statute, and these different perspectives have been manifested within the committee. One view sees the statute as a major game-changer, which requires significant revisions to the *CACI* harassment jury instructions. A contrasting view is that the statute is only a statement of legislative intent directed at trial judges, having little or nothing to do with juries and jury instructions.

Committee process

Proposed revisions in response to the statute were on the agenda for the committee's regularly scheduled January 2019 meeting, at which proposals for Release 34[4] were considered. But after considerable vigorous debate, no consensus could be reached. Many members felt the need for additional groundwork, so the proposed revisions were deferred from Release 34 and referred back to the committee's working group that is responsible for employment law proposals. However, all agreed that the issue was too important to defer until the new 2020 edition, which was the next regularly scheduled release. It was agreed that there would be an expedited process of reconsideration, which if successful, would lead to a special out-of-cycle release. In release 34, the seven instructions under review were each annotated with this sentence: "*The advisory committee is currently considering revisions to this instruction in light of newly enacted Government Code section 12923. (See SB 1300, Stats. 2018, ch. 955.)*"

The working group met in March and was able to agree on a proposal to submit to the full committee. The full committee then met specially on April 8 to consider the working group proposal and after vigorous and thorough debate also was able to reach agreement. This special release presents the committee's efforts.

Particular issues

Conflicting views of the statute. The committee decided that neither perspective of the statute presented in the comments was completely correct and has attempted to carve out a middle ground. The committee decided that much of the new statutory language did not need to be given to the jury. But neither did the committee agree that none of it was appropriate. Extracting the language in the statute that appropriately should be incorporated into jury instructions was the challenge.

"Severe or pervasive." Perhaps the most important element in a workplace harassment claim has been that the harassing conduct must be "sufficiently severe or pervasive to alter the conditions

[3] See Gov. Code, § 12923(e): "Harassment cases are rarely appropriate for disposition on summary judgment."

[4] Release 34 was approved by the Judicial Council at its May 2019 meeting.

of the victim's employment and create an abusive working environment."[5] All of the CACI instructions currently include this element. Some commentators took the position that in light of the new statute, "severe or pervasive" is no longer an element. Instead, they proposed recasting the instructions as simply addressing "harassing conduct" without a requirement that the conduct be "severe or pervasive."

The committee did not accept this position. The legislative history makes it clear that the purpose of the statute is not to eliminate the "severe or pervasive" element, but to change the way that it is interpreted.[6] This legislative history is attached at page 10.

The "adjectives." The characterization of a workplace infected with harassing conduct has been that it is "hostile or abusive."[7] The *CACI* instructions all currently express the environment in these terms. However, subdivision (a) of the statute says that "[t]he Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment." Subdivision (b) states: "A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has … created an intimidating, hostile, or offensive working environment."

The introduction of these additional adjectives created four problems for the committee. First, could the work environment now be something other than "hostile or abusive, that is, intimidating, offensive, or oppressive? Second, did the omission of "abusive" from the statutory adjectives mean that "abusive" should no longer be included as a work environment modifier? Third, what is the significance, if any, of the omission of "oppressive" in subdivision (b)? And fourth, if more adjectives were needed in the instructions, where should they go?

For the first issue, the committee concluded that the new adjectives were in fact significant and needed to be in the instructions. For the second issue, most members of the committee decided that there was no clear indication that "abusive" was no longer appropriate and elected to retain it in the instructions. For the third issue, the committee decided that there was no legal significance to "oppressive" appearing in subdivision (a) but not in subdivision (b) and included it in the list of adjectives. For the fourth issue, "hostile or abusive" currently appears three times in each of the six essential factual elements instructions (the 2521's and 2522's): in the opening paragraph and in the objective and subjective elements.[8] There was significant concern that presenting the complete list of adjectives multiple times would make the instructions needlessly

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[5] See, e.g., *Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409.

[6] See 2017 Legis. Bill Hist., S.B. 1300: "This bill declares that the intent of the Legislature is to adopt a different legal standard of severe and pervasive, one that focuses on how the conduct deprives the employee of his or her statutory right to work in a place free of discrimination."

[7] See, e.g., *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 ["To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' "].

[8] These are the elements regarding how a reasonable person would have considered the environment (objective) and how the plaintiff actually considered the environment (subjective).

wordy. But after considering the public comments, the committee decided that all of the adjectives needed to appear in all three locations.

Single incident. Subdivision (b) of the statute states that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." In the view of some commentators, this language refers only to standards for summary judgment and need not be given to the jury. The committee, however, rejected this narrow view. The committee believes that if there is evidence of multiple incidents, but the jury only considers one of them to be severe, it needs to know that one is enough. Therefore, reference to the single-incident rule from the statute has been added to CACI No. 2524, *"Severe or Pervasive" Explained*.

Some members of the committee believe that a single incident can only be severe and cannot be pervasive. The majority, however, were not convinced and voted to include both words in the instruction. The majority view is that a single act may be so egregiously harassing as to pervade the entire workplace and affect everyone negatively.

"Unreasonably interfered" or "more difficult to do the job"? Current CACI No. 2524 includes among the factors that the jury may consider in determining whether conduct is severe or pervasive "the extent to which the conduct unreasonably interfered with an employee's work performance" (current factor (e)). In subdivision (a) of the statute, the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in a concurring opinion[9] that in a workplace harassment suit "[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find … that the harassment so altered working conditions as to make it more difficult to do the job."

The committee concluded that Justice Ginsburg's language means the same thing as factor (e) and is a better plain-language expression of the point. The committee further concluded that the inclusion of this language in the statute elevates it to more importance than just one factor to be considered among several. The effect of the conduct on the employee's job performance is a component of "severe or pervasive" in all cases, not just one factor to be considered and weighed against others. The committee has deleted factor (e) and added Justice Ginsburg's language as a new paragraph to the instruction.

Is there a threshold level? Prior cases have held that in determining what constitutes "sufficiently pervasive" harassment, acts of harassment cannot be occasional, isolated, sporadic,

[9] *Harris v. Forklift Systems* (1993) 510 U.S. 17, 25.

or trivial.[10] While this rule is not currently included in the *CACI* instructions themselves, it is cited in the Sources and Authority in several case excerpts.

The legislative history notes in summarizing prior law that "occasional, isolated, sporadic or trivial behavior that is unwelcome and discriminatory does not rise to the level of severe and pervasive."[11] The history then declares that "the intent of the Legislature is to adopt a different legal standard of severe and pervasive, one that focuses on how the conduct deprives the employee of his or her statutory right to work in a place free of discrimination."

Many on the committee believe that this statement in the legislative history means that there is no longer a threshold that must be crossed before conduct is severe or pervasive. Others disagreed. Under their view, the legislative history is aimed at judges who might be inclined to invoke the threshold and grant summary judgment. These members believe that the jury should still know that they can find the conduct complained of to be occasional, isolated, sporadic, or trivial.

The committee addressed the different possibilities by removing the challenged excerpts from the Sources and Authority to CACI No. 2524 but presenting the issue in the Directions for Use, stating that "[w]hether this limitation remains in light of Government Code section 12923 is not clear."

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions and revisions to *CACI* circulated for comment from April 8 through May 17, 2019. Comments were received from only six different commenters, but five of them were extensive. The committee evaluated all comments and made some revisions to the instructions in light of the comments received. Many of the decisions that the committee reached based on the comments are discussed above. A chart summarizing the comments received and the committee's responses is attached at pages 48-74.

Alternatives considered

While the committee considered many alternatives with regard to revising the instructions, Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics

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[10] See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610; see also *Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377 [conduct must be extreme: simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment]; *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465–467 [law requires the plaintiff to meet a threshold standard of severity or pervasiveness; jury instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard].

[11] See 2017 Legis. Bill Hist., SB 1300.

to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternatives to fulfilling this obligation.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the instructions in print and online and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide for additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the Judicial Council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the Judicial Council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Government Code section 12923, at page 8
2. 2017 Legis. Bill Hist. SB 1300, at page 10
3. *CACI* instructions, at pages 15-47
4. Chart of comments and the committee's responses, at pages 48–74

Cal Gov Code § 12923

Deering's California Codes are current through Chapter 2 of the 2019 Regular Session.

Deering's California Codes Annotated > GOVERNMENT CODE > Title 2 Government of the State of California > Division 3 Executive Department > Part 2.8 Department of Fair Employment and Housing > Chapter 3 Findings and Declarations of Policy

§ 12923. Application of laws about harassment

The Legislature hereby declares its intent with regard to application of the laws about harassment contained in this part.

(a) The purpose of these laws is to provide all Californians with an equal opportunity to succeed in the workplace and should be applied accordingly by the courts. The Legislature hereby 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. In this regard, the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in Harris v. Forklift Systems (1993) 510 U.S. 17 that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (Id. at 26).

(b) A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. In that regard, the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in Brooks v. City of San Mateo (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.

(c) The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature affirms the decision in Reid v. Google, Inc. (2010) 50 Cal.4th 512 in its rejection of the "stray remarks doctrine."

(d) The legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties. The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision Kelley v. Conco Companies (2011) 196 Cal.App.4th 191.

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

History

Added *Stats 2018 ch 955 § 1 (SB 1300)*, effective January 1, 2019.

Annotations

Research References & Practice Aids

Hierarchy Notes:

Cal Gov Code Tit. 2, Div. 3, Pt. 2.8

Cal Gov Code Tit. 2, Div. 3, Pt. 2.8, Ch. 3

End of Document

2017 Legis. Bill Hist. CA S.B. 1300

Bill Analysis, June 18, 2018

Reporter
2017 Legis. Bill Hist. CA S.B. 1300

Committee: Assembly Labor and Employment Committee

Text

Date of Hearing: June 20, 2018

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Tony Thurmond, Chair

SB 1300

(Jackson) - As Amended May 25, 2018

SENATE VOTE: 22-11

SUBJECT: Unlawful employment practices: discrimination and harassment

SUMMARY: Requires sexual harassment training for both supervisory and non-supervisory employees of most employers, adds a bystander intervention training requirement, prohibits non-disparagement agreements and the releasing of claims for workplace discrimination or harassment, and clarifies the legal standard for harassment. Specifically, this bill:

1) Requires that in an action alleging that an employer, labor organization, employment agency, or specified training program failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring, a plaintiff shall prove the following elements:

a) That the employer knew that the conduct was unwelcome to the plaintiff;

b) That the conduct would meet the legal standard for harassment or discrimination if it increased in severity or became pervasive; and

c) That the defendant failed to take reasonable steps to prevent the same or similar conduct from recurring.

2) Provides that an employer may be liable for an act of a nonemployee with respect to any type of harassment, not just sexual harassment, committed toward employees, job applicants, and others, as specified, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

3) Prohibits an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following:

a) Require an employee to sign a release of a claim or right under the Fair Employment and Housing Act (FEHA).

b) Require an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including but not limited to, sexual harassment.

4) Declares that a release or agreement in violation of the above provision is contrary to public policy and unenforceable.

5) Extends the two-hour sexual harassment training requirement to all employees of employers who employ 5 or more employees. The training must be provided within 6 months of hire and then once every 2 years.

6) Requires employers to include bystander intervention training, as specified, as part of the sexual harassment training and to provide information on how and to whom harassment should be reported as well as the process to make a complaint.

7) Permits the awarding of fees and costs to a prevailing defendant in an action brought under these provisions only if the court finds the action was frivolous, unreasonable, or totally without foundation when initiated or that the plaintiff continued to litigate after it clearly became so.

EXISTING LAW:

1) Establishes the Department of Fair Employment and Housing (DFEH) to, among other things, receive and investigate complaints of illegal employment discrimination.

2) Provides that it is an unlawful employment practice, for an employer, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to, among other things, discharge, harass, or discriminate against the person.

3) Provides that it is an unlawful employment practice, for an employee, because of any of the above characteristics, to harass another person, if the employer, or its agents or supervisors, knows or should have known of this conduct and failed to take immediate and appropriate corrective action.

4) Extends liability to employers for the acts of nonemployees with respect to sexual harassment if the employer, or its agents or supervisors, knows or should have known of the conduct and failed to take immediate and appropriate corrective action.

5) Requires employers to take all reasonable steps necessary to prevent harassment from occurring.

6) Defines employer as a person employing 5 or more employees, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, with specified exceptions.

7) Requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment to all supervisory employees within six months of assuming their position and once every 2 years thereafter.

8) Authorizes the courts in specified circumstances to award the prevailing party in a civil action reasonable attorney's fees and costs, including expert witness fees.

FISCAL EFFECT: According to the Senate Appropriations Committee, the Department of Fair Employment and Housing (DFEH) would incur absorbable costs related to promulgating regulations and staff training (General Fund). Potential workload impacts to DFEH would be driven by changes in future complaints requiring investigation, which are unknown. Additionally, the bill would result in unknown, but potentially significant additional costs across all state departments, related to the expansion of sexual harassment prevention training to nonsupervisory employees (General Fund and special funds).

COMMENTS: Note: This bill is double referred to Assembly Judiciary Committee upon passage from this Committee.

The legal standard for workplace harassment

A major component of this bill, as well as its declarations, addresses the legal standard for harassment in the workplace. Courts have struggled with the question of what constitutes merely bad or offensive behavior versus harassing behavior. The controlling case on this issue, Miller v. Department of Corrections (2005) 1 , holds that the elements necessary to prove harassment are: 1) the conduct was unwelcome; 2) it was on a discriminatory basis; and 3) it rose to a level of "severe and pervasive."

This bill focuses on the third element of a harassment claim, namely, the definition of "severe and pervasive" conduct. The Miller court reasoned that harassing behavior becomes severe and pervasive when it alters "the conditions of employment and create(s) a work environment that qualifies as hostile or abusive to employees." 2 In contrast, "occasional, isolated, sporadic or trivial" 3 behavior that is unwelcome and discriminatory does not rise to the level of severe and pervasive. Furthermore, the severe and pervasive test includes looking at the conduct from both a subjective and objective perspective. This means that the plaintiff, as well as a reasonable person, would view the behavior as severe and pervasive. In Ellison v. Brady (1991), 4 the Ninth Circuit Court of Appeals interpreted the objective requirement to mean that the conduct is viewed from the point of view of a reasonable person in the plaintiff's position. Furthermore, whether conduct rises to a level that is severe and pervasive requires courts to look at the totality of the circumstances. Circumstances to be evaluated include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." 5

This bill declares that the intent of the Legislature is to adopt a different legal standard of severe and pervasive, one that focuses on how the conduct deprives the employee of his or her statutory right to work in a place free of discrimination. Specifically, the bill affirms and adopts the standard set out by Supreme Court Justice Ruth Bader Ginsburg in her concurrence in Harris v. Forklift Systems (1993), 6 which argued that a sexual harassment plaintiff "need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."

The bill also declares that the intent of the Legislature is to reject the "stray remarks doctrine" and rather affirm the California Supreme Court's decision in Reid v. Google (2010), 7 which found that isolated remarks, if viewed in light of other circumstances, can be evidence of severe and pervasive harassing conduct. In addition, the bill explicitly rejects the notion that workplaces can be held to different standards regarding sexual harassment. Further, SB 1300 declares that harassment cases- often nuanced and complex- are rarely appropriate for disposition on summary judgment. 8

Need for the bill

According to the author, "beginning in 2017, propelled by movements such as #MeToo and #WeSaidEnough, brave women began coming forward and exposing the prevalence of sexual harassment in the workplace… As a result of the #MeToo movement, a number of powerful perpetrators were subsequently exposed and fired. Yet, as important as it is to hold perpetrators accountable, it has become clear that preventing sexual harassment in the workplace must involve more than that. Enabled by our work culture and stifled by legal challenges, moving toward a

harassment-free culture in California will require comprehensive policy and legal reforms that will allow victims to seek justice, know their rights, and speak out about abuse, while effecting meaningful cultural change at work."

The California Employment Lawyers Association and Equal Rights Advocates, sponsors of the bill, argue that the current legal standard for workplace harassment is inconsistently applied and fails to protect victims of sexual harassment. They contend that SB 1300 "will ensure that courts properly apply the 'severe and pervasive' standard in sexual harassment cases by providing clear statutory guidance...The bill would clarify that a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment...In addition, the bill will ensure the legal standard for sexual harassment does not vary by type of workplace. In determining whether or not a hostile environment exists, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties."

In support, the California Labor Federation argues that the bill will strengthen sexual harassment prevention efforts by prohibiting any release of a worker's claims or rights under FEHA. They state, "some employers are requiring workers to sign various legal documents, as a condition of employment, as a way to silence victims, escape liability, or minimize public scrutiny. SB 1300 will make it an unlawful employment practice for an employer to require an employee to sign a release of a claim or a right under FEHA in exchange for a raise or bonus, or as a condition of employment or continued employment."

Arguments in opposition

In opposition, a coalition of employers, including the California Chamber of Commerce (CalChamber), argues that the bill "would remove the current legal standing requirement for specific Fair Employment and Housing Act (FEHA) claims and limit the use of non-disparagement agreements and general releases. These provisions will significantly increase litigation against California employers and limit their ability to invest in their workforce. The May 25th amendments do not address these concerns."

CalChamber further contends that the bill's definition of "severe and pervasive" conduct constitutes a "radical lowering of the bar (that) would result in a vast increase in litigation over potentially trivial workplace matters that simply do not rise to the level where the courts should be involved. Simply put, 'there's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen . ' See *Trujillo v. N. Cty. Transit Dist., 63 Cal.App.4th 280, 289,* (1998). The courts should concern themselves only with real harms to employees- not merely hypothetical disputes that may or may not evolve into actual harassment or discrimination."

The California Manufacturers and Technology Association, also in opposition, argues that the bystander intervention training requirement is unnecessary and inappropriate. The Association states, "Training employees on how to recognize and report sexual harassment in the workplace is an appropriate responsibility of the employer; training employees to intervene when witnessing harassment or discrimination is not. By mandating this separate and independent education and training requirement in the employment context, SB 1300 essentially imposes a new legal duty and obligation to act on individuals where none currently exists in law. Employees receiving this instruction from their employers will naturally feel a sense of responsibility given the employment relationship. In addition, the specificity of the mandate imposes an expectation among employees that their co-workers will respond when witnessing a situation in the workplace."

Related and Prior Legislation

SB 1038 (Leyva) 2018 would impose joint and several liability on an employee who retaliates against anyone else for filing a complaint, testifying, assisting in a proceeding or, otherwise opposing harassment and discrimination, among other unlawful employment practices. SB 1038 is currently pending in the Assembly.

SB 1223 (Galgiani) 2018 would direct the California Department of Industrial Relations to develop a harassment and discrimination prevention policy and training standard for use by employers in the construction industry. SB 1223 is currently pending in the Assembly.

SB 1343 (Mitchell) 2018 would, like this bill, expand the reach of workplace sexual harassment prevention training requirements to include all employees (not just supervisory employees) and all workplaces with more than five employees (not just those with more than 50 employees). SB 1343 is currently pending in the Assembly.

AB 1870 (Reyes) 2018 would extend the statute of limitations for filing a claim of harassment, discrimination, or retaliation, among other unfair employment and housing practices, with the California Department of Fair Employment and Housing. AB 1870 is currently pending consideration in the Senate Judiciary Committee.

SB 396 (Lara) Chapter 858, Statutes of 2017 required employers with five or more employees to put up a DFEH poster regarding transgender rights and mandated that employers with 50 or more employees include a component regarding harassment based on gender identity, gender expression, and sexual orientation in their sexual harassment prevention training.

AB 2053 (Gonzalez) Chapter 306, Statutes of 2014 required the inclusion of a component in the two hour training on prevention of abusive conduct.

AB 1825 (Reyes) Chapter 933, Statutes of 2004 mandated that all employers with 50 or more employees conduct two hours of sexual harassment prevention training for all supervisory employees.

SB 76 (Corbett) Chapter 671, Statutes of 2003 provided that employers may be responsible for sexual harassment of their employees, applicants, or independent contractors by non-employees.

Analysis Prepared by: Megan Lane / L. & E. /

1 *36 Cal.4th 446, 462.*

2 Ibid.

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

4 *924 F.2d 872, 880 (9th Cir. 1991).*

5 Mokler v. County of Orange, 157 Cal.4th 121, 142 (2007).

6 *510 U.S. 17.*

7 *50 Cal.4th 512.*

8 In doing so, the Legislature declares its approval of *Nazir v. United Airlines, Inc., 178 Cal.App.4th 243 (2009).*

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2521A. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to harassment based on [his/her] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***] and that this harassment created a~~,~~ ~~causing a hostile or abusive~~ work environment~~.~~ that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to ~~unwanted~~ harassing conduct because [he/she] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile~~.~~, intimidating, offensive, oppressive, or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

7. **That [***name of plaintiff***] was harmed; and**

8. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's

coworker, see CACI No. 2522A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, ~~*Hostile*~~ *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- ~~Harassment Because of Sex. Government Code section 12940(j)(4)(C).~~
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1042.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment.

Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant." (*Bihun, supra,* 13 Cal.App.4th at p. 1000.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering

all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The stray remarks doctrine … allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)

- "[I]n reviewing the trial court's grant of [defendant]'s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Reid, supra,* 50 Cal.4th at p. 545.)
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- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239-1240 [166 Cal.Rptr.3d 676].)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra,* 224 Cal.App.4th at p. 1527 fn. 8, original italics.)

- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment,* ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity*

Laws, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521B. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that ~~[he/she] was subjected to a hostile or abusive work environment because~~ coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***] and that this harassment created a work environment for [***name of plaintiff***] that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***], although not personally subjected to ~~unwanted~~ harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***];**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

7. **That [***name of plaintiff***] was harmed; and**

8. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, ~~*Hostile*~~ *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522B, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §

115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. ~~Hostile~~ Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [he/she] was subjected to harassment based on widespread sexual favoritism at [*name of defendant*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive ~~work environment~~. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of defendant*];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread;**

4. **That the sexual favoritism was ~~and also~~ severe or pervasive;**

5~~4~~. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;**

6~~5~~. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;**

7~~6~~. **[*Select applicable basis of defendant's liability:*]**

[That a supervisor [engaged in the conduct/created the widespread sexual favoritism];]

[*or*]

[That [*name of defendant*] [or [his/her/its] supervisors or agents] knew or should have known of the widespread sexual favoritism and failed to take immediate and appropriate corrective action;]

8~~7~~. **That [*name of plaintiff*] was harmed; and**

~~8.~~ 9. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, ~~*Hostile*~~ *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 7~~6~~, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, ~~*Hostile*~~ *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040-1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2522A. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [*name of defendant*] subjected [him/her] to harassment based on [*describe protected status, e.g., race, gender, or age*] at [*name of employer*] and that this harassment created ~~, causing a hostile or abusive work environment.~~ a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**
2. **That [*name of plaintiff*] was subjected to ~~unwanted~~ harassing conduct because [he/she] was [*protected status, e.g., a woman*];**
3. **That the harassing conduct was severe or pervasive;**
4. **That a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
5. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
6. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct;**
7. **That [*name of plaintiff*] was harmed; and**
8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from ~~f~~Former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521A, *~~Hostile~~ Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *~~Hostile~~ Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *~~Hostile~~ Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—*

Individual Defendant. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment;

and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

2522B. ~~Hostile~~ Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that ~~[he/she] was subjected to a hostile or abusive work environment because~~ coworkers at [*name of employer*] were subjected to harassment based on [*describe protected status, e.g., race, gender, or age*] and that this harassment created a work environment for [*name of plaintiff*] that was hostile, intimidating, offensive, oppressive, or abusive.

~~–~~To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

2. **That [*name of plaintiff*], although not personally subjected to ~~unwanted~~ harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

5. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*];**

6. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the harassing conduct;**

7. **That [*name of plaintiff*] was harmed; and**

8. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *~~Hostile~~ Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *~~Hostile~~ Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for

use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, ~~*Hostile*~~ *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2522C. ~~Hostile~~ Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff*] claims that [he/she] was subjected to harassment based on widespread sexual favoritism at~~by~~ [*name of ~~defendant~~employer*] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive ~~work environment~~. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.

To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was [an employee of/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was widespread;**

4. **That the sexual favoritism was ~~and also~~ severe or pervasive;**

~~4~~5. **That a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;**

~~5~~6. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the widespread sexual favoritism;**

~~6~~7. **That [*name of defendant*] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

~~7~~8. **That [*name of plaintiff*] was harmed; and**

~~8.~~ 9. **That the conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521C, *~~Hostile~~ Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the

plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, ~~*Hostile*~~ *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, ~~*Hostile*~~ *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment;

and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2524. "Severe or Pervasive" Explained

"Severe or pervasive" means conduct that alters the conditions of employment and creates a ~~hostile or abusive~~ work environment that is hostile, intimidating, offensive, oppressive, or abusive.

In determining whether the conduct was severe or pervasive, you should consider all the circumstances, including~~. You may consider~~ any or all of the following:

(a) The nature of the conduct;

(b) How often, and over what period of time, the conduct occurred;

(c) The circumstances under which the conduct occurred;

(d) Whether the conduct was physically threatening or humiliating.~~;~~

~~(e) The extent to which the conduct unreasonably interfered with an employee's work performance.~~

[*Name of plaintiff*] does not have to prove that [his/her] productivity has declined. It is sufficient to prove that a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job.

[A single incident can be sufficiently severe or pervasive to constitute harassment.]

New September 2003; Revised December 2007, July 2019

Directions for Use

Read this instruction with any of the ~~Hostile~~ Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C). Read also CACI No. 2523, *"Harassing Conduct" Explained*. Give the last optional sentence if a single incident forms the basis of the claim. (See Gov. Code, § 12923(b) [single incident of harassing conduct can be sufficient to create a triable issue regarding the existence of a hostile work environment].)

In determining what constitutes "sufficiently pervasive" harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610 [262 Cal.Rptr. 842].) Whether this limitation remains in light of Government Code section 12923 is not clear.

Sources and Authority

- "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work

environment that qualifies as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], Ginsburg, J., concurring; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' ... [¶] 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' ... California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance … and that she was actually offended ... . The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)

- ~~"In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher*, *supra*, 214 Cal.App.3d at p. 610.)~~

- "The United States Supreme Court ... has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there

is no need for it also to be psychologically injurious." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

- "As the Supreme Court recently reiterated, in order to be actionable, '... a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.' ~~The conduct must be extreme: ' "simple teasing," … offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." '~~ " (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.~~-~~App.~~-~~4th 1367, 1377 [62 Cal.Rptr. 3d 200], internal citations omitted.)

- ~~"[E]mployment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a *physical* assault or the threat thereof.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 [95 Cal.Rptr.3d 636, 209 P.3d 963], original italics.)~~

- ~~"In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to find that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.' ... [W]e find no error in the jury instruction given here ... . [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465–467 [79 Cal.Rptr.2d 33].)~~

- "[T]he jury only needed to find the harassing conduct to be either severe or pervasive … ." (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 40 [235 Cal.Rptr.3d 262].)

Secondary Sources

3 Witkin, Summary of California Law (11~~0~~th ed. 2017~~05~~) Agency and Employment, §§ 363~~40~~, 370~~46~~

Chin, et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 10:160–10:249

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.17, 3.36–3.41

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation, ~~(Thomson West)~~ § 2:56 (Thomson Reuters)

Instruction	Commentator	Comment	Committee Response
This Invitation to Comment addresses the following CACI instructions, which are proposed to be revised in light of Government Code section 12923 (See SB 1300, Stats. 2018, ch. 955): 2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant 2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant 2521C. Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employee or Entity Defendant 2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant 2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant 2522C. Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant 2524. "Severe or Pervasive" Explained			
All	California Employment Lawyers Association, by Mariko Yoshihara, Legislative Counsel and Policy Director Equal Rights Advocates, by Jessica Stender, Senior Counsel, Workplace Justice and Public Policy Legal Aid at Work, by Elizabeth	SB 1300 was sponsored by the California Employment Lawyers Association ("CELA") and Equal Rights Advocates ("ERA") in response to the "MeToo" movement and the failings of current law to adequately protect people in the workplace from harassing conduct. The bill legislatively revised the definition of harassing conduct for purposes of harassment claims under the Fair Employment and Housing Act.	No response is necessary.

Instruction	Commentator	Comment	Committee Response
	Kristen, Director of Gender Equity & LGBT Rights Program Consumer Attorneys of California, by Jacquie Serna, Legislative Counsel		
All 2521's and 2522's	Association of Southern California Defense Counsel	The current versions of CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C each require the plaintiff to prove that "a reasonable [e.g., woman] in [*name of plaintiff*]'s circumstances would have considered the work environment to be hostile or abusive," and that the plaintiff actually "considered the work environment to be hostile or abusive." This language correctly states the law on the objective and subjective elements of a claim for hostile work environment harassment. (See *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284, quoted in Sources and Authority for CACI No. 2521A.) However, the committee's proposed revisions to these instructions would replace the above-quoted phrase "work environment to be hostile or abusive" with the phrase "conduct to be harassing." As revised, the instructions would require the plaintiff to prove that "a reasonable [e.g., woman] in [*name of plaintiff*]'s circumstances would have considered the conduct	The committee agreed with the comment and has revised the objective and subjective elements of all of the 2521 and 2522 instructions to focus on how the working environment was considered rather than on how the conduct was considered. The committee revised both elements to state that (objectively and subjectively) the work environment was considered to be "hostile, intimidating, offensive, oppressive, or abusive" ("the adjectives") Many other comments have made essentially this same point in varying language. All references below to "addressed above" refer to this comment and response.

Instruction	Commentator	Comment	Committee Response
		to be harassing," and that the plaintiff actually "considered the conduct to be harassing." The ASCDC disagrees with these revisions, because they state the objective and subjective components less clearly and accurately than the current versions of these instructions.	
		The committee's proposed revisions to CACI Nos. 2521A, 2521C, 2522A, and 2522C (but not Nos. 2521B or 2522B) add the following sentence: "For purposes of this claim, harassing conduct is conduct that creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive." The ASCDC agrees with this language to the extent it is used to explain the nature of "unwanted" and "severe or pervasive" conduct required to establish a claim for hostile work environment harassment. However, this definition of "harassing conduct" does not warrant replacing the phrase "work environment to be hostile or abusive" with the phrase "conduct to be harassing." The proposed revision diverts jurors' focus away from the objective and subjective perceptions of the work environment, as required by the law (see *Lyle v. Warner Brothers Television Productions, supra,* 38 Cal.4th at p. 284), and towards perceptions of the conduct, which does not accurately reflect the law. This proposal is even less warranted in the context of CACI Nos. 2521B and 2522B, which do not purport to define the phrases "harassing conduct" or "conduct to be harassing."	The changes noted in response to the comment above have been made in the B instructions, as well as in the A and C instructions.
		These proposed revisions are not supported by newly-added Government Code section 12923, which declares the Legislature's "intent with regard to application of the laws about	Addressed above

Instruction	Commentator	Comment	Committee Response
		harassment" in the Fair Employment and Housing Act, but does not purport to change those laws or disapprove *Lyle v. Warner Brothers Television Productions* (which continues to be cited and quoted in Sources and Authority for CACI Nos. 2521A, 2521B, and 2522B). The only reference in section 12923 to the objective and subjective elements is the Legislature's approval of Justice Ruth Bader Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17, which states that it suffices for a plaintiff "to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did [in that case], that ***the harassment so altered working conditions as to 'make it more difficult to do the job.***'" (*Id.* at p. 25, emphasis added, quoted in Gov. Code, § 12923(a).) The current versions of CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C properly focus on the objective and subjective perceptions of "working conditions," and therefore are more consistent with section 12923 than the committee's proposed revisions.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The legislative declaration of intent in Government Code section 12923(a) includes language we find significant and helpful to the jury and would add to the elements instructions. That statutory language states harassing conduct creates a hostile, offensive, oppressive, or intimidating work environment if the 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	The committee had previously considered and rejected this language. Some of the concepts ("emotional tranquility" "personal sense of well-being") are too amorphous to be appropriate for jury instructions.

Instruction	Commentator	Comment	Committee Response
		usual, or otherwise interfere with and undermine the victim's personal sense of well-being."	
		The committee is divided regarding the language "severe or pervasive." We present both positions here for the benefit of the Advisory Committee. A majority believes "severe or pervasive" simply means created a hostile, intimidating, offensive, oppressive, or abusive work environment, as stated in CACI No. 2524. Rather than use the language "severe or pervasive," which is familiar to lawyers but unfamiliar to jurors, and then define that language, the majority believes the elements instructions should forego the defined term, refer to a hostile, etc. work environment, and in CACI No. 2524 set forth the factors to consider in determining whether the conduct created a hostile, etc. work environment. A minority believes "severe or pervasive" is an essential requirement because that language is used in Government Code section 12923 and in case law as the test for a hostile work environment under both FEHA and Title VII. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462.) The language "severe or pervasive," as defined in CACI No. 2524, is helpful to the jury and should be retained.	The committee agrees with the minority. The legislative history is very clear that the statute has been enacted to help courts construe the "severe or pervasive" standard, not replace it.
		The comment then presents a proposed revision of 2521A, which is to serve as a model for all of the 2521 and 2522 instructions. [*Name of plaintiff*] claims that [he/she] was subjected to harassment based on [his/her] [*describe protected status, e.g., race, gender, or*	The committee discerned five possible changes from the proposed revisions presented in the comment. First: Change "at [*name of defendant*]" to "at [*place of employment*]."

Instruction	Commentator	Comment	Committee Response
		age] at [~~*name of defendant*~~ *place of employment*]. ~~For purposes of this claim, h~~Harassing conduct is conduct that ~~creates a work environment that~~ is hostile, intimidating, offensive, oppressive, or abusive. To establish this claim, [*name of plaintiff*] must prove all of the following: 1. [no changes]; 2. That [*name of plaintiff*] was subjected to ~~unwanted~~ harassing conduct because [he/she] was [*protected status, e.g., a woman*]; ~~3. That the harassing conduct was severe or pervasive;~~ 43. That a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances would have considered the ~~conduct to be harassing~~ work environment to be hostile, intimidating, offensive, oppressive, or abusive; 54. That [*name of plaintiff*] considered the ~~conduct to be harassing~~ work environment to be hostile, intimidating, offensive, oppressive, or abusive;	This is currently inconsistent. The A's and C's have "name of defendant;" the B's have "name of employer." The committee agrees that there needs to be consistency. The 2522's should have "[*name of employer*]" because the defendant for those instructions is an individual. For the 2521's, the defendant is the employer. The committee concludes that "[*name of defendant*]" is preferred for the 2521's. Second: Delete "For purposes of this claim." Other changes made by the committee removed this language. Third: In the opening paragraph: move the list of adjectives from modifying the work environment to modifying the conduct. The committee agreed with other comments that the adjectives should modify the work environment rather than the conduct. Fourth: Delete "severe or pervasive" element. As noted above, the committee has retained this element. Fifth: Change the objective and subjective elements so that the adjectives modify the work environment, rather than the conduct. As noted above, the committee has made this change.
	California Employment Lawyers Association,	Additional definitional language to opening paragraphs is unnecessary, circular, and may cause confusion.	The committee believes that this language is appropriate for the opening paragraph. It provides a definition, not an element.

Instruction	Commentator	Comment	Committee Response
	by Mariko Yoshihara, Legislative Counsel and Policy Director Equal Rights Advocates, by Jessica Stender, Senior Counsel, Workplace Justice and Public Policy Legal Aid at Work, by Elizabeth Kristen, Director of Gender Equity & LGBT Rights Program Consumer Attorneys of California, by Jacquie Serna, Legislative Counsel	In the first paragraph of the revised instructions, the term "hostile or abusive work environment" is replaced with "a work environment that is hostile, intimidating, offensive, oppressive, or abusive." Is the additional language necessary or will it be interpreted as a separate element that a plaintiff must prove in addition to the enumerated elements subsequently listed in the instructions (which also incorporate the same language through CACI 2524, "Severe or Pervasive" Explained)? We believe the additional language in the opening paragraph should be struck because it is unnecessary, circular, and may cause confusion.	
		Under the Advisory Committee's revised instructions, there are several disparate, but connected phrases that describe or define what constitutes unlawful harassment. The opening paragraph contains one definition. The enumerated elements together constitute another definition. And three of those elements separately incorporate even another definition. We believe it would be clearer to consolidate all of those layered definitions into one consistent standard. The proposed changes would provide one consistent term harassing conduct" or "conduct that is harassing" throughout the harassment instructions and then define that term in Instruction 2524. The proposed changes would also remove the element that the conduct is "severe or pervasive" since the standard is already incorporated in the definition of "harassing conduct." Otherwise, it is not clear whether the	The committee did not agree that the focus of the instructions should be on "harassing conduct" rather than on the work environment.

Instruction	Commentator	Comment	Committee Response
		"conduct that is harassing" in element #4 and #5 is the same standard as conduct that is "severe or pervasive" in element #3. We believe it is more straightforward and clearer to require the plaintiff to prove that the conduct was "objectively" harassing conduct (element #4) and "subjectively" harassing conduct (element #5) and refer to Instruction 2524 to explain what harassing conduct means.	
		Remove "unwanted" as a modifier of "harassing conduct." (A and B instructions)	The committee agreed and has remove "unwanted." If it's harassing, by definition it is unwanted.
		Delete the "severe or pervasive" element	Addressed above
		Incorporate all of the guidance language from SB 1300 into the Sources and Authority. The Committee's proposed changes incorporates most, but not all of the guidance language from SB 1300. For example, 12923(d) is not incorporated anywhere in the instructions ("The legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties."). The express language from 12923(c) should also be incorporated into all of the harassment instructions ("The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even	CACI no longer includes statutory language in the Sources and Authority.

Instruction	Commentator	Comment	Committee Response
		if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination.").	
	Wilson Turner Kosmo, LLP, by Marissa L. Lyftogt, Partner	Elimination of Word "Hostile": Nothing in Gov. Code § 12923 supports the deletion of the word "hostile." To the contrary, subsections b, c and e all refer to the claim as a claim for "hostile work environment."	(The committee construes the comment as refering to the deletion of "Hostile" from the instruction titles as the word still appears in the instruction text.) The committee believes that in light of the additional adjectives introduced by the statute (intimidating, offensive, oppressive), "Hostile" is no longer a proper title for the claims. Using only "Hostile" in the title would deemphasize the other adjectives.
		Deletion of "causing a hostile or abusive work environment": The deletion of this language eliminates a part of Plaintiff's burden of proof. As Gov. Code § 12923 states, and as evidenced by the cases it cites with approval, a plaintiff must prove that the harassment created a hostile or abusive work environment. See, e.g. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21–22 ["Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263 ["The law prohibiting harassment is violated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter	This point is mostly addressed in response to the comments above. But in the introductory paragraphs, the instructions first say that there was harassment, and then that the harassment created the (adjectives) work environment. There's no difference legally between the current and proposed rewording.

Instruction	Commentator	Comment	Committee Response
		the conditions of the victim's employment and create an abusive working environment."]	
		Second sentence: Instead of including this definition in the first paragraph, it should be incorporated into questions 4 and 5, as discussed below. It will mislead/confuse the jury if this standard is not included in every question as it is part of Plaintiff's burden of proof.	Addressed above
		The objective elements: "That a reasonable [e.g., woman] in [*name of plaintiff]*'s circumstances would have considered the conduct to be harassing ~~work environment to be hostile or abusive;~~" The deletion of this language eliminates a part of Plaintiff's burden of proof. As Gov. Code § 12923 states, and as evidenced by the cases it cites with approval, a plaintiff must prove that the harassment created a hostile or abusive work environment. See, e.g. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21–22 ["Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263 ["The law prohibiting harassment is violated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter	Addressed above

Instruction	Commentator	Comment	Committee Response
		the conditions of the victim's employment and create an abusive working environment."]. As such, in order to find liability, a jury must find that a reasonable person in the plaintiff's position would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive. Proposal: That a reasonable [e.g., woman] in [name of plaintiff]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive.	
		The subjective elements: "That [*name of plaintiff*] considered the conduct to be harassing ~~work environment to be hostile or abusive~~ The deletion of this language eliminates a part of Plaintiff's burden of proof. As Gov. Code § 12923 states, and as evidenced by the cases it cites with approval, a plaintiff must prove that the harassment created a hostile or abusive work environment. See, e.g. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21–22 ["Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 263 ["The law prohibiting harassment is violated "[w]hen the workplace is permeated with	Addressed above

Instruction	Commentator	Comment	Committee Response
		discriminatory intimidation, ridicule and insult that is ‘ “sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.”]. As such, in order to find liability, a jury must find that the plaintiff considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive. Proposal: That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive.	
	Samantha Tanner, Duggan Law Corporation, Sacramento	The Judicial Council Advisory Committees proposed changes accurately reflect the law as codified in Government Code section 12923. Unfortunately, the problem lies with the new law itself, which radically lowers the bar of what constitutes sexual harassment. The new standard will result in a vast increase in litigation over potentially trivial workplace matters that simply do not rise to the level where the courts should be involved, placing a significant burden on employers.	No response is necessary
A and C instructions	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The proposed revisions to CACI Nos. 2521A, 2521C, 2522A, and 2522C effectively define “harassing conduct” to include creating a hostile, intimidating, offensive, oppressive, or abusive workplace. The proposed revisions to these instructions also change the elements from requiring that a reasonable person would have considered the *work environment to be hostile or abusive* to requiring that a reasonable person would have considered the *conduct to be harassing*.	Addressed above

Instruction	Commentator	Comment	Committee Response
		We believe this shift in focus from the work environment to the harassing conduct, defined to include a hostile work environment, is undesirable. The instruction should clearly delineate two separate requirements: (1) harassing conduct that (2) creates a hostile, etc. work environment. Harassing conduct is conduct that is hostile, intimidating, offensive, oppressive, or abusive, but not all harassing conduct creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.	
		A hostile or abusive work environment is a work environment that plaintiff considered, and a reasonable person would have considered, hostile or abusive. (Gov. Code, § 12923(a), adopting *Harris v. Forklift Systems* concurrence; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129-130.) We believe the elements should directly address this requirement by requiring the jury to find a hostile, etc. work environment, rather that address this requirement indirectly by requiring the jury to find harassing conduct, defined to include a hostile, etc. work environment.	Addressed above (The comment misstates 12923(a), which does not say "considered hostile or abusive." That is what the current elements say.)
2521A and 2521B	California Employment Lawyers Association, by Mariko Yoshihara, Legislative Counsel and Policy Director	SB 1300 also made clear that an employer may also be responsible for the acts of nonemployees, with respect to harassment – not just sexual harassment – of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.	See CACI No. 2528, *Failure to Prevent Harassment by Nonemployee.*

Instruction	Commentator	Comment	Committee Response
	Equal Rights Advocates, by Jessica Stender, Senior Counsel, Workplace Justice and Public Policy Legal Aid at Work, by Elizabeth Kristen, Director of Gender Equity & LGBT Rights Program Consumer Attorneys of California, by Jacquie Serna, Legislative Counsel	Therefore, we propose adding the following language to Instructions to 2521A, 2521B: "Employers may be liable for the harassing conduct of third-party nonemployees. The harassing conduct may be based on any protected status, not just based on sex." (See Gov. Code §§ 12940(j)(1) and *Carter v. Dept. of Veterans Affairs* (2016) 135 P. 3d 637).	
2521A	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A.	We would reject the proposed revision to the Sources and Authority for CACI No. 2521A adding the quote from *Nazir* stating that hostile work environment cases are rarely appropriate for summary judgment. The court does not instruct the jury on the summary judgment standard, and the quote is irrelevant to any jury instruction.	Excerpts in the Sources and Authority are not restricted to jury issues. Their purpose is to be helpful for general research. In section 12923(e), the Legislature expressly said that it agreed with *Nazir*. The committee believes that it is an appropriate addition.

Instruction	Commentator	Comment	Committee Response
	Ginsberg, Chair		
	Orange County Bar Association	The quoted language in *Reid v. Google, Inc.* (2010) 50 Cal. 4th 512, under the "Sources and Authority" section is incomplete and leaves the impression that any alleged ambiguous statement automatically results in a trial when the gist of the *Reid* decision is that courts can consider "alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record" in ruling on a motion for summary judgment. (*Reid v. Google, Inc.* (2010) 50 Cal.4th at 545. This language more accurately states the holding in *Reid*.	The committee added the proposed additional language to the excerpt from *Reid*.
	Wilson Turner Kosmo, LLP, by Marissa L. Lyftogt, Partner	We object to including the following excerpt in the Sources and Authority: "The stray remarks doctrine … allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540-541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.) Basis for objection: This case is a discrimination case and has nothing to do with a claim of hostile	Section 12923(c) expressly approves of *Reid* and its language regarding stray remarks.

Instruction	Commentator	Comment	Committee Response
		work environment harassment. Therefore, it should not be added to this instruction.	
		We object to including the following excerpt in the Sources and Authority: "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].) Basis for objection: This case addresses motions for summary judgment. It has nothing to do with the underlying elements of a claim of hostile work environment harassment. Therefore, it should not be added to this instruction.	Addressed above
2521B	Orange County Bar Association	Agree	No response necessary
2521C	Orange County Bar Association	Agree	No response necessary
2522A	Orange County Bar Association	Alter language of first paragraph as follows: [*Name of plaintiff*] claims that [he/she] was subjected to harassment based on [his/her] [*describe protected status, e.g., race, gender, or age*] at [*name of defendant*], ~~For purposes of this claim, harassing conduct is conduct that creates a~~ causing a work environment that is hostile, intimidating, offensive, oppressive, or abusive.	The committee agreed and has revised the language to combine the points into a single sentence as proposed.

Instruction	Commentator	Comment	Committee Response
2522B	Orange County Bar Association	Agree	No Response necessary
2522C	Orange County Bar Association	Alter the language of the first paragraph as follows: [*Name of plaintiff*] claims that [he/she] was subjected to harassment based on widespread sexual favoritism at [*name of defendant*] creating a work environment that is hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. ~~For purposes of this claim, harrassing conduct is conduct that creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.~~	The committee agreed and has revised the paragraph along the lines suggested.
2524	Association of Southern California Defense Counsel	The committee proposes to delete language from current CACI No. 2524 that instructs jurors to consider "[t]he extent to which the conduct unreasonably interfered with an employee's work performance," and to add the following language: "[*Name of plaintiff*] does not have to prove that [his/her] productivity has declined. It is sufficient to prove that a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job. "[A single incident can be sufficiently severe or pervasive to constitute harassment.]"	The committee concluded that Justice Ginsberg's language "more difficult to do the job" is another way of expressing current factor (e) "unreasonably interfered with work performance." Moving this language into the instruction rather than as a factor properly elevates its importance. It must be proved in all cases, not just weighed among other factors.

Instruction	Commentator	Comment	Committee Response
		However, the very language the committee would delete from CACI No. 2524 is basically a direct quote from Government Code section 12923 – indeed, it comes from the very same sentence that refers to "[a] single incident." That sentence reads in full: "A single incident of harassing conduct is sufficient **to create a triable issue** regarding the existence of a hostile work environment **if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.**" (Gov. Code, § 12923(b), emphasis added.) Section 12923 therefore does not support removing "[t]he extent to which the conduct unreasonably interfered with an employee's work performance" as a circumstance the jury should or may "consider" in determining whether the conduct was severe or pervasive. To the contrary, that is one of the circumstances enumerated in section 12923 that will suffice "to create a triable issue regarding the issue of a hostile work environment." By inserting the "single incident" language, but removing the reference to unreasonable interference with the plaintiff's work performance, the proposed revision distorts section 12923 and takes language out of context.	
		There is no reason to believe the Legislature intended the "single incident" language to be included in jury instructions at all. The language instead discusses what may be "sufficient ***to create a triable issue*** regarding the existence of a hostile work environment." (Gov. Code, §	The committee agrees that the statute is warning judges not to decide "severe" on summary judgment. But, that a single incident may be sufficiently severe is an important point that may come up in deliberations. The jury could decide that only one act of an employer qualifies as harassment and would need to know whether a single act is enough.

Instruction	Commentator	Comment	Committee Response
		12923(b), emphasis added.) Clearly, the intended audience for this language was judges, not juries. It is needlessly argumentative and one-sided in the context of a jury instruction – particularly without the qualifying reference to unreasonable interference with the plaintiff's work performance.	
		The proposed revision to CACI No. 2524 correctly states, as section 12923 does, that a harassment plaintiff does not have to prove a decline in productivity. However, the sentence that follows is incomplete, because it refers only to the objective element of harassment, while omitting the subjective element, which is also referenced in section 12923: " '... It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, ***as the plaintiff did,*** that the harassment so altered working conditions as to make it more difficult to do the job.'" (Gov. Code, § 12923(a), emphasis added, quoting *Harris v. Forklift Systems, supra,* 510 U.S. at p. 25 [conc. opn. of Ginsburg, J.].) Significantly, in the sentence preceding this quote, Justice Ginsburg – whose standard the Legislature explicitly approved – stated that "the adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance." (*Harris,* at p. 25, emphasis added.) The omission of the subjective element from the proposed revision to CACI No. 2524 renders it incomplete and inaccurate. The plaintiff must prove from both an objective and subjective standpoint – not merely the former – "that the	The subjective standard is an element to all six instructions. The committee does not believe that it needs to be stated in 2524.

Instruction	Commentator	Comment	Committee Response
		conduct so altered working conditions as to make it more difficult to do the job." The fact that this statement was preceded in Justice Ginsburg's concurrence by the focus on unreasonable interference with work performance further shows that the committee's proposed deletion of that reference from CACI No. 2524 is misguided.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	They present this revised draft, which is based on their majority position that "severe or pervasive" should be dropped: CACI No. 2524, ~~"Severe or Pervasive" Explained~~ Hostile, Intimidating, Offensive, Oppressive, or Abusive Work Environment ~~"Severe or pervasive" in the context of a harassment claim means conduct that alters the conditions of employment and creates a work environment that is hostile, intimidating, offensive, oppressive, or abusive.~~ Harassing conduct created a hostile, intimidating, offensive, oppressive, or abuse work environment if it offended, humiliated, distressed, or intruded upon [*name of plaintiff*] so as to disrupt [his/her] emotional tranquility in the workplace, affect [his/her] ability to perform the job as usual, or otherwise interfered with and undermined [*name of plaintiff*]'s personal sense of well-being. In determining whether the harassing conduct ~~was severe or pervasive~~ created a hostile, intimidating, offensive, oppressive, or abusive work environment, you should consider all the	The committee disagrees with all the proposed changes for reasons previously given.

Instruction	Commentator	Comment	Committee Response
		circumstances, including any or all of the following: (a) The nature of the misconduct; (b) How often, and over what period of time, the conduct occurred; (c) The circumstances under which the conduct occurred; (d) Whether the conduct was physically threatening or humiliating. [*Name of plaintiff*] does not have to prove that [his/her] productivity has declined. It is sufficient to prove that a reasonable person who was subjected to the harassing conduct would find that the conduct so altered working conditions as to make it more difficult to do the job. [A single incident can ~~be sufficiently severe or pervasive to constitute harassment~~create a hostile, intimidating, offensive, oppressive, or abusive work environment.].	
	California Employment Lawyers Association, by Mariko Yoshihara, Legislative Counsel and Policy Director	Change title to "Harassing Conduct" Explained	Addressed above
		Define "Harassing Conduct" as: "unwanted conduct that sufficiently offended, humiliated, distressed, or intruded upon the plaintiff, so as to disrupt the plaintiff's emotional tranquility in the workplace, affected the plaintiff's ability to perform the job as usual, or otherwise interfered with and undermined the plaintiff's personal sense of well-being."	Addressed above

Instruction	Commentator	Comment	Committee Response
	Equal Rights Advocates, by Jessica Stender, Senior Counsel, Workplace Justice and Public Policy Legal Aid at Work, by Elizabeth Kristen, Director of Gender Equity & LGBT Rights Program Consumer Attorneys of California, by Jacquie Serna, Legislative Counsel		
	Orange County Bar Association	Disagree with the proposed deletion of factor (e). Government Code Section 12923 adopted the standard in Justice Ginsburg's concurring opinion in *Harris v. Forklift System* (1993) 510 U.S. 17 that a plaintiff in a workplace harassment lawsuit need not prove his or her productivity declined as a result of the harassment, only that a reasonable person would find that the harassment altered	This comment appears to address whether "make it more difficult to do the job" (which has been moved to a new paragraph after the factors) means the same as "unreasonably interfered with work performance" (factor (e)). The committee concluded that they said the same thing, and that it needed to be more powerful than just a factor; hence it's new position. If the commentator thinks the two phrasings mean different things, that point is not addressed.

Instruction	Commentator	Comment	Committee Response
		working conditions to make the job more difficult. Justice Ginsburg's concurring opinion in *Harris* simply states that a plaintiff need not show a decline in productivity. The opinion, however, does not support the deletion of the requirement that the trier-of-fact consider all the circumstances including whether the harassing conduct "unreasonably interfered with an employee's work performance." In fact, the "Sources and Authority" section of the instruction cites with approval to the California Supreme Court decision in *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, which has not been overruled. In *Miller,* the Court noted that whether an environment is "hostile" or "abusive" is determined by looking at "all the circumstances" which "may include…..whether it [the conduct] unreasonably interferes with an employee's work performance." (36 Cal.4th 446, 462.)	
		Also disagree with the proposed deletion of *Fisher v. San Pedro Peninsula Hospital* (1989) 215 Cal.App.3d 590, 610 under the Sources and Authority. Government Code Section 12923 did not overrule the general holding in *Fisher* that acts of pervasive harassment cannot be occasional, isolated, sporadic, or trivial. Rather, in enacting Government Code Section 12923, the legislature rejected the holding in *Brooks v. City of San Mateo* (2000) 229 F.3d 917, where the Ninth Circuit held that "an isolated incident of harassment by a co-worker will rarely (if ever) give rise to" as hostile work environment sexual harassment claim. In *Brooks,* the alleged harasser put his hand on the plaintiff's stomach and commented on its softness and sexiness. When	The committee is divided over how much of *Fisher*, if any, is still good law in light of section 12923. While this excerpt has been removed from the Sources and Authority, the issue has been noted in the Directions for Use.

Instruction	Commentator	Comment	Committee Response
		she told him to stop and pushed his hand away, the alleged harasser positioned himself behind the plaintiff's chair, boxing her in against the communications console and forced his hand underneath her sweater and bra to fondle her bare breast. The conduct in *Brooks* falls under the severe standard and could legally constitute unlawful harassment under Government Code Section 12923. However, to show pervasive harassment, the *Fisher* standard still applies.	
	Samantha Tanner, Duggan Law Corporation, Sacramento	I specifically disagree with the proposed change to CACI 2524 – lessening Plaintiff's burden of proof by highlighting for the jury that Plaintiff does not have to prove that his or her productivity has declined. The purpose of the jury instructions is to explain to the jury what the Plaintiff does have to prove in order to meet his or her burden of proof. This new law is already extremely pro-Plaintiff, the instructions should remain neutral. It is the Plaintiff's prerogative to submit a special jury instruction explaining that he or she does not have to prove a decline in productivity that is the Plaintiff's prerogative, or to discuss that standard in closing argument. However, language regarding what the Plaintiff does not have to prove should not be included in the default instruction.	Section 12923(a) says that the Legislature "affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17 that in a workplace harassment suit 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment' "
	Wilson Turner Kosmo, LLP, by Marissa L. Lyftogt, Partner	Last sentence: "A single incident can be sufficiently severe or pervasive to constitute harassment." Nothing in Gov. Code § 12923 supports the inclusion of this language. Rather, Gov. Code § 12923(b) states "[a] single incident of harassing conduct is sufficient to create a triable issue	The committee believes that a single incident can be pervasive if it affects multiple employees.

Instruction	Commentator	Comment	Committee Response
		regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." Therefore, this language addresses motions for summary judgment and should not be used as a basis to modify the jury instructions. The language articulated in Gov. Code § 12923(b) is broader the language proposed here. This misstates the law. While a single incident may be severe enough to rise to the level of actionable harassment, there is no case that states a single incident may be pervasive. These are two different standards. See *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 ["[E]mployment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a physical assault or the threat thereof.' "]. Proposal: Do not include this sentence. Alternatively, the sentence should be changed to reflect the correct and complete legal standard: "A single incident, such as an assault or threat thereof, can be sufficiently severe to constitute harassment. To be pervasive, [*name of plaintiff*] must show a concerted pattern of harassment of a repeated, routine or a generalized nature."	
		We object to the deletion of following excerpt in the Sources and Authority:	Addressed above

Instruction	Commentator	Comment	Committee Response
		"In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (*Fisher, supra,* 214 Cal.App.3d at p. 610.) Basis for Objection: This is still the current law. Moreover, Gov. Code § 12923 does not address this case or its holding.	
		We object to the deletion of following excerpt in the Sources and Authority: "[E]mployment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a physical assault or the threat thereof.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1049 [95 Cal.Rptr.3d 636, 209 P.3d 963], original italics.) Basis for Objection: This is still the current law. Moreover, Gov. Code § 12923 does not address this case or its holding.	The committee believes that the suggestion that "severe" had to involve a physical assault or threat was probably too narrow under section 12923.
		We object to the deletion of following excerpt in the Sources and Authority: "In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to find that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot	This excerpt makes the same point on triviality as the *Fisher* excerpt. The question of triviality is now addressed in the Directions for Use.

Instruction	Commentator	Comment	Committee Response
		be occasional, isolated, sporadic, or trivial.' ... [W]e find no error in the jury instruction given here ... . [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial' acts was an accurate statement of that threshold standard." (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 465–467 [79 Cal.Rptr.2d 33].) Basis for Objection: This is still the current law. Moreover, Gov. Code § 12923 does not address this case or its holding.	