INTRODUCTION

With this handbook we hope to help public entity defense counsel shape their legal defenses to those claims under state law that former employees most commonly assert when they sue for wrongful discharge. We address statutory claims under the Fair Employment and Housing Act and the California Constitution, as well as the common law tort of wrongful termination in violation of public policy. Where it may shed light on state law issues to do so, we address legal principles that courts have developed in interpreting analogous federal law. Our intent is to provide a concise and useful reference to governing legal principles, not exhaustive analysis, with occasional practical suggestions to assist counsel in assessing their client's position and in determining strategy.

As defense counsel know too well, litigation in the area of employment law has exploded in recent years, and the law on many issues is far from settled. We have pointed out a number of cases on significant employment issues which are pending in the California Supreme Court. The underlying court of appeal decisions in those cases cannot be cited in memoranda of points and authorities, but if the particular issue arises, counsel may at least inform the trial court that review is pending and clarification of the law is on the way. Indeed, some of these cases may be decided by the time this handbook is actually in the hands of those for whom it is intended. Counsel would be well advised to check the status of pending cases and to shepardize any other case mentioned on which they intend to rely in order to ascertain the latest changes in the law.

We hope this handbook will be useful to defense counsel in their attempts to defeat unmeritorious claims against public entity employers and that, at the least, it will help them develop a strong record for appeal.

WRONGFUL TERMINATION CLAIMS AGAINST GOVERNMENT EMPLOYERS

THEORIES OF LIABILITY AND DEFENSE UNDER CALIFORNIA LAW:

AN OVERVIEW

I. Fair Employment and Housing Act (FEHA), Cal. Gov. Code, § 12900, et seq.

A. Unlawful Conduct.

Among other things, FEHA prohibits (1) discrimination in employment based on race, religion, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, pregnancy, and sexual orientation (Gov. Code, §§ 12940, subd. (a), 12941, subd. (a), 12945, subd. (a)); (2) retaliation against employees who oppose or complain about conduct prohibited by FEHA (Gov. Code, § 12940, subd. (h)); and (3) harassment in the workplace (Gov. Code, § 12940, subd. (j)(1)). It is also unlawful for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940, subd. (k).)

Public entity employers must comply with FEHA and are directly liable for FEHA violations (Gov. Code, § 12926, subd. (d); *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989, fn. 9.)

B. Discrimination: Disparate Treatment.

1. Personal Liability of Individual Supervisors.

In *Reno v. Baird* (1998) 18 Cal.4th 640, the Supreme Court adopted the reasoning of *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55 to hold that liability may *not* be imposed on individual supervisors who make allegedly discriminatory personnel management decisions. The *Reno* court distinguished between harassing conduct (for which liability has been imposed) and "commonly necessary personnel management actions such as hiring and firing . . . ." (18 Cal.4th at pp. 645-647; accord, *Melugin v. Zurich Canada* (1996) 50 Cal.App.4th 658, 666-667; accord, *Acuna v. Regents of University of California* (1997) 56 Cal.App.4th 639, 651.) To impose liability for the latter, the court

reasoned, would chill effective management while adding little to the alleged victim's prospects for recovery. (*Reno v. Baird, supra*, 18 Cal.4th at pp. 651-652.)[1/]

2. Shifting Burdens: the *McDonnell Douglas* framework.

In order to prevail on a disparate treatment theory of discrimination, a plaintiff must prove discriminatory intent on the part of the employer. (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1317.) Evidence of discriminatory intent may be direct or circumstantial. Where it is circumstantial (the usual case), courts follow the three-part burden-shifting analysis first mandated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.)

- The plaintiff must first establish a prima facie case of discrimination (raising the so-called *McDonnell Douglas* presumption);

- If the plaintiff establishes a prima facie case, the defendant employer must come forward with evidence of legitimate, nondiscriminatory reasons for discharge;

- If the employer meets that burden, the plaintiff must prove by a preponderance of evidence that the legitimate reasons were not the true reasons for discharge but rather "a pretext to mask an illegal motive." (E.g., *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1749-1750.)

"[T]he ultimate burden of persuading the trier of fact that the defendant engaged in intentional discrimination remains at all times with the plaintiff." (*Heard*, *supra*, 44 Cal.App.4th at p. 1750; *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 676.)

[1/] Following *Reno*, a California appellate court held that individual supervisors are not personally liable under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. for their allegedly discriminatory decisions. (*LeBourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1056.)

a. The prima facie case.

In *Guz v. Bechtel National, Inc.*, *supra*, the Supreme Court observed that "[t]he specific elements of a prima facie case may vary depending on the particular facts." (24 Cal.4th at p. 355; see also *Heard v. Lockheed Missiles & Space Co.*, *supra*, 44 Cal.App.4th at p. 1750.) Generally, a plaintiff alleging termination in violation of FEHA must provide evidence to establish the following:

- He belongs to a protected class;
- His job performance was satisfactory;
- He was discharged; and
- "[S]ome other circumstance suggest[ing] discriminatory motive." (*Guz*, *supra*, 24 Cal.4th at p. 355.)

In *Mixon v. Fair Employment & Housing Com.*, *supra*, decided 13 years before *Guz*, the court had been inflexible as to what that "other circumstance" should be, requiring evidence that others not in the protected class were retained in similar jobs, and/or that the employee's job was filled by an individual with comparable qualifications not in the protected class. (192 Cal.App.3d at p. 1318.) In *Heard*, *supra* (also decided before *Guz*), the court held that it was error to instruct the jury that a plaintiff was *required* to demonstrate that similarly situated employees outside his protected class received terms and conditions of employment that he had sought and been denied. (44 Cal.App.4th at pp. 1747, 1754.) The court emphasized United States Supreme Court authority that stressed the elements of a prima facie case vary according to different factual situations. (*Id.* at p. 1750.) It suggested that *Mixon* differed from the case before it in that *Mixon* was a wrongful discharge case rather than a terms and conditions case, but suggested that the fourth element might in any event not represent the only way to make a showing of circumstances from which discrimination might be inferred. (*Id.* at p. 1756, fn. 8; cf. *Ewing v. Gill Industries, Inc.* (1992) 3 Cal.App.4th 601, 610 [courts have not adopted a single statement of the elements of a prima facie case].) *Guz* proved the *Heard* court correct.

Depending on the type of discrimination alleged, there may be special considerations affecting a plaintiff's prima facie burden.

Age Discrimination. In *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308 [116 S.Ct. 1307, 1310, 134 L.Ed.2d 433], an age discrimination case under the federal Age Discrimination in Employment Act (ADEA), the Supreme Court held that the prima facie case does not require a showing of replacement by a person *outside* the protected class; replacement by a person "substantially younger" is a more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.[2/] Moreover, federal courts have held that proof of replacement by a substantially younger employee is not required where discharge is the result of a reduction in work force. (*Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 891.) In those circumstances, a plaintiff may simply show "'through circumstantial, statistical or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination.'" (*Ibid.*, quoting *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421; see also *Ewing v. Gill Industries, Inc.*, *supra*, 3 Cal.App.4th at pp. 610-611 [courts are flexible with respect to fourth element of prima facie case where employer claims termination justified by reduction in work force].)

Physical Disability. A plaintiff who claims membership in the protected class of those with physical or mental disabilities is more likely to have to litigate that point than someone who claims membership in a protected class based on gender or race. Paraphrasing the statute, FEHA defines physical disability as (1) having a physiological disease or condition that affects body systems *and* that limits an individual's ability to

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[2/] California courts deciding issues under FEHA may draw on federal decisions addressing the same issues under federal law. (See, e.g., *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354 ["Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes"]; *Clark v. Claremont University Center*, *supra*, 6 Cal.App.4th at p. 662 ["Although the state and federal antidiscrimination legislation 'differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute'" (citations omitted)].) Be cautious, however, because California law has become more protective than its federal counterpart, with respect to disability for example. (See Gov. Code, § 12926.1, subd. (a) [California law in the area of disabilities "provides protections independent from those" provided by the ADA and affords "additional protections"].)

participate in major life activities, (2) having a health impairment requiring special education and related services, (3) having a record or history of a disease, condition, or impairment, which is known to the employer, (4) being regarded as having a physical disability, or (5) being regarded as having a disorder or condition that has no present disabling effect but may become a physical disability. (Gov. Code, § 12926, subd. (k).)

Thus, for example, in *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1065-1066, the Supreme Court held that the plaintiff failed to establish a prima facie case of disability when she failed to present medical evidence demonstrating her obesity was the result of a physiological condition affecting one or more of her basic bodily systems. In *Schultz v. Spraylat Corp.* (C.D.Cal. 1994) 866 F.Supp. 1535, a district court interpreting FEHA regulations found that an employee with a sinus condition did not have a physical disability within the meaning of FEHA; while the sinus condition was a physical handicap and limited his ability to engage in work-related travel by air, flying was not a "major life activity." (*Id.* at p. 1538.)

Mental Disability. FEHA defines mental disability as "any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity." (Gov. Code, § 12926, subd. (i).) Until the Legislature stepped in, courts of appeal were divided as to whether it intended to adopt the meaning of mental disability found in the ADA as a condition "substantially" limiting a major life activity, even though that word was omitted from the California statute. (Contrast, e.g., *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 442-443 [Legislature did so intend]; *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 721-722 [Legislature did *not* so intend]; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 257-258 [agreeing with *Pensinger*].)[3/]

Because of FEHA amendments effective January 1, 2001, it is no longer possible to draw on cases decided under the ADA to interpret comparable provisions under FEHA. The protection afforded by FEHA is considerably broader:

[3/] *Muller* and *Pensinger* (with respect to physical disability) were overruled by Government Code section 12926.1 (c) and (d) (Stats. 2000, ch. 1049, § 6).

- The definitions of physical and mental disability under California law require a "limitation" on a major life activity, not a "substantial limitation." (Gov. Code, § 12926.1, subds. (c) and (d).)

- Mitigating or corrective measures are not a factor to be considered for purposes of determining whether a disability limits a major life activity, unless the mitigating measure itself limits a major life activity. (Gov. Code, § 12926, subds. (k)(1)(B)(i) and (i)(1)(A).)

- Working is a major life activity and a plaintiff need only demonstrate an impairment precluding her from a particular employment rather than from a class or broad range of employment. (Gov. Code, § 12926.1, subd. (c).)

- Prior to January 1, 2001, an impairment qualified for protection only if it made achievement "unusually difficult." (See *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 609 [construing former Gov. Code, § 12926, subd. (k)(4)].) Now a plaintiff need only show it makes achievement "difficult." (Gov. Code, § 12926, subds. (k)(1)(B)(ii) and (i)(1)(B).)

In *Colmenares v. Braemar County Club, Inc.* (2003) 29 Cal.4th 1019, the California Supreme Court held that in enacting these FEHA amendments, the Legislature merely clarified existing law. Hence, they applied to causes of action pending on January 1, 2001.[4/]

b. Pretext, discriminatory motive.

Once an employer offers legitimate, nondiscriminatory reasons for its actions, "'the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.'" (*Clark v. Claremont University Center*, *supra*, 6 Cal.App.4th at p. 664.) "[T]he burden then shifts back to the plaintiff to show that the employer's stated reason for the adverse employment decision was in fact pretext." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 197.)

[4/] In *Colmenares*, the Supreme Court disapproved of earlier cases which had suggested or asserted the Legislature intended the federal law's substantial limitation test to apply to claims of physical disability. (29 Cal.4th at p. 1031, fn. 6.)

"'[P]retext'" in this context "means 'pretext for discrimination.'" (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 515-516 [113 S.Ct. 2742, 2752, 125 L.Ed.2d 407] [plaintiff must establish "*both* that the reason was false, *and* that discrimination was the real reason," original emphasis].) As the California Supreme Court explained in the context of an age discrimination claim, "[T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 361, original emphasis.) While proffered reasons unworthy of credence may be circumstantial evidence of discrimination, "an inference of intentional discrimination cannot be drawn *solely* from evidence, if any, that [the employer] lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination." (*Id*. at pp. 360-361, emphasis added.) That is, a mere rejection by the jury of an employer's proffered reasons does not relieve the plaintiff of the necessity of proving actual discrimination. "[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." (*Hicks*, *supra*, 509 U.S. at pp. 514-515 [113 S.Ct. at p. 2751]; accord, *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 695; *Heard v. Lockheed Missiles & Space Co.*, *supra*, 44 Cal.App.4th at p. 1753, fn. 7; *Bradley v. Harcourt, Brace & Co.* (9th Cir. 1996) 104 F.3d 267, 270 [to avoid summary judgment plaintiff must do more than establish prima facie case and deny credibility of defendant].)

To demonstrate pretext, a plaintiff must satisfy a "but for" test of causation. (See *Clark v. Claremont University Center*, *supra*, 6 Cal.App.4th at p. 665, fn. 6 ["pretext" means "but for" causation].) That is, while discriminatory animus need not be the *sole* reason for discharge, to prevail a plaintiff must show that "but for" his race, for example, he would have been retained as an employee, i.e., that race was the determining factor in the decision to fire him. (See also *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 108 [plaintiff must show retaliatory animus was a but-for cause of adverse action]; see *Brown v. Smith* (1997) 55 Cal.App.4th 767, 783 [on sexual harassment claim plaintiff must show "the offensive act would not have happened but for" plaintiff's sex].)

In an age discrimination case, the First District Court of Appeal held that the fact that the plaintiff was replaced by an older employee does *not* conclusively establish the absence of age discrimination. (*Begnal v. Canfield & Associates, Inc*. (2000) 78 Cal.App.4th

66, 75-76.) The court reversed a JNOV for the employer finding there was substantial evidence to support an inference of age discrimination; the characteristics of the employee replacing the plaintiff go to the weight of the evidence, not its legal sufficiency. (*Id.* at p. 75.)

Practice Suggestions:

- In *Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal.App.4th at p. 202, the Second District Court of Appeal held that a trial court should *not* instruct the jury as to the shifting burdens: "[T]he construct of the shifting burdens of proof enunciated in *McDonnell Douglas* is an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the fact-finding process." In *Ewing v. Gill Industries, Inc.*, *supra*, 3 Cal.App.4th at pp. 608-613, however, the reviewing court implicitly approved an instruction pertaining to shifting burdens (focusing on plaintiff's burden with respect to a prima facie case). The *Caldwell* court noted that, had the issue been squarely posed in *Ewing*, it believed the court would have agreed that the jury should not have been instructed to make a factual finding concerning plaintiff's prima facie case because the issue of whether a plaintiff has met that burden is one of law for the court. (*Caldwell*, *supra*, 41 Cal.App.4th at pp. 204-205, fn. 9; see also *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 481-482 [qualification element of prima facie case is a question of law].)

- A chain of decisionmaking. Often in the public employment context, as in the corporate context, the decision to terminate an individual is a multi-leveled process beginning with the recommendation of the employee's immediate supervisor and culminating in the decision of one or more individuals with final authority over such matters. There may be some evidence of bias at work in the early stages of the process; for example, a plaintiff may assert her supervisor used racial epithets. However, there may be no evidence of bias on the part of the final decisionmaker. In *Clark v. Claremont University Center*, *supra*, the court stated that "'it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.'" (6 Cal.App.4th at p. 666; see also *Reeves v. Safeway Stores, Inc.*, *supra*, 124 Cal.App.4th at p. 110 [ignorance of decisionmaker does not "categorically shield the employer from liability if other substantial contributors to the decision bore the requisite animus"].) In

Clark, there was evidence that the final decisionmaker rubber stamped the decision of a department that included racially biased individuals. Thus, to defeat allegations that the decisionmaking process was tainted and to break the chain of causation, it is critical to develop evidence, where possible, that the final decisionmakers made their decision after independent review of the charges against the employee. *Clark* and *Reeves* suggest this will be an uphill battle, although federal cases under Title VII demonstrate that the lack of a causal nexus between the unlawful motives of a subordinate and the final decision of the employer may sometimes defeat an employee's claim. (See, e.g., *DeHorney v. Bank of America Nat. Trust & Sav. Assn.* (9th Cir. 1989) 879 F.2d 459, 468 [lack of nexus between allegedly racially biased statements of supervisor and decision to terminate precluded inference race was a factor]; *Willis v. Marion County Auditor's Office* (7th Cir. 1997) 118 F.3d 542, 547 [lack of causal relationship between subordinate's illicit motive and ultimate decision, where ultimate decision made on independent, legally permissive basis, renders bias irrelevant].) At the very least, be sure to develop and present evidence, where possible, that *all* those who played a role in the decisionmaking process had legitimate reasons for the positions they took.

3. The Mixed Motive Case.

In a "mixed motive" case, there is evidence that both legitimate and illegitimate factors played a role in an adverse employment decision. Under the federal Civil Rights Act of 1991, a finding of mixed motive affects the plaintiff's remedy for a Title VII violation. That is, if an illegitimate factor was "a motivating factor" in the decision, the employer has violated Title VII; *however*, if the defendant proves it would have taken the same action in the absence of the illegitimate factor, the plaintiff's remedy is limited to injunctive or declaratory relief, i.e., she obtains no reinstatement, no backpay, and no damages, because it cannot be said that the illegitimate motive *caused* her injury. (42 U.S.C. §§ 2000e-2, subd. (m), 2000e-5, subd. (g)(2)(B).)

Under FEHA, the matter is less clear. Purely as a matter of causation, a plaintiff should not be able to recover damages under FEHA, any more than under Title VII, where the jury finds the defendant employer would have taken the same action in the absence of the illegitimate factor; such a finding would mean the illegitimate factor was *not* a but-for cause of injury.

Until recently, courts assumed that a plaintiff was not entitled to a mixed-motive instruction unless he had "direct evidence" that decisionmakers were influenced by illegitimate factors. (See, e.g., *Heard v. Lockheed Missiles & Space Co.*, *supra*, 44 Cal.App.4th at p. 1748, citing *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 277 [109 S.Ct. 1775, 1804-1805, 104 L.Ed.2d 268] (conc. opn. of O'Connor, J.).) In *Price Waterhouse*, for example, the evidence indicated that the female plaintiff, who was denied partnership, had been described as "macho" by supervisors who tried to get her to behave "more femininely." (490 U.S. at p. 235 [109 S.Ct. at p. 1782].)

The United State Supreme Court has now held that a plaintiff need not present direct evidence of discrimination to prove a mixed-motive case and obtain a mixed-motive instruction under Title VII. (*Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 101-102 [123 S.Ct. 2148, 2155, 156 L.Ed.2d 84].) This development was welcomed in *Reeves v. Safeway Stores, Inc.*, *supra*, 121 Cal.App.4th at p. 112, fn. 11, although the issue has not yet been directly resolved in any published decision under California law.

Practice Suggestions:

- Summary judgment: In cases where a plaintiff has little or no direct evidence of discrimination, courts are increasingly willing to dispose of claims on summary judgment. In *University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, the court reversed a trial court that had concluded the legitimacy of an employer's reasons could not be determined by summary judgment: "To the contrary, we are satisfied that when an employer proves as a matter of law there was a proper basis for refusing to promote an employee and no substantial responsive evidence was presented of the untruth of the employer's justification or a pretext, a law and motion judge may summarily resolve the discrimination claim." (*Id.* at p. 1039; see also *Caldwell v. Paramount Unified School Dist.*, *supra*, 41 Cal.App.4th at p. 203 [summary judgment is a "particularly suitable means to test the sufficiency of the plaintiff's prima facie case and/or of the defendant's nondiscriminatory motives for the employment decision"].)

- In *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th 317, the Supreme Court addressed the issue of how the *McDonnell Douglas* formula should apply to an employer's motion for summary judgment under California law. (*Id.* at pp. 356-369.) The court left open the question whether an employer can prevail in a summary judgment motion if it

"stand[s] mute, relying solely on the premise that [the employee] failed to demonstrate a prima facie case." (*Id.* at p. 357.) Two justices, however, would have reached the issue and held that where a plaintiff, despite full opportunity to obtain discovery and present evidence, fails to establish a prima facie case, "the trial court may reasonably infer that the plaintiff cannot do so" and grant the motion to "avoid a useless trial." (*Id.* at pp. 371-374 (conc. opn. of Chin, J., joined by Brown, J.).)

- To avoid summary judgment at the pretext level of analysis, once the employer has come forward with legitimate reasons for its action, the employee must "show there was nonetheless a triable issue that decisions leading to [his] termination were actually made" on a prohibited basis. (*Id.* at p. 360.) *Guz* is a step forward for employers in their summary judgment motions at this pretext level. First, prior to *Guz*, the summary judgment motion could be defeated solely with evidence supporting an inference the employer was lying or that the stated reasons were unworthy of credence. (See, e.g., *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 [plaintiff could defeat motion with evidence employer's stated reason for adverse action was "untrue or pretextural"]; accord, *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806-807.) Such evidence may still support a circumstantial case of discrimination, but under *Guz* it appears there must be *other* evidence supporting a rational inference that intentional discrimination was the "true cause" of the adverse action. (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 361.)

- Second, the existence of *some* circumstantial evidence of discriminatory motive will not necessarily be adequate to defeat a summary judgment motion: "[S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred." (*Id.* at p. 362.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence *as a whole* is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at p. 361, emphasis added.)

- Keep in mind, and remind the trial court, that at the pretext stage of analysis, "the factual inquiry proceeds to a new level of specificity." (*Clark v. Claremont University Center*, *supra*, 6 Cal.App.4th at p. 664.)

4. Failure To Make Reasonable Accommodation (Disability, Discrimination).[5/]

An employee alleging wrongful termination based on disability discrimination may also allege a related unlawful employment practice, the failure "to make reasonable accommodation for the known physical or mental disability of an . . . employee." (Gov. Code, § 12940, subd. (m); see, e.g., *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 239-240.) While there are still some unanswered questions, it appears that the plaintiff must prove at least that:

- the employer knew of the disability;

- the employer knew the disability was interfering with the plaintiff's ability to do her job;

- the employer failed to make reasonable accommodation for the disability.

Employer Knowledge. *Brundage*, *supra*, addresses disability claims under the ADA and FEHA, and specifically the question of establishing employer knowledge of disability where there is no evidence the employee informed the employer of a disability: "While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. 'Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations . . . .' [Citations.]" (57 Cal.App.4th at p. 237.)

[5/] Government Code section 12940, subdivision (*l*) addresses the duty to accommodate religious beliefs. We address only the failure to accommodate with respect to disability because it is more frequently the subject of employment litigation, and many of the same principles are likely to apply in the context of religious belief.

Note that under FEHA one definition of disability includes the fact that it "[l]imits a major life activity," e.g., work. (Gov. Code, § 12926, subd. (k)(1)(B).) Thus, to prove the failure to make reasonable accommodation for a known physical or mental disability, a plaintiff must prove that the employer not only knew the diagnosis of the employee but also knew that the condition was interfering with his or her ability to perform his or her job. For example, in *Taylor v. Principal Financial Group, Inc.* (5th Cir. 1996) 93 F.3d 155 (a case under the ADA), the plaintiff failed to survive summary judgment because although he produced evidence that he had advised his employer of his diagnosis, he did not produce evidence that the employer knew that he suffered a physical or mental *limitation* arising out of his alleged impairment. The plaintiff had told his employer he had been diagnosed with bipolar disorder but when asked if he was "all right," responded that he was. The court stated that "the ADA does not require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs. . . . Accordingly, it is incumbent upon the ADA plaintiff to assert not only a disability, but also any limitation resulting therefrom." (*Id.* at p. 164.)

CAVEAT: When referencing cases under the ADA, remember that FEHA now provides broader protection (e.g., a "substantial" limitation is not required). However, the principle enunciated in *Taylor* appears to be sound, and hence worth arguing, in either the state or federal context.

Reasonable Accommodation. FEHA defines in considerable detail what constitutes "reasonable accommodation." (Gov. Code, § 12926, subd. (n).) In *Brundage*, *supra*, the court held that reasonable accommodation does not include reinstatement. (57 Cal.App.4th at pp. 239-240.) "'Reasonable accommodation' does not include excusing a failure to control a controllable disability or giving an employee a 'second chance' to control the disability in the future." (*Id.* at p. 239.) *Brundage* involved alcohol abuse. Whether this principle would extend to some other form of disability is unclear.

In a similar vein, summary judgment for an employer has been affirmed where the employer fired an employee whose alcohol abuse continued despite repeated attempts to accommodate him with recovery programs. In *Gosvener v. Coastal Corp.* (1996) 51

Cal.App.4th 805,[6] the court found it "highly significant" that the employee was a supervisor in a safety-sensitive position but stated more generally, "the employer's duty to accommodate such a disability condition is not unlimited, and an employer cannot be an insurer of recovery." (*Id.* at pp. 812-813.)

In *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, the employee was granted a lengthy leave to deal with his physical disability. Upon his return to work, he was offered an alternative position to accommodate the disability, but not the particular accommodation he desired. When he refused the position offered, he was fired. The court of appeal affirmed summary judgment in favor of the employer. "The employer is not obligated to choose the best accommodation or the accommodation the employee seeks," so long as the accommodation offered is "reasonable and effective." (*Id.* at p. 228.)

Reasonable accommodation may, but does not necessarily include "reassignment to a vacant position." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 947.) There is a "'*duty* to reassign a disabled employee if an already funded, vacant position at the same level exists.'" (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389.) However, there is no duty to create a new position, to move another employee, or to promote the disabled employee. (*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972.) In *Hastings*, the court held that a probationary correctional officer injured during training was "not entitled as an accommodation to reassignment to a position in a different civil service classification without complying with the competitive examination process of the civil service laws." (*Id.* at pp. 976-977.)

A disabled employee is, however, entitled to preferential treatment when it comes to reassignment. (*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 265.) The *Jensen* court rejected the bank's argument that other employees were more qualified or had seniority with respect to available positions. (*Ibid.*)

The Trigger. The question of what triggers the duty to provide reasonable accommodation is somewhat unsettled. Does the employee have the initial burden of

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[6] Disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.*, *supra*, 29 Cal.4th at p. 1031, fn. 6.

requesting accommodation or does the employer, if it knows the employee has a disability, have the burden of asking whether the employee needs reasonable accommodation?

In *Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at pp. 950-951, the court put the burden on the employer and held that the duty to make a reasonable accommodation requires employers to offer appropriate alternative positions even where disabled employees themselves do not request such accommodation: "[A]n employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees."[7/] The plaintiffs in *Prilliman* were two pilots disabled by AIDS. United Air Lines grounded them both upon learning of their disease, pursuant to Federal Aviation Association rules. The trial court had granted summary judgment because neither plaintiff had requested alternative job positions or identified vacant positions they were capable of performing. The court of appeal reversed as to the one pilot who was relatively healthy on the ground that triable issues of fact existed as to whether a reasonable accommodation other than paid disability leave (e.g., an alternative job position such as flight instructor) could have been provided without undue hardship. The court of appeal affirmed summary judgment against the other pilot: it could not be shown that a failure to reasonably accommodate would have caused damages since he was incapable of performing an alternate job position.

Prilliman may be somewhat overbroad. Under FEHA it is unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, *in response to a request for reasonable accommodation by an employee* . . . with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n), emphasis added.) The statutory language suggests the employer does not have to initiate the process, even if the disability is known or apparent.

[7/] See p. 36 below for a discussion of the undue hardship defense.

Summary Judgment. The *Jensen* court held that, assuming the employee is disabled, an employer can prevail on summary judgment only if it establishes on undisputed facts:

- the employer offered reasonable accommodation that the employee refused;

- there was no vacant position for which the employee was qualified; and

- "the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith."

(*Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at p. 263.)

C. Discrimination: Disparate Impact.

Under a disparate impact theory of discrimination, the plaintiff claims that "he has been the victim of a facially neutral practice having a 'disparate impact on his [protected] group.'" (*Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318, 1327; *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 354, fn. 20.) A plaintiff may thus prevail without proving motive. (*Ibid.*) However, the plaintiff must prove the actual disparate impact of a policy or practice; it is not enough to simply raise an inference of disparate impact. (*Ibarbia*, *supra*, 191 Cal.App.3d at pp. 1329-1330.) Statistical disparities may be enough to constitute prima facie proof of disparate impact. (*City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 987.) Once a plaintiff proves the operation of a policy or practice had a disparate impact, to escape liability, the defendant must prove a "business necessity" for the policy or practice. (See p. 41, below.)

Disparate impact theory is more apt to be invoked in a failure to promote case challenging company policy than in a wrongful discharge case. However, in *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30, now legislatively overruled, the plaintiff alleged age discrimination when he and another former employee over age 40 were the only ones not to find new positions with the corporation when theirs were eliminated. In the trial court the plaintiff proceeded on a disparate treatment theory, but the court of appeal treated the

case as one of disparate impact. (*Id.* at p. 42, fn. 4.) The challenge on appeal was to a jury instruction that stated an employer is entitled to prefer lower paid workers even if that preference results in choosing younger workers. The court of appeal affirmed the use of the instruction: "Employers may indeed prefer workers with lower salaries to workers with higher ones, even if the preference falls disproportionately on older, generally higher paid workers." (*Id.* at p. 36.)

The decision generated much controversy. The Supreme Court let it stand but signaled its discomfort in that there were three votes to depublish, two votes to review, and only two votes for denying review. After several attempts, the Legislature succeeded in overruling *Marks*. In Government Code section 12941, the Legislature "declares its rejection" of *Marks* and "its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group . . . [and] that the disparate impact theory of proof may be used in claims of age discrimination."

Marks was, in effect, an articulation of a "business necessity" defense based on economic factors, with the burden on the employer greatly reduced. Section 12941.1 explicitly states that nothing in it shall limit the affirmative defenses traditionally available in employment discrimination cases. However, the legislative rejection of *Marks* makes unclear how the business necessity defense will operate, or whether it can operate at all, if an employer may not use economic considerations such as salary as the basis of an employment decision.

Practice Suggestions:

- Summary judgment or JNOV may be possible when a plaintiff's only evidence of disparate impact supports what is in fact an erroneous premise. It is not unusual for a plaintiff to attempt to prove unlawful discrimination on a disparate impact theory with evidence that, for example, the department she works in, which was disproportionately impacted by an employer decision, was mostly staffed by members of a protected class. (See, e.g., *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1322 [plaintiff's challenge to reorganization "proceeded on the erroneous premise that administrative managers were a 'protected group' because administrative managers were almost all women and half were over the age of 40"].) The relevant and proper "sample"

for purposes of proving the employer's discriminatory animus would have to include members of the protected class outside the particular department who, in fact, may not have been affected at all by the challenged decision.

- Disparate impact liability requires sound statistical evidence, and frequently the statistical evidence of a plaintiff falls short. When confronted with a complaint alleging disparate impact, defense counsel should immediately set about assembling their own statistical evidence, first to see if there is any merit to plaintiff's suggestion, and second to be in a position to show up the deficiencies of the plaintiff's methodology. For example, in *Carter v. CB Richard Ellis, Inc.*, *supra*, the plaintiff's statistical evidence was found deficient—comprised of "'small or incomplete data sets and inadequate statistical techniques.'" (122 Cal.App.4th at p. 1324, citing *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 994-997 [108 S.Ct. 2777, 2788-2790, 101 L.Ed.2d 827] [Title VII].) In *Carter*, the court faulted the plaintiff for presenting no evidence regarding the gender or age of all the defendant's employees, but only evidence about the impact of reorganization on administrative managers "as though it were a group protected by law." (*Id*. at p. 1325.)

D. Discrimination: Harassment.

FEHA prohibits harassment of employees on the basis of race, sex, and other enumerated categories. (Gov. Code, § 12940, subd. (j)(1).) FEHA protects both male and female employees against harassment by members of the opposite or same sex. (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1416-1417.) The law regarding harassment has developed primarily in the area of sexual harassment, but certain principles should be equally applicable where harassment is engaged in on the basis of, e.g., race.

1. Hostile Environment.

A plaintiff alleging hostile environment harassment must prove that the harassment complained of was "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609, internal quotation marks and citations omitted.) One who is not personally subjected to offensive conduct must establish that he or she personally witnessed the harassing conduct and that it was in his immediate work environment. (*Id*. at p. 611.)

The plaintiff must meet both a subjective and an objective standard of proof. (See *id.* at pp. 609-610 ["The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee and that she was actually offended."].) The "reasonable employee" means a person of the same sex as the plaintiff. (*Id.* at pp. 609-610, fn. 7.) Although a plaintiff must show she was offended, she need not show psychological injury. (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 412.) Nor need she show economic loss. (*Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 608.)

Whether the conduct complained of was sufficiently severe or pervasive to create a hostile environment is determined from the "totality of the circumstances," which include "(1) the nature of the unwelcome . . . 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 . . . harassing conduct occurred." (*Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at pp. 609, 610.) "[A]cts 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." (*Id.* at p. 610; see also *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464 [racial harassment].)

Evidence that other employees were harassed may be admissible to prove a hostile work environment. (See *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [where plaintiff is a direct victim of harassment, evidence is relevant to show hostile environment if plaintiff establishes she observed or otherwise knew of other harassment during her employment]; cf. *Fisher v. San Pedro Peninsula Hospital, supra*, 214 Cal.App.3d at pp. 610-611 ["one who is not personally subjected to [offensive] remarks or touchings must establish that she personally witnessed the harassing conduct and that it was in her immediate work environment"].)

Note that the employee suing for discriminatory discharge may counter an employer's legitimate reason for termination (poor work performance) by attempting to prove a hostile environment *caused* the poor work performance. (See *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 22 [114 S.Ct. 367, 370-371, 126 L.Ed.2d 295] ["A

discriminatorily abusive work environment . . . often will detract from employees' job performance . . . ."].)

The California Supreme Court has granted review in *Lyle v. Warner Brothers Television Productions*, California Supreme Court Number S125171 to determine whether the use of sexually coarse language in the workplace constitutes harassment based on sex under FEHA and whether the potential imposition of liability for sexual harassment based on such speech infringes on defendant's right of free speech under the First Amendment or the state Constitution.

2. Quid Pro Quo.

To prove a claim of quid pro quo harassment, a plaintiff must prove that "a term of employment was expressly or impliedly conditioned upon acceptance of a supervisor's unwelcome sexual advances." (*Mogilefsky v. Superior Court*, *supra*, 20 Cal.App.4th at p. 1414.) If the plaintiff alleges she was fired for refusing sexual advances, a court is likely to apply the *McDonnell Douglas* shifting burdens analysis. See, for example, *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1478-1479, a Title VII quid pro quo case in which the Ninth Circuit found error in the exclusion of evidence that defendant harassed other female employees; such evidence was relevant to the issue of whether proffered legitimate reasons for firing were pretextual and the true reason was plaintiff's membership in a group toward which the employer was hostile.

3. Constructive Discharge/Hostile Environment.

A plaintiff alleging a hostile environment will frequently allege she was compelled to quit the job to escape the abusive situation, i.e., that she was constructively discharged. (See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 ["Constructive discharge occurs when the employer's conduct effectively forces an employee to resign"].) In a straight forward constructive discharge case, a plaintiff must prove "the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Id.* at p. 1251.) Harassment in retaliation for complaining about

discrimination (see Gov. Code, § 12940, subd. (h)) was held to be a basis for constructive discharge in *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1171.

The overlap of a hostile environment claim and a constructive discharge claim presents certain unresolved issues including the following:

- Must a plaintiff meet a higher standard ("intolerable") when claiming constructive discharge/harassment than she would if she were simply claiming hostile environment harassment (an environment "offensive" to the reasonable person)? For purposes of employer liability, does the plaintiff have to meet the actual knowledge standard for constructive discharge or the lesser burden under FEHA of strict liability (for supervisor misconduct) or "should have known" (for nonsupervisor misconduct)?

The *Turner* decision suggests that the answer in each case is affirmative, because the court held a plaintiff must *first* establish there was a constructive discharge in order to convert a resignation into a firing, and only then, independently, prove the discharge was wrongful, i.e., prove the tort connected to the "termination" in order to collect damages. (*Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th at p. 1251.)

A plaintiff should have to meet the actual knowledge standard for constructive discharge in order to get the type of damages which that tort would allow, such as economic damages for loss of income; if a plaintiff fails to prove the elements of constructive discharge, she could still recover damages for emotional distress caused by the harassment, and the fact that she quit her job would be evidence of distress but should not in itself be a basis for economic damages.

4. Employer Liability.

a. Harassment by supervisors.

Under FEHA, "supervisor" is defined as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but

requires the use of independent judgment." (Gov. Code, § 12926, subd. (r).) The employer is strictly liable for all forms of sexual harassment by a supervisor. (*State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042; *Kelly-Zurian v. Wohl Shoe Co.*, *supra*, 22 Cal.App.4th at p. 415; *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 608, fn. 6.)

b. Nonsupervisors.

The employer is liable for harassment by nonsupervisory employees only if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action. (Gov. Code, § 12940, subd. (j)(1).)

c. Nonemployees.

An employer may be held liable for the sexual harassment of its employee by a nonemployee, if the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action." (Gov. Code, § 12940, subd. (j)(1).) There is a split in authority as to whether this amendment of FEHA applies to causes of action arising before January 1, 2001, its effective date. In *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 328, the Second District Court of Appeal held that it does because the amendment is a mere clarification of existing law. However, the Fourth District concluded that while the Legislature clearly intended the amendment to apply retroactively, it would be unconstitutional to do so. (*Carter v. California Department of Veterans Affairs* (2004) 121 Cal.App.4th 840, 861-863.) Review has been granted in *Carter* (California Supreme Court Case No. S127921) and in a case from the Second District Court of Appeal, *Adams v. Los Angeles Unified School District* (California Supreme Court Case No. S127961) (unpublished) to determine the retroactivity issue.

d. Conduct outside the workplace.

Where a supervisor engages in harassing conduct outside the workplace, the conduct may or may not be an unlawful employment practice for which the employer is liable under FEHA. (*Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal.App.4th 1042, 1048, 1049, fn. 2 [directing summary judgment for employer where rape was committed after hours and off-site but suggesting outcome would be different if supervisors were

aided in accomplishing harassment by existence of supervisory relationship].) As one court explained, "While the offending conduct may and often does occur at the place of work, it need not. Unwelcome sexual conduct perpetrated by an agent, supervisor, or co-worker, which occurs elsewhere but is in some fashion work-related also constitutes sexual harassment within the meaning of [FEHA]." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1048, internal quotation marks and citations omitted; see also *State Department of Health Services v. Superior Court*, *supra*, 31 Cal.4th at p. 1041, fn. 3 ["The employer is not strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours," adding, "But instances of such harassment must be rare"].)

Practice Suggestions:

- Because of the effect on an employer's liability, "characterizing the employment status of the harasser is very significant." (*Doe v. Capital Cities*, *supra*, 50 Cal.App.4th at p. 1046.)

- Attention to factual detail is critical where a plaintiff alleges off-site harassment because the inquiry as to whether offending off-site conduct is work-related is, needless to say, very fact specific. In *Doe v. Capital Cities*, the plaintiff's allegations passed the test; in *Capitol City Foods, Inc. v. Superior Court*, the plaintiff's evidence failed the test.

5. Personal Liability Of Individual Supervisors And Co-Workers.

Effective January 1, 2001, any employee engaging in harassment is personally liable for that harassment. (Gov. Code, § 12940, subd. (j)(3).) Subdivision (j) contains a statement that its provisions are "declaratory of existing law." (Gov. Code, § 12940, subd. (j)(2).) But in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, the Supreme Court had held that FEHA did *not* impose personal liability on nonsupervisory coworkers. (*Id.* at p. 1140.) In *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 473-474, the Supreme Court held that notwithstanding statutory language to the contrary, under separation of powers principles, section 12940, subdivision (j)(2) was *not* declaratory of

existing law but a change in the law to be applied prospectively only and not to conduct predating its enactment.

"[A] nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under [FEHA], as either an aider and abettor of the harasser or the employer, or as an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322.)

Practice Suggestion:

- Plaintiffs frequently characterize what are clearly employment decisions as "harassment." Defendant employers should urge the trial court to characterize them as "discrimination," and to analyze them under *Reno v. Baird*, *supra*, 18 Cal.4th 640 so that individual supervisors can be extricated from the lawsuit by means of a summary judgment motion.

E. Retaliation.

It is an unlawful employment practice to retaliate against an employee for opposing any practice prohibited by FEHA, for filing a complaint, or for testifying or assisting in any proceeding under FEHA. (Gov. Code, § 12940, subd. (h).) Generally, courts employ the *McDonnell Douglas* burden shifting analysis to retaliation claims based on circumstantial evidence. (See, e.g., *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 215; see p. 2, above.)

1. Plaintiff's Prima Facie Burden.

To establish a prima facie case of retaliatory discharge, a plaintiff must show:

- She engaged in an activity protected by FEHA;

- She was subsequently discharged; and

- There was a causal link between the protected activity and the adverse employment action. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814.)

A plaintiff may satisfy the protected activity element of the prima facie case even if she turns out to have been "mistaken" about the employer's discriminatory conduct. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 477 [mistake must be a "sincere one" and "reasonable"]; see *Strother v. Southern California Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 868 [retaliation claim may be asserted if plaintiff had reasonable belief she had a legitimate claim when she filed with Department of Fair Employment and Housing].)

What is an adverse employment action? It "is not limited to 'ultimate' employment acts, such as a specific hiring, firing, demotion, or failure to promote decision." (*Akers v. County of San Diego*, *supra*, 95 Cal.App.4th at p. 1455.) However, "to be actionable, the retaliation must result in a substantial adverse change in the terms and conditions of the plaintiff's employment." (*Ibid.*; *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511-512.) In the federal context, the Ninth Circuit has explained that "only non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations" constitute actionable retaliation. (See, e.g., *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 928.) Examples of conduct courts have found actionable include "termination, dissemination of a negative employment reference, issuance of an undeserved negative performance review and refusal to consider for promotion." (*Ibid.*) Examples of conduct courts have found *not* to be actionable include "declining to hold a job open for an employee and badmouthing an employee outside the job reference context." (*Id.* at pp. 928-929.) In *Brooks*, the court found a negative evaluation was *not* an adverse employment action because it was subject to modification through a grievance process that the plaintiff had abandoned. (*Id.* at pp. 929-930.) In *Thomas*, the court found that problems with checks and an early job change did not constitute actionable retaliation and that an allegation that the plaintiff was assigned more duties than others in her unit was not supported by evidence that it had a "substantial and detrimental effect" on her employment. (*Thomas*, *supra*, 77 Cal.App.4th at p. 512). In *Akers*, the court found that mere oral or written criticism or transfer into a comparable position would not ordinarily constitute adverse employment acts; however, if the employer wrongfully used a negative evaluation to materially change the terms and conditions of employment, the conduct

would support a retaliation claim. (*Akers v. County of San Diego*, *supra*, 95 Cal.App.4th at p. 1457.)

Employer knowledge that a plaintiff has engaged in protected activity together with proximity in time between protected activity and discharge may be sufficient to establish the causation element of a prima facie case. Thus, for example, in *Flait*, the plaintiff survived summary judgment by showing that the corporate officer who had made harassing remarks subsequently terminated her and the termination occurred a few months after the plaintiff had confronted him. (*Flait*, *supra*, 3 Cal.App.4th at p. 478.) On the other hand, in *Robinson v. AFA Service Corp.* (N.D.Ga. 1994) 870 F.Supp. 1077, 1084, a court found no causal link although the employee was fired the day after the employer learned of a discrimination charge, where uncontroverted testimony proved that the plaintiff had been warned over a period of time that her performance was unacceptable.

Lack of knowledge on the part of the final decisionmaker does not foreclose employer liability so long as retaliatory motive by some supervisor in the chain of decisionmaking is the "but-for" cause of the adverse employment action. (*Reeves v. Safeway Stores, Inc.*, *supra*, 121 Cal.App.4th at pp. 107-108.)

While in some cases "timing," together with employer knowledge, may be enough to satisfy the causation element of a prima facie case, it is probably not enough to carry a plaintiff's ultimate burden of proving that "but for" her protected activity she would not have been fired. In *Flait*, the court made clear that timing was only one consideration in determining whether the employer's motive was retaliatory, stating that pretext may be inferred "from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Flait*, *supra*, Cal.App.4th at pp. 479, 480 [finding retaliatory motive where plaintiff had been exemplary employee and had received no serious criticisms before termination]; see also *Swanson v. General Services Admin.* (5th Cir. 1997) 110 F.3d 1180, 1188 ["once the employer offers a legitimate, nondiscriminatory reason that explains both the adverse action and the timing, the plaintiff must offer some evidence from which the jury may infer that retaliation was the real motive"]; *Stevens v. St. Louis University Medical Center* (8th Cir. 1996) 97 F.3d 268, 272 ["inference to be drawn from the temporal connection" is not enough to prove pretext]; *Delli Santi v. CNA Ins. Companies* (3d Cir. 1996) 88 F.3d 192, 199, fn. 10 ["timing alone will not suffice to prove retaliatory motive"].)

2. Personal Liability Of Individual Supervisors.

One California court has concluded that individual supervisors may be personally liable for retaliation under FEHA. (*Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 1239.) The court rejected the argument that *Reno v. Baird*, *supra*, 18 Cal.4th 640 was controlling on the ground that a different statute was involved: *Reno* addressed discrimination under section 12940, subdivision (a) which applies only to "an employer" whereas the prohibition against retaliation under section 12940, subdivision (h) applies to "any employer . . . or person." (99 Cal.App.4th at p. 1241; see also *Winarto v. Toshibia America Electronics Components* (9th Cir. 2001) 274 F.3d 1276, 1288 [FEHA provision addressing retaliation permits personal liability for retaliatory discharge].) Until the California Supreme Court rules, there is an argument to be made and preserved that *Walrath* was wrongly decided or is at least distinguishable from a case in which retaliation is directly related to or predicated on discrimination in the form of personnel management decisions, that is, when a personnel management decision is alleged to be retaliation for complaining about discrimination. While section 12940, subdivision (h) bars retaliation by "any person," the presence of the term "person" in a FEHA provision does not necessarily mean personal liability may be imposed on an employee who engages in the specified unlawful conduct. For example, in *Janken*, the court addressed section 12940, subdivision (i) (then section 12940, subdivision (g)), which provides that it is an unlawful employment practice for "any person" to aid or abet an act proscribed by FEHA; *Janken* rejected arguments that such language permitted imposition of liability on individual supervisors for their participation in personnel management decisions. (*Janken v. GM Hughes Electronics, supra*, 46 Cal.App.4th at pp. 78-79; *Reno v. Baird, supra*, 18 Cal.4th at pp. 655-656; see also *Fiol v. Doellstedt*, *supra*, 50 Cal.App.4th at pp. 1326-1328 [supervisor not personally liable as aider and abettor for failing to investigate or respond to harassment complaints; whether to investigate or not is a personnel management decision]; *Carrisales*, *supra*, 21 Cal.4th at p. 1140 [rejecting plaintiff's argument that "any person" language supported coworker liability for harassment, overruled by Gov. Code, § 12940, subd. (j)(3), Stats. 2000, ch. 1049, § 7.5]; but see *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 604 [individual agents of employer who aided and abetted harassment may be personally liable].)

If the term "person" is not dispositive, the focus should be on the *nature of the conduct alleged to be retaliatory*. Where the alleged retaliation takes the *form of a personnel management decision*, such as discharge, supervisors should not be liable whether the

underlying conduct is alleged to be retaliation, discrimination , or harassment. This is so, because the rationale articulated in *Reno* and in *Janken v. GM Hughes Electronics, supra*, 46 Cal.App.4th 55—that imposing personal liability on supervisors for decisions that are a basic, unavoidable part of their job would chill effective management—applies whether the underlying conduct that triggered complaints and then retaliation is alleged to be discrimination or harassment. In *Walrath*, *supra*, arguably the underlying conduct on the part of the individual supervisor was *not* a personnel management decision in the sense described in *Reno*, but at most petty harassment in the form of moving the plaintiff and his possessions out of an office into an open area. (99 Cal.App.4th at p. 1239.)

Practice Suggestions:

- If the employer has clear evidence of legitimate grounds for termination or plaintiff's only evidence of causation is that termination was subsequent to the protected activity, defense counsel should consider moving for summary judgment. (See, e.g., *Addy v. Bliss & Glennon*, *supra*, 44 Cal.App.4th at p. 217 [summary judgment granted for employer where plaintiff failed to rebut legitimate reasons for adverse employment decision and failed to present evidence of causation or rebut employer's evidence that there was no causal link]; see also *Nelson v. Pima Community College* (9th Cir. 1996) 83 F.3d 1075, 1080-1081 [First Amendment, Title VII retaliation claims defeated on summary judgment motion where employer had strong legitimate reasons for action and only evidence of causation was timing].)

- Since plaintiffs often allege that everything they perceive as negative in their job environment is retaliatory, it is sometimes possible to dispose of a retaliation claim by a summary judgment motion demonstrating to the trial court that other courts, state and federal, have found similar allegations as a matter of law do not rise to the level of actionable retaliation. If it appears that some actions alleged are trivial and some are potentially actionable, counsel might consider a motion in limine to exclude evidence of the trivial in order to minimize the risk of an adverse jury verdict inspired by the cumulative effect of unpleasant but not unlawful conduct.

- Where an employee alleges both discrimination and retaliation for complaining about it, a summary judgment motion on both issues might be appropriate. With respect to retaliation, where there is no evidence of underlying discrimination, a

court might find the employee did not engage in a protected activity even though she filed a complaint with the Department of Fair Employment and Housing ("DFEH"), because, as a matter of law, she could not reasonably and in good faith have believed she was being treated differently on the basis of, e.g., gender. In most cases, however, the reasonableness of an employee's belief that she was opposing unlawful conduct is a credibility question that cannot be resolved on summary judgment. (*Flait v. North American Watch Corp., supra*, 3 Cal.App.4th at p. 477.)

- It is not unusual in any context for a plaintiff's expert to overreach and in the form of an "opinion" tell the jury how to resolve a factual issue. In *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, the expert testified that certain facts were "indicators" of the employer's retaliatory motive. The court of appeal held that admitting the evidence was prejudicial error; the expert was in no better position than the jury to evaluate the facts and to decide the issue of motive without being told how to do so by the expert. (*Id.* at pp. 293-295.) Similar expert testimony often turns up in opposition to a defendant's summary judgment motion. Defense counsel should be sure to object and to obtain a ruling. A recent case in the Third District will help trial counsel obtain that ruling: in *Vineyard Spring Estates, Inc. v. Superior Court* (2004) 120 Cal.App.4th 633, 642-643, the court held that the trial court had failed in its duty under Code of Civil Procedure section, 437c, subdivision (c) to rule on the objections and directed it to do so and thereafter to reconsider its ruling on the motion.

F. Defenses.

1. Failure To Exhaust Administrative Remedies.

Before bringing suit in court, an employee alleging a violation of FEHA must first exhaust the administrative remedy provided by the statute. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1612.) The exhaustion requirement involves filing a verified complaint with DFEH and obtaining a right to sue letter if DFEH decides not to file an accusation or does not file one within 150 days after the complainant filed his or her charge. (Gov. Code, § 12965, subd. (b).)

In California, the failure to exhaust is considered a jurisdictional, not procedural, defect. (See e.g., *Okoli v. Lockheed Technical Operations Co.*, *supra*, 36 Cal.App.4th at p. 1613;

Robinson v. Department of Fair Employment & Housing (1987) 192 Cal.App.3d 1414, 1416 ["judicial review is unavailable until all administrative remedies have been exhausted, and a court violating the rule acts in excess of jurisdiction" (internal quotation marks omitted)]; but see *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 896-899 [questioning whether describing FEHA requirements as "jurisdictional" implicates court's subject matter jurisdiction].)[8/]

The allegations of the DFEH charge limit the scope of subsequent actions. The judicial complaint may encompass any claim "*like or reasonably related* to" the DFEH charge. (*Okoli v. Lockheed Technical Operations Co.*, *supra*, 36 Cal.App.4th at p. 1614.) "Essentially, if an investigation of what *was* charged in the [administrative claim] would necessarily uncover other incidents that were not charged, the latter incidents could be included in a subsequent action." (*Id.* at p. 1615.) Thus, for example, if in the DFEH complaint a plaintiff charged he was fired because of his age, and in the judicial complaint he alleged he was fired because of age and race, a court should find he failed to exhaust his remedies as to race. (See *id.* at p. 1617 [claim of retaliation barred because not reasonably related to race discrimination charge nor likely to have been uncovered in investigation]; but see *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1065 [characterizing alleged acts of retaliation as further acts of discrimination which would have been uncovered in a DFEH investigation and which thus were actionable].) In *Keiffer v. Bechtel Corp.*, *supra*, the court held that "the *scope* of the civil action permitted by a right-to-sue notice does not concern the trial court's subject matter jurisdiction" and thus, "the details with respect to which claims the right-to-sue notice permits the plaintiff to advance is a matter which must be timely raised or be forever waived." (65 Cal.App.4th at pp. 900-901.)

Individuals not named either in the caption or the body of the DFEH charge as perpetrators of the FEHA violation are entitled to summary judgment on the ground of

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[8/] Failure to exhaust is not a jurisdictional defect for Title VII purposes; exhaustion is simply a "condition precedent" to a Title VII suit, which a defendant may waive or be estopped from asserting. (*Stache v. International Union of Bricklayers* (9th Cir. 1988) 852 F.2d 1231, 1233.)

failure to exhaust. (*Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1509-1511.)[9/]

In *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, the Supreme Court held that "when . . . a public employee pursues administrative civil service remedies, receives an adverse finding, and fails to have the finding set aside through judicial review procedures, the adverse finding is binding on discrimination claims under the FEHA." (*Id.* at p. 76.) The plaintiff had exhausted his non-FEHA administrative remedies, pursuing a grievance through to a final decision by the city council, but then failed to challenge the decision with a petition for writ of mandate. The Supreme Court expressly declined to decide or discuss "the issue of whether a plaintiff must exhaust non-FEHA administrative remedies as a prerequisite to initiating a lawsuit, including a FEHA claim." (*Id.* at p. 73.)

In *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, the Supreme Court held that a plaintiff pursuing a claim for discrimination under FEHA need not exhaust internal civil service remedies. (*Id.* at p. 1092; see also *Ruiz v. Department of Corrections* (2000) 77 Cal.App.4th 891, 897.) The court squared its decision with *Johnson v. City of Loma Linda*, *supra*, explaining that the latter did not require an employee to exhaust internal remedies before asserting a FEHA claim; rather, *Johnson* held only that if an employee had exhausted internal remedies but had failed to exhaust judicial remedies, then the government agency's findings were binding on the subsequent FEHA claim. (*Schifando*, *supra*, 31 Cal.4th at p. 1090; see *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal.4th 1135, 1142-1144 [employee who sued under FEHA before a final decision in the administrative process and without then challenging it (if adverse) in mandate, failed to exhaust].)

When a public employee asserts both FEHA claims and nonstatutory claims (e.g., wrongful termination in violation of public policy), the *Schifando* "exemption" from the exhaustion requirement is controlling with respect to the nonstatutory claims only if they are FEHA-related. (*Williams v. Housing Authority of City of Los Angeles* (2004) 121 Cal.App.4th 708, 713, 727-729.) However, if the nonstatutory claims are not FEHA-related,

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[9/] As discussed, they may also be entitled to summary judgment on the merits in light of the Supreme Court's ruling in *Reno v. Baird, supra*, 18 Cal.4th 640. (See above p. 1.)

the rule of exhaustion of internal remedies applies. (*Id*. at pp. 729-730.) One rationale for this distinction is to avoid the preclusive impact on a FEHA claim of an administrative decision adverse to the employee on the FEHA-related nonstatutory claim. (*Id*. at pp. 727-729.) In *Williams*, the plaintiff's nonstatutory wrongful demotion and constructive discharge causes of action were based on employer actions allegedly taken because he had responded to a civil subpoena, rather than on any claimed violation of FEHA; thus, the court concluded, his nonstatutory claims were rightly dismissed for his failure to exhaust.

A plaintiff is not required to comply with the claims presentation requirements of the California Torts Claims Act before suing on a FEHA claim. (Gov. Code, § 900, et seq.; *Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 710-712.)

Practice Suggestion:

- The opinion in *Keiffer* attempts to align California law with federal law on the question of whether or to what extent the failure to exhaust defense raises a jurisdictional issue. (*Keiffer v. Bechtel Corp.*, *supra*, 65 Cal.App.4th at p. 901, fn. 6.) Until the California Supreme Court addresses the issue, defendants should, where appropriate, raise the defense in the trial court in their answers and by a motion challenging specific claims and allegations.

2. Statute Of Limitations.

An administrative charge must be filed with DFEH within one year of the date of the alleged unlawful employment practice. (Gov. Code, § 12960, subd. (d).) The limitation period begins to run on the actual date of termination, not when the employee first has notice of the plan to terminate him. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 493.)

The one year limitation may be extended up to 90 days if the plaintiff did not discover the discrimination until after the limitation period expired. In *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, the plaintiff unsuccessfully applied for a position in the police department. Sixteen months after his application was rejected, he learned that racial discrimination might have played a part in the City's decision, and shortly thereafter he filed his administrative claim with DFEH. In the subsequent lawsuit, the trial court

directed a verdict in favor of the City on the ground that he had failed to timely file an administrative claim, and the court of appeal affirmed. It rejected plaintiff's argument that the time for filing his administrative charge should be equitably tolled during the period he was unaware he was the subject of discrimination; while recognizing, "the harshness of [the] statutory scheme" allowing only an additional 90 days after the alleged unlawful act, the court explained this was a policy question for the Legislature, beyond the reach of the court's equitable powers. (*Id*. at pp. 92-93.)

A plaintiff must file a civil suit under FEHA within one year after the date of the right to sue notice. (Gov. Code, § 12965, subd. (b).) However, when a complainant has obtained a right to sue letter from DFEH but the Equal Employment Opportunity Commission (EEOC) is continuing to investigate his claim, the one year limitation period for filing his FEHA cause of action is equitably tolled. (*Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322, 1325-1326; see also *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1102 ["When a charge of discrimination or harassment is timely filed concurrently with the EEOC and the DFEH, the investigation of the charge is deferred by the DFEH to the EEOC under a work-sharing agreement, and the DFEH issues a right-to-sue letter upon deferral, then the one-year period to bring a FEHA action is equitably tolled during the pendency of the EEOC investigation until a right-to-sue letter from the EEOC is received"].)

Plaintiffs routinely attempt to avoid the time bar by invoking the equitable doctrine of "continuing violation" by which a claim under FEHA is not time barred "when there are continuous acts of discrimination over a period of time provided that some of those acts fall within the limitations period." (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 345.) In *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823, the Supreme Court held that a plaintiff may not recover damages for acts that occurred more than one year before she filed suit unless she can satisfy a three-prong test for "continuing violation":

- the unlawful acts must be "sufficiently similar in kind,"
- they must "have occurred with reasonable frequency," and
- they must not have acquired "a degree of permanence."

Employer conduct has permanence "*either* when the course of conduct is brought to an end . . . *or* when the employee is on notice that further efforts to end the unlawful

conduct will be in vain." (*Id.* at p. 823.) In other words, the statute does not necessarily start to run when the employee first believes her rights have been violated.

Richards involved a claim of disability discrimination but its principles apply to sexual harassment claims under FEHA as well. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1000-1007.) In *Birschtein*, the plaintiff offered evidence of sexual remarks by a male employee outside the limitations period and alleged retaliatory staring by him within the limitations period; the court found the latter sufficiently frequent and sufficiently related to prior acts of harassment to constitute a continuing violation. (*Id.* at p. 1006.) Note, however, that the court appeared to confuse the notion of "permanence" with that of the "adequacy" of employer response, leaving that issue to the lower court to assess in light of evidence produced at trial. (*Id.* at pp. 1006-1007.) In that respect, the *Birschtein* court strayed from the *Richards* analysis where concept of permanence focuses on whether any further efforts to resolve problem would be futile, not on whether the employer's efforts in response to complaint did or did not cause discrimination and harassment to cease.

In *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, *Richards* was applied in the context of a gender discrimination claim. The plaintiff alleged an on-going denial of a certain employment opportunity. The reviewing court concluded that even assuming the conduct she alleged was sufficiently similar enough and frequent enough to constitute a single course of conduct (the court had its doubts), the situation had reached "permanence" so as to cut off liability for acts outside the limitations period when someone else (a male) had been assigned the tasks she wanted and particularly when the employer's only response to her grievance requesting the opportunity to perform these tasks was an offer to transfer her out of the department altogether. (*Id.* at pp. 1042-1043.)

Practice Suggestions:

- If the plaintiff is claiming hostile environment based on conduct over time, the defendant should pin down in discovery his or her reasons for not complaining sooner. A defendant employer may at least be able to argue, depending on the evidence, that the fact the plaintiff failed to act sooner is evidence that the purported harassment was not severe or pervasive enough to offend him or her.

- If a plaintiff could probably prove an act of sexual or racial harassment occurring *outside* the limitations period, and alleges only facially neutral acts of purported discrimination (e.g., demotions or discipline) *within* the limitations period, defense counsel should consider moving for summary judgment before trial. The plaintiff may not be able to meet the first prong of the *Richards* test because acts of sexual harassment, e.g., are not "sufficiently similar *in kind*" to a decision to terminate. (See, e.g., *Green v. Los Angeles County Superintendent of Schools* (9th Cir. 1989) 883 F.2d 1472, 1480-1481 [dismissal affirmed where allegations of harassment and discriminatory training outside limitations period were not sufficiently related to discharge, poor references, and denial of benefits within limitations period].)

- Nonetheless, be aware that plaintiffs' counsel may argue that *Accardi* precludes this approach. In *Accardi*, the plaintiff was a female officer in a police department. The appellate court explained that a pattern of sexual harassment outside the limitations period might be evidence that the legitimate reasons proffered for facially neutral acts within the limitations period were pretext and that all the conduct taken together manifested a "policy" of discrimination. (17 Cal.App.4th at pp. 349-351.)

3. After-Acquired Evidence.

In *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352 [115 S.Ct. 879, 130 L.Ed.2d 852], the Supreme Court held that after-acquired evidence of wrongdoing which would have resulted in termination does not bar relief for an earlier violation of the Age Discrimination In Employment Act, although it may affect a plaintiff's remedy, for example limiting a plaintiff to backpay and precluding the right to future pay or reinstatement. (*Id.* at pp. 357-361 [115 S.Ct. at pp. 884-886].) An employer must do more than prove termination would have been *justified*; it must convince the jury that termination would have been a sure thing. (*Id.* at p. 360 [115 S.Ct. at p. 885].)

A California court has held that the after-acquired evidence doctrine may actually "shield[ ] an employer from liability . . . where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event." (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 632.) In *Camp*, the court held that the plaintiff's misrepresentation about a felony conviction barred his discrimination claim under FEHA. *Camp* may be confined to its facts. The plaintiff had

lied about previous felony convictions; the defendant was under contract with the federal government which required as a condition of the contract that no employee have a felony record. In ruling that after-acquired evidence barred the plaintiff's claim, the court drew a distinction between wrongdoing which would disqualify a person from employment under the employer's own internal voluntarily adopted policy and wrongdoing such that by law the person would not be qualified for the job. (*Id.* at pp. 636-637.) In the latter instance, the claim could be barred. (*Id.* at p. 639.)

In *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal.App.4th 614, 618, the court held that material misrepresentations in a job application were not a complete defense to an age discrimination claim. See also *Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1547, citing *McKennon* [after-acquired evidence of employee misconduct "would be admissible to limit the kind and quantity of damages recoverable"].)

Practice Suggestion:

- While actual injury is not a required element of this defense, defense counsel will increase their chances of success if they present strong evidence of actual injury resulting from a plaintiff's misconduct. Whether the after-acquired-evidence defense is available in a particular case requires a weighing of the parties' respective equities. The wrongfulness of the employer's conduct in terminating the employee will be weighed against the wrongfulness of the employee's conduct as demonstrated by the after-acquired evidence.

4. Statutory Defenses.

a. Undue Hardship (Reasonable Accommodation).

Reasonable accommodation of religious beliefs or disability is not required if the employer proves undue hardship. (Gov. Code, § 12940, subd. (m).) Undue hardship is defined as "an action requiring significant difficulty or expense" in light of certain factors specified in the statute. (Gov. Code, § 12926, subd. (s).)

b. Bona Fide Occupational Qualification (BFOQ).

Discrimination is not an unlawful employment practice if it is "based upon a bona fide occupational qualification." (Gov. Code, § 12940.) The employer must prove that the occupational qualification is "reasonably necessary" to its normal operation and that a categorical exclusion based on a protected class characteristic is justified because "all or substantially all" persons with the characteristic fail to satisfy the qualification. (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [excluding fertile women from jobs involving contact with lead not justified; *possibility* of harm to offspring is insufficient justification and since offspring of males exposed to lead are also at risk, there was no basis to differentiate between males and females].) The employer must also demonstrate that because of the nature of the business, job responsibilities could not be rearranged. (*Id.* at p. 541.)

Practice Suggestion:

- The more firmly the BFOQ defense is based on objective standards, the greater the chance of its success. Contrast *Hegwer v. Board of Civil Service Comrs.* (1992) 5 Cal.App.4th 1011, 1025 (defense succeeds where weight standards for paramedics supported by statistical standards rather than stereotyped generalizations) with *Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 23 (customer preference for employees of a particular sex not a BFOQ).

c. Statutory Immunities Under The Government Code.

The California Supreme Court has made clear that Government Code immunities are a defense to a FEHA cause of action asserted against an individual defendant. In *Caldwell v. Montoya*, *supra*, 10 Cal.4th 972, the Supreme Court held that Government Code section 820.2 immunized members of a school district's governing board from liability for race and age discrimination in violation of FEHA for the decision to terminate the employment of the district superintendent. (*Id.* at pp. 982, 989.) Protected discretionary acts are defined as basic policy decisions entrusted to a coordinate branch of government, and are to be distinguished from ministerial acts. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 793.) The *Caldwell* court found that section 820.2 immunity prevails over FEHA claims against public employees in their individual capacities, because FEHA contains no

indication of legislative intent to override or withdraw the immunity. (*Caldwell*, *supra*, 10 Cal.4th at p. 989.)

Note that while individual employees may be immune, the public entity employer is not, because FEHA creates direct statutory rights against employers, i.e., rights that are not dependent on employee liability. (*Id*. at p. 989, fn. 9.)

Practice Suggestion:

- Since the Supreme Court's decision in *Reno v. Baird* (see above p. 1), the immunities in the context of *discrimination* claims are superfluous. However, as long as the issue of individual liability with respect to *retaliation* claims is unresolved, defendants should preserve all potentially applicable Government Code immunities, including sections 820.2 (discretionary) and 821.6 (official proceedings) immunities.

5. Preemption (Disability Discrimination).

The California Supreme Court has resolved a conflict in the law on the issue of whether workers' compensation law bars an injured employee from suing for discrimination under FEHA. In *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, it held that Labor Code section 132a, which prohibits discrimination against employees injured in the course of employment, does *not* provide an exclusive remedy, and a plaintiff may pursue the more liberal remedies available under FEHA for disability discrimination. (*Id*. at p. 1158.)

6. Judicial Estoppel.

Judicial estoppel is known as the "'doctrine of preclusion of inconsistent positions,' [and] precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." (*Prilliman v. United Air Lines, Inc.*, *supra*, 53 Cal.App.4th at p. 957, citing *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 600.) In *Rissetto*, the court applied the doctrine to an age discrimination claim under FEHA where the plaintiff had claimed she was unable to perform her job in order to obtain workers' compensation benefits, and then claimed she

was able to perform her job adequately for purposes of her damages claim. (*Rissetto*, *supra*, 94 F.3d at p. 601.)

Noting that *Rissetto* applied federal law regarding estoppel to a FEHA claim, the *Prilliman* court *rejected* the argument that the plaintiff could not claim he deserved an alternative employment position because of his prior claim of total permanent disability. The court found the defendants failed to show the plaintiff's position in the lawsuit was "clearly inconsistent" with the position taken in his application and also failed to show any change in the plaintiff's position was "unjust" to them. (*Prilliman*, *supra*, 53 Cal.App.4th at p. 963.) In the lawsuit, the plaintiff contended that he should have been accommodated with job opportunities not requiring FAA medical certification; on his application for benefits he had asserted entitlement on the basis of inability to be flight qualified.

Subsequently, another panel in the Second District Court of Appeal attempted to establish clear principles as to the application of the doctrine in California courts (as distinct from federal courts). It found "the doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) For purposes of workers' compensation, the plaintiff in *Jackson* and his employer had stipulated to a work restriction—that his work environment be stress-free. For purposes of his damages claim, the plaintiff asserted he could perform the essential functions of "safety police officer III," the duties of which he admitted involved stress. The court found judicial estoppel properly applied under the test it had outlined. (*Id.* at pp. 190-191.)

The *Jackson* court noted that it did not read *Prilliman* to require detrimental reliance by the party invoking judicial estoppel. (*Id.* at p. 191, fn. 14; see also *Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086, 1092 [party need not show reliance or prejudice].)

Two post-*Jackson* cases reaching different results are *Bell v. Wells Fargo Bank* (1998) 62 Cal.App.4th 1382 (judicial estoppel does not apply) and *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950 (judicial estoppel does apply). In *Bell*, the defendant had not adequately shown the plaintiff had taken totally inconsistent positions, since the statement

on the disability application could be interpreted in varying ways: it was unclear whether his statement that he was unable to perform "his regular and customary work" referred to his work with or without accommodation. (*Bell v. Wells Fargo Bank, supra*, 62 Cal.App.4th at pp. 1387-1388.) In *Drain*, the plaintiff was judicially estopped from proceeding on racial harassment and wrongful termination claims because he had previously asserted total disability and on that basis had received benefits. (*Drain v. Betz Laboratories, Inc., supra*, 69 Cal.App.4th at pp. 958-959.) That the workers' compensation referee had made no findings on the nature and extent of disability was "not fatal" to the defense because "'circumstances may warrant application of the doctrine even if the earlier position was not adopted by the tribunal.'" (*Id.* at p. 957, quoting *Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 184, fn. 8.)

The United States Supreme Court addressed the issue in the context of a claim under the ADA. It held that to survive a summary judgment motion a plaintiff must explain why prior contentions to obtain benefits are not inconsistent with a necessary element of the ADA claim. (*Cleveland v. Policy Management Systems Corp.* (1999) 526 U.S. 795, 806-807 [119 S.Ct. 1597, 1603-1604, 143 L.Ed.2d 966].)

Practice Suggestion:

- The defense of judicial estoppel is controversial and in a state of development. Defense counsel should be sure to assert it in their answers and to read the cases for guidance regarding facts to be obtained through discovery that will increase the likelihood a plaintiff's particular claim will be barred.

7. Res judicata/Collateral Estoppel.

In *Acuna v. Regents of University of California*, *supra*, 56 Cal.App.4th 639, the court of appeal held that a federal court summary judgment on Title VII race and ethnic discrimination claims barred a suit in state court under FEHA on res judicata grounds, because the claims arose from the same primary right, "the right to be free of invidious employment discrimination." (*Id.* at p. 649.) The court found it irrelevant that the defendants were sued in an individual capacity in the state action and in a representative capacity in the federal, since res judicata applies to parties or their privies. (*Id.* at p. 651.)

It was also irrelevant that FEHA offers different remedies than its federal counterpart. (*Id.* at p. 650.)

Note that if a plaintiff files a petition for a writ of administrative mandamus under Code of Civil Procedure section 1094.5 and receives an adverse ruling, her FEHA claim is barred by res judicata. (*Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1476-1477; cf. *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at p. 76 [a civil service agency's adverse finding that an employee fails to have set aside through judicial review procedures has preclusive effect on FEHA claims].)

8. Business Necessity (Disparate Impact).

To avoid liability for a facially neutral practice or policy adversely impacting a protected class, the employer must prove the practice is "job-related." (*City and County of San Francisco v. Fair Employment & Housing Com.*, *supra*, 191 Cal.App.3d at p. 989.) To meet that burden, the employer must demonstrate the practice is "necessary to the safe and efficient operation of the business," its purpose is "sufficiently compelling to override any [adverse] impact," the practice carries out the purpose it allegedly serves, and there are "no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . impact." (*Id.* at pp. 989-990, internal quotation marks and citations omitted.)

9. The Avoidable Consequences Defense.

The United States Supreme Court has held that, under Title VII, employers are strictly liable for supervisor harassment if the plaintiff was subjected to a tangible job action (such as termination); however, in cases where no tangible employment action was taken, an employer may escape liability by proving, as an affirmative defense, that (a) it exercised reasonable care to prevent or to correct promptly any sexually harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities (such as an internal complaint procedure) or otherwise failed to avoid harm. (*Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 765 [118 S.Ct. 2257, 2270, 141 L.Ed.2d 633]; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807-808 [118 S.Ct. 2275, 2292-2293, 141 L.Ed.2d 662].) The promulgation of an antiharassment policy with complaint procedures is not necessary in every instance but helps to establish the first

element; an unreasonable failure to use an available complaint procedure will normally establish the second. (*Ibid.*)

In *State Department of Health Services v. Superior Court*, *supra*, 31 Cal.4th 1026, the California Supreme Court took *Ellerth/Faragher* as a point of departure to reach a different conclusion. It held that under FEHA "an employer is strictly liable for *all* acts of sexual harassment by a supervisor." (*Id.* at p. 1042.) However, under the doctrine of avoidable consequences, an employer may escape liability for those damages if the employee "more likely than not" could have prevented by taking advantage of the employer's procedures for preventing and eliminating sexual harassment. (*Id.* at p. 1044.) To limit its damages in this way, an employer must plead and prove:

- the employer took reasonable steps to prevent and correct sexual harassment in the workplace;
- the employee unreasonably failed to use the procedures provided; and
- reasonable use of the procedures would have prevented at least some of the harm the employee suffered.

(*Ibid.*)

The court emphasized that the employee's failure to report supervisor harassment to management is not sufficient to establish the "avoidable consequences" defense; the employer must also show the employee's failure to report the harassment was unreasonable under the circumstances and that the employer-provided measures would more likely than not have prevented some of the claimed damages. (*Id.* at p. 1045.)

Since this defense affects damages, not liability, facts regarding timing are critical—when the employee first suffered compensable harm and when a reasonable employee would have reported harassment. The court indicated that these questions "in many and perhaps most instances" present factual issues for the jury to resolve. (*Id.* at p. 1044.)

II. California Constitution.[10/]

A. Elements Of A Cause Of Action.

1. Equal Protection.

Article I, section 7, subdivision (a), of the California Constitution provides in pertinent part: "A person may not be . . . denied equal protection of the laws." The equal protection clause, whether the federal or the state, requires that those similarly situated not be treated differently unless disparate treatment is justified. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 914; *Kenneally v. Medical Board* (1994) 27 Cal.App.4th 489, 495.) Thus, to succeed on an equal protection claim alleging discrimination based on sexual orientation, for example, a plaintiff must plead and prove at a minimum that he was treated differently from others similarly situated who were not gay. (*Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 525-526.) He must also prove that his treatment was motivated by discriminatory animus against homosexuals. (*Miller v. Johnson* (1995) 515 U.S. 900, 913-915 [115 S.Ct. 2475, 2487-2488, 132 L.Ed.2d 762].)

2. Due Process.

Article I, section 7, subdivision (a), of the California Constitution provides in pertinent part: "A person may not be deprived of life, liberty, or property without due process of law." As a threshold matter, a plaintiff has to prove a liberty or property interest triggering due process protections. Permanent employees in civil service employment have a property interest in their jobs. (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1109; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 575.)

[10/] In 2002, the California Supreme Court ruled out actions for damages directly under the state constitution, at least for due process violations and presumably for equal protection violations. (See pp. 48-49, below.) Since plaintiffs who plead wrongful termination in violation of public policy—the public policy here being that embodied in the Constitution—presumably have to prove the elements of the underlying violation, we provide here older cases addressing these elements.

A plaintiff then must prove conduct by the public employer adversely affecting his property interest and thus triggering due process protections, for example, discharge, demotion, denial of benefits. (See, e.g., *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206-208; *Ng v. State Personnel Bd.* (1977) 68 Cal.App.3d 600, 606.) He must also prove he was not afforded pre-deprivation safeguards which *Skelly* mandates as a minimum requirement, namely "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly*, *supra*, 15 Cal.3d at p. 215.)

To succeed on a substantive due process claim a plaintiff must prove that the public employer's action was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 835, disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570 & fn. 2, internal quotation marks and citations omitted.)

3. Right To Privacy.

The right to privacy is among those rights specified in Article I, section 1, of the Constitution. The elements of a cause of action for the invasion of the constitutional right of privacy as set forth in *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 891 are as follows:

- A legally protected privacy interest
- A reasonable expectation of privacy
- A serious invasion of the privacy interest.

The question of whether a legally protected privacy interest exists is a question of law. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40.) The *Hill* court explained that legally protected privacy interests generally fall into two classes: "(1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Id.* at p. 35.) Courts generally agree that "'the details of one's personal life,' including sexuality, generally fall within a protected zone of privacy."

(*Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1701-1702, quoting *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1019.)

The test for whether an expectation of privacy is reasonable is an objective one. (*Hill*, *supra*, 7 Cal.4th at p. 37.) "[C]ustoms, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Id*. at p. 36.) Thus, for example, no invasion of privacy was found in a requirement that applicants for a promotion to a special police unit disclose medical and financial information in part because applicants generally were aware that such disclosure was historically required. (*Id*. at pp. 36-37, citing *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia* (3d Cir. 1987) 812 F.2d 105, 114.) In *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, the court affirmed summary judgment for the employer who had terminated an employee for pursuing a sexual relationship with a subordinate. The court held the employee had no reasonable expectation of privacy in light of case authority recognizing an employer's legitimate interest in avoiding conflicts of interest and the employer's express policy requiring supervisors to bring any intimate relationships to management's attention so that appropriate action could be taken to avoid any conflict of interest. (*Id*. at p. 533.)

Finally, for the invasion of a privacy to be actionable, it "must be sufficiently serious in . . . nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill*, *supra*, 7 Cal.4th at p. 37.)

Examples of cases, besides *Barbee*, where constitutional privacy rights were invoked to challenge termination are: *Pettus v. Cole* (1996) 49 Cal.App.4th 402 (employer who terminated employee for refusing to enroll in alcohol treatment program violated his constitutional privacy rights); *Leibert v. Transworld Systems, Inc.*, *supra*, 32 Cal.App.4th 1693 (no cause of action on privacy grounds for termination allegedly based on sexual orientation where employee admitted sexual orientation was not confidential).

4. Free Speech And Association.

Intrusions on speech and associational rights may be a violation of Article I, sections 2 and 3. We have found no cases addressing the merits of a public employee's speech rights under the state Constitution, but assume courts will adopt federal analysis. Note,

however, protection for employee speech rights under the state constitution may be greater than under the federal. (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1041.) In general, California courts hold that if there is a violation of the First Amendment, then there is a violation of the California constitution. (*Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 519, disapproved on other grounds in *Kasky v. Nike* (2002) 27 Cal.4th 939, 968; *Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365, 372, fn. 7 [defendant's free speech rights are at least as protected under the California constitution as they would be under the First Amendment, and any conflict between the two purporting to reduce the defendant's free speech protection would be resolved under the federal constitution].)

To prove a violation of his speech rights, a plaintiff must prove that his speech (or speech-related activities) was protected and that he was disciplined or otherwise retaliated against because of his speech. First Amendment inquiry into whether or not a public employee's speech is entitled to protected status is one of law for the court, not one of fact for the jury. (*Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 1690, fn. 7, 75 L.Ed.2d 708]; *Gray v. County of Tulare* (1995) 32 Cal.App.4th 1079, 1090.)

- **Is the Speech Protected?**

The question of whether speech is protected involves two steps: First, a plaintiff employee must prove that the speech at issue encompassed a matter of public concern. (*Connick*, *supra*, 461 U.S. at p. 145 [103 S.Ct. at p. 1689], quoting *Pickering v. Board of Education* (1968) 391 U.S. 563, 571-572 [88 S.Ct. 1731, 20 L.Ed.2d 811]; *Gray*, *supra*, 32 Cal.App.4th at pp. 1089-1090.) However, even if a given statement implicates a matter of public concern, it is not protected *unless* the employee's interest as a citizen outweighs any adversely affected interest of his employer in promoting the efficient delivery of public services. (*Connick*, *supra*, 461 U.S. at pp. 149-150 [103 S.Ct. at pp. 1691-1692]; *Gillette v. Delmore* (9th Cir. 1989) 886 F.2d 1194, 1197.) In determining whether the employer's conduct was justified, courts consider content, manner, time and place of the particular speech, as well as the context in which the dispute arose. (*Connick*, *supra*, 461 U.S. at pp. 152-153 [103 S.Ct. at p. 1693].) The nature of an employee's job is also a factor in assessing the possible effect of his action on morale, discipline, or efficiency. (See *Kannisto v. City and County of San Francisco* (9th Cir. 1976) 541 F.2d 841, 843 [emphasizing police department's interest in "'discipline, *esprit de corps*, and uniformity'"].)

Arguably, speech is not protected if it was knowingly false or made with reckless disregard of the truth. (*Garrison v. State of Louisiana* (1964) 379 U.S. 64, 75 [85 S.Ct. 209, 216, 13 L.Ed.2d 125]; *Brenner v. Brown* (7th Cir. 1994) 36 F.3d 18, 20.) However, the Ninth Circuit has rejected the notion that recklessly false statements are per se unprotected and held that recklessness should be part of the balancing test, with consideration given to "the actual damage done to the government by the reckless statement, whether anyone believed the statements, whether the government could easily rebut the false statements, etc." (*Johnson v. Multnomah County, Oregon* (9th Cir. 1995) 48 F.3d 420, 424; see also *Moran v. State of Washington* (9th Cir. 1998) 147 F.3d 839, 849 [falsity of allegations undermines employee's interest in making the statement].)

The extent to which the government must show actual disruption of the efficiency of its operations on a First Amendment claim is not altogether clear. (*Gray*, *supra*, 32 Cal.App.4th at p. 1093.) The Supreme Court in *Connick* required only the showing of a "clear potential" for undermining the tranquility and efficiency of the work environment. (*Connick*, *supra*, 461 U.S. at p. 152 [103 S.Ct. at p. 1692] [it is not necessary "for an employer to allow events to unfold to the extent the disruption of the office and the destruction of working relationships is manifest before taking action"]; see also *Byrd v. Gain* (9th Cir. 1977) 558 F.2d 553, 554 ["while First Amendment rights of employees are deserving of protection against unreasonable and arbitrary restriction in the name of institutional policy, the (police officer) employee does not have an unqualified right to abuse his employer in public while remaining on the payroll"].) Subsequent Supreme Court decisions led one California court to conclude the government had to demonstrate "actual, material and substantial disruption." (*Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 650, internal quotation marks and citations omitted.) However, another court concluded that the more recent Supreme Court ruling in *Waters v. Churchill* (1994) 511 U.S. 661, 673-674 [114 S.Ct. 1878, 1887, 128 L.Ed.2d 686], suggests actual disruption is *not* the standard. (*Gray*, *supra*, 32 Cal.App.4th at p. 1093; see also *Moran*, *supra*, 147 F.3d at p. 846 ["'reasonable predictions of disruption'" sufficient to establish employer interest]; but see *Kirchmann v. Lake Elsinore Unified School Dist.* (1997) 57 Cal.App.4th 595, 612 [requiring "an actual showing of disruption"].) If, in fact, speech is more protected under the state constitution than under the federal, a California court may require the employer to show evidence of actual disruption on a claim brought under the state constitution.

- **Is The Employer Liable?**

Assuming the court finds that the particular speech or speech-related conduct is protected, the plaintiff must then prove it was a substantial factor in the employer's adverse employment decision. However, even if a plaintiff shows constitutionally protected conduct was a substantial factor in an adverse employment decision, there is *no* violation and *no* liability if the same decision would have been made in the absence of the protected conduct. (*Mt. Healthy City School Dist. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 576, 50 L.Ed.2d 471].) Note that the rule of *Mt. Healthy* pertaining to liability is therefore different from the rule pertaining to liability in Title VII actions. In Title VII actions, the fact that the same decision would have been made in the absence of protected conduct affects only *remedy*, not liability. (42 U.S.C. §§ 2000e-2, subd. (m), 2000e-5, subd. (g)(2)(B).)

It is unclear what a plaintiff would have to prove to hold the employer, as distinct from the individuals who made the adverse decisions, liable on this or any other state constitutional claim. It is not certain whether a plaintiff would have to prove official policy or custom and practice caused a violation of his constitutional rights, as is the case in an action under 42 U.S.C. section 1983 for violation of the federal constitution, or whether liability would be imposed on the employer vicariously, based on Government Code section 815.2, subdivision (a). A policy or custom requirement is obviously more burdensome to a plaintiff.

B. Defenses.

1. Damages May Be Barred.

Due Process. In *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, the Supreme Court held that damages for a violation of due process liberty rights under the state constitution were barred. (*Id*. at p. 329.) In a lengthy analysis presumably applicable to the issue of damages under any of California's constitutional provisions, it concluded that nothing in the language or history of Article I, section 7, subdivision (a) implied a right to seek damages, nor, in light of the adequacy of existing remedies, was it appropriate to recognize a tort action for damages to remedy such a constitutional violation. (*Id*. at pp. 324, 328.) The court noted it was addressing only an action for

damages directly under the state constitution, not an action to remedy a constitutional violation tied to "an established common law or statutory action." (*Id*. at p. 303, fn. 1.)

Equal Protection. In *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, the court held that a plaintiff may *not* recover personal injury damages as a result of the violation of the equal protection provisions of the state constitution. Referencing a number of decisions by the California Supreme Court, it based its analysis on a review of voter intentions. (*Id*. at pp. 517-524; see also *Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1472, agreeing with *Gates*.) The analysis employed by these courts has been superceded by the Supreme Court's analysis in *Katzberg*, *supra*, 29 Cal.4th 300.

Speech. In *Degrassi v. Cook* (2002) 29 Cal.4th 333, the companion case to *Katzberg*, the Supreme Court determined that money damages was not an appropriate remedy in an action under Article I, section 2, subdivision (a) brought by a city council member. (*Id*. at pp. 343-344.) In *Katzberg*, the court had disapproved of the methodology employed in *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816 without expressing any view on the correctness of its result. (*Katzberg*, *supra*, 29 Cal.4th at p. 328, fn. 30; see also *Degrassi*, *supra*, 29 Cal.4th at p. 342, fn. 7.) *Laguna* had held there was a private right of action for damages. (*Laguna*, *supra*, 131 Cal.App.3d at p. 853.) The *Degrassi* court did *not* rule out a private right of action for damages directly under Article I, section 2, subdivision (a) under a different set of facts. (*Degrassi*, *supra*, 29 Cal.4th at p. 344.)

In *Motevalli v. Los Angeles Unified School District* (2004) 122 Cal.App.4th 97, the court applied *Degrassi* analysis and concluded an untenured teacher had no right to damages for violation of her speech rights because, among other things, recognition of such right would have adverse policy consequences. (*Id*. at pp. 118-119.)

Right To Privacy. In *White v. Davis*, the California Supreme Court held that a private right of action was possible under this provision; viewing the election literature available to the voters in November 1972, it noted that the election brochure indicated that the provision "'creates a legal and enforceable right of privacy for every Californian.'" (*White v. Davis* (1975) 13 Cal.3d 757, 775.) *White* involved injunctive relief and did not directly address the question of whether damages are an available remedy. Since the ballot literature apparently did not indicate any limitation on the remedies available, it appears damages are recoverable. Some California courts have proceeded on the

assumption they are. (See, e.g., *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829-830; *Payton v. City of Santa Clara* (1982) 132 Cal.App.3d 152 [an action for damages in which reviewing court reversed order sustaining demurrer on the ground that conduct alleged supported a cause of action for violation of privacy]; see also *Hansen v. California Dept. of Corrections* (N.D.Cal. 1996) 920 F.Supp. 1480 [where court assumed damages available].) The California Supreme Court appears to view the availability of damages for violation of privacy rights as an open question. (*Katzberg v. Regents of University of California*, *supra*, 29 Cal.4th at p. 313, fn. 13.)

2. Exhaustion Of Administrative Remedies.

"The general rule of exhaustion 'forbids a judicial action when administrative remedies have not been exhausted, even as to constitutional challenges . . . .'" (*Bockover v. Perko* (1994) 28 Cal.App.4th 479, 486, quoting *Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 688.)

With respect to a due process claim, a plaintiff must exhaust internal grievance procedures except when the procedures themselves violate due process. (*Bockover v. Perko*, *supra*, 28 Cal.App.4th at p. 486.) If a complaint alleges the plaintiff tried to file grievances but his complaints were arbitrarily rejected, and the allegation is proved, failure to exhaust would not be a defense.

3. Failure To Comply In A Timely Manner With The Claims Statute.

A plaintiff seeking money damages against a public entity (other than the Regents of the University of California) must present a timely claim to the public entity prior to filing suit; to be timely the claim must be presented no later than six months after the accrual of his cause of action. (Gov. Code, § 911.2.) With two exceptions, claims presentation requirements apply when the cause of action alleges violation of the state constitution.[11/] (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454.)

[11/] Claims presentation requirements do not apply to inverse condemnation claims (Gov. Code, § 905.1) or to claims against the Regents of the University of California (Gov. Code, § 905.6).

Plaintiffs routinely raise the continuing violation theory to defeat this defense. The only case we have discovered specifically addressing the issue with respect to the Claims Act is *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, in which the court, citing no California authority, held that a claim alleging conduct occurring more than six months before the plaintiff filed her claim was timely. (*Id.* at p. 1406.) The court characterized the alleged misconduct as an ongoing campaign of retaliation which had continued until less than a month before the plaintiff presented the claim. (*Ibid.*) *Maynard* is of dubious value now, even in a federal forum, given the analysis for determining a continuing violation set forth in *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101 [122 S.Ct. 2061, 153 L.Ed.2d 106]. Defense counsel attempting to avoid the continuing violation doctrine in the context of a claim under the state constitution should analyze their facts under *Richards v. CH2M Hill, Inc.*, *supra*, 26 Cal.4th 798. (See pp. 33-34, above.)

4. Statute Of Limitations.

Claims against the Regents of the University of California are exempt from claims presentation requirements, including time constraints. (Gov. Code, § 905.6.) Thus, time requirements are governed by the Code of Civil Procedure. In *Acuna v. Regents of University of California*, *supra*, 56 Cal.App.4th at p. 646, the court held that the one-year limitation period for personal injury set forth in former Code of Civil Procedure section 340, subdivision (3) applied to a claim for violation of speech rights under the California constitution. This was in line with claims under 42 U.S.C. section 1983 for violation of the federal constitution. The statute of limitations for personal injury is now two years. (Code Civ. Proc., § 335.1.) Section 335.1 presumably now covers claims against the Regents based on constitutional violations.

5. Immunities.

The question of whether any immunities apply to direct constitutional claim is significant only to the extent damages are available for the violation. (See pp. 48-49, above.) If a plaintiff links his constitutional claim is to a common law claim for, e.g., wrongful termination in violation of public policy, then the role of the immunities may be critical. (See p. 59, below.)

a. Statutory immunities.

The question of whether any governmental immunities under state law are applicable to claims under the state constitution has not been settled in California. In *Gates v. Superior Court*, *supra*, 32 Cal.App.4th 481, the defendants apparently argued that Article III, section 5, which allows the Legislature "to comprehensively regulate 'suits' against the state, local government agencies, and public employees" would permit application of the immunities. (*Id.* at p. 516, fn. 9.) Since the *Gates* court determined there was no cause of action for damages for violation of equal protection rights, it was not necessary to resolve the immunities issue. A federal district court has assumed immunities were applicable in an action alleging the violation of the constitutional right to privacy. (*Hansen v. California Dept. of Corrections*, *supra*, 920 F.Supp. at pp. 1500-1503.) Specifically, it held that certain defendants performing ministerial acts were not entitled to immunity under Government Code section 820.2, the immunity for discretionary acts, but that the record was inadequate for a determination as to its applicability with respect to the director of the Department of Corrections. (*Id.* at p. 1501.) The court ruled out other immunities for lack of evidence to support them. (*Id.* at pp. 1501-1503.)

If immunities apply when liability is premised on a constitutional violation, individual defendants may be shielded by Government Code sections 820.2, 820.8, and perhaps 821.6, and the public entity employer may be shielded for their acts or omissions by Government Code section 815.2, subdivision (b).

b. Qualified Immunity.

This, of course, is a federal defense raised in actions under 42 U.S.C. section 1983. However, its roots are in the common law. (See, e.g., discussion in *Butz v. Economou* (1978) 438 U.S. 478, 496-504 [98 S.Ct. 2894, 2905-2909, 57 L.Ed.2d 895].) If cases are going to be brought for violations of the state constitution with increasing frequency, this would be a useful defense, particularly since the California Supreme Court, as suggested by *Caldwell v. Montoya*, *supra*, 10 Cal.4th 972, intends to limit discretionary immunity to higher policy-making officials. The court in *Hansen v. California Dept. of Corrections*, *supra*, noted the potential unfairness of immunizing a director while imposing liability on subordinate employees who may have been doing their jobs in good faith and who are not shielded by some type of qualified immunity, but the court apparently felt any unfairness was

remedied by the fact those employees were entitled to indemnity. (920 F.Supp. at p. 1502.) Entitlement to indemnity is really irrelevant to any analysis of the rationale for qualified immunity, so we suggest defense counsel assert qualified immunity as an affirmative defense. We think a good argument could be developed for introducing this immunity into the context of state constitutional law.[12/]

6. Justification (Privacy).

Justification is a defense to a constitutional privacy claim. The critical question concerns the standard by which the employer's conduct will be scrutinized. Assuming a protectable interest, the employer may have to demonstrate a compelling interest for interference with plaintiff's privacy rights. The "compelling interest" test was first articulated in *White v. Davis*, *supra*, 13 Cal.3d at p. 775. The Supreme Court in *Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal.4th 1, limited the test to situations involving the "government invasion of one distinct set of privacy interests—those which overlap the First Amendment and relate to 'our expressions,' our 'freedom of communion,' and 'our freedom to associate with the people we choose.'" (*Hill*, *supra*, 7 Cal.4th at p. 33, quoting ballot argument.)

If as to certain alleged misconduct there is no overlap between privacy interests and expressive interests, then courts are to rely on a balancing test. (*Hill*, *supra*, 7 Cal.4th at p. 34.) "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Id.* at p. 38.) If a defendant offers evidence of countervailing interests, the plaintiff has the burden of demonstrating the availability of alternative conduct that would minimize the intrusion on the privacy interests. (*Ibid.*) The court in *Barbee v. Household Automotive Finance Corp.*, *supra*, 113 Cal.App.4th at p. 533, used a balancing test to find that

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[12/] Introducing federal principles into the analysis of state common law issues is not unprecedented. Note that in *Falls v. Superior Court* (1996) 42 Cal.App.4th 1031, 1045, the Second District Court of Appeal relied on federal law and analysis to hold that prosecutors are immune for certain conduct preliminary to the initiation of a prosecution.

the employer's interests "weigh[ed] heavily" against finding that supervisors have a privacy right to engage in intimate relationship with their subordinates.

C. Labor Code Section 96.

In 1999, the Legislature amended this statute regarding claims an employee can assign to the Labor Commissioner for resolution to include the following:

> Claims for loss of wages as a result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.

(Lab. Code, § 96, subd. (k).)

In *Barbee*, *supra*, the court rejected the plaintiff's attempt to base a wrongful termination claim on this provision, finding that it neither created or described any public policy but simply authorized the Labor Commissioner to vindicate existing public policies. (113 Cal.App.4th at pp. 535-537; see also *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 88.)

Section 96 is intended to protect the civil rights of employees guaranteed by Article I of the California Constitution. (Stats. 1999, ch. 692, § 1.) It is expected to be invoked where an employee complains of alleged violations of privacy or speech rights, as in *Barbee*. Presumably, the standards developed in those areas, as described above, should govern the resolution of such claims. However, the language of the statute is very broad, and the question of how constitutional claims may be resolved in an administrative process may have to be determined by the courts.

III. Wrongful Termination In Violation Of Public Policy.

Plaintiffs now have so many hurdles to overcome if they assert this cause of action against a public entity or its employees that it is questionable any such claim will survive past the demurrer stage. Nonetheless, perhaps because of the lack of Supreme Court authority addressing this tort in the context of public employment, wrongful termination in violation of public policy claims continue to be alleged.

A. Plaintiff's Burden Of Proof.

1. Existence Of A Public Policy.

A plaintiff alleging wrongful termination in violation of public policy must prove his termination violated a policy "(1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 894.)

In *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6, the Supreme Court held that a tortious discharge claim exists only for violation of a policy with a "basis in" or "tethered to" a statutory or constitutional provision. (*Id.* at p. 1095.) In *Green v. Ralee Engineering Co.*, *supra*, 19 Cal.4th 66, the Supreme Court held that various federal administrative regulations regarding the safety of aircraft parts provided a sufficient statutory "tether." (*Id.* at p. 74.)

In *Sequoia Ins. Co. v. Superior Court* (1993) 13 Cal.App.4th 1472, the reviewing court rejected the argument that Insurance Code provisions barring excessive rates supported a wrongful discharge claim where the plaintiff complained he was fired for refusing to participate in a scheme to inflate reserves that would ultimately result in higher premiums. The court held that the public policy element was satisfied only when the statutory or constitutional provision "sufficiently describe[s] the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law." (*Id.* at p. 1480.) The statutes raised in *Sequoia* did not restrict insurer reserve practices, so an employer would not have adequate notice that increasing reserves was a violation of public policy.

In determining that FEHA's prohibition of age discrimination was "substantial and fundamental," so as to support a tortious discharge claim, the Supreme Court in *Stevenson* explained it had not articulated a "test" for giving that phrase content but had identified certain relevant considerations: it found age discrimination could be equated to race and sex discrimination (i.e., to conduct already determined to be against fundamental public

policy) in that, for example, it was founded on group stereotypes; it cited to legislative declarations that age discrimination was against public policy, and other statutory embodiments of a policy against age discrimination; it cited to the laws of other jurisdictions against age discrimination. (*Stevenson v. Superior Court, supra*, 16 Cal.4th at pp. 896-897.)

Practice Suggestion:

- If, as in *Stevenson*, a claim is founded on FEHA's prohibition of discrimination, the plaintiff should be required to prove the underlying statutory violation (discrimination) just as she or he would have to if the statutory claim were standing alone. The *Stevenson* court explained that "when a plaintiff relies upon a statutory prohibition to support a common law cause of action for wrongful termination in violation of public policy, the common law claim is subject to statutory limitations affecting the nature and scope of the statutory prohibition." (*Stevenson, supra*, 16 Cal.4th at p. 904.)[13/]

2. Nexus Between Plaintiff's Conduct And Public Policy.

A plaintiff must prove a fundamental public policy exists to protect his conduct or status. There are four types of conduct subject to protection under a claim of wrongful termination in violation of public policy: "'(1) refusing to violate a statute; (2) performing a statutory obligation; (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance.'" (*Stevenson*, *supra*, 16 Cal.4th at p. 889, citations omitted.)

3. Causation.

A plaintiff must also prove that he was fired *because* he engaged in protected conduct. (See *Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th at p. 1258 [while plaintiff identified violations of statutes, he failed to show his whistle-blowing activities caused his termination].) *Turner* was a constructive discharge case. In that context, a plaintiff must satisfy the elements of a public policy claim (statute embodying fundamental public policy,

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[13/] The court distinguished substantive requirements from procedural: "the common law claim is not subject to statutory procedural limitations affecting only the availability and scope of nonexclusive statutory remedies." (*Stevenson, supra*, 16 Cal.4th at p. 904.)

public policy protecting his conduct, causation) and also prove constructive discharge (intolerable conditions, etc.). For example, the *Turner* court noted that "an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge." (*Id.* at p. 1247, fn. 3.)

The test or standard for causation is probably a "but for" test, that is, an employee's protected conduct need not be sole cause of discharge but must have been a determinative factor in the decision to discharge. (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1191.) A plaintiff need only prove the employer's motivation was to thwart public policy, not that it was successful in doing so. (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1148, fn. 3.)

B. Personal Liability.

In *Reno v. Baird*, *supra*, 18 Cal.4th 640, the Supreme Court held that individual supervisors are not personally liable for wrongful discharge in violation of public policy against discrimination. (*Id.* at p. 664.) In *Sheppard v. Freeman* (1998) 67 Cal.App.4th 339, the appellate court extended the rationale of *Reno* to hold that an employee cannot sue other employees (supervisorial or otherwise) on *any* common law theory for conduct relating to personnel actions. (*Id*. at pp. 342, 349.) Personnel actions include "termination, demotion, discipline, transfers, compensation setting, work assignments, and/or performance appraisals." (*Id*. at p. 343.) The *Sheppard* court made an exception for libel claims because they are regulated by statute. A federal district court has rejected *Sheppard*'s "co-employee privilege" as based on flawed reasoning. (*Graw v. Los Angeles Metropolitan Transp. Authority* (C.D.Cal. 1999) 52 F.Supp.2d 1152, 1155-1157.)

C. Wrongful Termination Claims Asserted By The Alleged Harasser.

When an alleged harasser is terminated after an investigation into charges brought by a fellow employee, it is not uncommon for a lawsuit to follow, alleging claims for wrongful termination. The principles outlined above apply equally in this context and should dispose of the matter. If counsel are nonetheless forced to take the case to trial, the jury will have to decide "whether at the time the decision to terminate his employment was made, defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff [had

sexually harassed other employees]." (*Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 109 [cause of action for breach of implied covenant not to terminate except for good cause].)

D. Defenses.

1. Government Code Section 815, subdivision (a).

Pursuant to Government Code section 815, subdivision (a), a public entity is not liable for injury except as provided by statute. Government Code section 815.2, subdivision (a) provides that a public entity is liable "for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee . . . ." Reading section 815.2, subdivision (a) together with *Reno*'s holding that individual supervisors are not personally liable for wrongful termination in violation of public policy against discrimination, arguably a plaintiff is precluded from suing a public entity on this theory because a supervisor's conduct would *not* "have given rise to a cause of action against" him personally.

2. Failure To Exhaust.

At least with respect to claims not related to a FEHA violation, a public employee plaintiff must exhaust the internal remedies provided by his employer before bringing suit for wrongful termination in violation of public policy. (See, e.g., *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899, 905; see *Williams v. Housing Authority of City of Los Angeles*, *supra*, 121 Cal.App.4th at p. 731 [distinguishing between nonstatutory claims that are FEHA-related and those that are not].)

A public employee plaintiff must also exhaust his judicial remedies, i.e., mandamus procedures pursuant to Code of Civil Procedure section 1094.5 before bringing suit for wrongful termination in violation of public policy. (*Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 905-906, disapproved on other grounds in *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at p. 72; see *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 [party to quasi-judicial administrative agency proceeding must challenge adverse findings by means of mandate action before bringing civil action].) That is, to

assert a public policy violation predicated on termination, a plaintiff must obtain judicial review of the pertinent administrative agency's finding that termination was justified and a ruling overturning the termination. (See *Johnson v. City of Loma Linda*, *supra*, 24 Cal.4th at p. 76 [adverse administrative findings not challenged in mandate proceeding are binding on subsequent FEHA action].)

Remember, however, that if the plaintiff ties his public policy claim to FEHA, he may choose to forego administrative and judicial remedies altogether. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1092; *Williams v. Housing Authority of City of Los Angeles*, *supra*, 121 Cal.App.4th at pp. 727-729.)

3. Immunities.

A public entity employer and its employees have been held to be immune from liability for claims of wrongful termination in violation of public policy, pursuant to Government Code sections 821.6 (official proceeding immunity) and 815.2, subdivision (b). (*Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1425; see also *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435-1437 [pertaining to other common law theories and immunities in sections 820.2 and 821.6]; cf. *Williams v. Housing Authority of City of Los Angeles*, *supra*, 121 Cal.App.4th at p. 713, fn. 3 [not addressing possible applicability of Government Code immunities because parties did not raise the issue].) In *Shoemaker* the court held the immunities would not apply to a claim directly based on the whistleblower statute. (Gov. Code, § 19683.)

4. Failure To Comply With Tort Claims Act.

To pursue a wrongful discharge claim, a plaintiff must comply with the claims presentation requirements of the Tort Claims Act, unless the Regents of the University of California is the employer. (*Shoemaker v. Myers*, *supra*, 2 Cal.App.4th at pp. 1425-1426; Gov. Code, § 905.6.) The time for filing a claim presumably begins to run from the date termination became a reality. (*Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 491.) The same rule would apply where a plaintiff alleges constructive termination. (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 738.)

Practice Suggestion:

- In a recent decision, the California Supreme Court held that so long as the notice of claim informs the public entity employer of a wrongful termination cause of action, the employee is not precluded from asserting in the complaint new theories about the nature of the wrongfulness. (*Stockett v. Association of California Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441.) The plaintiff's complaint in *Stockett* alleged, as his claim did not, that he was fired for opposing a conflict of interest and for exercising his right to free speech. The court explained these did not represent additional causes of action, only new theories. (*Id*. at p. 447.) Understanding the difference between "cause of action" and "theory" before challenging a plaintiff for failing to give adequate notice under the Tort Claims Act will save counsel time and the client unnecessary fees.

5. Statute Of Limitations.

For claims against the Regents of the University of California, where the Claims Act does not apply, the statute of limitations was one year, running from the date of actual termination. (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1208-1209; *Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at pp. 492-493.) Presumably, the two-year limitation of Code of Civil Procedure, section 335.1 is now controlling.

6. After-Acquired Evidence Doctrine.

As discussed above (p. 35), when an employer learns after the fact (e.g., during discovery in a wrongful termination action) that the plaintiff engaged in misconduct that would have caused the employer to fire the employee, then the plaintiff's remedy may be limited or barred altogether. (*McKennon v. Nashville Banner Pub. Co.*, *supra*, 513 U.S. at pp. 358-359 [115 S.Ct. at pp. 884-885] [after acquired evidence may not be used to bar all relief in an ADEA action]; *Camp v. Jeffer, Mangels, Butler & Marmaro*, *supra*, 35 Cal.App.4th at p. 639 [all relief barred where employee caused employer unwittingly to violate law]; *Cooper v. Rykoff-Sexton, Inc.*, *supra*, 24 Cal.App.4th at p. 618 [discrimination claims not barred because of omissions in employment application although remedies may be limited].)

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WRONGFUL TERMINATION CLAIMS AGAINST GOVERNMENT EMPLOYERS

THEORIES OF LIABILITY AND DEFENSE UNDER CALIFORNIA LAW:

AN OVERVIEW

Alison M. Turner